CRITICALLY EVALUATING THE ROLE OF THE JUDICIARY

IN THE GOOD GOVERNANCE PARADIGM:

A STUDY OF PAKISTAN

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Abstract

In this dissertation, I critically evaluate the central role assigned to the judiciary in "the good governance" paradigm (as promoted by international institutions such as the World Bank), through a study of Pakistan. I argue that the paradigm's focus on institutional arrangements/rearrangements, in order to produce a strong judiciary, judicial reforms, and to implement 'the rule of law', is problematic. I find, in contrast, and based on a detailed historical study of the different judicial regimes in the post-colonial era, that the judiciary is a part of the state, and has served to reproduce the state, in its democratic and military forms, as well as political and structural inequality in Pakistan. I document in detail how the judiciary increasingly gained autonomy in state power leading to result in what I term as a 'judicial dictatorship' by the 2000s. Through the thesis, I advance an alternative structural analysis of the state and institutional arrangements, using a class analysis and historical-contextual approach.

My study argues that a strong ('activist') judiciary cannot be a substitute for a weak and inadequately representative legislature. The fallback position of the judiciary - in promoting a 'rights' discourse, or protection of minorities - is also an inadequate remedy for the lack of a deeper democracy in the society. My research in Pakistan contributes to the view that the role of the judiciary ultimately is to uphold political ends crafted elsewhere, rather than be seen as an agent to 'cause' political betterment. This study is based on most of the relevant case law in the post-colonial era, primary sources such as interviews, speeches, and judge's monographs, as well as the available secondary material such as journal articles, books, and newspaper reports.

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DEDICATIONS

To my family, Sara and Sumana

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ACRONYMS

AJP	Access to Justice Program
ANP	Awami National Party
APSEUA	All-Pakistan Small Enterprises Unions association
BD	Basic Democracy
BLLF	Bonded Labour Liberation Front
CDF	Comprehensive Development Framework
CJ	Chief Justice
CJLHC	Chief Justice Lahore High Court
CJSHC	Chief Justice Sindh Court
CMLA	Chief Martial Law Administrator
COAS	Chief of the Army Staff
HDI	Human Development Index

ICS	Indian Civil Services
IFIs	International Financial Institutions
IMF	International Monitory Fund
LFO	Legal Framework Order
LHC	Lahore High Court
MNAs	Member of the National Assembly
MPAs	Members of the Provincial Assembly
MRD	Movement for the Restoration of Democracy
NAB	National Accountability Bureau
NAP	National Awami Party
NGOs	Non Governmental Organizations
NRO	National Reconciliation Ordinance

NSC	National Security Council
NWFP	North Western Frontier Province
PCO	Provisional Constitutional Order
PCS	Pakistan Civil Services
PHC	Peshawar High Court
PIA	Pakistan International Airlines
PIL	Public Interest Litigation
PM	Prime Minister
PML	Pakistan Muslim League
PML-N	Pakistan Muslim League-Nawaz
PML-Q	Pakistan Muslim League-Quide-i-Azam
PNA	Pakistan National Alliance
PTV	Pakistan Television

PWA	Progressive Writers Association
RCO	Restoration of the Constitution Order
SAP	Structural Adjustment Policy
SHC	Sindh High Court
WAPDA	Water and Power Development Authority
WB	World Bank

Chapter One

Introduction: The World Bank's 'Good Governance' Paradigm and the Role of the Judiciary in Post-colonial Pakistan

The good governance paradigm has encouraged an activist role for judiciaries in the face of feeble and weak democratic institutions in developing countries. In December 2001, the Asian Development Bank financed a $350 million loan for judicial reform in Pakistan.[1] Subsequently, the world also saw a gigantic and powerful lawyers' movement in Pakistan in 2007 for an independent judiciary, and Harvard's Law School awarded the Medal of Freedom to Supreme Court Chief Justice Iftikhar Chaudhry. The Canadian Bar Association President participated in a march of Ontario lawyers in solidarity with this movement. The Quebec Bar and Law Society of Upper Canada added their concern.[2]

No doubt, judicial reform[3] is necessary and the lawyers' movement is historic.[4] It had wide popular support and even led to the toppling of the military government. I

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[1] This Project, numbered 38612, was titled *Islamic Republic of Pakistan: Support to Governance Reforms in Pakistan (Financed by the Government of the United Kingdom)* for "Improving governance and preventing corruption." It was launched in Pakistan as the Access to Justice Program (AJP). See Selected Proceedings of TA 3433-PAK: Strengthening of Institutional Capacity for Judicial and Legal Reform (Technical Assistance Provided by Asian Development Bank to the Government of Pakistan (Islamabad: Asian Development Bank & Ministry of Law, Justice and Human Rights, Government of Pakistan, January 2003).

[2] See Muneer A. Malik, *The Pakistan Lawyers' Movement: An Unfinished Agenda* (Karachi: Pakistan Law House, 2008) at 251.

[3] For its critical evaluation, see Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge: Cambridge University Press, 2013).

[4] In chapter six I discuss articles on the lawyers' movement. For example, Taiyyaba Ahmad Qureshi, "State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan" (2009-2010) 35: XXXV N. C. J. Int'l L. & Com. Reg. 485-538; also Joel A. Mintz, "Introductory Note: A Perspective on Pakistan's Chief Justice, Judicial Independence, and the Rule of Law" (2008-09) 15:1ILSA Journal of International & Comparative

argue, as part of my overall argument, however, that it was not in fact a movement to widen democracy. This was largely because the lawyers' movement did not (and could not) problematize the issues of deep structural inequality or highlight the entrenched power of the landed elite in Pakistan. As a result, although an activist judiciary was promoted under subsequent civilian rule, it failed to deepen democracy or address structural issues of power and powerlessness. This problematic relations between the 'rule of law' and an independent, activist judiciary with political governance raises the need for a critical assessment of the 'good governance' model and, especially, the paradigm's reliance on the role of an activist judiciary. The paradigm's key failure is to not recognize that the judiciary has reproduced the state in both its democratic and military forms, but also political and structural inequality in Pakistan, and has also failed to broaden representation and inclusion or deepen democracy.

I thus critically evaluate the central role of the judiciary in the 'good governance'[5] paradigm promoted by the World Bank. I first analyze the conceptual tool of the Good Governance Indicators (WGIs) to see their value.[6] I propose that an 'activist judiciary,'

Law 1. Related to this is Tariq Hasan, "The Need of Judicial Activism and CJSC Iftikhar Chaudhry as a "judicial activist" on the basis of PIL" (2008-09) 15:1ILSA Journal of International & Comparative Law 9-14; see also Naveed Ahmad, "The Rule of Law- A Substratum of Justice" (2012) 8:2 Journal of Commonwealth Law and Legal Education 11-21; also Shoaib A. Ghias, "Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf" (2010) 35:4 Law & Social Inquiry 985-1022.

[5] "The hero figure of third globalization is unmistakably the judge, who brings either policy analysis or neo formalism to bear, as best s/he can, on disputes formulated by governmental and nongovernmental organizations claiming to represent civil society," Duncan Kennedy, "Three Globalizations of Law and Legal Thought" in David M. Trubek & Alvaro Santos *Introduction: The Third Movement in Law and Development Theory and the Emergence of a New Critical Practice* (Cambridge: Cambridge University Press, 2006) at 65.

[6] This is a paradigm promoted by the World Bank through the use of Good Governance Indicators (WGIs). These were developed by using large data bases which compiled several hundred cross-

even when equipped with ideas of judicial reforms, good governance, institution building, and the rule of law, cannot bring about social and political change as a positive developmental outcome. While there have been numerous critiques of the good governance paradigm - both internal critiques of WGI,[7] and external critics of evaluation- my critique goes to the central role it assigns to law and the judiciary for political development.

The role of the judiciary in political development (law and development), termed as 'good-governance,' is not new and is always discussed affirmatively even by its

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country indicators produced by 13 different organizations and covered 178 countries. These WGIs (Worldwide Governance Indicators) presently cover over 200 countries for the period 1996-2006. They are based on hundreds of underlying individual indicators drawn from 30 different organizations, which rely on responses from tens of thousands of citizens, enterprise managers, and experts. See Daniel Kaufmann, Aart Kraay &Massimo Mastruzzi, "Governance Matters VI: Governance Indicators for 1996-2006" (World Bank Policy Research Paper Series No. 4280, 2007); see also Daniel Kaufmann, Aart Kraay& Zoido-Lobaton, "Governance Matters: From Measurement to Action" (1999) 37:2 Finance & Development: a quarterly magazine of the IMF, (June 2000); Daron Acemoglu, Simon Johnson &James A. Robinson, " The Colonial Origins of Comparative Development: An Empirical Investigation" (2001) 91:5 The American Economic Review1369-1401.

[7] The main critics of the Bank's `good governance` indicators are Arndt, Christiane and Charles Oman. They have identified numerous problems with the indicators including a) the imprecision of indicators to permit meaningful comparisons; b) their bias towards the views of the business elite and their excessive emphasis on business friendly regulation, and ideological biases such as against left-wing governments; c) the lack of evidence of a two-way relationship between governance and growth; and d) that the "users of governance indicators easily get lost in the jungle of hundreds of existing indicators." See Arndt Christiane & Charles Oman, *Uses and abuses of governance indicators* (Paris: Development Centre of the Organisation for Economic Co-operation and Development, 2006) at 21. Other critiques include that e) The indicators are used by international investors, official donors, development analysts and academics to discriminate between developing countries, and are of no use for local domestic groups and policy makers; f) The over-time and cross-country comparability of the WGI is problematic because these indicators use units that set the global average of governance to be the same in all periods and there are substantial margins of error in the aggregate WGI; and g) There are definitional issues when relying on subjective data. Similarly, for long-established and documented critiques of IFIs, see Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (London, New York: Routledge, 2007); also Trubek & Santos, *supra* note 5.

nuanced internal critiques.[8] No one can deny the role of law and the judiciary in advancing the cause of the marginalized sections of the Western societies[9] and non-Western societies alike.[10] Even Marxists believe in the rule of law as an 'unqualified human good.'[11] My argument is simply that the 'good governance' paradigm of the World Bank is entrenched within a liberal institutionalist-functionalist understanding of law and the state. It should be clear that I do not argue for any contextual or cultural differences between Western and non-Western academic analyses.[12]

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[8] Trubek's untiring work of defining, critiquing, and redefining the law and development moments has spanned over half a century. The main features of his contribution are pragmatism and analytically engaging with development with a consistent, theoretical Weberian understanding of law. Any subsequent engagement with law and development is incomplete without engaging with his work. Trubek divides the field of law and development into three moments. Starting from the 1960s, the first moment focussed on modernizing regulation and the legal profession. The second moment was the emphasis in the 1990s on private law in order to protect property. The current third moment of law and development gives a centrality to judges and the judiciary. See Trubek in the introduction of the book David M. Trubek & Alvaro Santos (2006) *supra* note 5 at 5-7.

[9] For instance, the trend in using law as a tool for social change, as with 'cause litigation.' See Michael McCann & Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States" in Austin Sarat & Stuart Scheingold ed.s, *Cause Lawyering* (New York: Oxford Univ. Press).

[10] The South Asian version of cause litigation is Public Interest Litigation (PIL), chiefly articulated by scholar Upendra Baxi. Upendra Baxi, *The Future of Human Rights*, 2nd ed. (New Delhi: Oxford University Press); also Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford University Press: New Delhi, 2009).

[11] E.P. Thompson reached this conclusion after studying the origins of the Black Act in the 18th century England. See Edward P. Thompson, *Whigs and Hunters: The Origins of Black Act* (Harmondsworth: Penguin Books Ltd. 1975) at 266. Tamanaha claimed that "Thompson's findings bear directly on the focus of this book," see Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006) at 247.

[12] See, for example, postcolonial theory and its exemplar, the subaltern studies school of historical research. I argue, based on Chibber, that there is no fault line separating east and west in theorizing as claimed by the subaltern studies. See Vivek Chibber (2013) *Postcolonial Theory and the Specter of Capital* (London, New York: Verso, 2013).

My intention is to thus expose the limits of the liberal political and legal project[13] of good governance by using a structural analysis of state and the society.[14] There are important structural hindrances on the path of political development, like a dependency relation with imperialist powers and unequal distribution of land and wealth, and re-arranging institutions (through 'good governance') does not address this. It is frankly beyond the scope of the judiciary and hence speaks to the problematic nature of the paradigm as a whole as a template for human development.

Looking at the Good Governance Indicators (WGIs) of the World Bank

Its problematic understanding of democracy

'Governance' defined as, 'how the decisions are made and implemented,'[15] includes three main processes as a new form of conditionality for developing countries.

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[13] Ruth Buchanan (2014) summarized Trubek and Galanter to break down the 'liberal legalist paradigm' into six key propositions. "1. Society is made of individuals and the state; since individuals consent to the state, state control furthers individual welfare. 2. The state exercises control over the individual through law; law is understood as addressed to all individuals similarly situated; the state is constrained by law. 3. Rules are consciously designed to achieve social purposes and formulated through pluralist processes that are fair (that is, not unduly influenced by special characteristics like wealth and race). 4. Rules are enforced equally for all, in accordance with their purposes. 5. Courts have the principle responsibility for defining and interpreting legal rules; adjudication proceeds on the basis of an autonomous body of learning. 6. The behaviour of social of social actors tends to conform to the rules," in " A Crisis and its Afterlife: Some Reflections on 'Scholars in Self-Estrangement'" in de Búrca, Kilpatrick & Scott, eds. *Critical Legal Perspectives on Global Governance* (forthcoming Hart, 2014).

[14] For this I draw on the Marxist theorists, Althusser, Poulantzas, Miliband, Issa Shivji, John Saul, and Hamza Alavi.

[15] In 1999, Daniel Kaufmann et. al. adapted the definition of governance as put forward by the IMF, IDEA, and the Institute of Governance, and came up with "the traditions and institutions by which authority in a country is exercised. See Daniel Kaufmann, Aart Kraay & Zoido-Lobaton "Governance Matters II: Updated Indicators for 2000-01" (Policy Research Working Paper No. 2772/1999).

These are (1) the process by which governments are selected, monitored, and replaced; (2) the capacity of the government to effectively formulate and implement sound policies; and (3) the respect of citizens and the state for the institutions that govern economic and social interactions among them.[16]

In the first process, democracy in a country is 'measured' by an indicator of "Voice and Accountability." This includes all the indicators of the transparent election of governments, civil liberties, and political rights of citizens. To further remove any doubts about the presence of the exact model of 'liberal democracy,' another indicator is included in this process. This is called "Absence of Terrorism/Violence." It rules out any armed struggle or military coup. I call the above two indicators, taken together, ***the Project of Democracy***. If both are read together it means the presence of liberal democracy is the guarantee of stability in developing countries like Pakistan.

One problem with these indicators, and 'the project' is that it wants clear 'rules of the game', that is, 'institution' for 'predictability' and 'certainty' for liberal democracy.[17] It should not be removed by 'terrorism' or military coup. It sets up the comparison between an 'ideal type' of democracy versus a notorious 'ideal type' dictatorship. Any other regime type is a deviation from the 'ideal type.'

Clear rules of the game make sense, but questions persist regarding who will play the game, and how the game is played. The indicators of "voice and accountability" do

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[16] *Ibid* at 1, 6.

[17]This is very particular to the new institutionalism like that of Douglass C. North, see *Understanding the Process of Economic Change* (Princeton and Oxford: Princeton University Press, 2005).

not raise the issue of how ruling classes or the 'ruling bloc' (landed and capitalist elite under the hegemony of metropolitan bourgeoisie, particularly the U.S.) remain intact both in dictatorship and in democracy in countries like Pakistan. In Pakistan, elections are only contested by the landed and capitalist elite; they are frequently rigged and, if contested, in the courts or tribunals, these judicial bodies can be influenced by the political powers. This is because of structural hindrances like unequal distribution of land and wealth, which are not considered as part of the indicators.

Any form of politics which is not sanctioned becomes 'terrorism' and is counted as a negative 'measurement.' This is profoundly ahistorical, as many changes in history (for land distribution, etc.) have always gone beyond the legal and constitutional channels. Further, any form of politics that resists foreign incursion or inequality is also vilified and dismissed by this indicator.

'State Capture': the problematic understanding of state in the governance paradigm

When neoliberal policies began to collapse globally in the mid-1990s, the reasons given for these developments by the WB were about poor governance in developing countries.[18] Two consecutive presidents of the World Bank, James Wolfensohn and Paul

[18] World Bank, "Governance: The World Bank's experience" (Washington DC: World Bank 1994); World Bank, "Assessing aid – what works, what doesn't, and why" (Washington DC: World Bank 1998); Burnside, C. & Dollar, D. "Aid, policies, and growth" (2000) 90:4 American Economic Review at 847–868; Easterly, W., Levine, R. & Roodman, D., "Aid, policies and growth: Comment" (2004) 94:3 American Economic Review at 774–780; see also International Development Association, "IDA's performance-based allocation system: IDA rating disclosure and fine-tuning the governance factor" (Washington DC: International Development Association, 2004).

Wolfowitz, raised the issue of corruption attached to governance.[19] New governance indicators were developed to assist the construction of new governance structures in the 2000s to combat this situation. Where the paradigm could not bear fruit, its own architects blamed 'state capture' (a form of elite corruption) in countries with developing and transitional economies. For instance, promoters of the World Bank project, Kaufmann and Kraay, have argued that 'state capture' by the elite is the "illicit influence of the elite in shaping the laws, policies and regulations of the state." It results in a negative effect of per capita income on governance in developing and transitional economies because the fruits of the growth go to benefit a certain elite. The phenomenon is observed by the writers in transitional economies of the former socialist bloc. They recall 'historical' evidence of the influence of "robber barons" in the United States at the turn of the 20th century and crony capitalism in the Philippines under Marcos. This is indicative of "misgovernance" by the writers.[20]

The state in this understanding seems neutral, autonomous, outside the classes and able to be 'captured' by a corrupt elite. This reflects a very peculiar Hegelian Weberian institutionalist-functionalist understanding of the state, whereas in class divided

[19] World Bank, "Strengthening Bank Group engagement on governance and anticorruption" (Washington DC: World Bank, 2006); World Bank, *World Bank releases largest available governance data source* (Washington DC: World Bank, 2006).
[20] Daniel Kaufmann & Aart Kraay "Growth without Governance" (Policy Research Working Paper No. 2928, 2002) at 30.

societies[21] the state, I argue, is a class state. Let me expand on these two concepts, the Weberian institutionalist-functionalist understanding of the state, and the class state.

Legal scholar David Trubek describes what is a Weberian understanding of the state. Weber related capitalism and its legal system (order) as mutually causative. Weber's main conclusion was that laws were present in Europe before the full development of an industrial capitalist system, and hence they were partially responsible for the rise of capitalism. He connects this legal system with the political system - a centralized, bureaucratic state constructed through rational decisions which had gained people's loyalties.[22]

Functionalism is a school of thought mostly associated with Durkheim and Parsons. It understands institutions by investigating their functions, and considers institutions as the key for maintaining social order which is the key goal of a state.

In my arguments, I depart from the concept of the state (institutionalist-functionalist) as a mere 'legal state' or as institutionalist of functionalist and devoid of classes. Instead of a legal entity, in my analysis, a state is a class state and a political state. I argue that these aspects should be analyzed through class formations. There is no complete separation of the political from the economic, and the state has instrumental aspects that are used by dominant classes. It has functionalist aspects to maintain law and order, stability and protection of the property of the dominant classes against the

[21] I distinguish 'class societies' of the developed countries of the West from the 'class-divided' societies of the non-western developing countries. The former have inequalities, but the latter have a far more highly unequal distribution of resources.
[22] See David M. Trubek, "Towards a Social Theory of Law: An Essay on the Study of Law and Development" (1972) 82:1 The Yale Law Journal, 12-14.

dominated classes. The state maintains law and order and the liberal political and economic project it upholds stands against the challenges of rupture and revolution.

In relation to classes, I argue that of Hamza Alavi's "three fundamental classes,"[23] as identified in Pakistan, the imperialist fraction plays a dominant role. Alliances between the fractions between the other dominant classes happen under the political leadership of the metropolitan bourgeoisie. Using Poulantzas terminology, the reigning classes[24] are the landed and indigenous capitalist classes.[25] In a nutshell, the hegemonic class, the metropolitan bourgeoisie in this case, governs and produces internal contradictory unity amongst them.

Under neoliberalism (from the early 1990s), the local elite tried to benefit from privatization, deregulation and decentralization, which were translated as 'state capture' by the metropolitan bourgeoisie through International Financial Institutions [IFIs]. The constitutional, legal arrangements which posited law and judiciary at the center was a

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[23] Alavi (1982) argues that there is a 'plurality of fundamental classes' in postcolonial societies, namely the indigenous bourgeoisie, the metropolitan bourgeoisie and the landed class. There is accordingly no one 'ruling class.' This is in contrast to the fundamental classes in the West, namely the bourgeoisie and the proletariat, where the bourgeoisie rules. I agree with Alavi's plurality of fundamental classes but differ from his rigid formulation. I argue that there is a hegemonic class and a reigning class from amongst the three dominant classes. I provide a detailed account of my argument in chapter two. See Hamza Alavi, "State and Class Under Peripheral Capitalism" in Hamza Alavi & Teodor Shanin eds, *Introduction to the Sociology of "Developing Societies"* (New York and London: Monthly Review Press, 1982) 289-307 at 298.

[24] By the reigning class, Poulantzas means the layer from which the personnel of the state are recruited – politicians, functionaries, judges, military men, police, teachers, etc. Marx gave the illustrative example, that in England in the 18th century, while financial (banking) was dominant the administration, army and diplomats were from the aristocracy. See Poulantzas (1976), "The Political Crisis and the Crisis of the State" in. James Martin, ed, *The Poulantzas Reader: Marxism, Law, and the State* (London, New York: Verso, 2008) 294-322 at 313, trans. by JW Freiburg in Freiburg ed. Critical Sociology: European Perspective, New York, 1979 at 373.

[25] Alavi himself accepted that in the case of Pakistan, the bureaucracy came from the landed class and it did not allow land reforms to occur.

response and the solution became counter-posed as "controlling corruption" of the state bureaucracy and "controlling the political ruling elite" of developing and transitional economies (of East Europe) through the judiciary and 'civil society' or non-state actors, NGOs, networks, and so on.[26] Let me explore this central role given to the judiciary and its limits.

Why place the judiciary at the center of political development?

Law and judicial reforms led by a strong judiciary are the core pieces of the good governance paradigm. It includes the indicator, "Government Effectiveness," which is measured by parameters regarding perceptions of the quality of civil and public services of a country to make and implement policies, and "Regulatory Quality" (sometimes referred to as "regulatory burden"), which is an assessment of all laws and policies by how they measure up against an ideal market economy.[27] Through this, a whole body of enactments, amendments, legislations, and repeals of laws in developing countries, including Pakistan, are measured for governance of the market economy.

Yet, people should also respect these 'laws' and here we find the sub-paradigm of 'Rule of Law.' This comprises several indicators which measure the extent to which

[26] Kaufmann & Kraay (2002), *supra* note 21, at 35.
[27] See Daniel Kaufmann, Aart Kraay & Zoido-Lobaton "Governance Matters" at 7-8, online:<http://elibrary.worldbank.org/action/doSearch?AllField=daniel+kaufmann&startPage>, last visited Dec 06, 2013; see also Daniel Kaufmann, Aart Kraay & Zoido-Lobaton, "Governance Matters: From Measurement to Action" (1999) 37:2 Finance & Development: a quarterly magazine of the IMF (June 2000).

foreign investors and 'agents' have confidence in and abide by 'the rules of society.'[28] The predictability of judicial decisions and contract-enforceability are key here. I will call this entire complex ***the Project of the Judiciary.***

The judiciary itself is either assumed neutral or class-less, and as a better alternative to stubborn red tape (civil-military bureaucracy) and a corrupt political elite. It is not assumed to be 'independent,' or a check on other state apparatuses, executive and legislature.

The judiciary in Pakistan itself has made a claim for a role in political governance at two levels. Firstly, and since it could not defend democracy, it promoted itself as an institution to protect the rights of the people. To understand why it could not defend democracy, I ask, why and how did the legislative make, amend, and repeal laws? I explore the nexus between elite institutions, their composition, and in whose interests laws were made. Here, one can see how the laws and decisions that cut across the classes were blunted at the legislative level and, if saved, this was done at the implementation stage. There was no remedy left for the judiciary, even if it had been concerned with substantive issues. The judiciary in fact spent most of its time on laws which had no obvious class content, like struggles around accountability and constitutional engineering. Where laws were directly the product of class struggles and reproduced the political power of the combatants in them (like nationalization and land reforms) ,the judiciary strongly resisted them.

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[28] *Ibid.*

My central finding is that the judiciary should be seen as a part of the bureaucratic state – what I describe as a juridico-bureaucratic structure. It was involved in the class hegemonic plan of the ruling elite and was the battleground for ideas of the ruling class like liberal democracy and the rule of law. In that sense I conclude that the judiciary had been a crucial link in the reproduction of the state and political inequality in Pakistan. A strong judiciary to create democracy is not possible, rather the converse. The weakening of one institution like the military or strengthening of the judiciary in the same structure does not mean strengthening of the legislature. Similarly, the weakening of the state (in developing countries) does not mean the strengthening of the people, rather they become vulnerable to International Financial Institutions-IFIs. Pointing out the problem with liberal capitalist democracy, market economy and their relation with the judiciary is well trodden and does not take us long. To sharpen my critique, I have to also engage with theories of institutions, structures and change.

Problematic understanding of institutions, structures and change

Through good governance and its indicators, International Financial Institutions-IFIs want to assure investors (foreign in case of developing countries) of two things. One is protection of property and the other is enforcement of the contract. Protection of private property is the organizing principle (structure) of the capitalist society.[29] The

[29] For Poulantzas, institutions "meant a system of norms or rules which are socially sanctioned." On the hand, "*structures* cover the *organizing matrix* of institutions. He added that "structures always remain *hidden* and function through the ideological and institutional system which it

social and economic contract and its enforcement involves the institutional and legal arrangements and its rules. All have entered into this 'contract' with 'consensus,' without coercion, and with 'freedom' and 'equality.'

The good governance paradigm does not look at property relations as a fundamental cause of conflict and a hindrance for the development for people, but merely as an empirical base upon which successful countries are built.[30] On the other hand, the unequal distribution of wealth is indeed a significant hindrance for democracy.[31] Good governance is not a theory of change but a theory of status quo in the name of stability.

I want to conclude that overemphasis on the need for institutions or the overextended institutional analysis of our time[32] is problematic in developing countries

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organizes. In that sense, structures are principles of organization." See Nicos Poulantzas, *Political Power and Social Classes*, 3rd ed. (London: NLB, 1976) at 115, footnote 24.

[30] This is the assumption in all the writings of Douglas North. See Douglas Cecil North, *Institutions, Institutional Change and Economic Performance: Political Economy of Institutions and Decision* (Cambridge: Cambridge University Press 1990); also Douglas Cecil North, *Structure and Change in Economic History* (New York, London: W. W. Norton & Company 1981).

[31] The Marxist concept of class hinges on internal relations, which means that one aspect of a relation or a contradiction cannot exist without the other. For instance, capital and labour mutually constitute one another, their relationship mediated by the extraction of surplus in the form of surplus-value or profit. The relationship between landlords and tenants, which is mediated by rent, forms a structure on the basis of internal relations. As opposed to this, external relations refer to objects that can exist without each other like relation between me and a lump of earth. The relationship between patriarchy and capitalism is contingent or external. See Andrew Sayer, *Method in Social Science: A Realist Approach*,2nd ed (London, New York: Routledge, 1992) at 89-92.

[32]This is evident from three Nobel Prizes in this area for Ronald Coase 1991, Douglas North 1993, and Oliver Williamson 2009 in last few decades. New Institutionalism is based on classical economics like rational choice theory, self interested individual, methodological individualism, utility maximization and equilibrium. A black box is common to all varieties of institutionalists, by which I mean the link between political demands and ultimate outcomes. Williamson placed emphasis on transaction costs adopted from Coase's theory of the firm. He saw transaction costs

like Pakistan, because it not only hides the structures, but also protects them. Secondly, the majority of the population is assumed to be 'represented' in an institutional arrangement (liberal democracy) but are actually absent. Furthermore, as pointed out above, the metropolitan bourgeoisie (represented by officials from the World Bank and IFIs, as well as the United States) in case of Pakistan is very much present in the development of state and society in Pakistan, but they are not visible in any institutional arrangement. These aspects remain unexplained in the paradigm of good governance and explanations of political governance in Pakistan rely on a superficial analysis that sticks with legalism and constitutionalism. Finally, I need to state that one of the focal points of this dissertation is to show how the current paradigm of good governance is part of the continuity of imperialist intervention in Pakistan and its coupling within the internationalist capitalist system. In this context, legalism as an overextension of institutionalism is fundamentally antithetical to a broader and deeper democracy.

Summary of the chapters

In **Chapter Two** of the dissertation, I locate myself in relation to a Weberian institutionalist-functionalist understanding of law and state. In the Weberian functionalist understanding of the state and later in the structural-functionalism of Talcott Parsons, norms, customs, values (informal institutions) and laws (formal institutions) are the subjects of the history around which societies are organized and above all, they are

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being negotiated within a 'governance structure. See Williamson Oliver E., "The Institutions of Governance" (1998) 88:2 The American Economic Review at75-79.

perceived to be derived from a social consensus. As opposed to these understandings, I argue there is no consensus around institutional forms (formal or informal), rather contradictions. State in post-colonies functions to maintain law and order (as there are class contradictions) for the dominant classes to overpower the dominated classes. Furthermore, this functional aspect of the state (which is a condensate of class relations) is very dependent on the class formations and class struggle of the society. Hence, these institutions (including the state, rule of law, and the separation of power etc.) are not the subjects of history but of class struggle. The Weberian functionalist understanding of the state is linked to a reproduction as a site of political and cultural class struggle, rooted in the relations of production and reproduction.

Relying on Poulantzas, I develop what I call a structural analysis of law and the state. Structural analysis means going beyond institutions to analyze organizing principles to which the institutional arrangement corresponds. Poulantzas called it the internal-external analysis process of the analysis of law and the state.

Being aware of this contextual difference between postcolonial and western state and societies, I try to elaborate on how Poulantzas's insight of the state as a condensate of class relations is helpful for understanding a class-divided postcolonial state and postcolonial societies. But I also argue that Poulantzas confined the analysis of the state and its class formation to explaining the relative autonomy of the capitalist state only, whereas, I need to understand the instrumental as well as functional aspects of postcolonial law and the state. Above all, I argue that Poulantzas's analysis is confined to

the state, that is, it is state-centric, whereas there is a space beyond and outside the state in postcolonial societies. I then consider the scholarship of Hamza Alavi and show its limitations as being closer to the position of Miliband, who Poulantzas had critiqued. I suggest the need for a new theory of state for Pakistan.

In **Chapter Three**, I begin the historical narration of the development of state formation in Pakistan along with the role of the judiciary in political development (governance). This chapter tries to capture the changing state formation (institutional, legal, and constitutional arrangements) spanning under the colonization project in India until 1947 to under an immediate post-independence Pakistan in the context of retreating British colonial modernity and the establishment of U.S. modernization in the1960s. I show that law and state formations before independence integrated India with the colonial economy. The entrenched constitutionalism and legalism could slow down the participation of the population in political governance, and it also left the independence struggle to fall within legal and constitutional means. Founding fathers and the leadership of Pakistan (both in the bureaucracy and judiciary) trained within British tradition and wanted to keep the same institutional and constitutional set up. The dominant 'consciousness' among the jurists was that 'we inherited a good judicial system.'

Though Pakistan did not get a major part of its state apparatus from a united India, and there was a possibility of building the state structure anew, the state formation (reflected by the bureaucracy and judiciary) was dependent on feudal and semi-colonial classes. Delinking and self-reliance were not possible. Rather, the rising tide of popular

participation, unleashed by an anti-colonial struggle that aspired to socialist modernization, scared the local elite and strengthened the relinking and reliance of Pakistan on Western powers. To avoid popular participation, the British-type parliamentary system was not sufficient. That system meant an unwritten constitution, a long tradition of democracy, and the supremacy of legislature, which is also protector of fundamental rights. I want to contrast the British system with a new infant democracy, including a written constitution, written guaranteed fundamental rights, and the judiciary as the guardian of the constitution and protector of fundamental rights (a U.S.-type constitutional arrangement), which Pakistan followed in the years following independence.

In the 1950s, the constitutional experimentation and the legal decisions and discourse reflected this crisis of increasing participation in the state formation. While the U.K. was pulling away from the country, the U.S. was emerging as a key player that was very internal to class formation. It refused to include masses and the minority nationalities in the democratic process. To respond to this, the actors behind state formation used the doctrine of necessity to support a quasi-dictatorial regime type. My explanation here is different than most of the written literature which poses this as a judicial and constitutional struggle or a deviation from some 'ideal type' of democracy or constitutionalism which, if followed, could have resolved the political and socioeconomic issues Pakistan faces even today. My take is the crisis did not lie in the absence of the constitution, nor within the constitution or legal cases, their decisions and interpretation, nor could the state, if 'fixed,' have solved the problems. The crisis during these years was

within the processes of re-colonization (neocolonialism) and the refusal to include the masses. The solution found by the dominant class formation (including the U.K. moving out and the U.S. moving in) was in the doctrine of necessity, which proved to be a transition to the U.S. presidential system in 1962 and aided the re-colonization (neocolonialism) of Pakistan and was motivated by a refusal to include masses.

By the end of 1950s, the U.S. modernization project in Pakistan had fully consolidated. This gave birth to a class formation in which the U.S. was hegemonic, the landed and emerging capitalist class was the reigning class, and the working class was excluded. General Ayub, implemented a strong presidential system with indirect elections, a strong judicial review vested in the courts as a check on the legislature and the executive, and rights as a substitute for a democratic deficit in which the legislature (politicians) was not trusted. The Judiciary, drawn from Indian Civil Services (ICS), formed a juridico-bureaucratic structure. Supreme Court Chief Justice Cornelius, (May 13, 1960 to February 29, 1968) fully supported this state formation. The idiom of Islam (as a substitute of 'morality' in the U.S. judicial discourse) served as a cohesive force for nation-building. I do not call this the development of an 'Islamic'[33] state, because I argue Islam was grafted on to the liberal form of state in Pakistan.[34] In this phase of

[33] As the 'liberal' project of the 1990s emphasizes.

[34] This is the common approach to understand the judiciary . For example, see the statement "CJ Iftikhar is at least liberal as are most of the judges" claimed Pervaiz Anayat Malik, ASC-Advocate Supreme Court and member of the Pakistan Bar Council, in an interview on Dec 14, 2012. Leading Pakistani jurist and legal scholar, Abid Hasan Minto, also claims that while it was true that the judiciary did not touch Hudood Laws, no one was executed and the courts did not convict anyone guilty of offences under that legislation. Doctors refused amputations. According

modernization (1950s to 1960s), the law and legal institutions were not the centre of political development; rather, development was to 'pacify' the masses. When this did not work, the central role of law and institutionalism as behavioural sciences emerged to deal with this crisis of participation of the masses. This, for me, is the explanation of the current centrality of law in contemporary institutionalism and the good governance paradigm of 1990s and 2000s.

Chapter Four gives us an opportunity to ask, if the law and constitutional arrangements were to stop popular participation, what was the place of law in a popular democracy? The events of the 1970s, a period of state-led quasi-socialism under Bhutto offers an alternative where popular, but not deep democracy, made law and the courts less relevant. The first free elections of the history of Pakistan in 1970 invited more participation of the masses, particularly the marginalized, and led to a slight retreat of the U.S. imperialism that gave birth to the state formation that Zulfikar Bhutto led from 1970 to 1975. The courts, trained under the 'Cornelius tradition' of a limited and controlled democracy with proceduralism to control the 'development' bureaucracy, were not ready for this. Now there was no need of a check on the legislature because it was popular. This fact was particularly illustrated in the court's reluctant and cautious decisions on structural issues such as land reforms and the nationalization of industry.

This period lasted until 1973 when Bhutto started losing popular support. The state, with its old ruling elite, started re-emerging and the reliance of Bhutto on military

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to him, even General Zia did not want to change the complete system. Interview with Abid Hasan Minto, August 14, 2010.

and bureaucracy increased. The democratic deficit also brought back the relevance of courts in the state formation and constitutional arrangement. The complete restoration of the Cornelius tradition came with the overthrow of Bhutto in 1977 and the entry of U.S. imperialism after the Russian invasion in Afghanistan and Iranian revolution of 1979. It completely pushed back the aspirations of socialist modernization.

The implementation of a strong presidential system by wholesale constitutional rearrangements and the entrenchment of Islam under the Zia regime was also relevant. The courts came to protect fundamental rights at the end of Zia's regimes around 1988. The height of this 'judicial role' was the development of Public Interest Litigation around 1988 Benazir Bhutto cases.[35] Whereas these decisions showed a tradition of loud rights for democratic deficit in the Cornelius tradition in its continuity, they also indicate how Benazir Bhutto accepted the 'hegemony' of the U.S. (unlike her father Zulfikar Bhutto) and presented herself as more 'liberal' than liberals; hence, her acceptance to lead one of the fractions of the reigning class.

In **Chapter Five**, which examines the period of the 1990s, I define class formations as part of my explanations of rising 'legalism,' 'constitutionalism,' and hence my conception of a 'strong' and 'activist' judiciary within the state formation. The dominant class, I argue, was the new, uncontested, unipolar hegemonic presence of the metropolitan bourgeoisie aligned with neoliberalism. Its rise was possible only because of the demise of aspirations of socialist modernization that had been based on working class

[35] *Benazir Bhutto v Federation of Pakistan,* 1989 PLD S. C. 66; *Benazir Bhutto v Federation of Pakistan*, 1988 PLD S. C. 416.

struggle. The metropolitan bourgeoisie (through the World Bank and IFIs) wanted the restructuring and withdrawal of the 'developmental' state, and attempted to gradually change the seat of power from the military/civil bureaucracy state apparatus to the legislature. The slogans boasted of the arrival of liberal democracy. The legislature in Pakistan started its journey to take charge of democracy in the decade of 1988 to 1999. Meanwhile a new middle class, or petit bourgeoisie, was emerging. It was ready to adopt legalism/constitutionalism and this central role of law and institutionalism as its ideology. The working class in this arrangement was diffused into the 'public' and 'citizenry' and the perception was that judges would watch out for their 'interest.' This 'discovery' of the centrality of the role of law and legalism turned a 'check' on the corrupt elite into 'good governance' of the 2000s.

The new middle classes were the subjects of law, but not the subjects of the 'development' under the allocation of resources by the market, who were to be compensated separately by charity that was delivered through NGOs and poverty alleviation programs. The political elite was not trusted even for charity work, let alone political governance. I call this process a 'weakening' of the state. In this context, I explain the rise of judiciary in the 1990s against the political elite. It began with the issue of the separation of power structures (1989-1990), went on to the independence of the judiciary (1991-1994), the question of the appointment of judges (1996-1998), the supremacy of the constitution (1999-2006), the supremacy of judiciary (2007), and finally to 'judicial dictatorship' (2008).

The 2000s (**Chapter Six**) was the period of an alliance between the metropolitan bourgeoisie and the petit bourgeoisie (with legalism of a 'quasi-liberal' and 'liberal' type). Both projects of the petit bourgeoisie expected to get their share from the devolution and decentralization plan under good governance. The obsession with good governance compelled the metropolitan bourgeoisie to keep the leadership of the two mainstream parties in exile. Strangely, the 'quasi-liberal' and 'liberal' project did not even care about this because the rule of law was more important than democracy. I argue that, ironically, under martial law, the judiciary for the first time enjoyed sharing power with military as a seat of power of the metropolitan bourgeoisie. The judiciary got a loan from the Asian Development Bank for judicial reforms, extended its power under Public Interest Litigation, kept the legislature under control, and let the opposition stay in exile. Mainstream parties were not scared of General Musharraf but were afraid of the judiciary, and hence did not talk about the need to restore democracy, but to reign in the judiciary.

Until 2006, this alliance between the metropolitan bourgeoisie and the petit bourgeoisie worked well in steering 'good' political governance. Public Interest Litigation [PIL] was a comfortable substitute for real democracy. The problem came when the metropolitan bourgeoisie decided to include exiled leaders of the two ruling class fractions (Benazir Bhutto and Nawaz Sharif). This was going to weaken the position of the military vis-à-vis the legislature, and the judiciary would have to control both the military and the corrupt incoming exiled leadership. The lawyers' movement of 2007 and the period after the restoration of democracy in 2008 showed the height of prestige and

power of the judiciary vis-à-vis the legislature. I call this period one of *judicial dictatorship* in Pakistan.

Methodological Considerations

"What we understand about the world is determined by what the world is, who we are, and how we conduct our study."

- Bertell Ollman, 2003

How we conduct our study depends upon the nature of our inquiry and research question. Method, object and purpose are linked in a triangular way.[36] The purpose of my research was to answer the question of why the basic lives of the people around me in Pakistan have not been changed by an activist judiciary. My own background as a lawyer attempting to work on behalf of the working class also informs the perspective that I bring to this study. I have observed that when I was successful in freeing bonded labourers from one brick kiln, soon after they were caught up in another debt-bondage situation. I also saw the leaders of bonded labour leadership competing for funds from foreign NGOs. Choosing a vantage point affects results and the pattern of change. My vantage point throughout this paper is from amidst ordinary people and the marginalized who continue to suffer under every regime, hence I feel I can contribute something unique.

[36] Based on Sayer, *supra* note 32 at 4.

The available literature conceives of political developments as a series of events and cases. The explanation and interpretation of events centres on poor leadership and poor judges who did not follow the rules of the game (institutions). Different court decisions (whether good or bad for democracy), changing governments (whether democratic or dictatorial) were inconsistent and collectively unable to improve people's lives. There is a great deal of literature describing the failure of the judiciary as mostly found in the judges themselves; any bold decision is meanwhile considered to be inspired by judges' courage. According to this position, if the rule of law existed, everything would be fine. This analysis does not help one to imagine change.

Yet, to understand and explain social phenomena, there is a need to evaluate and criticize societies' own self-understanding.[37] How do people and structures reproduce social phenomena? Relativism and invoking complexity are also not sufficient responses to intractable problems. As Sayer writes, "Observation is neither theory-neutral nor theory determined, but theory laden."[38] Events were visible and hence so were the institutions that are players in the events. Observers explained the pattern on a superficial level but did not explain why the same people were part of both good and bad decisions as well as dictatorship and democracy. For me, this descriptive level is the beginning of the research and not an end in itself.

Based on Sayers, Olman and my understanding of structural analysis (a detailed account follows in the next chapter), I will use an abstract-deductive approach to the

[37] Based on Sayer, *supra* note 32 at 39.
[38]Sayer, *supra* note 32 at 84.

social reality and will not rely on the observed 'facts' only. My approach involves a double-movement between what appears to be presented to us by the world around us, the abstraction of this reality into its most significant elements, and the reconstitution of these abstractions within an ordered concreteness of a more deeply understood reality. First of all, there is a need to explore the surface appearances, which present themselves as including the historical development of the object, that is, the judiciary in my case. Based on this, a prior conception was built which led to the selection of empirical material. Now, with the concrete empirical material before me, there was a need of 'ascent from the concrete to the abstract.' After collecting this empirical material, I divided it into its most important constituent elements. Here, I could see the judiciary and political development in the concrete in constant motion, developing in a particular direction due to contradictory and mutually affecting determinations. Abstraction helped me in pulling out the most decisive of these contradictions to build the reproduction of the concrete-in-thought through the criteria of social practice. This stage of abstraction also helped to determine the general mutual connections of the decisive, abstract elements in moving the social phenomenon. After this, I was able to reconstruct the concrete going through the empirical material. This was not a one-time process, it was a repeated process of conceptualization (abstraction) that led to new ways of appropriating and abstracting empirical material. Let me explain more some of the concepts and concerns raised above.

To look at the role of the judiciary in political governance in Pakistan, it is necessary to look at the judiciary as a part of the state structure. Sayer claims that much of social science is "ignorant" of structure. Social science could not keep abreast of

advances in this philosophy by Giddens, Bhaskar, and Bourdieu.[39] The idea of structure is also controversial as poststructuralists have claimed structuralist analyses have ignored agency. The 'overextension' of structural analysis meant a dehumanizing of social science.[40] Yet I had to include structural analysis to counter individualistic and voluntarist views (which means that social processes were reproducible to the apparently unconstrained actions of individuals). The result of abandoning a structural analysis is political prescriptions like 'managerialist' political interventions to mediate the effects of the exercise of institutions. This simply means manipulating the conditions in which they operate.

Structures are social relations which stay the same with only slight changes to the rules of the game, or slight changes to institutions, which in turn give birth to events. To properly conceptualize events, we need abstraction.[41] Objects and their relations are not transparent. My claim here is that 'abstraction' is familiar, for instance, people know that things have been the same for the last 66 years; whereas facts and empirical matters or specific 'concreteness' are unfamiliar and are superficial knowledge.[42] Abstraction will not offer *concrete* descriptions (emphasis added by the writer).[43]

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[39] Sayer, *supra* note 32 at 97, foot note 20. See also the Journal for the Theory of Social Behaviour, 13, no.1 (1983). The debate happened between Miliband-Poulantzas in R. Blackburn, *Ideology and Social Science*, London 1972. Secondly reaction of E. P. Thompson to Althusser's structuralism, *The Poverty of Theory*, (London 1979) and P. Anderson's reply to Thompson in *Arguments within English Marxism*, London 1980 as cited by Sayer.

[40] Sayer, *supra* note 32 at 97.

[41] Abstraction here is not in terms of its common sense use meaning 'vague' or 'removed from reality,' see Sayer, *supra* note 32 at 87.

[42]Sayer says that the common assumption is that theoretical matters and abstraction are unfamiliar, abstract and esoteric, while empirical matters are the opposite. Yet, everyday life

So this step was simply to pick the constituent elements of political development in relation to the approach and actions of judiciary. One was center-periphery relations which entered through the overdeveloped state (civil-military bureaucracy) and directly into the judiciary through education, precedents, seminars and projects, both during modernization and the current phase of global modernity. The second constituent element is inter-elite struggle, which shapes and reshapes legal discourse and practice and is itself is shaped through successive presidential and parliamentary, unitary and federal governments.

I conclude that the judiciary was not a 'tool' which could be used, but a 'process' which has its own history and possible future, meaning it has taken a certain role in political development, and in its relation to state and political development. The idea of 'process' and 'relation' helps us to explore the general common sense idea on why the judiciary changed and established relations with other institutions of the state. Common sense states that the judiciary's new visibility can be posited as a 'solution.' However, I trace the judiciary and its place in the state structure as process and relation in order to explain its new role and the limits of this role.

Legal categories, terms and discourse like the rule of law, separation of power are presented by most analysts and scholars as neutral vehicles. Contradictions are presented as differences, paradoxes, opposition, strain, tension, disequilibrium, dislocation, or

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includes concepts which are abstract and theoretical like 'we are mortals.' And, concreteness cannot necessarily be familiar or lay knowledge as we mostly deal with apparent and superficial knowledge. See Sayer, *supra* note 32 at 145-46.

[43] Sayer, *supra* note 32 at 98.

imbalances, or if accompanied by open strife or conflict,[44] are hidden. I study the judicial discourses around judicial review, fundamental rights, separation of power, PIL, appointment of judges and even the politics of the bar in an interconnected manner to understand its role in political development. Rather than getting to the bottom line quickly, sufficient time is given in this dissertation to complex mediations over space and time to discover the relation of the political governance and judiciary.

Keeping in mind the nature of my research topic, it was also important to avoid *holophobia*. Therefore, I did not try to break judicial discourse into mutually indifferent parts and claim some kind of 'specificity specialization' (knowing more and more about less and less). Legal practice happens within a complete system even with our incomplete understanding. To know more and more about the judiciary or some aspect of it cannot help us if we do not look at it situated in a web of institutions forming state structure. The judiciary as an institution is part of the institution of the state. There was a continuous need to account for the relation of specificity with totality throughout the development of our argument, especially when in history each event is in a changing totality.

An important point here is that study should be approached *system-inward,* that is, from the whole to the part and the system should be examined before history. That is, interactions that constitute a problem in the present state are studied first before we go into their progress over time. A big danger of engaging with the whole is to miss the parts and specific details. I do pay attention to parts but in their interconnection with the whole.

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[44] See Bertell Ollman, *Dance of the Dialectics: Steps in Marx's Method* (Urbana and Chicago: University of Illinois Press, 2003) at 18.

It was not a search to go and orient the state, to come up with the idea that state is everywhere and not something structured in certain fashion. Rather, my quest was to find parts of society linked with the state or parts of the state. In a way, this quest was not to prove the judiciary is a part of the state, but to examine which ideas, discourse and persons make up the parts of the state in tandem with political development projects.

History matters but I differ with Historical Institutionalists. While turning to history to understand 'real world outcomes,' they take history as a part of the nature of the events. But, studying the history of the welfare state, for example, cannot in itself reveal the nature of the welfare state. Similarly, in our case, studying the history of the judiciary and its decisions in time tells us nothing about what the judiciary is. For me, history is something which happens to objects, it is not part of their nature. In that sense, the study of the history of the judiciary does not mean to know its nature. The need is to study history in a way that shows how it changes the nature of the judiciary.

For example, it is often said that, if the judiciary under Chief Justice Munir could have been pro-legislature, the history of Pakistan could have unfolded differently.[45] There is much regret that the judiciary did not step forward to save democracy.[46] However, I choose not to use case law to understand history, but rather to use history to see how it has given birth to case law. In that sense, my research is historical, with an insistence on particularism, context, and the materiality of ideology. History, as a part of the structure,

[45]Like by Hamid Khan in "In the Memory of Justice (ret.) A. R. Cornelius: A Great Judge" (1992) PLJ 70-74 at 70.
[46] Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi: Cambridge University Press, 1995).

was happening to the judiciary as well as to politics. Finally, I study history backward. I look at the origins of a situation, and what had to happen so that it acquired its present qualities, and what, therefore, were the preconditions of the conditions of the present.

Chapter Two

Law and State Theory in Postcolonial Pakistan

This study develops a critique of the liberal legal project of good governance. This project emphasizes the changing of institutions for social change in tandem with certain values. Through my focus on the law and state of Pakistan, where the ruling class did not change with shifts between democracy and dictatorship, where class and power contradictions are sharp, and structural hindrances like unequal distribution of land and wealth is alarming, where these deep structures haunt the environment and reflect the helplessness of the working class vis-à-vis the hold of the 'power bloc', I suggest the 'values' of liberal democracy and 'Rule of Law' do more harm than good.

In a postcolonial state under the hold of 'liberalism,' the working class is unable to gain favourable outcomes for itself despite turning out for elections. In Pakistan, not a single working class person has been elected to the legislative assemblies. The major players of global capital are also invisible in institutional arrangements and state formations, but differently, for they have a lasting impact through their entanglement with structure. In my analysis of structure, I advance a two-prong conceptual framework (structural analysis and class formation/state formation) based on Poulantzas' study of the

Western capitalist state. I adapt it for postcolonial law and state, and in the process engage with and critique a leading postcolonial scholar of the region, Hamza Alavi.

What this review is not about

It is important to clarify what streams of literature I will not review, including poststructuralist/postmodernist approaches to legal studies like Critical Legal Studies,[47] Third World Approaches to International Law (TWAIL),[48] or the Law & Society school. In the 1990s, post- structuralist studies and their legal variants were the main resistance against the thrust of formal institution-building approaches in developing and transitional economies.[49] On the terrain of international law this tendency expressed itself in

[47] It criticizes the law as perpetuating inequalities and hierarchies, but found reason in the language of legal discourse. For Trubek (1984), CLS emerged as a critique of the legal order as an outgrowth of American Legal Realism. Its bases were indeterminacy, anti-formalism, contradiction, and marginality. See David M. Trubek, "Where the Action is: Critical Legal Studies and Empiricism" (1984) 36 Stanford Law Review 575 at 577-78.

[48] TWAIL is an intellectual 'collective' holding the contemporary concerns (political and economic) of Third World people and countries in global international law in its historical trajectory ('recolonization'). A main proponent of this approach is B. S. Chimni. See for the 'manifesto' of this collective, B. S. Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 International Community Law Review 3-27. See also Okafor who pointed out the disadvantaged position of the Third World in international law negotiations, Obiora Chinedu Okafar, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall LJ 171-191. Recently Sundhya Pahuja (2013) claimed that the universal promise with Global South to use international law for combating global inequality has not been fulfilled. The reason is the use of developmental state (and the idea of 'development') and rule of law of 1960s for the protection of foreign investors. See Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press 2013).

[49] As opposed to the thrust of 'Westernized' and 'Eurocentric' rationalist legal reforms, they emphasized informal/ indigenous laws/norms and legal pluralism. This approach opposed the imposition of legal transplantation in East and South East Asia, as a continuation of colonialism, imperialism, and post-colonialism despite the claims of democratization, 'modernity' and

TWAIL. These tendencies came out of the resistance of social movements. Credit goes to these approaches in shaking the complacency of European and North American political and legal thought. I argue that TWAIL, served its purpose as a resistance to the international thrust of judicial reforms, but did not help in understanding the internal structural contradictions within and among developing countries. I levy the same criticism against approaches which have rejected formal institutions,[50] given that formal institutions persist alongside and through the informal.[51] (My study around Islam and the local justice system of *Jirga/Panchayat* will illustrate how local culture is not only coopted with formal institutions but has its own hierarchy and exploitation.)

'progress, see Tim Lindsey, "Legal infrastructure and governance reform in post-crisis Asia: The case of Indonesia" in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (Routledge: London New York, 2007) at 31. For results of reform see Howard Dick, "Why Law Reform Fails: Indonesia's anti-corruption reforms in Tim Lindsey, ed., *Law Reform in Developing and Transitional States*, (Routledge: London New York, 2007).

[50] Formal institutions are created through legal acts and then implemented. Implementation can be partial or full through the judiciary. On the other hand, informal institutions exist through implementation over a long period. They create more stable expectations than formal institutions. In societies like in Africa, non -formal and non-institutional politics are dominant and hence studies of informal institutions are important. See Patrick, Chabal, & Jean-Pascal Daloz, "Africa Works: Disorder as Political Instrument" (Indiana: Indiana University Press, 1999), at 4, 10, 13; see also Mahmood Mamdani "Citizen and subject: Contemporary Africa and the legacy of late colonialism" (Princeton: Princeton University Press, 1996); Frederick Cooper, *Africa Since 1940: The Rise of the Present* (Cambridge: Cambridge University Press 2002).

[51] As opposed to this, there is a substantial degree of formal institutionalization in Africa. The concerns about formal institutions as being 'Eurocentric' have merit, but that, in and of itself, does not take us far. The reality is that formal and informal institutions exist side by side or in relation with one another, see Gero Erdmann, Sebastian Elischer & Alexander Stroh, "Can Historical Institutionalism be Applied to Political Regime Development in Africa", (2011) German Institute of Global and Area Studies (GIGAWP166/2011), 22-23.

This literature review is neither a critique of institutionalism from the standpoint of another type of institutionalism,[52] nor is it the mixing of some Marxism with old institutionalism.[53] It is also not a study of courts, judging, judges, the performance of courts, or corruption, etc.[54] Rather, it attempts to be an overarching study or structural analysis of the role of the judiciary in political/social development, as a contribution to a new wave of law and development theory.[55] I hope to accomplish this by shifting the framework to focus on law and *state theory*.[56]

Structural Analysis and the class formation explanation of law and the state

[52] Like Historical Institutionalism, Political Economy Institutionalism, or Sociological Institutionalism (a revival of Veblen's institutionalism).

[53] John Kenneth Galbraith, Wendell Goeden, and Gunar Myrdal also used an institutional perspective. See Kirsten Ford, "The Veblenian Roots of Institutional Political Economy," Working Paper No. 2011-07, Department of Economics Working Paper Series, University of Utah, at 11. See also Paul Sweezy, "Veblen on American Capitalism" in D. F. Dowd ed, *Thorstein Veblen: A Critical Reappraisal* (Ithaca: Cornell University press 1958) 177-98, as an example of integrating parts Marx and Veblen in their work. O' Hara has also discussed similarities between Marxism and Institutionalism, see Phillip Anthony O Hara, *Marx, Veblen and Contemporary Institutional Political Economy: Principles and Unstable Dynamics of Capitalism* (City: Edward Elgar Pub, 2000).

[54]Studies like that of Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, "Building on the Bench: How Judges Decide Cases" (2007) 93: 1, 2 Cornell L. Rev.; Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Judging on a Collegial Court* (Charlottesville: University of Virginia Press 2006).

[55] Trubek and Santos (2006) see the doctrine of law and economic development as an intersection of ideas and practices in the sphere of economic theory, legal ideas, and policies and practices of development institutions; see David M. Trubek & Alvaro Santos, "Introduction: The Third Movement" in David M. Trubek & Alvaro Santos, eds, *Law and Development Theory and the Emergence of a New Critical Practice* (Cambridge: Cambridge University Press, 2006) at 4.

[56] Essentially, the structuralist or Marxist tradition of Althusser, Poulantzas, Miliband, Issa Shivji, John Saul, and Hamza Alavi.

Poulantzas responded to the Hegelian Weberian institutionalist-functionalist understanding of the state in European Marxism, particularly that of Ralph Miliband. Miliband had tried to counter the dominant pluralist view of the state with empirical data to show how the state is used by the capitalist elite. Poulantzas argued that the capitalist state was a material condensation of forces and relationships among classes and class factions, and that *this* specific materiality of the state is very important.[57] Conceptual and theoretical prerequisites for an empirical engagement were necessary for Poulantzas. [58]

The Marxist tradition of state theory, particularly in regards to Poulantzas, has been marginalised in the social sciences but, in my view, is well equipped to explain the relations of domination in contemporary societies and states. For it, statehood is not an 'innocent' institutional arrangement but is constitutively present in the relations of production and reproduction of exploitative relations. This is the key to understand the limits of state interventionism and 'welfare state illusion.' Only Marxist state theories stand against the 'professionalized reason' of the state which are "common sense." The state is not a shell protecting a 'political project' rather is a political form in which hegemony of the dominant and reigning classes is organized. Finally, the point of a state analysis is not only for analyzing facts but to explore potential for the transformation of specific state formations.[59] Poulantzas, for theorists Alexander Gallas, Lars Bretthauer,

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[57] Nicos Poulantzas (1978), *State, Power and Socialism* (London, New York: Verso, 2000) at 128, translated by Patrick Camiller; see also R. Miliband, "Marx and the State" in R. Miliband and J. Saville eds, (1965) Socialist Register.

[58] Alexander Gallas, Lars Bretthauer, John Kannnakulam & Ingo Stutzle, eds, *Reading Poulantzas* (Wales: Marlin Press, 2011) at 12.

[59] *Ibid.* at 10-11.

John Kannnakulam and Ingo Stutzle, is more important than ever due to his analysis of systematic links with crisis, state, and class under the contemporary crisis of neoliberalism.[60] I share this sense of the importance of Poulantzas's work but do not unnecessarily align myself with the evaluation of its interpretation by Bob Jessop's "strategic-relational approach,"[61] nor with the recent German discourse of making Poulantzas suitable for 'social movements'[62] and the 'global anti-capitalist left.'[63]

My aim is modest: to use Poulantzas's critique of the Hegelian Weberian institutionalist-functionalist understanding of law and the state to expose the limits of the

[60] *Ibid* at 9.

[61] Bob Jessop extended the work of Poulantzas as a relational concept but criticized his inability to explain the relative autonomy of the state. He suggests to fill this gap with a "strategic-relational approach." See works of Bob Jessop, particularly, *Nicos Poulantzas: Marxist Theory and Political Strategy* (Basingstoke: MacMillan, 1985),*State Theory: Putting Capitalist States in their Place* (Cambridge: Polity Press, 1990),*The Future of Capitalist State* (Cambridge: Polity Press, 2002), "The Gender Selectivities of the State: A Critical Realist Analysis" (2004) 3:2 Journal of Critical Realism 207-237.

[62] Tadzio Mueller reviewed the edited book of Alexander Gallas, Lars Bretthauer, John Kannnakulam & Ingo Stutzle *Reading Poulantzas* and claimed that it addressed these two tendencies. See Tadzio Mueller. "Review: Reading Poulantzas" (2008) International Journal of Contemporary Sociology 209-214.

[62] Ulrich Brand, Cristoph Gorg and Markus Wissen 2010, 2008 are moving away from the 'institutionalism' of many Left leaning approaches and strongly focusing on social movements. They use superstructural forms of statehood with INGOs, "second order condensations," see Alexander Gallas, Lars Bretthauer, John Kannnakulam & Ingo Stutzle eds, *Reading Poulantzas* (Wales: Marlin Press, 2011) at 17,.

[63] Leo Panitch has used Poulantzas' analysis for his inquiry into imperialism, see Leo Panitch, "Globalization and State" (1994) 30 Socialist Register 60-93; Leo Panitch, "The New Imperial State" (2000) 1: 2 New Left Review 5-21; Leo Panitch and Sam Gindin, "American Imperialism and Euro-Capitalism: The Making of Neoliberal Globalization" (2004) 71/72 Studies in Political Economy 7-38; Leo Panitch and Sam Gindin, "Superintending Global Capital" (2005) 35 New Left Review 101-12 as cited by Alexander Gallas, Lars Bretthauer, John Kannnakulam & Ingo Stutzle eds, *Reading Poulantzas* (Wales: Marlin Press, 2011) at 29.

overemphasized institutionalism of our age. I also want to use Poulantzas's concept of the state as a condensate of class relations to understand postcolonial law and the state.

Structural analysis of law

In the legal and social science literature on Pakistan, 'liberal' democracy, 'rule of law,' 'separation of power,' 'independence of judiciary,' and 'human rights' are taken as 'values' (given unqualified ideal and good) and governments and regimes are measured as deviations from these ideals. Legal decisions are a deviation from some 'true value' of separation of power. Similarly, dictatorial regime is a deviation from an 'ideal type.' Meanwhile, the horizon available to political scientists is limited to the assault on the judiciary by the military and/or civil authoritarian governments. The judiciary in this analysis is always under attack and sometimes compelled to support the dictators.[64] In turn, the judiciary is seen as deserving support, both in terms of safeguarding its independence, and in terms of interpreting Pakistan as a 'constitutional state' that absorbs the pressures caused by political and economic changes thanks to the judiciary.[65] My

[64] Mushahid Hussain & Akmal Hussain, *Pakistan: Problems of Governance* (Lahore: Vanguard, 1993) at 2. It is also argued that the Supreme Court "became obliged to perform the unpleasant duty' of adjudication of Martial Law in the *Nusrat Bhutto case*, see Jan Mohammed Dawood, *The Role of Superior Judiciary in the Politics of Pakistan* (Karachi: Royal Book Company, 1994) at 2.
[65]Mohammad Waseem, *Politics and the State in Pakistan*, (Islamabad: NIHCR , 2007) at 2.

concern is that the dichotomy of dictatorship versus democracy[66] removes class and class relations from an understanding of the political dynamics of the state, and, the law.[67]

I divide the very limited academic legal literature analyzing law and state in Pakistan into two eras, that produced before the mid-1990s, and the current period. Tayyab Mahmud's writings fall in the former category and offer a common sense liberal constitutional explanation of the times.[68] Paula Newberg's book is the most nuanced attempt to understand state of Pakistan within liberal tradition in legal literature.[69] A few recent academic articles, after the lawyers' movement, have tried to understand the rise of the judiciary but could not escape the dichotomy of democracy and dictatorship.[70] Why do I object to these approaches, and what do I propose as an alternative?

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[66] The dichotomy of constitutional and military politics as argued inHasan Askari Rizvi, *Military, State and Society in Pakistan* (Palgrave: Macmillan, 2000) at xiv-xix. Waseem's opinion is that this dichotomy does not tell what is on the ground because the military regimes kept the constitutional set up intact. See also Mohammad Waseem, "The Causes of Democratic Downslide" in S. Akbar Zaidi, ed, *Continuity and Change: Socio-Political and Institutional Dynamics in Pakistan* (Karachi: City Press, 2003) 59-78 at 65.

[67] In particular, it sees the struggles of peasants (e.g., the Hashtnagar and Okara peasant movements) and workers (e.g., the Faisalabad power looms workers movement) as largely irrelevant to understanding the state, and therefore ignores them.

[68] See Tayyab Mahmud, " Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan" (1993) Utah L. Rev. 1225; Tayyab Mahmud, "Jurisprudence of Successful Treason: Coup d'Etat & Common Law" 27 (1994) Cornell Int'l L. J. 49; also Mark M. Stavsky, " The Doctrine of State Necessity in Pakistan" (1983) 16 Cornell Int'l L. J. 341.

[69] See Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi: Cambridge University Press, 1995).

[70]Anil Kalhan's work is an example, see Anil Kalhan, ""Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan" (2013) 1Vanderbilt Journal of Transnational Law 1-96. According to the writer Pakistan lies in a "grey zone" between authoritarianism and democracy. As a result there is an 'institutional imbalance' or 'a persistence institutional disequilibrium' (at 10, 12). The writer urges for a balance between judicial autonomy and constraint. His work borrows heavily from proponents of common sense liberal projects in

Since legal conceptions as 'values' are deeply entrenched in the good governance paradigm and marketed extensively, this has given 'good governance' a 'value' and an 'ideology.' This is particularly true when these 'values' of rule of law and 'good governance' are measured in good governance indicators. Furthermore, a perpetual return of dictatorial regimes in Pakistan and the presence of political and even militant Islam had left these 'liberal' values as uncontested by 'liberals' and 'conservatives' (quasi liberal) alike.

For Poulantzas, when social 'values,' 'social ends,' 'consciousness' or 'hegemony,' become a 'dominant' factor in organization of the social whole, this understanding becomes a Weberian type of functionalism. For Weber, 'values' or 'social ends' are taken as subject to history. From these 'values,' the formation of the political class, the 'spirit of capitalism' and the analysis of the bureaucracy is undertaken.[71] Here the state has regulatory functions and the state's class regulatory functions are reduced to its function as guarantor of order or wellbeing and hence the state takes on an institutional-functionalist organizational form.

Pakistan. Its theoretical framework explains the causes of disequilibrium as flowing uni-directionally from "military and deep state interests" to judiciary and from judiciary to representative interests. (at 37, Fig 3). Another example is the work of Osama Siddique (2005-6), see Osama Siddique, "The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistan's Constitution and its Discontents" (2005-06) 23:3 Ariz. J. Int'l & Comp. Literature. He tries to understand the different interpretations of dissolutions of assemblies' cases by different judges. The writer explains how the contradictory and inconsistent interpretations led to an adverse impact on judicial neutrality and its public perceptions [at 713].

[71] Poulantzas (1966) "Marxist political theory in Great Britain" in James Martin, ed., *The Poulantzas Reader: Marxism, Law, and the State*. (London, New York: Verso 2008) 120-138. First translation published in New Left Review 43 43 (May/June 1967) at 57-74.

Poulantzas objected to the above understanding of the state underlying Weberian political theory, where the state's 'rationality' or the 'universal' character of the state give birth to formal, abstract liberty and equality and hence the modern juridical system based on values.[72] He also rejected two economistic approaches to law, firstly, of Reisner and Vyshinsky, who considered law as a *set of norms* declared by the state to exploit the dominated classes by the dominant class or classes, and secondly, that of Stuchka and Pashukanis, who saw law as a *system or order of social relations* ratified by the state. Poulantzas's objection is that neither could understand that law is a superstructure phenomenon and reduced law to the base.[73] He rejected reducing law simply to the *materiality* of the infrastructural levels. Similarly, law is not an external relation with basis on an unreal form. Rather, it is very real and the new values of formal, abstract liberty and equality are grafted in modern law and the state on the basis of infrastructural realities of capitalist society.[74]

The early Poulantzas thesis, under the influence of Sartre, was a synthesis of phenomenological approaches to law and existentialist philosophy. He tried to reach the natural theory of law with 'dialectical unity' of *facts* and *values*. He did not agree with legal positivists, like Kelsen and Hart and others, who think that law must be obeyed regardless of its moral character. He followed Hegel, Marx, Heidegger and Sartre and gave 'imminent' grounding of legal *values* which were in the ontological 'fact' of human

[72] As described by James Martin, ed., *The Poulantzas Reader: Marxism, Law, and the State*, (London, New York: Verso, 2008) at 5.
[73] Nicos Poulantzas (1964), Marxist Examination of the Contemporary State and Law and the Question of the 'Alternative,' in James Martin, ed., *supra* note 26 120-138. First translated and published in New Left Review 43 (May/June 1967) 25 at 26.
[74] *Ibid* at 31-32.

freedom (my emphasis). The point to remember here is that legal values are not derived from moral philosophy as in natural law but from the Anglo-Saxon tradition. This tradition is based on the 'sociology of law,' which traces values to conscious human interaction. This way, Poulantzas could avoid the crude reduction of law to class interests and was able to place law in the social development of human existence.[75]

Poulantzas's critique of Sartre is aimed at his 'socialist humanism' or the 'existentialist ontology of law,'[76] where the rights and duties are in their ontological structure at the level of the group but start from the individual. Sartre takes an individual praxis of the 'solitary' man as a starting point for his ontology. This is incompatible with scientific Marxism, where the starting point is the social economic structures of a society at a historically determinant stage of its development.[77] For Poulantzas, Sartre presupposes law and state. The historical perspective is a subsequent addition ontologically to explain variation in the framework of structures and practices, whereas in the Marxist method, it is integrated into the internal structuration of the law and state.

Poulantzas stated that we should not start with 'law and state', 'art,' or 'morality' for it means we are considering them as pre-given ontological or transcendent categories, as Sartre did. On the contrary, one should start with a certain art, a certain law and state, a certain morality concretely situated in time and space in a given society and maintaining a determinate relationship with certain structures of the base. Only then can the

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[75] See James Martin, ed, *supra* note 26 at 3-4.
[76] Poulantzas (1965) explains Sartre's enterprise with respect to the field of law, see Poulantzas (1965), "'Sartre's critique of dialectical reason and law'" in James Martin, ed, *supra* note 26 47-73, translated by Gregory Elliot.
[77] *Ibid* at 70-71.

specificity of the law and state be disclosed in the course or at the end of the process of knowledge. For Sartre, meaning creates the rational subject, a subject of knowledge that is transcendent and external to the world and Sartre is to decipher meaning through this possibility of his existence and rational knowledge of the world. On the contrary, for Marxism, a person is a natural being integrated into a concrete natural materiality and is the dialectical extension of it.[78]

For Poulantzas, an analysis will proceed first by discovering the specificity of a normative model of a particular law (or '*an internal analysis of state as an organization*'). It will accompany dialectical relation of this legal superstructure to the base or infrastructure (or *an external analysis of 'the state as body or instrument'*). This will help to re-establish the various complex degrees and proximity of legal norms to class expectations.[79] Poulantzas called it an 'internal-external' process of analysis with the relations of interiority and exteriority. From an external point of view, we can study the complex mediation between the base and the state political superstructure but it should be *dialectically combined* with a study from an internal point of view. This will tell us which institutionalized power has emerged in the form of norms and values through which dominant classes mediating their interests. For my purposes, this is the same with the state.

At one level, the state is an axiological-normative order of juridical rules and institutions taken as a whole (state as an organization). That is the internal point of view.

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[78] *Ibid* at 71.
[79] Martin, ed., *supra* note 26 at 4-5.

On the other hand, the state is a repressive force using juridical rules and institutions for class exploitation (the state as base or instrument).[80]

State formation as a class formation explanation

In 1968, Poulantzas explained how structure *is not the simple principle of organization which is exterior to* the institution.[81] Rather, for Poulantzas, structure is present in an allusive and inverted form in the institution itself. Due to the successive hidden presence of structure, we can discover the principles to explain the institution. On the other hand, Miliband only drew attention to the formal organization and control of particular institutions by networks of corporate and political elite.[82]

Poulantzas connects his argument with the reproduction of various social formations, which are the sites of class struggle. "The theory of the capitalist State cannot be isolated from the history of its constitution and reproduction," he explained. In that sense "social formations are the actual sites of the existence and reproduction of the mode of production." According to Poulantzas, the theory of the capitalist state should be elaborated upon and related to the history of political struggles under capitalism.[83]

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[80] Poulantzas (1964), *supra* note 27 at 42-3.
[81] For Poulantzas, 'institutions' "meant a system of norms or rules which is socially sanctioned;" while "*structures* covers the *organizing matrix* of institutions. Structures always remain *hidden* and function through the ideological and institutional system which it organizes. In that sense structures are principles of organization." Nicos Poulantzas, *Political Power and Social Classes*, 3rd ed. (London: NLB, 1976) at 115, footnote 24.
[82] Clyde W. Barrow, "(Re)Reading Poulantzas: State Theory and the Epistemologies of Structuralism" in Alexander Gallas et al., eds, *supra* note 12, 27-40 at 32.
[83] Nicos Poulantzas, *State, Power, Socialism* (London, New York: Verso, 1978, 2000) at 25.

Poulantzas's theory suggests that state formation, which comes into being, should be linked to class formation. This would permit an assessment whereby class is dominant in state formation. Only by understanding this, would the dominated class, from whose vantage point theory needs to be understood, know what and how to pose its struggle. This is particularly true about societies where organizing principles of the society, or structures, are about maintaining inequalities of the land and wealth distribution, which I call the structural hindrances on the path of political development. This analysis has no place in institutional explanations, which only considers instability in 'institutionalisms' and measures this instability as a negative in the good governance paradigm.

Class formation explanation of postcolonial law and the state formation

To understand the postcolonial state, I want to advance two arguments. First, that the state in the post-colony is deployed in its functionalist aspects to disorganize, repress and disperse the dominated classes, using law and order, with the goal of promoting particular political and economic development. The state in postcolonial societies has instrumental as well as functional aspects and is not 'autonomous' *only*. This functionalism is different than the Hegelian Weberian institutionalism-functionalism, as I have explained in the previous chapter and its detailed account will come when I'll apply these arguments to the postcolonial state of Pakistan. The second argument is that the postcolonial state lacks resources, and cannot reshape all aspects of society. This has left a huge space beyond the state. I refer to this reality of struggle outside, beyond and against the state as 'extralegal struggles.' Let me expand on these two arguments.

I wish to argue that Poulantzas's concept of the 'relative autonomous' state has limited application in a post-colony, where instrumental and functionalist aspects of the state are dominant. The instrumental aspect of the state can be seen in the two major state formations of Pakistan (dictatorial/democratic), where an 'intact historical bloc' vis-à-vis the dominated classes can make the state serve its interests. The state's functionalist aspect can be seen in its activity against dominated classes and their class struggles during the Cold War and afterward. The state had to maintain law and order and it allowed the liberal political and economic project to confront the challenges of rupture and revolution.

Functionalism is linked to reproduction, but in post-colonies this reproduction is a site of political and cultural class struggle, rooted in the relations of production and reproduction. This is different than the functionalism in capitalism, which is reduced to a biological reproduction, as for Althusser, as well as in the Hegelian sense just to overcome an irrational State.[84] Poulantzas wished to achieve social and political change through democratic socialism, as opposed to the social democracy and welfare stateism of Miliband. Its underlying assumption is the relative autonomy of the state, which can, therefore, be employed to bring about such a change. What about in post-colonies – how can legal and extra-legal struggles win deep structural changes like land distribution and rupture (revolution)? Poulantzas ignores any space of struggle beyond the state. All social

[84] Althusser did not identify oppositional ideologies within the State structure, so it pulled his analysis strongly towards functionalism. See Louis Althusser (1968) "Ideology and Ideological State Apparatuses," in *Lenin and Philosophy and other Essays*, (Monthly Review Press, 2001).

relations are already a relation of power with the state and hence the state becomes an enduring state of affairs for Poulantzas.[85] Let me cite Derorovic:

> It is the state that is comprehended as a social relation; it is not the concrete social relations that take on the state form [….] and because it is everywhere, it [the state] cannot be abandoned, nor can it be attacked, but rather, only transformed."[86]

In post-colonies and non-western societies, the state is absent from many spheres of life. The state only comes to those spheres for instrumental reasons (to strengthen the local hierarchies) and functionalist aspects (law and order). The state does not act for economic reasons *only* as Poulantzas, drawing from the European experience, has emphasized. Struggles outside the state and law are many.[87] Poulantzas's theory can only lead to legalism and stateism but these are limited as tools of emancipation, and can function rather as the opposite. On the other hand, struggles of the landless and the marginalized, could be viewed as a 'dual power' in highly class divided societies.[88]

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[85] Peter Thomas, "Conjunctures of the integral state? Poulantzas' reading of Gramsci in Alexander Gallas et al. eds., *supra* note 12, 277-292 at 281.

[86] Derorovic as cited by Peter Thomas, *ibid* at 281, footnote 8.

[87] In non-western societies, the primacy of labour and peasants struggle over liberal political development through elections is well established. A case for example is that of Sara Abraham's work about the Caribbean Left movements, whose struggles showcase labour struggle as deepening democracy as also the importance of political struggles over institutional causes for change. See Sara Abraham *Labour and the Multiracial Project in the Caribbean* (Lexington Books, 2007).

[88] For Poulantzas (1977), since class contradictions have permeated the state, socialists cannot organize an oppositional alliance wholly external to it. He rejected a Bolshevik model of insurgency from outside building a 'dual power'. He wanted struggle both inside and outside the terrain of the state. See Poulantzas (1977), "State and the Transition to Socialism' in Martin, ed, *supra* note 28, 334-360 "Socialism will be democratic, or it will not be at all," see Poulantzas (1978), 'towards a democratic socialism' in James Martin, ed, *supra* note 26, 361-375 at 367, trans as *State, Power, Socialism*, London 1978; Poulantzas (1979) further makes it clear that he was aligned with the 'Eurocentrist' strategy of Spanish and Italian communist parties who

To sum up, Poulantzas gave primacy to class struggle but, by confining it to the state and by ignoring the possibility of dual power, he offered a form of legalism and institutionalism within the European tradition that I call *a class struggle variant of institutionalism*, which is opposed to the legal state institutionalism of Weber. These are my departures from Poulantzas's formation. Nonetheless, using Poulatzas' formation, whereas I am able to expose the limits of Hegelian Weberian institutionalist-functionalist understanding of the state, I would also be able to explain postcolonial state as a class state in Poulantzas' tradition. This can only lead us to open up the space beyond state and legalism.

Law and State Theory in Postcolonial Pakistan

I will first critique liberal institutionalist explanations of the law and the state in Pakistan. I will then situate the nuanced work of Hamza Alavi, the foremost theorist of the state in Pakistan. I conclude with positing an alternate understanding of the law and state in postcolonial Pakistan.

'Liberal' understanding of law and state in Postcolonial Pakistan

The liberal approach to the state in Pakistan holds that political governance moves between dictatorship and democracy, and that the judiciary decides which it is to be. For

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adopted the approach of a parliamentary road to power. He acknowledged that this meant blurring the boundaries between reforms and revolution. See Poulantzas (1979), 'interview with NP' first published by *Marxism today* July 1979 at 198-205. Reproduced in James Martin, ed, *supra* note 26, 387-402 at 391.

this approach, the military is a main player of governance in Pakistan. In general, the military uses the civil bureaucratic structure and the judiciary, through constitutional engineering and legal maneuvering, to keep the legislature under its control. During dictatorial regimes, military dictators (Chief Martial Law Administrators) seek to bypass the legislature entirely and govern directly through local governments and the bureaucracy, with a 'co-operative' judiciary. In quasi-democratic regimes, the military exercises power through a constitutionally strong president who can dissolve the legislature. In particular, Article 58(2)(b) of the 1973 Constitution of Pakistan[89] has allowed the military to dissolve the National Assembly through the President. This Article therefore is a key point of struggle between the military and the legislature. The introduction and removal of this Article in the constitution is responsible for the to and fro movement of the executive authority between president and prime minister. The judiciary hence can be seen to have a central role in the dynamics of regime change, with either set of political actors seeking favors from it or seeking to limit its legitimizing potential.

Governance Pattern of Dictatorial Regimes: Surface Appearances[90]

[89] 8th Amendment in 1973 Constitution.

[90] For instance, Charles H. Kennedy's explanations as an example of common sense understanding of the Pakistani state. He correlates Musharraf's first 5-year regime with other three dictatorial regimes and devises a 'A User Guide to Guided Democracy.' These steps include avoiding legal chaos (continuity of the government), making things legal in the short term (judiciary's stamp), eliminating political opponents, arranging to become a president, reinventing local government, intimidate the civil bureaucracy and superior judiciary, rewriting the

All the military regimes in Pakistan (Ayub Khan, 1958-1968; Zia ul-Haq, 1977-1988; Pervez Musharraf, 1999-2009) came to power through bloodless coups, suggesting that there was widespread agreement among powerholders that the prior political democratic regimes were not functioning properly. The military regimes also maintained the continuity of the constitution through a malleable judiciary, which gave their rule constitutional approval. This judiciary helped them at times to eliminate their political opponents.

In order to consolidate themselves as elected and design their version of governance, the three military heads took a particular path to constitutional engineering. They invented and re-invented local governance to create a new electoral college so as to create a new party in order to bargain with the existing feudal and business elite. This way, the dictator could be elected as a president, and later the assembly could approve the constitutional arrangements for the designed governance mechanism. During such transitions, an intimidated civil bureaucracy had to control the masses.

Governance Pattern of Quasi Democratic Regimes: Surface Appearances

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constitution, and orchestrating elections. This description assumes the passivity of politicians and sees the military as the only active agent. The 'reluctant conclusion' of the writer is that the fault lies in both military and politicians for not developing a stable constitutional system. See Charles H. Kennedy, "A User's Guide to Guided Democracy: Musharraf and the Pakistani Military Governance Paradigm" in Charles H. Kennedy & Cynthia A. Botteron, eds, *Pakistan: 2005* (Karachi: Oxford University Press, 2005) 120-157 at 150.

All the quasi-democratic regimes[91] led by mass parties, on the other hand, have attempted to loosen the grip of the executive/president over the governance structure. The base of these parties has been the rural elite, the majority of whom have been recruited through political defection (horse-trading, buying and/or terrifying the opposition and rewarding the new ruling party Members of National Assembly). They readjust the judiciary to implement certain legal and constitutional arrangements, which usually ends in confrontation with the judiciary.[92] They also use the judiciary to focus on the opposition's corruption and to bring attention away from their own corruption cases. The regimes try to control the civil and military bureaucracy and to appoint their own 'sincere' Chief of Army Staff. Every time they attempt this, however, the assembly is dissolved and cannot complete its tenure. The judiciary has always been there to put its stamp on this dissolution of assembly as 'constitutional deviation.'

In my analysis, this much-touted dichotomy of dictatorship versus democracy removes class and class relations from an understanding of the political dynamics of the state and, as a result, the law. The dichotomy emphasizes that the state is totally autonomous from society and social relations, except insofar as there is a contradiction between the military and the ruling landed and capitalist elite. By implying that the legislature is weak because of a strong military, the liberal paradigm stresses that the military is the primary problem in Pakistan's politics. Yet, this analysis obscures the

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[91] Heeger (1977) thinks that even when the military is not in power it has control over resource allocation and decision-making. See Heeger Gerald A. "Politics in the Post-Military State: Some Reflections on the Pakistani Experience" (1977) 29 *World Politics* at 242-62.

[92] The second term of Benazir Bhutto (1993-1996) and Nawaz Sharif (1997-1999) are marked with this confrontation.

sharp class contradictions and often sharp class struggles within society. In particular, it sees the struggles of peasants (such as the Hashtnagar and Okara peasant movements) and workers (such as the Faisalabad power looms workers movement) as largely irrelevant to understanding the state, and ignores them. By stressing the apparent contradictions of the institutional arrangements of dictatorship and democracy, the liberal dichotomy obscures how the structure of the ruling class coalition in Pakistan remains intact.

In order to understand the totality of Pakistan's politics and how this structures the law, there is a need to go beyond the liberal approach. This means that the theory of the state in Pakistan has to be engaged *structurally* as opposed to being reduced to an analysis of its *institutional* arrangements. In what follows, I engage with the major 'structural' analysis of the Pakistani state to illustrate its inadequacies—insofar as it ironically reinforces the liberal approach—and to make an initial contribution toward the reconstruction of structural analysis of the state in Pakistan.

'Structural' Analysis of the postcolonial State in Pakistan: colonial, postcolonial, or western?

The Pakistani state has not developed through the European path of state formation,[93] and requires theorization that can account for its particular characteristics.

[93]As explained by Tariq Amin-Khan (2012) in his engagement with the stream of western scholarship for which the natural social and, political form of the modern world is anchored in the nation-state. See Amin-Khan, *infra* note 48. See also Andreas Wimmer and Nina Glick Schiller, "Methodological Nationalism and Beyond: Nation-State Building, Migration and Social Sciences, 2002 2.4 Global Networks at 301-334. Other theorists of nationalism and nations are Ernest Gellner, Eric Hobsbawm, ElieKouderie, and Benedict Anderson. They link the industrial

Hamza Alavi, the most renowned and original scholar of the Pakistani state, proposed a 'non-poststructuralist' theory of the postcolonial state focusing on Pakistan (including East Pakistan, now Bangladesh, as it got independence from Pakistan in 1971). Alavi stressed the 'overdeveloped' nature of the state, relative to the society, as will be further detailed below. Alavi's formulation has recently been revised by Tariq Amin-Khan (2012). Based on the experiences of the postcolonial states of India and Pakistan, Amin-Khan extends the differentiation of the postcolonial state from the colonial and European nation state by arguing that the Pakistani state is proto-capitalist, as opposed to the capitalist state in India.[94] Aasim Sajjad Akhtar (2008), another contemporary scholar, has shown how Alavi's 'overdeveloped state' is, rather, 'overdeveloping' insofar as state patronage coopts the intermediate classes and pacifies the resistance of subordinate classes.[95] Vivek Chibber in *Postcolonial Theory and the Specter of Capital* (2013), in his study of Indian political economy in relation to subaltern interpretations, has also given me elements of a framework to work with, as he also pointed me to the weaknesses of certain theoretical traditions.[96]

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revolution with the beginning of nationalism and nation state.. See Benedict Anderson, *Imagined Communities: Reflection on the Origin and the Spread of Nationalism* (London: Verso, 1991).

[94]Tariq Amin-Khan, *The Post-Colonial State in The Era of Capitalist Globalization: Historical, Political, and Theoretical Approaches to State Formation* (New York: Routledge, 2012).

[95] Aasim Sajjad Akhtar (2008), *Overdeveloping State: The Politics of Common Sense in Pakistan, 1971-2007* (Submitted to the SOAS, University of London for the degree of PhD) at 2.

[96] Similarly Tariq Amin Khan gives a critique of ethnographic studies of state like Gilbert Joseph & Daniel Nugent, *Everyday Forms of State Formation: Revolution and the negotiation of rule in modern Mexico* (Durham: Duke University Press, 1994); Akhil Gupta & Ardhana Sharma, "Globalization and postcolonial States" (2006) 47:2 Current Anthropology 277-307 at 278; Sarah A. Radcliffe, "Imagining the State as a Space: Territoriality and the Formation of the State in Ecuador" in Thomas B. Hansen & Finn Stepputat, eds, *State of Imagination: Ethnographic Explorations of the post-Colonial State* (Durham: Duke University Press, 2001) at 125. See Tariq

In what follows, I argue that structural analyses of the Pakistani state, including that of Alavi, have nonetheless seen the role of the military-bureaucracy as being so dominant that it seems to stand above and outside of class relations. In the last instance, the state is rooted in society as a result of its being composed of the "salariat" class—a peculiar class initially located outside of any productive activity. I argue that such analyses end up facilitating a view of politics that is in fact very close to a liberal understanding of the State. The problem with such structural analyses is that they confuse structures and institutions, rather than carefully examining how structures and institutions are related. As a result, they undermine and underplay the extent of class struggle, and the ways in which the state is a political practice of dominant classes *in relation with dominated classes.*

Alavi's influential essay, *The State in Postcolonial Societies,* was an intervention in the debate between the English Ralph Miliband and the Greek Nicos Poulantzas on the nature of the capitalist state. While Miliband tried to counter the dominant democratic-pluralist view of state with empirical data to show how it is being used by the capitalist elite, Poulantzas argued that the capitalist state was a material condensation of forces and relationships among classes and class factions, and that this specific materiality of the state is very important.[97] Alavi argued that the postcolonial state should be differentiated from the Western state as the two types went through different and divergent histories in

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Amin- Khan *supra* note 48. See Vivek Chibber, *Postcolonial Theory and the Specter of Capital* (London, New York: Verso, 2013).

[97] Nicos Poulantzas (1978), *supra* note 11 at 128. To fully understand the debate, see also R. Miliband, "Marx and the State" in R. Miliband and J. Saville ed.s, (1965) *Socialist Register.* See for detail of the debate *infra* note 107.

their formation,[98] an analysis that was engaged by Issa Shivji and John S. Saul in their analyses of the Tanzanian state.[99] I differ from Alavi's inclusion of Weberian institutionalism-functionalism in his theory, which weakens its Marxist structural content and its political incisiveness.

Salient Features of Alavi's 'Overdeveloped State' Formation for Post-Colonies

Let us first lay down the salient features of Alavi's 'overdeveloped state' formation in postcolonial states. Alavi's main argument was that in the postcolonial state, none of the three fundamental classes of the indigenous bourgeoisie, metropolitan bourgeoisie, and landed classes, were strong enough to dominate the other two. The tension among the three fundamental classes enabled the state apparatus, which had been made especially strong by colonial rule, to achieve relative autonomy from the social structure. Alavi's analysis did shift over time, and many of his writings focused on the sociological, political and economic aspects of the Pakistani social formation. Yet, Alavi did not comprehensively describe his theory of the postcolonial state and social structure in a coherent way. His theorizing is spread over several of his writings, in which many concepts and ideas shift over time. Nevertheless, a general understanding of Alavi's theory has emerged and here I'll lay out the salient features of his theoretical proposition.

[98]Alavi Hamza, "The State in Post-Colonial Societies: Pakistan and Bangladesh" (1972) 74 New Left Review at 59-81.
[99] As explained by Amin-Khan (2012) *supra* note 48. See Issa Shivji, *Class Struggle in Tanzania* (New York: Monthly Review Press, 1976); John Saul, *The State in Postcolonial Societies: Tanzania* (London: Merlin Socialist Register, 1974) 349-372.

- Alavi rejects structural-functionalism (the anthropological tradition associated with Radcliffe-Brown)[100] as well as methodological individualism (the tradition left by Durkheim).[101] At the same time, in the Marxist tradition, Alavi stood neither with the instrumental view of state (state as an instrument in the hands of the ruling elite) nor with the Marxist-functionalist view (state as reproducer of social order). Rather, in his formation, state has relative autonomy with respect to three contending fundamental classes in postcolonial societies.
- Alavi argues that there is a 'plurality of fundamental classes' in postcolonial societies, namely the indigenous bourgeoisie, the metropolitan bourgeoisie and the landed class. There is accordingly no one 'ruling class.' This is in contrast to the fundamental classes in the West, namely the bourgeoisie and the proletariat, where the bourgeoisie rules.[102]

[100] He is considered as the founder of structural functionalism and in the Durkheimian tradition.
[101] The main objection of Alavi against structural-functionalism was against the notion of harmoniously integrated individuals in a system working in reciprocity and collectivity. This was not possible in stratified societies with a primitive 'state.' It ignored the inequality of statuses and structurally determined differences among different strata of society. Methodological individualism, according to Alavi, had the individual as exploiter of 'social norms' and 'social facts' are reduced to 'individual facts.' See Hamza Alavi (1973), "Peasant Classes and primordial loyalties" (1973) 1: 1 Journal of Peasant Studies 23-62 at 36, 42.
[102] He was not ready to call them complementary fractions of a single class. On the other hand, in peripheral capitalism, the indigenous bourgeoisie, metropolitan bourgeoisie and landed class have exclusive roles which are not necessarily contradictory - "the three classes are located in the single structure of peripheral capitalism, which admits their competing interests without a structural contradiction between them." See Hamza Alavi, "State and Class Under Peripheral Capitalism" in Hamza Alavi & Teodor Shanin eds, *Introduction to the Sociology of "Developing Societies"* (New York and London: Monthly Review Press, 1982) 289-307 at 298.

- According to Alavi, the three 'fundamental classes' are located in the same mode of production.[103] Alavi described their political unity against revolutionary movements as being based on an *'underlying structural alignment.'*[104]
- Second in dominance after metropolitan capital, according to Alavi, is the fraction of the landed elite that links the state with subordinate classes by leading political parties in West Pakistan. Similarly he points out that despite some independent development, the indigenous bourgeoisie compromise with the metropolitan bourgeoisie rather than opposing it.[105]
- Since no class can dominate in the formation mentioned above, this gives relative autonomy to the military-bureaucratic structure that Alavi conceptualized as an 'overdeveloped state.' The military-bureaucratic oligarchy is a British creation and it remains a dominant political force that is 'autonomous' of the propertied classes, that is, landlords, industrialists (the indigenous bourgeoisie), and foreign capital (metropolitan bourgeoisie). They all mediate their interests through the state and at the same time the state-bureaucratic structure gains the major part of surplus.

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[103] Hamza Alavi, "Structure of Colonial Formations" (1981) Economic and Political Weekly 474-486 at 475. He objected to the mode of production debate in Indian agriculture which failed to focus on the sociological structures, patterns of social formations, and class alignments.
[104] Alavi (1972), *supra* note 59 at 73.
[105] Hamza Alavi, "Bangladesh and the Crisis of Pakistan" (1971) The Socialist Register 289-317 at 306-307.

- For Alavi, the state is a military-bureaucratic oligarchy.[106] The bureaucracy is an auxiliary class, composed of a *salariat* class (described below).[107] To mediate among the ruling, or fundamental, classes the state has relative autonomy and out of this tension, civil servants of the state benefit themselves.
- For Alavi, the lack of democracy in the post-colony is due to the 'overdeveloped state.' That is, the states in peripheral capitalist societies maintain their relative autonomy against the dominant classes (minus subordinate classes[108]) by preventing the creation and functioning of effective, representative political institutions. Through these institutions the dominant classes can bring pressure on state authorities and bureaucracy, which they do not want.[109] Whereas the current situation is that there is "a very considerable accretion of powers of control and regulation over the 'dominant' fundamental class, which is "centralized in the bureaucratic state and hence results in an 'overdeveloped state."[110]
- In Alavi's proposition, the ideology of Pakistan – two-nation theory or Islam – is the product of a *salariat class,* that is, those educated middleclass Muslims who competed in colonial India with the educated Hindu middleclass. Later this class

[106]Hamza Alavi, "Class and State in Pakistan" in Hasan Gardezi & Jamil Rashid, ed.s, *Pakistan: The Unstable State* (Lahore: Vanguard Books, 1983).
[107]He used both terms "class" and "auxiliary class" like *salariat* class which means self interested group apart from the interests of the state. Hamza Alvi, "Politics of Ethnicity in India and Pakistan" in Hamza Alavi & John Harris, ed.s, *Sociology of "Developing Societies : South Asia* (London: Macmillan, 1989) at 225-228.
[108]The reasons are that working class struggles were weak. He accepted that there was repressive and ideological apparatus of the state at work but found all these explanations were "insufficient." See Alavi *supra* note 56, 289-307 at 301.
[109] *Ibid* at 304.

> dominated the civil bureaucracy and hence held firmly to the ideology of the state. He further added that the slogans of 'Islamic unity' acquired a new significance after independence when the ruling groups (right wing ideologues and civil military oligarchy) tried to deny the distinct identities and legitimate demands of different regions. This denial led to the breaking apart of Pakistan, not because of the actual diversity itself, but because of the state refusing it and not recognizing the material needs which underlay the idiom of cultural diversity.[111] Islam is how the state denied diversity, and its material underpinnings, in Alavi's analysis.[112] That is, Islam was an excuse.

I now appraise the 'overdeveloped' state formation explanation of the postcolonial state as put forward by Alavi.

Nature of state: Instrumental/Marxist -functionalist and relatively autonomous

While Alavi correctly rejected structural-functionalism (anthropological tradition associated with Radcliffe-Brown) as well as methodological individualism (the tradition left by Durkheim), he did not closely examine the basic theoretical differences between Miliband and Poulantzas. That is, Alavi basically sidestepped the question of the

[111] Alavi (1971), *supra* note 59 at 298.

[112] Alavi (1972), *supra* note 52 at 76.

structural analysis of Poulantzas as opposed to the embedded institutional-functionalism of Miliband.[113] Ultimately, Alavi stood with Miliband, though didn't declare this, which left weaknesses in his understanding of the postcolonial state.[114] Alavi only took from Miliband a primary view of the state as an instrument (based on *The Communist Manifesto*) and a secondary view where the state is absolute, autonomous and above classes (i.e., a Bonapartist state). He did not engage Poulantzas's position, but rather unsystematically rejected it at different instances in his writings. Pointing out contextual differences between the western capitalist state and the postcolonial state and leaving the theorizing at the descriptive level is not adequate. My analysis aims to conceptualize the two bases of contextual differences of the postcolonial state of Pakistan with that of the western capitalist state, namely *there is no separation of the state and civil society, nor is there separation of the political from the economic*.

1) Separation of the state and civil society in postcolonial state

Separation of the state and civil society is the theoretical basis of the western capitalist state and society. The concept of civil society, borrowed from Hegel and 18th century political theory, connects 'concrete man' for world needs into a national political unity through universal suffrage. The 'equality' and 'liberty' of individual citizens is in their relation to the abstract laws form a 'legal state' separated from civil society or above the citizens. The problem with this preposition, even in western capitalist society, let alone postcolonial one, is that it prevents us from understanding the relation of the state to the

[113] R. Miliband, "Marx and the State" in R. Miliband and J. Saville ed.s, (1965) *Socialist Register*
[114] See Alavi (1972), *supra* note 52.

class struggle. Similarly individuals are told so equal that it is not possible to constitute social classes from this. In this way state comes at the origin of the economic individual agents and one cannot start from classes to understand the state.[115] The separation of state and civil society based on Hegel stayed in Marx but later he evolved the concept of a 'class state,' with 'objective structures' giving birth to a 'specifically political' concept of the state. Consequently, Marx and Gramsci conceived of politics as a practice of power.[116] When I say that in postcolonial Pakistan, there is no separation of state and civil society, it means that state is a class state. It is not a state above classes or outside classes (relative autonomous *only*). It serves the interests of the dominant classes (instrumental aspect of the state) and disperses the dominated classes (keeping law and order-functional aspects). But these relative autonomous and functional aspects of the state are not aclass as in Weber and Parsons. Similarly these aspects are not because dominant classes control the state (on *behest* of the capitalist class, as is in Miliband). Rather I refer the nature of each aspect (instrumental, functionalist and relative autonomous) to particular conjecture of class struggle in a particular society in a particular period of time. This should be the basis of looking at the state formations going from democracy to dictatorship rather than democracy and dictatorship as deviations from an ideal type. Similarly rule of law, separation of power, strong and independent judiciary are not neutral enterprises and 'unqualified human good' but should be analyzed as certain class and political formations in particular society at a particular time. This will help us to

[115] See Nicos Poulantzas, Political Power and Social Classes, 2nd ed. (London: NLD, 1975) at 123-125.
[116] Martin in James Martin, ed, *supra* note 26 at 5.

recognize the legal struggle within them and in certain cases beyond them and to embrace class struggle and politics outside the courts directly. This I call class formation analysis of a state formation.

2) Separation of political from the economic

In western capitalist society, the state is assumed to be above the economic interests of all the classes and individuals, and protects the property and ensures contract enforcement. There is an assumed consensus in regards to the economic base or infrastructure, or the organizing principles of the society. The state's involvement in the economy is assumed to be on behalf of all classes. So there is complete separation of political from the economic. As opposed to this, Althusser pointed out that how this economic account is important. He pointed out how economic determination in the last instance leads to complex variations in socioeconomic and political development. Poulantzas pointed out that Althusser insufficiently provides the relationship between structure and history. Furthermore, Althusser did not explain, while the variation in the economic level is dominant, how it recoils into the superstructure in the last instance. He warns about the degrees of functionalism in Althusser.[117] This is true because all the dominant classes seem united in their consensus against the dominated classes. First, Poulantzas separated political forms of the state from the economic sphere, giving it a relative autonomy. Social cohesion is the function assigned to it because it is 'a point of condensation' between various class contradictions. The dominant class is not the immediate occupant of the state. Furthermore social classes are not self-aware subjects emanating from 'pure

[117] See James Martin in Martin, ed., *supra* note 26 at 10.

economic structures.' According to Poulantzas, different class factions through conflicting practices went through fusion and dissolution which is an 'overdetermined' level of class struggle.

My take on the issue is that since there is no actual separation of the political from the economic. The state in postcolonial societies has instrumental, functionalist-Marxist as well as autonomous aspects. The presence of an industrialist class, along with capitalist agriculture under the hegemony of the metropolitan bourgeoisie was crucial and not the developmental civil and bureaucracy *only*. Of course, this represents the contradictory unity of the dominant classes. The same is true about structural adjustment policies and privatization under neoliberalism. How does one define these functionalist aspects of the state? It is true that the state is not merely an object or "authorized author" or representing the will of the dominant class. It can be used 'instrumentally' as a repressive force with 'internal unity' of the state to that will.[118] Yet, in a postcolonial society, the 'political practice' of the dominant classes overtly or covertly makes intensive use of the state apparatus and hence the state has an instrumental aspect. However, this instrumentality should be found in the political practice (class struggle) and not in the 'will' of the dominant classes. It is this very political practice that, at once, also gives 'relative autonomy' to the state. Given that there is no separation of political from the economic in postcolonial Pakistan, we should reconsider the instrumental and functionalist aspects of the state and examine the direct involvement of the state in

[118] Vyshinsky's formula which Poulantzas rejected. See Nicos Poulantzas (1965), *supra* note 30 at 76.

protecting the structures of society. It This has implications for considering different forms the postcolonial state can take. I call it structural analysis of the law and the state. But it should be carried along with class formation analysis to avoid economic, mechanically deciding politics.

Rather than seeing relative autonomy as but one aspect of the state, and one that emerges from class struggles in the very structure of society, relative autonomy of the state for Alavi is presented as a permanent and static feature. Alavi doesn't examine instrumental and functionalist aspects of the state. As a result, he misses how state exhibits its instrumental and functionalist aspect to serve the dominant classes.

Class formation and the 'Plurality' of 'fundamental classes'

In Alavi's class formation, the working, or dominated, class is missing. Furthermore, the metropolitan bourgeoisie is mentioned in the bloc of the dominant classes, but is not explained in the 'overdeveloped' state formation. As a result, in Alavi's formulation, the plurality of the 'fundamental classes' in postcolonial societies means that no class could dominate the social formation, and hence it was the military-bureaucracy (and therefore the state) that dominated society. After reaching this conclusion, Alavi never analyzed how class formation and class struggle determine the state. Since no class could be dominant in society, the fundamental classes, in Alavi, were at the beck and call of an autonomous, self-interested state, and particularly a dictatorial military. Class appeared in Alavi's analysis, but in reference to a descriptive illustration of the present.

At the most, according to Alavi, it tied the state to a weak 'structural imperative.' What is left in Alavi is that the institution (superstructure-state) uni-directionally determines the fate of the structure (base-infrastructure).

The phenomenon of the plurality of classes is not unique to postcolonial societies, as claimed by Alavi. The European ruling class, according to Poulantzas, was composed primarily of the bourgeoisie (divided into different fractions of a single class, such as industrial, commercial and financial), but it also included other classes in a 'power bloc,' notably the landed aristocracy. Out of all classes, one class exercises hegemony and guarantees the functions of other classes in a 'power bloc.' The 'power bloc' is not a fusion-totality of a Hegelian type but, in dialectical terms, is related to relatively macro-chronic objective structures, or phases, of the relations of production as a whole, where classes or class fractions denote their contradictory unity. The power bloc is not related to tactical 'compromises' or 'alliances'. The issue is to identify, out of this plurality of fundamental classes, is which class is hegemonic and dominant and which one is the reigning class. The point I want to make is that the issue in class analysis is to understand not the conjunctural or temporary forms of alliances between dominant classes, but to look at what structural or enduring arrangement of class fractions and classes makes some of them hegemonic, others reigning and so on.

Alavi presented a frozen bloc of three fundamental classes, which are run by an overdeveloped state and hence an autonomous state devoid of class struggle. In contrast, I argue that of the 'three fundamental classes' in postcolonial Pakistan, the imperialist

fraction plays a dominant role. Alliances between the dominant classes, and their fractions, happen under the political leadership of metropolitan bourgeoisie. Here, the reigning classes – the layer from which the personnel of the state is recruited – are the landed and indigenous capitalist classes. The hegemonic class governs and produces internal unity, and this hegemonic class is the metropolitan bourgeoisie as I will demonstrate below in the section related to center-periphery relations. What I have tried to do is to break above the mentioned frozen and rigid 'dominant classes' formation of Alavi and have tried to show how, out of the dominant classes, the metropolitan bourgeoisie is hegemonic and landed and capitalist class is the reigning class.

In order to know why one state apparatus is dominant (for example, the bureaucracy over the legislature after Partition in 1947), we should start dialectically from the hegemonic fraction and its relations with the dominant apparatus within the ensemble of relations of a society. Changes in regime forms and state forms can be traced back to modifications and changes in hegemony.[119] During colonization, the metropolitan bourgeoisie was the hegemonic class as well as the reigning class vis-à-vis the Indian people.[120] Its seat of power was the civil bureaucracy. It gradually handed over the reigning position to the local landed class and the emerging trader business elite, while keeping itself as the hegemonic class. The increasingly more active role of the bureaucracy after partition in Pakistan in these terms would thus be due to the weak reign

[119]Poulantzas (1972), "On Social Classes" in Martin, ed., *supra* note 26,186-219 at 212, translated by Elizabeth Hindess New Left Review 1978, 27-54.

[120]David Washbrook has separated the represented form of colonial India after 1857 from the democratic one. See David Washbrook, "The Rhetoric of Democracy and Development in Late Colonial India" in Sugata Bose & Ayesha Jalal, ed.s, *Nationalism, Democracy, and Development: State and Politics in India* (Delhi: Oxford University Press, 1997).

of the local elite (politicians) vis-à-vis the people and hence the greater reliance on the bureaucracy and later military by the metropolitan bourgeoisie. By looking at the class formation and the position of a class in the mode of production, we can explain aspects of the state formation.

Redefining the place of center-periphery relations in state formation

From 1961 on, Alavi analyzed in detail the traps of neocolonial dependency relations, beginning with the burdens of U.S. Aid and continuing on to other aspects of the relationship between Pakistan and the U.S.[121] According to Alavi, the metropolitan bourgeoisie (the U.S. in the case of Pakistan) was the most dominant force shaping Pakistan's political direction; this class acted as the patron-in-chief of the local oligarchy. Alavi agreed that the relatively autonomous role of the state apparatus is of special importance for the neo-colonial metropolitan bourgeoisie. Due to this relative autonomy they are able to pursue their class interests in the postcolonial societies.[122] Despite

[121] Hamza Alavi & Amir Khusro, "The Burden of U.S. Aid" (Autumn, 1961) Pakistan Today, reprinted in (Autumn, 1962) New University Thought; see also Hamza, Alavi, "U.S. Aid to Pakistan_ An Evaluation" (July 1963) Economic Weekly, Special Number; see also Hamza Alavi, "Imperialism Old and New" (1964) The Socialist Register 104-126; where he emphasized the center-periphery relations as the hurdles on the path of independent development by newly independent countries being trapped in neo-colonial relations. In case of Pakistan he asserted this point in this essay but give a detailed analysis in 1961 in Alavi, Hamza & Amir Khusro above.

[122] Alavi (1982) is of the opinion that colonial capitalism adopted a *conservation* and *dissolution* strategy regarding pre-capitalist mode of production. This meant that metropolitan capital is not only externally connected with peripheral capitalism in trading and exchange relations (like trade presented by Andre Gunder Frank and Immanuel Wallerstein. but also is internal to the structure of the peripheral capitalism. Based on this, Alavi offered a 'structural specificity' of peripheral capitalism. This relation of peripheral capitalism with metropolitan capital is dependency and there is no possibility of fundamental change within the framework of world capitalism (with

correctly identifying the metropolitan bourgeoisie as being 'internal' to the structure, and being the dominant aspect of that structure, Alavi could not show how it shaped the outcome, that is democracy or dictatorship. Instead, Alavi remained at the descriptive level, where the metropolitan bourgeoisie made a connection with the already formed, relatively autonomous state. Alavi does identify the peripheral or dependent nature of Pakistan, but does not work out what this means or how this determines state formation.

Tariq Amin Khan properly identifies this aspect of metropolitan bourgeoisie in the proto-capitalist nature of the state. He points out that the proto-capitalist state of Pakistan is more dependent than the capitalist variant of India. I add that the lack of liberal democracy can only be explained due to the presence of metropolitan bourgeoisie in the state formation as a relational condensate during cold war as well as post-cold war period in Pakistan. In contrast, in India's case, the presence of a strong bourgeoisie vis-à-vis the relatively lesser presence of a metropolitan bourgeoisie (along with other social relations and class struggle) explains the 'level' and 'nature' of liberal democracy. In other words, the weakness of the bourgeoisie vis-à-vis a strong state is not the key to explain a dictatorial state formation, as is Alavi's position. Rather, weakness of the political elite vis-à-vis the metropolitan bourgeoisie in class formation is a reason for the lack of democracy in Pakistan.

I emphasize the structural presence of metropolitan capital in Pakistan because this aspect is not considered in the contemporary institutionalist literature on governance. It

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'dependent' relation) but only by a decisive structural break. See Alavi (1982), *supra* note 56,172-192 at 172, 176.

is important to remove 'neutral' (with respect to imperialist design) explanations of judicial, legal and constitutional issues as part of political development. This 'neutral' imperialist presence was not neutral, despite the analyses in the 1980s. It was argued that "Pakistan hardly enjoys any degree of freedom in its external relations."[123] The neglect of imperialist design is a phenomenon of the 1990s under rising 'institutionalism.' Pakistan's political elite is fully convinced that the road to Islamabad lies through Washington,[124] and its liberal elements argue that the U.S. should intervene for democracy in Pakistan. Responding to why the U.S. has supported every authoritarian regime in Pakistan,[125] even Siddiqa stood for U.S. intervention. According to her, the claim that the U.S. supported dictatorships is just an excuse that dictatorial regimes used. Siddiqa is an example of a more contemporary theorist who has lost the old plotline, that imperial interests work within and through the Pakistani state, and that they have always done this through the military.

To summarize, in the case of Pakistan, the metropolitan bourgeoisie dominates. Alavi and other liberal intellectuals could not recognize this because of their inclination towards more 'institutionalist' explanations. They failed to understand the role of the landed and capitalist elite as a reigning/ruling class because of the absence or less visible presence of these classes in legal institutional settings in quasi-dictatorial regimes. Ironically, the liberal theorists have the reverse problem when understanding the working

[123]See Wolfgang Peter Zingel, Stephanie Zingel, & Ave Lallemant, ed.s, *Pakistan in the 80s: Law & Constitution* (Lahore: Vanguard, 1985) at 3. This is the compilation of papers read at the international conference 'Pakistan in its Fourth Decade: Test Ahead for the Islamic State, held on May 27 to 30, 1980 in Hamburg. All the participants were of the above opinion.
[124]Mushahid Hussain & Akmal Hussain, *supra* note 18 at 41.
[125] Ayesha Jalal, *State of Martial Rule* (Lahore: Vanguard Books, 1991) Pakistan edition at 63-4.

class presence. The working class and even the middle class is assumed present in institutional/constitutional settings, whereas actually they are not present. We cannot resolve this irony without structural analysis.

The ruling class in state formation

Second in dominance after metropolitan capital, according to Alavi, was the fraction of the landed elite that linked the state with subordinate classes by leading political parties in West Pakistan. Proponents of the state autonomy thesis are generally of the opinion that the state (military-civil bureaucratic structure) has never focused on protecting the economic interests of the landed class. Rather, the state's policies have an urban bias.[126] Land reforms and labour policies went against this class's interests. Alavi has shown that the landed elite opposed land reforms and agriculture tax but could not change the long-term bias against agriculture.[127] Indeed, many studies have showed there was no necessary connection between holding or controlling land and having an effect on power in social formation.[128] Land control is not the guarantee of prominence in government decision making.[129] Ayesha Jalal found that the interests of the landed class as well as the state can be the same but not necessarily all the time, calling the

[126]Mahmood Hassan Khan, "Changes in the Agrarian Structure of Pakistan" in S.M. Naseem & Khalid Nadvi, eds, *The Post-Colonial State and Social Transformation in India and Pakistan* (Karachi: Oxford University Press, 2003).
[127] Alavi (1983), *supra* note 60.
[128] Rehman Sobhan, "State and governance as factors in development" in S.M. Naseem & Khalid Nadvi, eds, *supra* note 80 at 8-9.
[129] Robert Laporte, Jr., *Power and Privilege: Influence and Decision-making in Pakistan*. (Berkeley: University of California Press, 1975) at 92.

convergence a "politics of compromise."[130] Aasim S. Akhtar concludes that the landed elite have become less committed to the autonomy and corporate interests of their class. According to this position, both the major propertied classes are fragmented and are guided by a cynical logic of gaining access to the state to distribute (or access) patronage and both are incapable of following the specific *class* interests of the party leadership.[131] All of the above is showing one side, that is, the relative weakness of the landed elite as a coherent class to assert itself against the state while balancing the interests of other contending classes.

The other side of the story is of how the landed elite has posed as a restraint on the autonomy of the state vis-à-vis subordinate classes, particularly by having blunted the efforts of land reforms. Burki suggested the names of prominent landed elites as those who made history, as opposed to the typical "who's who" of Liaquat Ali Khan, Ayub Khan, Bhutto, Benazir Bhutto, etc.[132] He selected them because they were highly effective in impeding change.[133] Similarly, Naim Ullah highlights how the suppression of a series of reports on land reforms and tenancy rights was in fact a forceful defense of the landed elite against land reforms. Zia declared on 16 Oct 1979 that "Inshaallah" (God willing) there will be no land reforms. In 2003, Prime Minister Jamali announced that

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[130]Ayesha Jalal, "The State and Political Privilege in Pakistan " in Ali Banuazizi & Myron Weiner, ed.s, *The Politics of Social Transformation in Afghanistan, Iran and Pakistan* (Syracuse: Syracuse University Press, 1994) at 157.
[131]Akhtar, *supra* note 49 at 111-113 foot note 179.
[132] Rather he gave a list of Khizar Hayat Khan as opposed to Jinnah, Mushtaq Ahmad Gurmani not Liaqat, Amir Muhamad Khan (Nawab of Kalbagh) not Ayub see Shahid Javed Burki, *A Revisionist History of Pakistan* (Lahore: Vanguard, 1998).
[133] *Ibid.*

there will be no more land reforms as far as our government is concerned.[134] That is to say, the fundamental interest of the landed elite – their ownership of the land – have in fact been protected.

Alavi has explained the rise of the indigenous comprador bourgeoisie in relation to the metropolitan bourgeoisie. The evolution of indigenous bourgeoisie in its own is also explained.[135] Amin-Khan argues that, unlike India,[136] the capitalist class in Pakistan is not in control of the state and remains a proto-capitalist class.[137] Apart from the above position, we cannot say that state ever went against the capitalist class, except during a short period of Bhutto. For Ishrat, the market was rigged and distorted and in the benefit of the elite, whereas the instruments of the state did not correct these inequalities but benefitted the same small group of people.[138]

Recently, the role of the capitalist class in local politics has been increasing.[139] The new business class of the 2000s is more closely linked to the popular classes than the business class of the 1960s. Prime Minister Nawaz Sharif integrated the business class

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[134]See the detail in Mohammed NaimUllah (?) Pakistan in the Stranglehold of Feudalism [*Pakistan Jagirdari Zamindari Nizam Ke Shikaney Men,* (Lahore: Jumhoori Publications)

[135] Hamza Alavi, "Authoritarianism and Legitimation of State Power in Pakistan" in S. K. Mitra, ed., *The post-colonial state in Asia: dialectics of politics and culture* (New York: Harvester Wheatsheaf, 1990).

[136] For detail see Vivek Chibber, *Locked in Place: State-Building and Late Industrialization in India* (Princeton: Princeton University Press, 2003).

[137] See Amin-Khan, *supra* note 48.

[138] Ishrat Husain, *Pakistan: The Economy of an Elitist State* (Karachi: Oxford University Press, 1999) at 348-50.

[139]The number of MNAs from 1985 onward has increased. This was 54 in 1985 elections but decreased subsequently. See Saeed Shafqat,"Democracy and Political Participation in Pakistan" in Soofia Mumtaz, Jean-Luc Racine & Imran Ali, eds, *Pakistan: The Contours of State and Society* (Karachi: Oxford University Press, 2003) at 225.

with the intermediate classes in Punjab.[140] Weiss, after studying the steel rolling, pharmaceutical, and sporting goods industries in Punjab found industrialists to be well connected with the local formation and local politics.[141] Now they fund, back and even participate in political parties.[142]

Furthermore, the bourgeoisie, through their personal relations with the state personnel, have been directly involved in the formation and implementation of the state policies.[143] They also affect the legislature in democratic regimes, advising governments sitting on the committees, commissions and regulatory boards. They do not make many decisions, or present or write actual bills for legislative consideration, but no policies go against their overall interests within the capitalist system as explained below.

The point I want to make is that the landed elite has largely succeeded in protecting its interests throughout the history after independence in Pakistan, and has acted as the reigning class. Despite lacking coherence in terms of following economic policy, propertied classes have persuaded the state to protect their property and let them increase their property holdings. Every major policy (like the "Green Revolution" of 1960s and privatization of 1990s), though adopted under the pressure of the International Monetary Fund and Wrold Bank, has gone in favor of the capitalist class as well as the

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[140]Andrew R. Wilder, *The Pakistani Voter: Electoral Politics and Voting Behaviour in Punjab* (Karachi: Oxford University Press, 1999) at143-44.
[141]Anita Weiss, *Class, culture and development in Pakistan: the emergence of an industrial bourgeoisie in Punjab* (Boulder: Westview Press, 1991) at 11.
[142] Best illustrations are Shahid–ur-Rahman (1997) *Who owns Pakistan*, online: <http://www.scribd.com/doc/125960792/Who-Owns-Pakistan>, last visited Nov 21, 2013; also Ishrat Husain, *supra* note 99.
[143] In Chapter 3, we will see how the capitalist class moved along with the state building project in Pakistan.

landed class.[144] Capitalist development, as a part of the liberal project of state building, has always been central for state building in Pakistan. From the available literature, we can only find a positive relation between the three fundamental classes; though at times contradictory, the relation is non-antagonistic, whether under democratic or military-bureaucratic governance. The few episodes of failed and half-hearted land reforms and non-antagonistic 'governance disputes' around democracy and dictatorship have done little, if anything, to affect the material interests of these fundamental classes.

Nevertheless, our point that the state is serving the interests of the landed and capitalist classes does not prove anything except to expose that the state is not 'neutral.'[145] This does not add to any understanding to the structural analysis of the state, and is an empirical observation.[146] We are still grappling with Miliband's position. I want to add two aspects to the understanding of the state. The first is Poulantzas' understanding of the state as a 'condensate of a relation of power between struggling classes.' The state is not autonomous of its own will (i.e., as a subject). Only by looking at the state this way can one understand exceptional forms of state, rather than simply whether fascists or capitalists or workers are ruling the state. Secondly, for Poulantzas,

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[144] See Shahid–ur-Rahman (1997), *supra* note 96.

[145] Miliband rejected a view of the state as a neutral umpire needed by a pluralist society, as theorizedin Anglo- American political science. He argued that the state served the interests of the dominant class. See Ralph Miliband *State in Capitalist Society: Analysis of the Western System of Power* (London: Quartet Books, 1973).

[146] Miliband did not agree that his work was empiricist; rather, he attacked Poulantzas being functionalist or abstract without 'empirical validation'. He called it structural superdeterminism see Ralph Miliband. "The Capitalist state: reply to Nicos Poulantzas" (1970) 59 New Left Review; also Ralph Miliband, "Poulantzas and the Capitalist state" (1973) 82 New Left Review. For Poulantzas, Miliband could not analyze historical conjunctures and forms of state. For him 'separation of power' and the role of political parties in the bourgeois state did not matter.

each particular form of the capitalist state (liberal state, interventionist state, Bonapartism, military dictatorship, fascism) presents *specific internal unity* and forms an *objective system* of special branches. Furthermore, each particular form of the state in its unity refers back to important modifications of the relations of production as well as to important stages of class struggle like competitive capitalism, imperialism, state capitalism, and so on.[147] Looking from this perspective, we can see how different state formations in post-colonies represent different class formations. So neither certain class domination (as in Miliband) or no class domination (as in Alavi) explains state formation. Rather, the specific determination of the dominant classes can explain state formations like dictatorial, democratic or fascist regimes. Only through this we can understand why during cold war, imperialism backed military rulers against dominated classes.

To conclude, the 'overdeveloped' state is actually the extreme control of the state by the fundamental classes vis-à-vis the dominated classes being unable to frame their own class struggle. The power of the fundamental classes calls into question Alavi's concept of 'structural imperative', which he sees as a very mild hold on the state by the fundamental classes. This mild 'structural imperative' on the state has to be replaced with *the structural determination of classes*, which refers to how the determination by structure (relations of production, politico-ideological domination/subordination) operates on class practices.[148] Since in Alavi's 'institutionalist' understanding of the state, the

[147] Nicos Poulantzas (1969), "Problems of the Capitalist State" in Martin, ed, *supra* note 26, 172-185 at 180-81. This essay was first published in (1969) 58 New Left Review 67-78.
[148] Nicos Poulantzas (1972), "On Social Classes" in Martin, ed, *supra* note 26, 186-219 at 187. This essay is a part of his book *Classes in Contemporary Capitalism.*

'overdeveloped' aspect of the state was the focus of analysis. He tied the state, which he saw as having its own will and self-interest, to the mode of production with a loose 'structural imperative.' In our formulation, the focus of analysis is the class formation (society and class struggle) and consequently the state as a condensate of class relations. Here, the state is determined by a strong structural determination.

Class struggle and structural analysis add to our understanding of how institutions change. Institutional analyses can only tell how an institution is an enabling as well as a restraining factor, as in Northian new institutionalism, but what makes them enabling or restraining for particular classes is the nature of the class struggle and the class struggle changing the organizing principles of the state and the society. Only this way, analysis and practice can prioritize political struggle over legal struggles or political struggles through legal struggles. Examining legal struggles can only shed light on the enabling aspects of institutions but cannot explain how the class struggle determines them.

Nature and extent of the relative autonomy of the state

Alavi started with a question of how the relative autonomy of the state with respect to the metropolitan bourgeoisie, the landed elite, and the indigenous bourgeoisie, is exercised in the short and long run. Alavi is interested in the "purposes for which relative autonomy of the state, and those at the head of it, is deployed."[149] One of these purposes is the private benefits of bureaucrats as a result of foreign aid and development

[149] Alavi (1982), *supra* note 56 at 302.

expenditures and the appropriation of local surplus. The second is to respond to the collective demands of the state, like the military, at the cost of other classes. These state appropriations represent a loss of the portion of surplus, which "fundamental classes" would otherwise expropriate from subordinated classes themselves. No doubt, the Pakistan military's role has increased, over and apart from its constitutional role under Article 245 to defend the country against external aggression and to support the civilian government during disasters. There is plenty of literature available pointing out the manipulative role of the military in political life,[150] whether in terms of 'Military Inc.,'[151] or literature articulating how the military bears a *qualitatively* greater role than that of a mediator.[152] In this section, I will explain how Alavi defined, explained, and determined the extent of relative autonomy of the state in post-colony. It was, though limited, carefully articulated in Alavi's early work of 1972, but was inaccurately defined, which led to many wrong explanations in his effort to explain the recurrent dictatorial regimes in Pakistan.

Alavi was aware of the limits of the relative autonomy of the state 'superstructure' in relation to the underlying 'structure,' where the latter puts a formative influence on

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[150] Saeed Shafqat, *Civil-military relations in Pakistan : from Zulfikar Ali Bhutto to Benazir Bhutto* (Boulder, Colorado: Westview Press, 1997) at 21; Hussain Haqqani, *Pakistan Between Mosque and Military* (Washington D. C.: Carnegie Endowment for International Peace, 2005).

[151] In a recent study, Siddiqa (2007) pointed out the role of military through the concept of "Milbus" or military capital different from defense budget, and being the military's internal economy and responsible for direct/indirect control of governance of the country. The military's predatoriness is cause and effect of the feudal authoritarian and nondemocratic political system, see Ayesha Siddiqa, *Military Inc.: Inside Pakistan's Military Economy,* (New York: Oxford University Press, 2007).

[152] Since the landed class and the indigenous bourgeoisie wants access to the state so the military enjoys implicit consent of both in the form of no resistance. See Akhtar, *supra* note 49.

superstructure in a complex way but *"is the ultimate determinant of the superstructure."* But Alavi never came back to explain this 'ultimate determinant.' Secondly, he rejects the *absolute relative autonomy of the state* but argues it is *relatively* autonomous [emphasis added by me]. He determines its relativity within the matrix of a class society, and not outside of it, arguing all the fundamental classes (but not the dominated classes) put a negative limit on the autonomy of the state insofar as the protection of their property is concerned. On the other hand, as a 'developmental state,' with the state leading political and economic development, this relative autonomy has a positive limit.

Yet the relative autonomy of the state cannot be determined as if it were a mathematical puzzle. According to Poulantzas, relative autonomy can only be examined with reference to a given state, and the precise *conjunctures* of the corresponding class struggle. This means "specific configuration of the power bloc, the degree of hegemony within this bloc, the relations between the bourgeoisie and its different fractions on the one hand and the working class on the other etc."[153] All this, and particularly the politics of class struggle, is missing in Alavi's formulation of relative autonomy. This left very little negative limit on the state and an unlimited capricious relative autonomy. The point I want to make is that Alavi though carefully articulated the extent of relative autonomy as limited, yet expanded all his analysis to this limited aspect as the only explanation of postcolonial state.

[153] Nicos Poulaztzas (1976), "Capitalist State: reply to Miliband and Laclau" in Martin, ed, *supra* note 26, 270-93 at 280-81. First published in New Left Review 1976.

For Alavi, the state is neither "instrumental" on behalf of particular groups and classes that seek control over it, nor is it functional, but rather the state is relatively autonomous. This relative autonomy is the mediation of the interests of the three fundamental classes through the state. The mediation results in a kind of arithmetic sum with zero result, in other words, no class can dominate, and there is no class relational formation as we have discussed above. Out of above mentioned aspects, Alavi is more interested in the nature and character of the "servants of the state." Do they have autonomy? Do they have their own interests that are independent of the dominant classes?[154] By rejecting the 'instrumental aspect' of the state, Alavi freefell into the opposite position, that is, seeing the state as a subject rather than an object. But to correctly understand the very nature of Alavi's state formation, let us first describe a few features of Weberian state, then see it in its Marxist variant in Miliband. Based on this, we can understand how the same position is being used by Alavi for a 'bad' rationale state.

The Weberian state has its own internal unity, rationality, and relative autonomy from civil society as a whole (there is a separation of state and civil society). This relative autonomy mediates among dominant, dominated and different dominant classes or fractions. So the state's class regulatory functions are reduced to its function as guarantor of order or wellbeing and hence consequent institutional-functionalist organizational form. Here political theory is the state's 'rationality' (the 'universal' character of the state) giving birth to formal, abstract liberty and equality and hence the modern juridical

[154]Alavi (1982), *supra* note 56 at 290.

system based on values.[155] Keeping the state's rationality, exceptional state forms or different 'types' of state or political regimes, like the welfare state, technocratic state, dictatorship, etc., are explained as a deviation from the formal models of the 'ideal type' or the 'concrete-universal' concepts. Miliband, according to Poulantzas, also reduces his analysis of state managers and technocrats to playing a purely 'techno-administrative' function of the capitalist state. He uses the ideologies of development, consumption, industrial society etcetera, which are "isolated from its 'political' structure as a class state."[156] This is akin to the rationality of a Weberian state of its own.

Based on this, we can see that state for Alavi is just the same as Miliband (a Weberian state), one with poor rationality in Pakistan, that is, having its own 'will' but using it for self-interest as a class-in-itself. Since the 'rationality' ('intent' in Alavi's formulation) of the Pakistani state is seen as being bad, this presumes a deviation from an 'ideal' liberal state formation. Since there is no separation of the economic and political, this state indulges in bad politics. With all these features together, an overdeveloped state according to Alavi is basically a subject with 'bad' politics, as opposed to the 'good' politics of the Weberian state, or it is a *salariat* class state (as politics is being done without the dominant class) in its final analysis. To depart from Alavi, we need to theorize a class-based state.

The separation of state and civil society based on Hegel was a concept relied on by Marx, but later he evolved the concept of a 'class state,' with 'objective structures,'

[155] As described by Martin in James Martin, ed, *supra* note 26 at 5.
[156] Nicos Poulantzas (1965), "Preliminaries to the study of hegemony in the state" in Martin, ed, *supra* note 26, 74-119 at 113.

giving birth to a 'specifically political' concept of the state. Consequently, Marx and Gramsci conceived of politics as a practice of power.[157] 'Political practice' and 'objective structures' give birth to exceptional state forms (democracy or dictatorship) through hegemony. Hegemony explains *political power* of dominant classes with respect to dominated classes through a combination of consent and coercion which state crystallizes.[158] The dominant class and its fractions are structured into an ensemble through the mediation of the state. In Gramsci, the structure of the ensemble *is* the state. Furthermore, in Poulantzas, there are not only the dominant and dominated classes, but at the political level, the 'specific' interests of dominant classes are concentrated to form a 'power bloc'—a contradictory unity of dominant classes, themselves 'under the dominance' of the hegemonic class or fraction.[159]

Salariat Class: Intermediate Class or Petty Bourgeoisie?

In Alavi's formulation, the civil and military bureaucracy as a salariat class is dominant in Pakistan. So not only did this self-interested 'overdeveloped' civil/military state replace the role of the fundamental classes in political/economic development but there is no role for working class or class struggle. The social category of the bureaucracy/military is presented as a unity of its own and is also autonomous vis-à-vis

[157] Martin in JamesMartin, ed, *supra* note 26 at 5.
[158] Martin in James Martin, ed, *supra* note 26 at 9 .
[159] Nicos Poulantzas (1965), "Preliminaries to the study of hegemony in the state" in James Martin, ed, *supra* note 26, 74-119 at 103.

classes in their political functions. They are presented as categories outside classes, that is, they do not belong to dominant, dominated or the petty bourgeoisie.

It is important to distinguish Marxism from American conceptions of social stratification, which dilute and eliminate social classes.[160] Marxism rigorously defines differentiation within class divisions; 'fractions, strata, and categories'[161] are not 'outside' (bureaucracy, intellectuals, technocrats) or 'alongside' (intermediate classes) of social classes. They form part of them.[162] Based on this, we can see that Alavi's categorization is under the influence of the American conception of social differentiation.[163] He picked a social category (the salariat class) external to other classes capable of asserting their own politics and ideology. Rather, we should define a social class based on its relation to the mode of production in the social formation. The 'intellectuals' and members of the bureaucracy generally belong to either the bourgeois or petty bourgeois class. The idea of an 'intermediate class'[164] or a 'salaried' class, though sensible in terms of American sociology, do not cohere in Marxist analysis.[165]

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[160] According to Poulantzas , social classes should not be limited to economic criteria alone but should be explained with reference to their explicit reference to political and ideological criteria. Class is not a "statistical category. Nicos Poulantzas (1977), "New Petit-Bourgeoisie" in Martin, ed, *supra* note 26, 323-333 at 332. First published in Alan Hunt ed., *Class and Class struggle* (London: Lawrence and Wishart, 1977) 113-124.

[161] The term social category**,** for Poulantzas, is an ensemble of agents whose principal role is its functioning in *the state apparatuses and in ideology*, e. g. state bureaucracy, intellectuals. According to Poulantzas, Gramsci demonstrated in a concrete way that all public servants, all servants of the state must be considered as intellectuals in the general sense. See Nicos Poulantzas (1972), "On Social Classes" in James Martin ed., *supra* note 26, 186-219 at 202-4.

[162]Poulantzas used the criteria used by Marx, Mao and Lenin. See *Ibid* at 200.

[163] Marxism also recognized fractions of a class but considered them as a part of a class, e.g. commercial bourgeoisie as a part of bourgeoisie, and labour aristocracy as a part of working class.

[164] Intermediate classes for Akhtar (2008) are based primarily in the

Alavi also explained that since the bureaucracy came from the landed class, it did not allow land reforms.[166] Presently in Pakistan, the civil and military bureaucracy is composed of people from lower or middle classes ("non-landed classes"), and they still do not promote land reforms. Mushahid and Akmal offer a more lucid analysis, and their book, as opposed to looking to overdeveloped and overdeveloping state theory,[167] tries to explain the dynamics between the military and more importantly "the changing internal balance of power within the state structure itself." According to the writers, for the last three decades, the social origins of civil and military bureaucracy have changed to a more broadened social base, and moreover, as compared to the bureaucracy, there is institutional growth in terms of its capability in the military.[168] This betterment in the technological and organizational structure of the army is because of U.S. cooperation.[169] The civil bureaucracy has gone through an institutional decay, on the other hand. Particularly, a stress came on the bureaucracy in 1990 due to political conflict and resultant social conflict.[170]

According to Poulantzas, while it is important to know where the state personnel are coming from, it is not the most important question. For example, a popular

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unorganized/ informal economy, internally differentiated across urban and rural with their means as organized, unorganized, and wage labour. See Akhtar, *supra* note 49 at 158.

[165] See Poulantzas (1972), *supra* note 115 at 198.

[166] Similarly he found *class affiliation* irrespective of class origins of the members with local or metropolitan bourgeoisie. This point says "mode of class representation in the state." See Hamza Alavi (1982), *supra* note 56 at 301-02.

[167] That of Akhtar, *supra* note 49.

[168] Mushahid Hussain & Akmal Hussain, *supra* note 18 at 11-15.

[169] Stephan P. Cohen, *The Idea of Pakistan* (Washington, D. C.: Brookings Institution, 2004) at 103. Saeed Shafqat (1997) also looked at the support of U.S. as strength of military against civilian institutions. See Saeed, *supra* note 104.

[170] Mushahid Hussain & Akmal Hussain, *supra* note 18 at 11-13.

government can change the upper ranks of state personnel, only by assuming that good political intentions are enough to get things changed (as Bhutto did in 1970s). The real task is to change the very structure of state and society.[171] So Pounlantzas was right that the origins of the bureaucracy are not the most important thing to know. As opposed to this, Alavi tried to devise a whole thesis of politics and ideology out of a *salariat* class, which is not a class within Marxist understanding.

Problematic understanding of crisis of the state

Finally, Alavi has reduced the crisis of democracy to the crisis of the state (crisis because of the 'over-developed state '), which, according to Poulantzas, is common in 'institutionalist-functionalist' and 'system' analyses of bourgeois sociology and political science. Here, the crisis is a dysfunctional moment in an otherwise harmonious functioning of the 'system' and will pass after the equilibrium is re-established because the state is assumed to be an integrated pluralist society of 'powers' and 'counter-powers,' resulting in 'the institutionalization of social conflicts.' In addition, conflicts are taken to the level of conflicts of 'ideas,' 'opinions,' 'values,' or crisis of 'legitimization.' The only difference in Alavi's explanation is that, since the crisis was recurrent in Pakistan, a deformed institutional arrangement and the self-interest of the personnel of the state transcended the dysfunctional moment and are engaged in dysfunction permanently. For Poulantzas, the "generic elements of political crisis, due to class struggle, are inherent in the reproduction of institutionalized political power."

[171] Nicos Poulantzas (1972), "On Social Classes" in Martin, ed, *supra* note 26, 186-219 at 210.

Furthermore, "the political crisis of the state although slackening in certain aspects, plays an organic role in the reproduction of class domination."[172] So it is not a crisis of institutions, but rather a structural crisis that has resulted in the crisis of hegemony.[173] This means there is a challenge posed by class struggle of the dominated classes and within the 'power bloc' of dominant.

The 'overdeveloped state' in Alavi is actually an 'overdeveloped state apparatus' of military/civil bureaucracy vis-à-vis other apparatuses of the state, that is the legislature and judiciary. Politicians, functionaries, judges, military men, police, teachers, etcetera should be considered as state personnel.[174] This means that the legislature is included in the state. The political crisis in the state apparatuses sometimes is reflected in the conflict of personalities, as seen with the Chief Of Army Staff conflicting with the parliamentary leader, or Chief Justice differing with the elected Prime Minister. These conflicts of personalities must be traced back to political crises and the crisis in the class formation. When political crises led to the problem of state's own unity, the dominant class (the metropolitan bourgeoisie) created networks to oversee different branches of the state. An example is that of National Accountability Bureau (NAB), which was created to control corruption, and other governance mechanisms initiated by the World Bank. As another

[172] Nicos Poulantzas (1976), "The Political Crisis and the Crisis of the State" in Martin, ed, *supra* note 26, 294-322 at 297. Trans by JW Freiburg in Freiburg ed., "Critical Sociology: European Perspective" (New York, 1979) 373-93.
[173] *Ibid* at 299.
[174] *Ibid* at 313.

example, the U.S. Gulf states brokered an agreement between Musharraf and Benazir and Nawaz. This was the National Reconciliation Ordinance.[175]

The above illustration shows the dislocation within branches of the state where the compromises of the allied classes are being crystallized, as well as the dislocations in ideological and political forms that are trying to unify allied classes. But where are the origins of this dislocation of state apparatus as crisis? The actual contradictions between dominant and dominated classes in the postcolonial society can be explained when the state is understood as a class formation engaged in politics defined as class struggle.

Based on all of these points of critique, I argue we should depart from Alavi's explanation of the state's actions as being motivated by its self-interest. Oppressive regimes are not only due to the self-interest of dictatorial regimes. It is necessary to locate class struggle against which repression is unleashed.[176] Bringing back class struggle simply means to understand the power of the state as a class power. The military in Pakistan and other newly developed countries operated for the benefit of the fundamental

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[175] This ordinance was a result of the deal between Musharraf and Benazir Bhutto and was issued on October 5, 2007. See the ordinance online: <http://www.pakistani.org/pakistan/legislation/2007/NationalReconciliationOrdinance.html>. Supreme Court of Pakistan declared the ordinance "null and void" on December 16, 2009. See the order of the SC in *The Dawn* December 17, 2009, online:<http://www.dawn.com/news/688541/timeline-from-nro-to-memogate>.

[176] Colin Leys, "The Overdeveloped Postcolonial State: A Re-evaluation" (1976) Review of African Political Economy at 41-42. Leys questioned the formulations on postcolonial state and its bureaucracy developed by Hamza Alavi, Rogers Murray and John Saul. He challenged the 'over-developed' notion and proposed that peripheral capitalist countries produce less surplus as compared to advanced capitalist societies, so they had to appropriate a large share directly, which is the reason for class struggle. See Alavi (1972), *supra* note 52; Rogers Murray, "Second Thoughts on Ghana" (1967 March/April) 42 New Left Review; John Saul, "The State in Post-Colonial Societies- Tanzania" (1974) The Socialist Register, London.

classes, particularly metropolitan capital, and against the subordinate classes. This was an institutional arrangement to keep the structure intact. What Alavi tried to debunk was the idea that the working class struggles in these countries mattered.

Bringing class struggle back in state formation

Alavi dropped the subordinate and intermediate classes from his structural analysis as either weak or irrelevant. Alavi found economic competition as the main reason preventing poor peasants from revolt. For Alavi, the helplessness of the poor peasant is not subjective but an objective fixed reality.[177] The same neglect of class struggle is carried by all liberal writings. Yet in 1968, the working classes did get organized, and did make victories in Pakistan. The state did not stay impartial. The concessions were greater when the working classes were better organized and lesser when they were disorganized. Poulantzas was clear that the working class has specific ideological elements even without a revolutionary party, which Lenin called a 'class instinct,' as an autonomous discourse. They behave differently even under bourgeois ideology. He gave an example of the U.S. working class without a revolutionary party. The absence of a politics of resistance in postcolonial societies can be traced to the

[177] Hamza Alavi, "Peasants and Revolution" in Ralph Miliband and J. Saville, eds, (1965) The Socialist Register 241-277 at 274. In this essay Alavi tried to prove that not the poor peasants but the middle peasants led the revolution in Russia and China. This is also true regarding peasants struggles in India.

absence of class struggles that focus on the fundamental structures in order to change those structures. Poulantzas stated that it is class struggle that determines how the apparatuses are modified.[178] In the complex relation between class struggle and state apparatuses, it is class struggle that has the principal role.[179] Not taking working class struggle as a constituent element of the state formation left Alavi discussing the state as removed from class relations. I will show how the class struggle (through leftist class politics) and even the class in different class formation, such as the translation of the working class movement in the ethno-nationalist idiom of the National Awami Workers Party, has serious consequences for class formations and hence state formations in Pakistan.

Does the State, or Salariat Class, have its own Ideology?

Alavi proposes that the ideology of Pakistan or two nation theory or Islam as an ideology of Pakistan is the product of a *salariat class*, that is, middle class Muslims in colonial India who got an education and competed with the Hindu educated class for government jobs. Later, this class as Pakistan's civil bureaucracy dominated, and hence held firmly to the ideology of the state. He further added that the slogans of 'Islamic

[178]Nicos Poulantzas (1972), *supra* note 125 at 212.
[179] *Ibid.*

unity' acquired a new significance after independence when the ruling groups (right wing ideologues and civil military oligarchy) tried to deny the distinct identities and legitimate demands of different regions. The separatist tendencies and sentiments were not a result of the actual diversity itself but due to the state's refusing the diversity and not recognizing the material needs which underlie the idiom of cultural diversity. [180] Islam provides a unifying rationale in Alavi's analysis.[181]

I argued that, before partition, Islam as a state ideology should be considered in its historical context of colonial economic manoeuvrings and subsequent constitutional and legal devices. Attaching any state ideology to one class or the result of a class is always misleading. Rather we should point out class relations to explain the conjunctures that gave birth to a certain ideology.[182] Secondly, after partition, the state does not create the ideology of Islam—as per Althusser, the state does not create ideology. It is Weberian to think that the church creates and perpetuates the religion, when it is religion that creates and perpetuates the church. The ideological state apparatuses do not create ideology and they are not the sole or primary factors in reproducing relations of ideological

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[180] Alavi (1971), *supra* note 59, 289-317 at 298.

[181] Alavi (1972), *supra* note 52 at 76.

[182]Poulantzas explained it while rejecting the common perception of attaching fascism with dominant capitalist class without explaining how the popular classes join fascism. See Nicos Poulantzas (1967), "Political forms of Military Coup D'etat" in Martin, ed, *supra* note 26, 166-171. See also Nicos Poulaztzas (1976), "On the Popular Impact of Fascism" in Martin, ed, *supra* note 28, 258-269. first published in French, translated by James Martin. The first work mentioned above was a book titled 'Fascism and Dictatorship: the third International and the Problems of Fascism', London 1974.

domination/subordination. They simply fashion and inculcate the dominant ideology.[183] Ideology corresponds to the class struggle which governs the apparatuses, that is, ideology is a 'correspondence' between 'institutions' and 'forms of social consciousness.'[184] Poulantzas insisted on looking into objective coordinates of political domination within this ideological formation. For him, this is particularly useful when we are examining several politically dominant classes or class fractions, of which only one takes the hegemonic role, a situation typified by capitalist Britain.[185] Fair enough. Rather than the state as a salariat class giving birth to ideology, Islam should be looked in the perspective of the Cold War as a defense against communism and its application as a defense against land reforms by Jamaat Ahmedia and then Moudoodi of the Jamaat-e-Islami. The class formations will further explain the actual nature of ideology, which the state upholds in the name of Islam.

Above all, the ideology of the state of Pakistan is a liberal project on which Islam has been grafted by a new emerging petty bourgeoisie. It was not the creation of the bureaucracy. It was and is still neither liberal nor Islamic alone. My dissertation will demonstrate that the Pakistani state has used Islam for its legitimacy (as during the Zia regime) but also resisted it to some extent (as during the Ayub and Musharraf regimes)

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[183]Poulantzas (1972), "On Social Classes" in Martin, ed., *supra* note 26 at 217.
[184] *Ibid.*
[185] Nicos Poulantzas (1966), "Marxist political theory in Great Britain" in Martin, ed, *supra* note 26 at 132. trans, published in (1967, May-June) 43 New Left Review 57-74.

through state apparatuses.[186] What was common throughout was the deepening influence of international capital, and the growing hegemony of the ruling elite. Where religion was used by the state formation for legitimizing oligarchic rule, it also came in conflict with the above liberal project of the state. The grafting of Islamic law onto liberal legal institutions, I suggest, was to protect liberal institutions, including legal institutions, against theocracy. The function or purpose or intent or effect of all the regimes was to promote the liberal project, with the help of legal engineering, which in Gramscian terms was a key element of the formation of the historical bloc. I will argue that engaging with history and culture cannot make 'structures' disappear; the point is to always unearth the underlying structures (organizing principles of the state and the society) around which formations and struggles develop.[187] Therefore, my dissertation will empirically show how juridical and legitimacy aspects were not neutral vehicles for the resolution of the disputes of the dominant classes, but were to stop the potential ruptures caused by the struggles of the subordinate classes.

Summary: a Structural Understanding of the Postcolonial State of Pakistan

[186] Repressive State Apparatuses (RSA) and Ideological State Apparatuses (ISA) as explained by Althusser. see Louis Althusser (1968), "Ideology and Ideological State Apparatuses" in *Lenin and Philosophy and other Essays*, (New York: Monthly Review Press, 2001) 85-126.

[187] We have shown how judiciary used the Islamic clauses to blunt blasphemy laws and Huddood laws at the implementation stage.

Working through the critique of Alavi, I can now summarize key aspects of what I consider to be an alternative approach: a structural analysis of the postcolonial state and society of Pakistan, which I will empirically explore through the state and judiciary's historical evolution in postcolonial Pakistan in the remaining chapters.

Conceptualizing the state as autonomous, as in the Weberian neutral state or Alavian 'relative' autonomy of the 'overdeveloped' state model, is misleading. The Pakistani state has instrumental, functionalist (Marxist), as well as relative autonomy aspects to it. The instrumental aspects need be traced in dominant class formation, for they are found in both dictatorial and democratic regimes alike. In both types of regimes, the 'historic bloc' of the dominant classes (the metropolitan bourgeoisie and the landed and capitalist classes) stayed intact vis-à-vis dominated classes, through acquiring unity within elite class fraction. Thus the 'historic bloc' could exploit the instrumental aspects of the state.

While exhibiting the instrumental aspects of the state as mentioned above, the postcolonial state of Pakistan, also functionally maintained 'law and order.' It did this partially to suppress working class aspirations for egalitarian socialist modernization. The state functionally advanced capitalist modernization, from Cold war dictatorial regimes to current instances of neoliberal policy and its related liberal democracy and legalism. These instrumental and functionalist aspects are not fixed or permanent state features, but gain content from underlying class formations.

While exhibiting instrumental and functionalist aspects against dominated classes, the postcolonial state can be ruthless. This looks like an arbitrary 'will' of the state

(relative autonomy of the 'overdeveloped state' in Alavi and a deviation from an ideal type in Weberian understanding). In my understanding, this autonomy is itself 'limited' in political practice and is further dependent on relations with the hegemonic metropolitan bourgeoisie (the U.S. and International Financial Institutions) who use the state to force through a contradictory consensus within 'historic bloc'. The autonomy is also constrained by political classes fractions (like differences between the People's Progressive Party (PPP) and Pakistan Muslim League(PML)). The metropolitan bourgeoisie becomes internal to the structure of the state and society of Pakistan as part of 'historic bloc' along with the reigning class, that is, landed and capitalist classes. The working class is excluded from the state, but this too is not fixed but depends on class struggle and class power. During the high tides of the working class struggle, the state exhibited more relative autonomy, which therefore is also not a fixed quantity.

Hence, the state is not above and outside of class as in Alavi's formulation. In that sense, there was only state left by the British which by itself started running the affaires of the newly born country. Further, neoliberal globalization is not representing the interests of only one particular state. Rather, the postcolonial state of Pakistan needs to be analyzed by deconstructing its objective coordinates of domination within its particular and shifting political and ideological formation. By doing this, one can come to know which class controls it, and how. In Pakistan's case, control was exerted through the agenda of controlled democracy, both during the Cold War with dictatorships and later with quasi-democratic regimes in Pakistan. This process also saw the grafting of Islam onto liberal institutions, without fundamentally changing the nature of class control. My

core argument is that the developing judicial discourses (of rule of law and the strong judiciary, amongst others) are crucial components of the state and should be analyzed from the point of view of class, hegemony, and control.

In the empirical chapters, I offer such a structural analysis of changing state regimes in Pakistan over 67 years. I hope that at the end of the dissertation, liberal democracy, rule of law, separation of power, independence of judiciary, and universal formal rights will no longer be seen as innocent or neutral institutional arrangements. Their crisis will no longer be understood as a deviation from some 'ideal type,' manipulated by a corrupt dictator or evident in a bad decision of a judge. When we understand this, I suggest we can also understand the space beyond law and state where true democracy may actually be developed.

Chapter Three

Law in the Era of Capitalist Modernization (1947-1960s)

During the period of the 1940s to the 1960s, Pakistan moved from being under British colonial rule to coming under the influence of the United States (U.S.). Jinnah, the 'founder' of Pakistan was a Lincoln's Inn graduate, as was his successor and the first Prime Minister, Liaqat Ali Khan. The main jurists were either British lawyers hired by the Pakistani government or local barristers trained in Lincoln's Inn and citing Privy Council decisions. At the same time, the colonial state legacy continued to affect the civil servants who served in the judiciary, the number rising to 65 members in 1964. They facilitated the assimilation of "modern" U.S. legal norms in Pakistan. After the formation of the 1956 constitution, judicial decisions in Pakistan started leaning more towards the U.S. Supreme Court precedents on the issue of the arbitrary use of administrative and legislative powers against fundamental rights, claiming it was because of the written constitution. Politically, Pakistan adopted a presidential system in the 1962 constitution. Under the guidance of experts from Harvard and MIT, Pakistan thus modernized.

I will argue that, in this period of transition, the juridico-bureaucratic structure eventually came to undermine the legislature, not because 'it did not like politicians' as is

commonly stated,[188] but rather because it surmised that the legislature could not be trusted to control the population. The general thrust of legal discourse in 1950s was in support of a move from Privy Council decisions to 'modern' U.S. legal norms as a way of accommodating political and economic change. The main issue raised in the legal cases of this period was not the supremacy of legislature or bureaucratic dictatorship (as is the 'common sense' explanation) but rather which arrangement could best keep the structure of the government intact against popular struggle. Passing through the confusion of the 1950s, legal discourse and constitutional arrangements in Pakistan ended with a set of institutions not dissimilar to that of the U.S. presidential system, with indirect elections, controlled democracy, and rights as a substitute for this democratic deficit. The idiom of Islam was deployed both as a cohesive force for the nation-building project and a substitute for 'morality' in U.S. legal discourse. The judiciary, drawn from the civil bureaucracy and leading the process of modernization, was an indispensable part of the project.

Law and State during Colonial Rule

[188] The particular reference here is Ayub's action against politicians by creating a parallel system of Basic Democracies (BD System). see *Elective Bodies (Disqualification) Order*, 1959, President's Order No. 13 of 1959, (1959) PLD Central Statutes 101.

The historical Western scholarship on the Indian subcontinent has tended to either romanticize the village community of pre-British India,[189] or to emphasize the exploitation and heavy rents extracted by British.[190] Either way, the state structure of British India came to rearrange local power and social structures and adjusted India to a new location in global capitalist expansion.[191] According to Mohammed Waseem, it was the law that tied India to the British Empire politically and economically.[192] The 'expropriation[193]' of law in India as a decisive step towards a modern system went through three stages, according to Marc Galanter. The first was Warren Hasting's re-organization of state in 1772 in Bengal, which was a general expansion of the government in isolation from courts and legislation; the second, after 1860, with extensive codification of laws and rationalization of the court system, where legislation provided the laws; and three, the post-independence stage.[194]

The relationship of the local polity with law-making, meanwhile, went through two phases. Before the extensive *Ghadar* (revolt) of 1857, military struggle and

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[189] Sumit Sarkar, "Orientalism revisited: Saidian frameworks in the writing of modern Indian history" in Vinayak Chaturvedi, ed, *Mapping subaltern studies and the postcolonial* (London: Verso, 2000).
[190] Irfan Habib *Essays in Indian History: Towards a Marxist Perception* (New Delhi: Tulika, 1995).
[191] Loic Wacquant J.D. "Heuristic models in Marxian theory" (1985) 64 *Social Forces* at 17-40.
[192] The details of the development of this law can be found in Justice Ret. Abdul Moudud, "Administration of Justice under the British Rule and the Birth of the High Court" (1968) XX PLD at 50-54
[193] Weber used this term. According to him, through 'expropriation' the monopoly of the Govt. declared, and applied the law, see Max Weber (1958) "Politics as a Vocation" in H. H. Gerth & C. W. Mills, eds, *From Max Weber: essays in sociology* (London : Routledge & K. Paul, 1970) as cited by Marc Galanter, "The Displacement of Traditional Law in Modern India" in Rajeev Dhavan, ed, *Marc Galanter: Law and Society in Modern India* (Delhi: Oxford University Press, 1989) at 17.
[194] Marc Galanter, *Ibid* at 17. Reprinted from the 24 Journal of Social Issues at 65-91.

occupation were followed by colonial laws, like the Permanent Settlement laws. In the second phase, after 1857, the relation of the polity to laws changed and protests *followed* law-making. For example, the struggles of Syed Ahmad Khan (Sir Syed) on behalf of the Muslim polity were a reaction to the Minto-Morley reforms on the issue of local representation.[195] Eventually we see the "constitutional" or "legal birth"[196] of two independent states in subcontinent in 1947.[197] Let us look a little closer at the working of the colonial state and society.

The colonial system came to be based on the extraction of taxes with the state's penetration in society working through the land revenue system. Existing social structures at all district and sub-district levels were given meaning through legal protection of landed property and its lawful usage exercised by the formal state structure. In West

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[195] For example, *The Government of India Act*, 1858 in Constitutional Documents (Pakistan), Vol. I, 1964, Karachi at 332-62. This came just after the revolt (Ghadar) of 1857 and was a constitutional document for colonial India which transferred the administration territory under East India Company to the Crown. The Indian Council Act of 1861 further deepened the local administration in colonial India. See *The Indian Council Act*, 1861 in Constitutional Documents (Pakistan), Vol. I, 1964, Karachi at 399-400. But still the local population was not included in the administration. Later the formation of Indian National Congress created a cadre of native politicians to include in the administration in 1892. See *The Indian Councils Act*, 1892 in Constitutional Documents (Pakistan), Vol. I, 1964, Karachi, 408-13. It expanded the Council of the Governor-General. Muslim minority consciousness was triggered resulting in demand of separate electorate and formation of Muslim League in 1906, leading to the Minto-Morley Reforms 1909 (see *The Indian Councils Act*, 1909 in Constitutional Documents (Pakistan), Vol. I, 1964, Karachi at 413-19). Afterwards, the politics of Congress and Muslim League followed the indigenization of Indian politics through *The Government of India Act*, 1919 (in Constitutional Documents (Pakistan), Vol. I, 1964, Karachi 513-74, and finally *the Government of India Act*, 1935 (Constitutional Documents (Pakistan), Vol. I, 1964, Karachi .

[196] Hamid Khan, *Constitutional and Political History of Pakistan*, 2nd ed. (Karachi: Oxford University Press, 2009) at 41.

[197] Pakistan was arguably created through an Act of the British Parliament (see *The Independence Act*, 1947, Constitutional Documents (Pakistan) Volume III, Government of Pakistan, 1964, Karachi) and not through a prior existence of a 'revolutionary' movement as in other colonial countries.

Bengal, the British East India Company (EIC) introduced the Law of Permanent Settlement and created a rural elite to extract surplus from the peasantry.[198] Later, the state protected this class from moneylenders who had been strengthened due to increases in usury in the agrarian economy. Landowners were converted into landlords and preserved through legislation.[199] According to Waseem, the society was connected with the new state through the revenue bureaucracy mediated by the rule of law.[200]

British India also came to deny people formal justice. During colonial rule, law functioned to allow the development of coercion, through self-legitimation and bureaucratic rule. The colonial state monopolized the dispensation of justice and deprived local leadership of a role in dispute settlement. Uniform codified laws like the *Specific Relief Act* externalized the source of legitimacy away from each localized society and gave authority to civil courts to interfere in the social and economic life of people.[201] The justice system was divided into matters of policy, revenue collection, economic decision making and defense, giving rise to a civil-military oligarchy. Most of the effective power to adjudicate disputes was held by local landed elites, for the courts were distant from most of the people.[202]

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[198] Mohammad Waseem, Politics and the State in Pakistan, 3rd ed. (Islamabad: NIHCR, 2007) at 29

[199] Like the *Punjab Alienation of Land Act*, 1901 and *Sindh Encumbered Estates Act*, 1878, see Irfan Habib. *Essays in Indian History: Towards a Marxist Perception* (New Delhi: Tulika, 1995)

[200] Waseem *supra* note 11 at 45-48.

[201] Hugh Kennedy Trevaskis, *The Land of the Five Rivers: An Economic History of the Punjab from the Earlier Times to the Year of Grace 1890* (London: Oxford University Press, 1928) at 297-299.

[202] A detailed study of this can be found in Waseem *supra* note 11.

This was very different from pre-British India where many overlapping local jurisdictions existed along with administrative autonomy on the part of different groups.[203] Mughals had administrative centres, or royal courts, where criminal and commercial jurisdiction was exercised. Family matters were dealt with internally by the Muslim population. The hierarchy of courts existed but was not systematic or sustained in supervising the lower courts. These courts were not deep in the countryside and there was no appeal to the royal courts. Essentially, before the British, there were multiple local hierarchies of informal/local laws, which were not part of a centralized economic, political, and legal hierarchy. The British connected these local forums with a centralized system through the bureaucracy, while leaving local hierarchies intact. Lawyers, mostly drawn from elite castes, themselves became part of the exploitative structure. The emerging power of lawyers was frequently set aside by special pleadings.

Law in colonial India also defined religious, caste and tribal categories, creating codified social anomalies. Laws based on these categories, which were made operational through courts, helped further the cause of separatism, for instance in facilitating the creation of Muhammadan and Hindu laws. Codification further sharpened and institutionalized these divides. Meanwhile, the process of indigenization of the Indian state was very slow. By 1926, the Indian Public Service Commission was autonomous.

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[203] See Galanter *supra* note 6 at 16. For this period see also Altekar, A. S. *State and government in ancient India*, 3rd ed (Delhi: Motilal Banarsidar, 1958) ; Derret, J. D. M. "The administration of Hindu law by the British" (1961) 4 Comparative Studies in Society and History 10-52; Derret, J. D. M. "Law and Social Order in India before the Muhammadan Conquests" (1964) 81 Journal of Economic and Social History of the Orient 73-120; also Ahmad, M. B. *The administration of justice in medieval India*, (Aligarh: The Aligarh Historical Research Institute, 1941) as cited by Marc Galanter at 16-17.

The rise of the legislature was even slower, though political and constitutional arrangements were accelerated after the 1857 revolt, which swept parts of North India. The second phase of the development of the legislature occurred in the second decade of the 20th century with the rise of the Indian nationalist movement. As soon as it looked like the country was near revolt, the need for constitutional arrangements became a matter of urgent concern.[204]

Did Pakistan inherit a good judicial system?

As already explained, after the defeat of Ghadar (1857), the local polity followed the legal and constitutional changes introduced by the British authorities. These new ideas of 'constitutionality' and 'legality' became the dominant mode for legal policy at the national level (both Congress and Muslim League-ML), with exception of the Ghadar Party (1913), Bhagat Singh's movement (1930), and finally Subhash Chandra Bose (1940s).[205] The rule of law became so pervasive that by the 1950s, the dominant

[204] Ghadar ("Mutiny") was an anti-colonial movement started by South Asian immigrants in California in 1913. It spread quickly to East Asia, Europe, the Middle East and East Africa. This movement deployed around 8,000 rebels from around the World for anticolonial struggle. See Maia Ramnath, *Haj to Utopia How the Ghadar Movement Charted Global Radiclaism and Attempted to Overthrow the British Empire* (Berkley: University of California Press, 2011).

[205] The Ghadar party was formed by the Punjabi Indians in 1913 in U.S. and Canada to liberate India. Bhagat Singh (1907-1931) was a socialist in United British India struggling for independence. He was accused of murdering British police officer Saunders by throwing a bomb in the Punjab Legislative Assembly. A trial by Special Tribunal and appeal at Privy Council in England found him guilty. He was hanged on March 23, 1931. Subhash Chandra Bose was an Indian nationalist who formed the Indian National Army to liberate India out of the British Indian Army in the battle of Singapore during the Second World War. Bose was assisted by Germany. The British Raj charged 300 INA soldiers for treason. Bose escaped but died in a plane crash in Taiwan.

opinion was that Pakistan had inherited a good judicial system.[206] The Law Reforms Commission (1967-70) found that the essential principles of the Mughal system of administration of justice were sound and efficient and that the British had only changed the system in those areas which were previously unregulated. According to the commission, British influences on India were assimilated and were no longer foreign.[207] Even the critique of this view of the 'inherited good judiciary' only extended to the issue of appointment of British only judges.[208] The profound social and political changes that had accompanied the transplantation of British law went unremarked upon and little was changed by the successive governments in two decades after independence.[209]

The only exceptional voice in this regard was that of Chief Justice Cornelius. He discussed the diversity of the courts and laws before the British arrival. According to Cornelius, during the period of Hindu rulers, there was also a gradation of courts. Landowners or *Zamindars* had jurisdiction over the population in the courts of the territories. Gradually, in his view, British rule had displaced the prior forms of justice and

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[206] Justice S. Anwarul Haq CJSC (Ret., as he then was), "Administration of Justice" (1983) PLJ 42-59; see also Sh. Abdul Haque, "Laws Delays- A Study: Diagnosis and Cure" (1976) XXVIII PLD 64 at 65.

[207] Justice S. Anwarul Haq CJSC (Ret., as he then was) has summarized the report. See "Administration of Justice" (1983) PLJ 42-59 at 50. He is also of the view that Civil Services should not be discarded as "ruling elite" which is a relic of the colonial past and he resented Yahya's Civil services reforms in 1970-71, see Justice S. Anwarul Haq CJSC (Ret., as he then was) *Revolutionary Legality in Pakistan* (Lahore: Pakistan Writers' Co-operative Society, 1993) at 303. This opinion was shared by Justice (Ret) Saiduzzaman Siddiqui in a speech delivered at National Defense College, Islamabad to the Senior Cadre Officers of the Armed Forces of Pakistan and Friendly Countries in Asia, Africa, Europe and North America, see Justice (Ret) Saiduzzaman Siddiqui, "Judiciary in Pakistan: An Overview" (2000) PLD 52 at 53.

[208] Justice Amin Ahmad (CJ, East Pakistan High Court. Ret.), "Judicial Review of Administrative Actions and Independence of Judiciary in Pakistan" (1970) XXII PLD 135 at 139.

[209] Saber Ahmed, "Administration of Justice- A Hoax" (1971) *X*XIII PLD 123 at 123.

discriminated against the locals, as they could not sue any British person. All of the judges were European, with the East India Company having jurisdiction all over the subcontinent. Few locals served as judges in these courts and they were called "Black Judges." The Indian Civil Services, after the Parliamentary Act of 1761, were exclusively British.[210] Cornelius also pointed out that it was the beneficiaries of the system, like certain judges and lawyers, who believed in the British system.[211] And yet, Cornelius did not extend his critique to more fundamental questions such as the purpose and function of the British legal system in India in terms of exploitation or oppression. While he did not indulge with the hierarchies and exploitation within the legal system in British or pre-British India, he never asked if independence would mean delinking from the colonizers, or how the state and legal structure might have to change.

Modernizers even before Modernization

As a rapidly constructed state, Pakistan did not inherit a centralized state machinery.[212] It could have experimented with new forms of governance, but did not. What are the explanations for this? One may be that the founding father had internalized the ideas of the colonizers.[213] The founding father of Pakistan, Jinnah, was a Lincoln

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[210] See Justice A.R. Cornelius CJSC, "Restoration of Judicial Responsibility to People; Repairing Damage Done to National Character During Period of Subjugation" (1963) XV PLD at 7-8. Address delivered at a gathering of Military officials at G. H. Q., Rawalpindi on 11th July 1962.
[211] *Ibid* at 3.
[212] As opposed to India, Pakistan started with a completely new state. See Shahid Javed Burki, *A Revisionist History of Pakistan*, (Lahore: Vanguard, 1998).
[213] Frantz Fanon. *The Wretched of the Earth* (New York : Grove Press, 2004); see also Frantz Fanon. *Black skin, white masks* (New York : Grove Press, 1968) as cited by Amin-Khan (2012) at 33, 45. See Tariq Amin-Khan. *The Post-Colonial State in The Era of Capitalist Globalization:*

Inn's graduate and under the influence of liberal British parliamentarians.[214] His vision of Pakistan was as a liberal democratic Islamic welfare state.[215] Since socialist ideas were also prominent at the time, he also offered a haphazard condemnation of landlords and capitalists.[216] He stated that major key industries and public utility services would be socialized.[217]

But where should one put the idiom of Islam? The notion of the "Muslim ummah (nation)," the basis of the Pakistani movement, seemed ephemeral on the eve of decolonization. The Partition of India as the assertion of "national" identity became the motivating force behind the demands for status of different national groups in what became Pakistan.[218] Instead of judging the process of state formation as a state-building project in terms of the 'values' dichotomy of liberalism and Islam, I start with the very particular nature of state formation in Pakistan as a condensate of class relations and consequent 'ideology' of the state. There we can see how constituent elements of the

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Historical, Political, and Theoretical Approaches to State Formation (New York: Routledge, 2012).

[214] As a student in England, Jinnah used to visit Hyde Park Corner to listen to Soap Box orators and he was a regular visitor of the House of Commons to listen to the speeches of Gladstone, Lord Morley, Joseph Chamberlain, Balfour, etc. See Justice S. Anwarul Haq JSC (as he then was) (1976) "Quid-i-Azam as a Constitutionalist" a paper read at the Third Jurist Conference held on December 9, 1976 at Karachi, in Justice Haq *supra* note 20 at 251.

[215] Here the word 'welfare' is important to keep in mind, as it came to later be replaced by PIL. The other prominent position attributed to Jinnah was that he wanted a "secular" Pakistan. His famous speech about Pakistan being a place for people of all religions and creeds is commonly cited. See Nasim Hassan Shah CJSC (Ret., as he then was), *Memoirs and Reflections* (Islamabad: Alhamra Printing, 2002) at 142.

[216] Jinnah addressing Muslim League on 24th of April 1943.

[217] Jinnah talking to the Associated Press of America on 8th November 1945.

[218] For Burki (1998), Jinnah emphasized the social and cultural differences of Muslims with Hindus in India over religious differences. Pakistani leaders, however, could not understand the social and cultural differences of Bengalis and insisted on religious similarities and that Islam could fashion a nation out of Balochis, Muhajirs, Pathans, Punjabis and Sindhis. See Burki *supra* note 25 at 5.

liberal project of state-building used the grafting of Islam onto it to reflect this class formation as a state of a particular type. Indeed, the relation of the idiom of Islam, Islamic laws, and the Islamic legal tradition to the dominant liberal, and now neoliberal, project of the state will be an element of the analysis that runs through this dissertation.

The first Prime Minister of Pakistan, Liaquat Ali Khan, was a student of Exeter College, Oxford. He completed his studies in law and was called to the bar of the Inner Temple in 1922. He was also awarded an honorary PhD degree of Doctor of Law (*honoris causa*) by Columbia University of Kansas City on May 13, 1950 during a visit, ostensibly in response to President Truman's Point IV Program to let the developing world benefit from the technical advances of the U.S.. His request for private investment from the U.S.[219] was for Pakistan to catch up and make up for lost centuries within the shortest possible time.[220] I note that this rhetoric of "catch up" fits with the rhetoric of Truman's speech and with the dominant modernization approach to development. He was convinced that the modernization of Pakistan could not be accomplished without the help of advanced countries like the United States.[221] Thus, he took a clear stand in the Cold War, on the side of the U.S. He predicted that 'liberal civilization' and its institutions were under attack by "dark forces" and identified the United States as the torch bearer of civilization.[222] He emphasized the common values of private ownership as opposed to

[219] Liaqat Ali Khan, *Pakistan: The Heart of Asia: speeches by Liaqat Ali Khan* (Karachi: Royal Book Company, 1989) at 62. Speeches delivered in 1950 but first issued in Pakistan in 1989.
[220] *Ibid* at 30.
[221] *Ibid* at 22.
[222] *Ibid* at 30.

distribution,[223] individual enterprise and civil liberties.[224] In his formation of modernization for Pakistan, he replaced U.S. morality with Islam as "the best security of law and the surest pledge of freedom" for Pakistan. According to Ali Khan, Islam was a necessary supplement due to the "mental confusion of the colonial world or their struggle."[225]

The Making of an 'Overdeveloped State' under Modernization

Long before Hamza Alavi's influential scholarship about the 'self-interests' of state servants and their consequent political ambitions, General Ayub in the 1950s also had noticed that politicians were dependent on civil services, which had also developed its own political ambitions.[226] Neither of these observations, however, fully explain the thin base of political parties in Pakistan and its implications for class struggle and consequent state formation. After the formation of Pakistan, Waseem divides the parties between the externally created and internally created. The internally created are the 'official' parties (eg. Muslim League) and the external parties are those outside the state supervision (eg. National Awami Party-NAP, which was formed after 1956 and started representing

[223] He assured Americans that "we as Muslims believe in private ownership as opposed to Hindus whose laws were designed to promote the distribution of wealth and discourage vast unearned accumulation." See *Ibid* at 56-57.
[224] *Ibid* at 62.
[225] *Ibid* at 4.
[226] This later became true about the dependence on military also. The period from 1951-1958 showed an alliance between the civil bureaucracy and the military and the dependence of politicians, landed and newly born capitalist elite, particularly from West Punjab on bureaucracy. See Mohammad Ayub Khan, *Friends not Masters: A Political Autobiography* (Oxford: London, 1967) at 49; see also Mushahid Hussain & Akmal Hussain, *Pakistan: Problems of Governance* (Lahore: Vanguard, 1993).

communists, nationalists, and masses outside the state formation). Waseem explains that the Muslim League (hereinafter 'ML') split into many groups, the last one being the Republican Party, which was formed in 1957. The Republican Party (180 members) and Awami League (120 members) were the 'statist' parties, which dominated the legislature, and gave legitimacy to the parliamentary arrangement, without having a mandate from the masses. Indeed, the dominant political parties were reluctant to go to the masses, and were instead, born and reborn within the legislature.[227] The assembly was no more than a battlefield of the dominant parties. Between 1956 and 1957, 72 bills passed out of which 50 were ordinances.[228] The class base was the landed elite with almost no capitalist class, at least in West Pakistan.[229] The main concerns of these parties were the control of the population and the discrediting of the Communist Party, rather than gaining legitimacy with voters.[230] Internally, the Muslim League [ML] was facing pressure for land reforms from Doltana and left-wing Mian Iftikharuddin.[231] Landlords started ejecting the tenants,

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[227] Waseem, *supra* note 11 at 118-120.

[228] Mushtaq Ahmad, *Government and Politics in Pakistan* (Karachi: Space Publishers, 1970) at 120.

[229] Habib Bank gave Rs. 80 million as a loan equal to half of the revenue. See Shahid-ur Rehman. *Who owns Pakistan*? (Islamabad: Mr Books, 1998): at 9. The statement of Industrial policy came in 1948. This was the beginning of a capitalist class. In 1950s, 99% growth was through Import Subtitute Industrialization (ISI). See A.R. Kemal, "Patterns and growth of Pakistan's Industrial Sector" in Shahrukh Rafi Khan, ed, *50 Years of Pakistan's Economy: Traditional Topics and Contemporary Concerns* (Karachi: Oxford University Press, 1999) at 152-9.

[230] Waseem (2007) thesis is that the bureaucracy cannot rule without legitimacy, and it did not trust that the political leadership could preserve the state's legitimacy. See Waseem *supra* note 11 at 87.

[231] Report of the Agrarian Committee appointed by the Working Committee of the Pakistan Muslim League, published by S. Shamsul Hasan, Assistant Secretary, PML 1949.

so the situation was deteriorating and taking on 'semi-revolutionary' proportions.[232] Hence, the agrarian question continued to be volatile. The bureaucracy had even less concern with legitimacy. It wished only to acknowledge representatives who could control the population. This form of governance was easily justified by the U.S. approach to modernization, which supported a concept of elite democracy as an appropriate countervail to the upsurge of popular participation and democracy unleashed by anti-colonial struggles.

I will briefly elaborate on the U.S. modernization school alluded to above. The political dimensions of the modernization project, according to Michael Adas, was felt in China, the Philippines, Caribbean and Latin America even before World War I. The focus was to create a middle class committed to both democracy and supportive of continuing ties with the United States.[233] There was a consensus on some version of social democracy as the only way to organize society[234] and a basic political liberalism. Democracy was to follow "the elite theory of democracy" led by a rational, coherent, self-confident elite, stated political scientists David Easton and Robert Dahl.[235] Morris

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[232] The report of A.R. Preston, American Consul General, as cited by Ayesha Jalal. See Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defense* (Lahore: Vanguard & U.K.: Cambridge University Press, 1991) at 105.

[233] Michael Adas, "Modernization Theory and the American Revival of the Scientific and Technological Standards of Social Achievements and Human Worth" in David C. Engerman, Nils Gilman, Mark H. Haefele & Michael E. Latham, ed.s, *Staging Growth: Modernization, Development, and the Global Cold War*(Amherst, Boston: University of Massachusetts Press, 2003) 25 at 26.

[234] Edward Shills, "The End of Ideology?" (1955) 5 Encounter at 55-58.

[235] As cited by Nils Gilman, "Modernization Theory, the Highest Stage of American Intellectual History" in David C. Engerman, et al. *supra* note 46, 47 at 59.

Janowitz appreciated the role of third world militaries in the managing of the affairs of the countries.[236]

In Pakistan too, according to Toor, the ruling classes were concerned with an increasing unruly populace and were determined to expel socialism/communism from the realm of legislative politics. The left was seeking to articulate an alternate narrative of nationalism and the nation-state project on the basis of 'vision' of progressive society as opposed to liberal anti-communists. She has discussed this conflict between the liberal capitalist vision and socialist progressive vision in 1950s -1960s in detail. The final blow to the working class was the *Pindi Conspiracy case* (1951) and the consequent banning of the Communist Party and All Pakistan Progressive Association (APPWA) and the take over of Progressive Papers Ltd.[237] Toor also connects this struggle with the McCarthy era, liberal anti-communist consensus.[238] This account helps to clarify the reason why, in 1954, Pakistan chose to align with the West, and also joined the South-East Asian Treaty Organization (SEATO) and later CENTO (the Baghdad Pact). In the wake of these moves, Pakistan lost the sympathy of the Soviet Union.[239] Nixon, after

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[236]Morris Janowitz, *The Professional Soldier: A Social and Political Portrait*, (New York: Free Press, 1960). For literature emphasizing military's superiority as socio-economic modernizers, see Samuel P. Huntington, *The Political Order in Changing Societies* (New Haven, Conn.: Yale University Press, 1968) at 203; Alfred Stepan, *The Military in Politics: Changing pattern in Brazil* (Princeton, N. J.: Princeton University Press, 1971) at 9-20.

[237] Saadia Toor, *The State of Islam: Culture and Cold War Politics in Pakistan* (London: Pluto Press, 2011) at 52. Kamran Asdar Ali also gave an account of communist perspective as a contesting voice on the intellectual and cultural scene in the early days of Pakistan, see Kamran Asdar Ali, "Communists in a Muslim Land: Cultural Debates in Pkistan's Early Years" 45:3 (2011) Modern Asian Studies 501-534.

[238] *Ibid* at 79.

[239] Mohammad Ayub Khan, *Friends not Masters: A Political Autobiography* (Oxford: London, 1967) at 16-17.

meeting with General Ayub in 1953 in Pakistan, described him in his memoirs as, "one Pakistani leader who was more anti-communist than anti-Indian."[240] Ayub credited himself as promoting U.S.-Pakistan relations. Jalal is of the opinion that entry of Pakistan into Middle East defense pacts re-established the dwindling influence of the government. A number of key political and economic figures of the time concurred, including Iskandar Mirza, Akhtar Hussian, Amjad Ali, Yousaf Haroon and Chaudhri Salahuddin. Amjad Ali and Haroon (Karachi) were from influential business families, and Salahuddin was the General Secretary of the ML. We can see, therefore, how "the alliance between big business and the bureaucratic-military axis already well-established in the 1950s."[241] My argument here is that the state formation in Pakistan, from the outset, was a class formation, which included an alliance between three fundamental classes (metropolitan bourgeoisie internal to the very class formation, landed elite, and an emerging merchant and industrial class). We will see this also demonstrated in my analysis of the legal and constitutional cases to follow.

Judiciary and Jurists in the Emerging State-Formation

The first constitution of Pakistan is found in the *Indian Act* of 1935.[242] The judiciary arrived in two streams - from the Indian Civil Services (ICS),[243] and the Lincoln

[240] As quoted by Hussain & Hussain, *supra* note 39 at 30.
[241] Jalal *supra* note 45 at 176, footnote 122.
[242] *The Government of India Act*, 1935 (Constitutional Documents (Pakistan), Vol. I, 1964, Karachi.

Inn Barristers.[244] Another aspect of the colonial legacy during the formative years of Pakistan, was that the main jurists, in the leading cases in the 1950s, were either British lawyers hired by the Pakistani government or local barristers trained at Lincoln's Inn.[245] Both judges and jurists continued to cite Privy Council decisions as "the expositions of the law by one of the highest judicial tribunals in the world composed of distinguished men."[246] As a result, most cases cited were from United Kingdom or United States, the language of courts and judgments continued to be English and, as in the English tradition, the judges would refer to each other as "my brother" and counsel would refer to the judges "my Lord." The "English concept of justice remain the dominant factors in Pakistan's higher judiciary, and indeed these are the part of the Pakistani culture."[247] It took fifty years for Pakistan to abandon the wigs of English justices and the phrase "your

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[243] Chief Justices Muhammad Shahabuddin (May 03, 1960 to May 12, 1960), A.R. Cornelius (May 13, 1960 to Feb 29, 1968) and S.A. Rahman (March 01, 1968 to June 03, 1968) were from this category. The point to remember is that they all served in the 1960s, the era of modernization in Pakistan.

[244] Chief Justices Sir Abdur Rashid (June 07, 1949 to June 29, 1954) and Muhammad Munir (June 29, 1954 to May 02, 1960) came before the start of modernization. Fazal-e-Akbar (June 04, 1968 to Nov 17, 1968) and Hamoodur Rahman CJSC (Nov 18, 1968 to Oct 31, 1975) also served in the post-capitalist modernization period and even in socialist modernization period of 1970s.

[245] As in the first leading constitutional case of *Maulvi Tamizuddin*, the judges of the Sindh High Court deciding in favour were Chief Justice Constantine, and Justice Bachal and Justice Vellani, who were all English judges. Sir Ivor Jennings and Sir Kenneth Diplock, Queen's Counsel, were engaged by the government of Pakistan in this case. British judges of the 1950s were Sir Edward Snelson, KBE, Joint Secretary of Law from 1947 to 1958. He served as Federal Law Secretary till 1961. He resigned after the conviction in the Snelson case, as I'll discuss later. There were nine appointments of judges or registrar in 1947 and were reduced to two in 1961. Sir George B. Constantine, KBE, and J. Ortchenson, CBE, from Lahore High Court retired in 1962 and 1965 respectively. From the ICS (Indian Civil Service) and IPS (Indian Police Service) a total of 158 officers opted for Pakistan, out of which 36 in the ICS and 17 in IPS were British. Even in 1951, out of 202 officers, 23 were British. Five Britishers were in the judiciary. See Ralph Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Karachi: Oxford University Press, 1999).

[246] Comments of Chief Justice Munir in *Noorul Hassan and others v. The Federation of Pakistan*, 1956 PLD SC 331.

[247] Justice Hasan-Shah, *supra* note 28 at 138.

Lordship." Indeed, barristers are still required to say "my Lord" when addressing the court. [248] To define this new state in the language of British Constitutionalism with a colonial state structure for governance seemed "an imperfect enterprise."[249] The traditions were so powerful that all the related political activities were also understood as "mere motions in a foreign mode,[250] as we will see.

Leading Cases

Pindi Conspiracy case

The starting point for my account of the role of the judiciary in the constitutional and legal history in Pakistan is the *Pindi Conspiracy case* of 1951. This is not the usual starting point, which is the *Tamizzuddin case*. However, as I will argue, the *Pindi Conspiracy* case can explain how the legal and constitutional institutions in Pakistan respond to class formations, irrespective of whether the country is governed by democracy or dictatorship. The facts of the case are that Askar Ali Shah of the Criminal Investigation Department (CID) of NWFP disclosed a conspiracy in the military on 19 Feb 1951. Between 4-7 March, Major General Akbar Khan and Latif Khan were dismissed and arrested under Bengal Regulation III of 1818. The judgement pronouncing guilt comprised of 852 pages along with 41 appendices. It was written by Justice Abdur

[248] Braibanti (1999), *supra* note 58 at xxiii.
[249]Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi: Cambridge University Press, 1995) at 3.
[250] Justice Cornelius (1963), *supra* note 23 at 11-12.

Rahman. The charge against all of the accused was a conspiracy to wage war *against the King*. [emphasis is mine][251] The trial was held *in camera* in Hyderabad Jail. The accused were found guilty and convicted.

What was the context for this case, and what was its direct impact? According to General Ayub (1967), General Gracy, while transferring to him his position as Commander-in-Chief of the Army on January 17, 1951, informed him about a 'Young Turk' Party in the army. General Ayub himself had always been suspicious of Major-General Akbar Khan, his ambitions and his "political leaning"[252] and hence the conspiracy was always about class politics.[253] Hasan Zaheer (1998) insisted the Communist Party was involved in the conspiracy.[254] General Akbar had been under the observation of U.K. intelligence agencies during his training there. He was seen with Andrew Roth, a leading American Communist intellectual.[255] Before arrests under the conspiracy charges, Akbar Khan met with the Russian Progressive Writers' delegation

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[251] Hasan Zaheer, *The Times and Trial of the Pindi Conspiracy Case 1951: The First Coup Attempt in Pakistan* (Karachi: Oxford University Press, 1998) at 248.

[252] He did not state it clearly here, but obviously these were communists. See Ayub-Khan (1967), *supra* note 39 at 35-38.

[253] For Zaheer, the Left intellectuals propagated that there was actually no conspiracy, and that it was a conspiracy engineered by intelligence agencies of the Anglo-Saxon American bloc. See Zaheer, *supra* note 67 at x-xi. He also disagrees with the position of Ayesha Jalal throwing blame on 'complex influence' like asserting the government to form a policy independent of Anglo-Saxon bloc, see Jalal *supra* note 45 at 121-3.

[254] He insisted that based on 'A long interview with Major Ishaq, 6 May 1972, 'What was the Rawalpindi Conspiracy Case? A Staff Study', 11 November 1972; 'Was the Rawalpindi Conspiracy a Myth?' Air Commodore M. K. Janjua (retd.) 13 January 1973, *The Outlook*, Karachi. Based on interview with Eric Cyprian, Islamabad 18 January 1995, the writer claimed that he criticized the adventurous steps of Sajjad. Hasan Zaheer himself threw the blame on the few rich feudal families of Lahore espousing the Russian model of economic and social progress, "without of course, missing out on the good things of life." See Zaheer, *supra* note 64 at x-xi.

[255] *Ibid* at 224-25.

between 19 and 20 November 1950. He was introduced to the delegation as the next Commander-in-Chief of Pakistan.[256] Based on the reports of intelligence agencies, the Communist party lost many of its cadre during partition but in three years "a powerful party machine had emerged." The budget of the party was second to that of the ruling Muslim League. It had more paid workers than any other party. It had many front organizations in powerful sections of the society, including for journalists and students. It had an upward mobility with leaders such as Mian Iftikharuddin who moved into the upper layers of Pakistani society. The Party was remarkable in a feudal and tribal society.[257] This was also the early period of the Cold War.

The following legal account will explain how an elected government under one of the founding fathers of Pakistan, Liaqat Ali Khan, not necessarily a dictatorship, responded to the class struggle. Prime Minister Liaqat informed the constituent assembly that the plan of conspiracy in the military was spearheaded by the support of Communists and revolutionary forces. He argued there was a plan of implementing a communist dictatorship.[258]A bill was passed in the national assembly on April 13, 1951 and was passed the same day with an intense debate.[259] Provisions of the Act were at variance with the prevailing laws. The rights of the accused were abrogated explicitly by relaxing the standard of the prosecution's evidence and procedural requirements, and ignoring principles of administration of criminal justice. This law set an example of 'bad

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[256] *Ibid* at 169.
[257] *Ibid* at 207-08.
[258] See *Constituent Assembly (Legislature) of Pakistan Debates (CLAD)*, Vol. I, no. 2, 34-6.
[259] *The Rawalpindi Conspiracy (Special Tribunal) Bill*, 1951.

governance' and 'disregard of fundamental rights.'[260] Under the Act, the statement made before the police was admissible and conclusive without cross examination.

Four main areas violated the norms of natural justice, namely, the right of inquiry was waived, no appeal was allowed, a person's statement was admissible as evidence without cross examination and even the statement before investigating officer was admissible under Sec. 5 (2) of the Act. The tribunal could convict any person even if not charged on the basis of evidence produced before it. No appeal was allowed under Sec. 10 of the Act. Removal of the right to appeal was unprecedented in the history of British India.[261]

Sec.2 of the *Rawalpindi Conspiracy (Special Tribunal) Act*, 1951, empowered the central government to set up a Tribunal in which to try the accused. Sec. 4 of the Act gave the Special Tribunal all the powers of the High Court in relation to a criminal trial. But the Tribunal could not take the bail of any accused person. Under Sec. 5, the Tribunal could also try offences falling under Army Act. The Tribunal consisted of Justice Amiruddin of Dhaka High Court, Justice Sharif of Lahore High Court and Justice Abdur Rahman of Federal Court (as Chairman) of the Tribunal. Mr. A. K. Brohi, Advocate General, conducted the prosecution.

Through the *Pindi conspiracy case*, the Communist Party's underground apparatus was totally smashed by large-scale arrests of all leadership and sympathizers and the seizing of documents, including records and bills, etc. All mass fronts of the party were

[260] Zaheer, *supra* note 64 at 18.
[261] *Ibid* at 20.

also smashed and the communist influence in the Trade Unions, Progressive Writers' Association P.W.A. and Students decreased sharply. The Communist Party of Pakistan itself was banned in 1954.[262]

The long-term outcome of the case is even more interesting than the direct impact of the case, and points to why I find this case to be a decisive turning point in the 'constitutional' history of Pakistan. General Ayub strongly disliked defence counsel Suhrawardy's cross examination of the army officers but found himself helpless against a "passive court" at the time. We know this because years later, he met Suhrawardy as a colleague in the Cabinet and told Suhrawardy that he did great damage to military at the trial. When Suhrawardy was going to be appointed as Prime Minister, President Iskandar Mirza appointed Ayub as a defense minister. Mirza advised Suherwardy to negotiate but never to interfere in the matters of the Army.[263] I believe that this reveals that the *Pindi Conspiracy case* had a lasting effect on Ayub's mind, and we will see later that this movement was the source of General Ayub's major anxiety before and after his removal in 1968.

Moulvi Tamizuddin Khan case

[262] See "The socialist movement in Pakistan: an historical survey - 1940-1974", by Iqbal Leghari PhD Dissertation, Université Laval, Québec City, 1979, 253 pages, at 69-70.

[263] Ayub-Khan (1967), *supra* note 39 at 37.

On October 24, 1954, the first Constitutional Assembly was dissolved by Governor-General Ghulam Muhammad.[264] The grounds were that the constitutional machinery of the country had broken down and the Assembly had lost the confidence of the people.[265] The president of the Constitutional Assembly, Moulvi Tamizuddin Khan, challenged this dissolution in the Sindh High Court as unconstitutional, illegal, *ultra vires,* without jurisdiction, inoperative, and void. Moulvi requested that the court restrain the government from interfering under a writ of *mandamus,* and to determine the validity of certain appointments of the Governor General's Council of Ministers under a writ of *quo warranto.* The Sindh High Court decided unanimously in favour of Moulvi Tamizuddin Khan.[266] The court accepted the sovereign and supreme power of the Constitutional Assembly on the constitution and law making and found no powers were vested in the Governor General to dissolve the Constitutional Assembly in the *Indian Independence Act*, 1947. The decision was challenged in an appeal by the government in the Federal Court. On 21 March 1955, The Federal Court, under the leadership of Chief Justice Munir, decided the case in favour of the government and against Moulvi by a majority of four to one. The court reversed the judgment of the Sindh High Court on technical grounds without addressing the question of whether the assembly was rightly

[264] Order No. F. 81/Pres./58, text of the proclamation is produced in Jamil Ahmad, ed., *Constitution-Making in Pakistan* (Islamabad: National Assembly of Pakistan, 1973) as Annexure V at 41. Order of the dissolution is partly produced on page 251 of *Federation of Pakistan v Moulvi Tamizuddin Khan*, 1955 PLD, Federal Court 240.

[265] According to Jan Mohammed Dawood (1994), the Assembly did not have a representative character. Most of the members did not have a constituency of their own in Pakistan. The fact was proved in the elections of 1954, when only 14 were re-elected. From West Pakistan, 28 out of 40 were landlords, whereas in East Pakistan, 20 out of 40 were lawyers. See Jan Mohammed Dawood, *The Role of Superior Judiciary in the Politics of Pakistan* (Karachi: Royal Book Company, 1994) at 17, 211.

[266] *Moulvi Tamizuddin Khan v Federation of Pakistan*, 1955 PLD Sind 96.

dissolved or not.[267] The dissenting judge in this case was Justice A.R. Cornelius. He placed the Constitutional Assembly above the Governor General and found it to be a sovereign body.

As a result of the above judgment, 46 of the Acts on the statute's books became invalid. The Governor General promulgated the Emergency Powers Ordinance IX of 1955 to frame the constitution, validate the laws already made by the Constituent Assembly and make central budgets.[268] This ordinance was challenged in the Federal Court. Chief Justice Munir, heading a full Federal Court bench, declared on April 13, 1955 that powers to make provisions to the constitution of the country could not be exercised by the Governor General through an ordinance.[269] After this declaration, the government requested that the Federal Court detail the constitutional steps to come out of this constitutional crisis in a reference.[270] The courts had to fall back on the doctrine of state necessity to address the constitutional impasse by the Emergency Powers Ordinance 1955.

The prompt statement from leading jurists against the original Federal Court judgment is that it paved the path of future "arbitrary, malicious and capricious acts of the executive on hyper technical grounds or self-serving theories or concepts."[271] Hamid (2001) declared Chief Justice Munir, on this decision, as a "supporter of the feudal-

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[267]*Federation of Pakistan v. Moulvi Tamizuddin Khan*, 1955 PLD Federal Court 240.
[268]*Emergency Powers Ordinance of 1955* (Ordinance IX of 1955), 1955 PLD, Central Acts and Notifications.
[269] *Usif Patel v. Crown*, 1955 PLD Federal Court 387.
[270] *Reference by His Excellency The Governor General*, 1955 PLD Federal Courts 435.
[271]Khan (1999), *supra* note 9 at 84 .

bureaucratic establishment of West Pakistan which was headed by his old friend Ghulam Muhammad.[272]" For Waseem, the decision "over-expanded" the judiciary's institutional resources and established the tenacity of the rule of law for the time to come.[273]

What did Maulvi Tamizuddin Khan, the petitioner, want? Maulvi Tamizuddin argued that he was against the presidential system on the basis of fear, due to the history of one-man rule in Muslim states. Ayub's logic was that a presidential system like that of the U.S. was not a monarchical system and with so many political parties, a parliamentary system was not feasible. Tamizuddin responded by asking for a decree of law allowing only two parties. The response from Ayub was that "you cannot control people's conscience by legal contrivances."[274] We can see how each of these accounts represents a different view of history.

The judiciary in Pakistan, quite in accordance with British tradition, had a firm belief in the supremacy of the legislature. Justice Bathsh of Sindh High Court in Maulvi Tamizuddin Khan's case cited the ruling of the House of Lords in 1920 where in the British civil liberties tradition, Parliament is declared the protector of individual rights. The protection of the Parliament is the protection of individual liberties, and the legislature should be protected from the executive or governor general.[275] The lawyer for Moulvi Tamizuddin, Mr. I. I. Chundrigar, clearly told the court, "the constituent assembly is a sovereign and sacred body, it can only be extinguished by a revolution or a

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[272] *Ibid* at 235.
[273] Waseem, *supra* note 11 at 129.
[274] Ayub-Khan (1967), *supra* note 39 at 205-6.
[275] *Moulvi Tamizuddin Khan v Federation of Pakistan*, 1955 PLD Sind 96.

coup d' etat." [276] Cornelius, in his dissent, seems to be defending the legislature's exclusive right to limit its own actions.[277] He established clearly the supremacy of the legislature as opposed to executive. Does this mean that he was establishing a link of legislative power with popular sovereignty, as argued by Paula Newberg (1995)?[278] I don't agree. A further reading of Cornelius and his views against popular democracy suggests that his assertion of legislative supremacy is in the context of an asserted independence from the colonial supremacy of the Governor General. He did not consider the Governor and the British sovereign as part of the constituent assembly. Rather, he wanted the legislator free from that type of colonial control, although he did not object to the role of the governor general in the political structure.

Rather than finding the reason for the decision in the event (dissolution of assembly), the books (constitution), and within the courts (institutions), Chief Justice Munir located it outside the courts.[279] The state structure's position, from the point of view of Ayub (1965), was that the Constituent Assembly had lost its prestige and the demand for its dissolution was gaining support. Moreover, he held the view that "unfettered democracy" would be dangerous on the face of rising communism. Munir warned that communism

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[276] As quoted by Justice Nasim Hassan Shah. Nasim had been present in the court. See Justice Hassan-Shah (2002) *supra* note 28 at 57.
[277] Note that here he is not giving this right to judiciary as is current.
[278] "Justice A.R. Cornelius offered the equally forceful alternative notions of *popular sovereignty* and constitutional government." [emphasize is mine] see Newberg *supra* note 62 at 45.
[279] "Where the enforcement of law is opposed by the sovereign power, issues become political or military which has to be fought out by other means and the courts by espousing the cause of one party against the other merely prepare the grounds for bloodshed." Addressing High Court Bar Association Lahore after his retirement. Chaudhri, Nazir Hussain. *Chief Justice Muhammad Munir: His Life, Writings and Judgments*, ed, (Lahore: Research Society of Pakistan, University of the Punjab, 1973) at 21-22.

from within and without is quick to make use of this weakness of political governance. [280] I argue that the *Tamizuddin Khan case* can be connected with the *Pindi Conspiracy case* in structural terms. While liberal explanations give considerable attention to the dissenting judgement of Cornelius in this case, my own view is that there was no hero in this judicial battle. Rather, the judiciary in this case revealed itself to be a part of the juridico-bureaucratic structure of the state. I will develop this explanation in the following section.

The Judiciary as a Part of Juridico-Bureaucratic State Structure

The close entanglement of the judiciary and bureaucracy in Pakistan's early years was greater than in any other developing country.[281] Civil Servants could, and frequently did, opt for judicial service. In 1961, eight officers of the Civil Service of Pakistan were justices of the courts, namely M. Shahbuddin, Sir George Contantine, A.R. Cornelius, S.A. Rahaman, J. Ortcheson, M.B. Ahmad, A.R. Khan, M.R. Kayani, Sheikh Anwarul Haq. In 1964, there were 65 such members. Three hundred and sixty-six officers of the Civil Services were presided over by Chief Justices Kayani of Lahore High Court, followed by Supreme Court Chief Justices S.A. Rahaman and M. Shahabuddin. The

[280] Ayub-Khan (1967), *supra* note 39 at 53, 188.
[281] See Braibanti (1999) *supra* note 58 at 109; see also the detail of this relationship in Ralph Braibanti, "Public Bureaucracy and Judiciary in Pakistan" in Joseph La Palombra, ed., *Bureaucracy and Political Development* (Princeton: Princeton University Press, 1963) 360-441; also Ralph Braibanti (1963), "The Socio-Judicial Context of the Cornelius Era – 1950-70" in Braibanti (1999), *supra* note 58. This essay was first published in Ralph Braibanti, *Research on the Bureaucracy of Pakistan* (Durham, N. C. Duke University Press, 1966).

judiciary also headed all administrative reform commissions.[282] The string of jurists[283] which followed [the Cornelius tradition[284] and Ralph Braibanti[285] laid down the basis of the current rights discourse. By the 1960s it became influenced by the U.S. legal tradition. In his influential history of the Pakistani bureaucracy, Braibanti found that the Civil Services Academy was divided in two groups, old-line conservatives (pre-partition Indian Civil Servants) and new entrants after partition. The difference between the two was that the old conservatives (such as Chief Justice M. R. Kayani of Lahore High Court who served from 1958 to 1962) considered themselves as custodians of the "steel frame" of this service, and hence were not supportive of reforms. Indeed, Kayani was popular

[282] Justice Munir JSC (as he then was) headed the First Pay and Service Commission of 1949-50. Justice Cornelius headed the second Pay and Service Commission from August 1959 to 28 May 1962 and completed a 300-page report in 1962. See Government of Pakistan, Report of the Pay and Service Commission (Karachi, Manager of Publications, 1969). An important point to note here is that S.M. Haider reviewed this report in 1970. See S.M. Haider, *A Review of the Cornelius Report* (Lahore: National Institute of Public Administration, 1970).

[283] For example, the first batch included Justice Cornelius CJSC , Justice S.A. Rehman CJSC. Later jurists included Justice Nasim CJSC, S. M. Haider, and Hamid Khan who were not from the Lincoln's Inn tradition. The only exception is Rabia Sultana Qari, who was an important figure and is also a bureaucrat in the Lincoln Inn tradition.

[284]Cornelius passed the Indian Civil Service examination, did two years of study in Selwyn College, Cambridge U.K., and joined the ICS in 1926. He opted for judicial services in 1930. He was Justice in Lahore HC in 1946 to 1950, Secretary of law 1951, elevated to Federal/Supreme court, and became the CJSC in 1960-1968. After retirement, he was the Law minister of Yahya Khan from 1969 till Bangladesh independence. He joined a law firm, Lane and Mufti. For writings on Cornelius, see S. M. Haider, ed., *A.R. Cornelius, Law and Judiciary in Pakistan* (Lahore: Lahore Law Times Publications, 1981); Hamid Khan, "In Memory of Justice (Retd) A. R Cornelius- A Great Judge" (1992) PLJ, Magazine Section, 70-74; Justice Nasim Hasan Shah, "A Salute to the SC (A Tribute to the Cornelius Court)" (1992) PLD, Journal Section, 17-20; and also Ralph Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Karachi: Oxford University Press, 1999).

[285] He became the Chief Advisor and Professor of the Civil Services Academy in 1960 in Lahore. At the time he was on leave from Duke University and was on a contract with United States Agency for International Development. I consider him the main architect of the liberal legal and administrative project to this date.

among the people because of his literary writings and speeches, which gave a satirical critique of the establishment.[286]

On the other hand, Cornelius was of the view that the civil service of Pakistan had been compartmentalized and was caste-structured.[287] Due to this, it was not advancing beyond a certain level. He wanted it to be restructured in order to be attuned with the political philosophy of the new state. Cornelius was part of a group of new reform-minded young Civil Service students, looking to establish a national character to the Service. He grafted Islam to the British-oriented structure as a way of bringing this national character. Kayani critiqued Cornelius's report (Government of Pakistan, Report of the Pay and Service Commission, 1962) and ridiculed the concept of *Conseil d' etat* of Cornelius.[288] According to Braibanti, Kayani and Cornelius were in agreement on such legal issues as writ jurisdiction, natural law, and contempt of law.[289] In my account, their significant differences were related to their preferences for forms of governance influenced in turn, by the United Kingdom and the United States. The replacement of Kayani by Cornelius is, in my account, indicative of a larger shift in influence within the

[286]His approximately 50 published speeches and are very popular and include, *Nor the Whole truth (1963)*; *A judge May Laugh (1970)*; *Some More Truths (1977)*; *Half Truths (?)* are published by Pakistan's Writers' Co-operative Society of Lahore as described by Braibanti (1999) *supra* note 58.
[287]Justice A.R. Cornelius, "Equality of Opportunity in Public Service" in Ralph Braibanti, *Research on the Bureaucracy of Pakistan* (Durham, NC: Duke University Press, 1966). This is also included in speeches as Appendices 10-15 in Braibanti (1999), *supra* note 61 at 466-532. This was an address before the Rotary Club of Lahore on Sep 1, 1961. This is fact is described by Braibanti also in 1999. See Braibanti (1999) *supra* note 58 at 44.
[288] As claimed by Ralph Braibanti. See Braibanti (1999), *supra* note 58 at 47.
[289] Braibanti (1999), *supra* note 58 at 50.

legal system from the U.K. model to that of the United States. I will detail this shift further in the following section.

The Significance of the Shift in Influence from United Kingdom to United States[290]?

Pakistan, according to Bhutto, gave considerable importance to the Commonwealth in the beginning, without considering waning British influence in the world. Later, realizing the change in the global power structure, it moved towards U.S. influence.[291] Ayub was clear that the situation had changed and the United Kingdom could no longer give military and economic cover to the members of the Commonwealth.[292] Soon, Sandhurst-trained generals were being replaced by American trained ones in the military. This continued throughout the 1950s and 1960s under the auspices of the American Military Assistance Program (MAP).[293] Similarly, a substantial U.S. intellectual and financial investment was allocated to train the bureaucracy.[294]

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[290] "Polite British and American rivalry in South Asia" was beginning. It was accompanied by the declining prestige of U.K. in the Middle East and South Asia with the increasing influence of the Soviet Union . See Jalal. *Supra* note 45 at 126, 137, 171.

[291] Zulfikar Ali Bhutto (1968), "*Political Situation in Pakistan*" in Hamid Jalal and Khalid Hasan, eds, *The Politics of the People- Awakening the People, Vol. Two, 1966-69* (Lahore: Classic, 1969) 89 at 98. This speech was first published as a pamphlet. Bhutto served as a Foreign Minister in the 1960s under General Ayub.

[292] A letter on the Future of the Commonwealth to the PMs of U.K., Australia, and New Zealand in Baxter, Craig. ed. *Diaries of Field Marshal Mohammad Ayub Khan: 1966-1972* (Karachi: Oxford University Press, 2007). at 93, Entry May 3, 1967.

[293] The number of these trained officers was very high. For example, in 1967-69 alone, 60 officers were trained under this program. See for more details of this cooperation: Stephan P. Cohen, *The Pakistan Army*, (Berkley, Los Angles and London: University of California Press, 1984); also

The transition from U.K. to U.S. tutelage was tricky and the tension could be seen in the connection of the upper brass of the civil and military bureaucracy. The first Commander-in-Chief of Pakistan was British General Gracy. When he was leaving, Liaqat Ali Khan decided to appoint a Pakistani General as Commander-in-Chief, but not the senior most one. General Iftikhar was backed by the British.[295] General Ayub Khan was appointed the first Pakistani Commander-in-Chief on January 16, 1951. Ayesha Jalal notes the detail of this "subtle but significant British-American rivalry." By early 1951, it was decided by American policy makers to directly contact the Pakistani establishment and bypass the British, for the defense of the Gulf.[296]

The transition away from U.K. influence was also tricky in terms of legal and constitutional arrangements. Dr. S.M. Haider (1988) has elaborated on the process of assimilation of "modern" U.S. legal norms in Pakistan. In the beginning, the judges relied on decisions of the British courts but also used U.S. precedents. After the 1956 constitution, the decisions started reflecting the U.S. Supreme Court regarding arbitrary use of administrative powers against fundamental rights. Another factor which made this task easy was the already present legal institutional arrangement of the British.[297] Braibanti has found a shift from U.K. to U.S. precedents in the change to the presidential

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Wolpin Miles D., *Military Aid and Counterrevolution in the Third World* (Lexington, Massachusetts: Lexington Books, 1972).

[294] In 1960, under U.S. guidance and assistance, the Administrative Staff College was established in Lahore. In 1961, three National Institutes for Public Administration were established in Karachi, Lahore and Dhaka.

[295] Ayub-Khan (1967), *supra* note 39 at 34-35.

[296] Ayesha Jalal, *Democracy and Authoritarianism in South Asia* (Lahore: Sang-e-Meel Publications, 1995) at 37.

[297] Dr. S. M. Haider, "American Constitution and Assimilation of Modern Legal Norms in Pakistan" (1988) XL PLD 121-131 at 126.

system and federalism,[298] as well as the written constitution and a chapter on Fundamental Rights. English courts do not have a written constitution and their fundamental rights were assured through Common Law and legislators. The quickly growing appreciation of U.S. tradition, with the help of academics, can be explained as part of an active modernization project and an understanding of the role of law in this project.[299] Thus, judicial approaches started tilting more towards the U.S. judicial system.[300] The judiciary at that point was led by Indian Civil Services judges, who were not only aware of the ongoing modernization project led by the civil bureaucracy but were bringing interpretation to help the project and at the same time to reduce its excesses. The judiciary was the point of permeation of American norms of administrative techniques but also of its review and future reforms.[301] So until the end of the Cold War, the impact of American law was pronounced on the Pakistani legal system.[302] Ayesha Jalal explained it as a presidential form of government based on the American pattern, the framers of the constitution had ingeniously superimposed it on a distorted version of the

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[298] Ralph Braibanti, *Research on the Bureaucracy of Pakistan* (Durham, N. C. Duke University Press, 1966); see also Ralph Braibanti, "The Higher Bureaucracy of Pakistan" in Braibanti et al. *Asian Bureaucratic Systems Emerging from the British Imperial Tradition* (Durham, N. C.: Duke University Press, 1966).

[299] S. M .Haider was Braibanti's student and on his advice wrote a dissertation on the writ jurisdiction in Pakistan. He worked for Law Reform Commission till his death. See Braibanti (1999) *supra* note 58 at xxii.

[300] Ralph Braibanti, an American political scientist and Duke Prof Emeritus at Duke University, studied the judiciary in Pakistan in the 1950s until 2005. From his writings, A.R. Cornelius, Dr. S. M. Haider, and Justice Kayani are found as close to the U.S. judicial system. This was at its height when the Cornelius was chief justice in 1960s. Ralph Braibanti's book on A.R. Cornelius reflects implicitly on the relation of the modernization project under way in Pakistan and the changing approach of the judiciary. See Braibanti (1999) *supra* note 58.

[301] See for details of this interaction, Ralph Braibanti, "Public Bureaucracy and Judiciary in Pakistan" in Joseph La Palombra,ed., *Bureaucracy and Political Development* (Princeton, N.J.: Princeton University Press, 1967).

[302] Haider (1988) *supra* note 110 at 125.

British's parliamentary system. She explained how it veered but could not deviate from a U.K. or U.S. model.[303] In my view, Jalal correctly pointed out the *form,* but doesn't adequately account for the *content* of this move from the U.K. to U.S. legal system. It is the objective of my analysis in this dissertation to demonstrate how it was that the law took on a central role in this transition, in the face of the failing modernization project and a rising participatory popular democracy. A concrete and decisive step towards this US type political and constitutional system was 1958 coup.

1958 – General Ayub's Coup

The second constitutional assembly came with a constitution instituting a parliament in 1956, but with more powers to the president. This constitution only lasted for two and a half years and no elections were held under it. Eventually there was a coup in 1958 and the abrogation of the 1956 constitution by the president, Iskander Mirza.

On October 8,1958, President Mirza announced Martial Law. On October 10, 1958, the Law (Continuance in Force) Order was promulgated. It restored the jurisdiction of all courts (along with writs of *Habeas Corpus, Mandamus,* and *Certiorari,* however, not against Chief Martial Law Administrator), and directed the government to adhere as close as possible to the late constitution.[304] The above order was challenged in the Supreme Court of Pakistan and decided in *Dosso's Case*. The Supreme Court, headed by

[303] Jalal (1991), *supra* note 45 at 215.
[304] *President's Order (Post-Proclamation),* No. 1 of 1958, *Laws (Continuance in Force) Order*, 1958. PLD 1958 Central Statutes 497.

Chief Justice Munir, upheld the Martial Law and the Law (Continuance in Force) Order.[305] The court, using Hans Kelsen's *General Theory of Law and State*, declared that a successful *coup d'etat* or a victorious revolution is an internationally recognized method of regime and constitutional change. It can be noted here that other Commonwealth countries also "benefitted" from this judicial decision as they were passing through similar problems in the nation-building project.[306] Nigeria faced the same type of military coups and used the same justification through doctrine of necessity as Pakistan.[307] India used this justification during the emergency of Indira Ghandi.[308] Munir clearly used it as a legal principle of common law countries.[309] As far as the doctrine of necessity is concerned, Dieter Conrad notes that the political question was

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[305] *The State v. Dosso*, 1958 PLD S. C. 533.

[306] A list in this regard is given by Attorney General of Pakistan in *Begum Nusrat Bhuttoo v. The Federation of Pakistan and others*, 1977 PLD, The list of cases is *Rex vs. Stretton* (1779) vol 21, *Howell's State Trials*, *Attorney General of Duchy of Lancaster vs. Duke of Devenshire* (1984) 14 QBD 273, Cypress case as *the Attorney- General of Republic vs. Mustafa Ibrahim* (1964 CLR 195), Nigeria case of *Lakanmi and another vs. Attorney- General West Nigeria*. Dosso's case based on Kelsen's theory was accepted by the judges in Matovu case (1966). Later , Stages of Madzimbanuto case (1968) Mustafa Ibrahim case (Cypress) 1964 were referred to Privy Council. The Cypress Law Reports 1965 did mention the Dosso case but used "the legal doctrine of necessity." In the Sallah case (1970), courts referred Kelsenian arguments. In Lakanmi case (1970), judges refused to follow either the *Dosso case* or the *Matovu case*. Kelsen had made his position clear in 1965 in *Stanford Law Review* 1965. See Leslie Wolf-Phillips, "Constitutional Legitimacy in Pakistan 1977-82" in Wolfgang Peter Zinge, Stephanie Zingel, & Ave Lallemant ed.s, *Pakistan in the 80s: Law & Constitution* (Vanguard: Lahore, 1985) 37-122, at 70.

[307] See P. Ehi Oshio, Esq, "Military Coups D' Etat in Nigeria: Rationale, Legality and Effects on Constitutionalism"(1986) PLJ 37-49; see also Dr. Dieter Conard, " In Defense of the Continuity of Law: Pakistan's Courts in Crisis of State" (1985) XIII PLD 2-33.

[308] Emergency imposed by Indira Gandhi from 1975 to 1977 (21 months) under Article 352 (1) of the Constitution.

[309] While commenting on *Nusrat Bhutto case* 1977, 22 years after the *Dosso case*, Chief Justice Munir (Ret. as he then was) made clear that he treated the doctrine of necessity as a common law principle applicable to all civilized governments. He rejected prefixes or suffixes of 'extra', '*supra*' with constitutional as all were authorized by the constitution. Highways & Bye ways of Life at 271 as cited by Jan Mohammed Dawood (1994). see Dawood, *supra* note 78 at 48-49; See also Mark M. Stavsky, "The Doctrine of Necessity in Pakistan", (1983) 16 Cornell Int'l L.J. 341.

how the court should react to the suspension of the constitution and revolutionary changes in the constitution. For him, looking at cases in Commonwealth,[310] these are two basic types of cases, one are 'necessity' cases[311] and second are Kelsen cases.[312] Historically for the writer, the doctrine of necessity was not a novel doctrine in Anglo-American and Continental European jurisprudence. British courts recognized the 1976 Revolution and German Reichsgericht recognized the November Revolution of 1918 as both these established the valid order.

In *Dosso's Case***,** Article II of the Order mandated the government to follow the late constitution, but not to restore fundamental rights. In *Mehdi Ali Khan's case*, the Dhaka High court issued a writ of Mandamus against the provincial government not to take *Waqf* properties as the right of communities to organize their religious institutions. In an appeal by provincial government, the Supreme Court followed its previous decision in Dosso's case and reiterated that no law could be declared to be void merely because it

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[310] Like *Madzimbamuto vs. Lardner- Burke of Rhodesia*. Discussions with reference to the Pakistani cases are found in Palley, Claire "The judicial process: U. D. I. and the Southern Rhodesian Judiciary" (1967) 3 Modern Law Review 263-287; de Smith, S.A. "Constitutional law years in revolutionary situations" (1968) 7 Western Ontarion Law Review 93-110; Dias, R. W. M. "Legal politics: norms behind the Grundnorm" (1968) 26 Cambridge Law Journal 233-259; Brookfield, F. M. "The courts, Kelsen, and the Rhodesian revolution" (1969) 19 University of Toronto Law Review 326-352; Welsh, R. S. "The function of the judiciary in a coup d'etat" (1970) 87 South African Law Journal168-192; Ojo, Abiola "The search for a Grundnorm in Nigeria- The Lakanmi case" (1971) 20 International and Comparative Law Quaterly117-136; Eekelaar, J. M. "Principles of revolutionary legality" in *Oxford Essays in Jurisprudence*, 2nd. Series, (Oxford, 1973) 22-43; Iyer, T.K.K. "Constitutional Law in Pakistan: Kelsen in the courts" (1973) 21 American Journal of Comparative Law 759-771; as cited by Dieter Conrad. "In Defense of the Continuity of Law: Pakistan's Courts in Crisis of State" in Wolfgang Peter Zingel& Stephanie Zingel, Ave Lallemant eds, *Pakistan in the 80s: Law & Constitution* (Vanguard: Lahore, 1985)123-207 at 168, footnote 2.

[311] *Special Reference case* (1955), *Mir Hasan* case (1969*), Asma Jilani* case (1972), *Begum Nusrat Bhutto* case (1977) as I'll cite and discuss in their order.

[312] Like the *Dosso* case.

came into conflict with fundamental rights.[313] Let us go beyond this doctrinal explanation and check the question and nature of political development involved.

Who actually dissolved the 1958 assembly and why? The secondary literature suggests that President Mirza dissolved it, and the courts justified it on the basis of doctrine of necessity.[314] But, who advised the president to dissolve the assembly? According to Ayub's diary (2007), Chief Justice Munir was under the impression that General Ayub advised Iskander Mirza to do so. Later, Mirza during his exile told Munir (then retired) that Ayub was not consulted. Ayub was under the impression that Munir was responsible for that. Munir explained that he advised Mirza to allow elections to take place and let inevitable chaos develop so that he could declare emergency. Mirza was not sure he would be elected again and hence he abrogated the constitution.[315] Apart from Ayub's denial about any involvement,[316] we know that Ayub was in the U.S. when the assemblies of 1954 were dissolved. Upon hearing the news, he wrote a full program of an

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[313] *Province of East Pakistan v Md. Mehdi Ali Khan*, 1959 PLD S. C. 387. Certain *wakf* (religious trust) properties, which were acquired by the East Pakistan Government were challenged, raising the plea of fundamental rights claiming *wakf* as religious institutions. These were dismissed by the High Court. In an appeal before the Supreme Court, the case was remanded to the High Court to look to the extent whether the dedications involved could be declared as *wakf*. (*Jibendra Kishore Chowdhury etc. v. Province of East Pakistan*, 1957 PLD S. C. (Pak.) 9. The High court ordered for the withdrawal of the acquisition orders. When an appeal came in the Supreme Court against this, the *Law (Continuance in Force) Order* (Post-Claimation I of 1958) was in force and the question was whether writ on the basis of fundamental rights is justifiable now.

[314] Zulfikar Khalid Maluka, *The myth of Constitutionalism in Pakistan*, (Karachi: Oxford University Press, 1995) at 175.

[315] Ayub-Khan's Diaries, *supra* note 105 at 116-117, entry of July 1967.

[316] Mohammad Ali gave an interview to Shorish Kashmiri (that appeared in The Pakistan Times) where he said that Ayub was over-ambitious and conspired with Ghulam Muhammad and Mirza to diminish constituent assemblies. Of course, Ayub denied this in his diary. See Ayub-Khan Diaries *supra* note 105 at 322.

alternative system.[317] He did not like the constitution and political system as the 1956 Constitution was a "hotch-potch of alien concepts" and it had brought confusion by distributing power between the Prime Minister and president and having no focal point of authority.[318] Even the Justice Shahabuddin Commission Report (Constitution Commission)[319] was against the dismissed legislature of 1958 as there was political interference in administrative matters rather than interference with the legislature. This caused failures of parliamentary democracy.[320] We see the nexus of civil-military bureaucracy and judiciary through this case. Though relevant and extensively debated, our quest has to go beyond Mirza's dishonesty, Ayub's ambitions, and Munir's wrong decision, to ask, why did they all agree to dissolve that assembly?

Revolution/Evolution or Preventing 'Revolution'

According to Waseem, the coup of 1958 was not a military but a civilian arrangement to stop the 1958 elections, however, it did not carry any ideological content. [321] Newberg has also discussed the lack of serious ideological question in Pakistan's constitution. In her analysis, the conflict is between the vice-regal system and the liberal

[317] Ayub-Khan, *supra* note 39 at 188.
[318] *Ibid* at 188 and 54.
[319] This commission was formed by Ayub after his overthrow to propose a new political set up. It was headed by Justice Muhammad Shahbuddin and its members were Azizuddin Ahmad, Muhammad Sharif, Naseer A. Seikh, Abu Sayeed Chowdhary, D. M. Barori, Arbab Ahmad Ali Jan, Aftabuddin Ahmad, Sardar Habibullah, and Odeidur Rahman Nizam.
[320] Report of the Constitution Commission, 1961 (Karachi, 1962) at 6.
[321] Waseem (2007), *supra* note 11 at 143.

conflict within the elite.[322] Chief Justice Munir, according to her, was secular but pro-establishment, whereas Cornelius was in favour of Islamic jurisprudence but was against the establishment. She concludes, "Although the regimes would change from civilian to military and from populist to authoritarian to dictatorship, the question they posed about democracy and equality were similar." That is why each regime with each new constitution only puts forward a "slightly revised role for the superior courts."[323] This quest for 'ideological' content definitely is confusing within the liberal framework or an 'institutionalist-functionalist' understanding. However, it can be explained in terms of class formation (as result of class struggle), a particular state form with an ideological content.

In my view, the toppling of the 1958 election must be understood 'ideologically,' as an attempt at the imposition of a controlled democracy. Key here is that the Communist Party of Pakistan (CPP), Progressive Writers Association (PWA), and Democratic Students Federation (DSF) had been banned; the communists had gone underground and had taken refuge in the National Awami Party, and the NAP was definitely going to win the elections.[324] By preventing the elections, the elite ensured that the communist movement would have no space from which to emerge.

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[322]Newberg, *supra* note 62 at 10.
[323] *Ibid* at 119.
[324]National Awami Party. The NAP was formed in 1957 in Dhaka. It was predominantly a Left wing party. NAP, in alliance with Awami League (a party of Bengali nationalism) was going to win the scheduled elections of 1959.

The judiciary agreed with the founding father Jinnah who praised "evolution and not revolution."[325] According to Newberg, Chief Justice Munir's persistent question during the hearing reflected serious worries about the prospect of violent upheavals in Pakistan. Interestingly, while mentioning 1953 riots, Newberg ignores the Pindi Conspiracy case and the banning of CPP, PWA, and DSF. Chief Justice Munir repeatedly pointed out that if there is no power of dissolution of the assembly, only revolution is left. In the *Maulvi Tamizuddin Khan* case, a concern was raised: what would be the position of the court if the assembly got inoculated by communist ideas? Chief Justice Munir's prompt response was "Revolution with a capital R." To this, the Advocate General responded "Dissolution with a capital D."[326] This clearly shows the concerns of the executive and judiciary in Pakistan.[327] Bureaucracy, according to Braibanti (1999) was very clear that "all were united, self-preservation if for no other reason, in their belief that the CSP was an elite group whose destiny, inherited from the ICS, was to govern Pakistan. Virtually all were opposed to radical reform."[328]

Chief Justice Munir also expressed these feelings on his retirement in the 1960s, saying the country was at the brink of a revolution and hence the court had to decide between anarchy and order. The bias of the Pakistani judiciary against the prospect of

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[325] Justice S. Anwarul Haq JSC (as he then was) (1976) "Quid-i-Azam as a Constitutionalist" a paper read at the Third Jurist Conference held on December 9, 1976 at Karachi, in Justice Anwarul-Haq *supra* note 20 at 255.
[326] Newberg, *supra* note 62 at 48.
[327] It is pertinent to note that up until this point, under the excuse of *Pindi Conspiracy case*, all the Communist Party leadership had already been arrested and in 1954 the Communist Party and its fronts like Progressive Writers' Association and Democratic Students Federation had been banned.
[328] See Braibanti (1999), *supra* note 58 at 47.

revolution was so extreme that one of the justices, who later became Chief Justice of the Supreme Court, Anwarul Haq, announced while addressing the world delegates in Ghana that there is nothing revolutionary in his paper as no judge has so far been awarded the Nobel Prize for his revolutionary ideas.[329] For him, the changes in the existing laws in developing countries are an instrument of social revolution, "so as to forestall violent and abrupt changes."[330]

The point I tried to make is that the 'ideological content' of the 1958 coup was to stop revolution,[331] which was a desire for a deeper and broader democracy that had been unleashed by colonial struggle. Here Chief Justice Munir and Justice Cornelius both stood against 'revolution' (socialist modernization as an inspiration for anti -colonial struggles at that time) inspite of dissenting opinions. They stood for a state-formation of nation-building under capitalist modernization and a consequent model of 'political development,' not for democracy versus dictatorship. For this, we'll have to look beyond the legal decisions to the ideas and involvement with 'modernization.'

Ayub 'the Modernizer' and Pakistan as the Experimental Lab

[329] Justice Anwarul Haq (1976), "Role of Law in a Developing Society" in Justice Anwarul-Haq, *supra* note 20 at 82-83. This essay was a lecture delivered at the State House, Accra, on October 7, 1976 in connection with the Centenary Celebrations of the Supreme Court of Ghana.
[330] *Ibid* at 92.
[331] Even if the anti-establishment/Left forces were not as strong, they did create fear in the elite. This was exaggerated in the overall cold war environment.

The late 1950s through the 1960s was the era of modernization theory taking root in Pakistan. This era was led by Ayub politically and Cornelius judicially with the bureaucracy implementing modernization. People and their opinion, according to Ayub in his design of political development, were irrelevant and a "responsible government" should not be a "prisoner of wayward public opinion."[332] Pakistan needed a strong not popular government, Ayub argued.[333] Ayub's idea of "basic democracy" was to develop a controlled democracy with which the landed elite of Sindh and Punjab could also be controlled. He developed a rural political elite to counter that 81.2% of civil service officers came from urban settings and only one in 31 had ever lived in a village.[334] In entering rural politics, he had to contend with the issue of land reform. Ayub stated that big land holdings impeded the free exercise of political institutions and could not flourish in democracy as landlords enjoyed protected constituencies. So in fixing a ceiling of landownership, the target was to build a strong middle class and land reforms as the "*Magna Carta of Rights*" for peasants. But private ownership was not to be destroyed.[335] He thus connected the democratic content of the new Constitution with land reforms.[336]

Ayesha Siddiqa argues that the threat of land reforms were a coercive tool to discipline the landlords.[337] I want to distance myself from this position that Ayub was against the big landlords. Capitalist agriculture was part of the modernization, and the

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[332] Ayub-Khan (1967), *supra* note 39 at 206.
[333] *Ibid* at 213.
[334] Waseem (2007), *supra* note 11 at 169-70.
[335] I will evaluate this claim later.
[336] Ayub-Khan (1967), *supra* note 39 at 87-92.
[337] Ayesha Siddiqa, *Military Inc.: Inside Pakistan's Military economy* (Karachi: Oxford University Press, 2007) at 75.

landed class greatly benefitted from it. The state also created an industrialist class that had no political power but relied entirely on state bureaucratic power.[338] I want to argue that these three classes plus the metropolitan bourgeoisie were the classes behind the state formation as led by Ayub. Ayub only targeted politicians who were part of the urban-based Jamat-e-Islami and the nationalist and communist alliance (National Awami Party).

How is the judiciary connected with this project of capitalist modernization in Pakistan? How were legal decisions, discourse, and the judiciary a crucial link in this project?

Judicial Modernization 'Coalition'

In 1958, Braibanti met Chief Justice Cornelius at a conference of the South East Asia Treaty Organization (SEATO). He returned to Pakistan to become the Chief Advisor and Professor of the Civil Services Academy in 1960 in Lahore. At the time he was on leave from Duke University and was on a contract with United States Agency for International Development.[339] In his memoirs he mentions Kyani, Cornelius, Nasim, Mahmud Ali Qasuri and Rabia Sultana Qari from the judicial side and Mian Aminuddin (the first local head of civil services after 13 years of independence) and Agha Hamid (who succeeded Amiruddin), as examples of "how a truly liberating Islamic perspective can mould personalities devoted to principle, compassion, freedom, and learning."

[338] Hamza Alavi, "Class and State in Pakistan" in Hasan Gardezi & Jamil Rashid ed.s, *Pakistan: The Unstable State* (Lahore: Vanguard Books, 1983).
[339] Braibanti (1999), *supra* note 58 at xix.

When Braibanti returned to the U.S. in 1964, he gathered 26 scholars and government officials interested to work on Pakistan and launched the American Institute of Indian Studies. His students included Craig Baxter, Charles Kennedy, Afak Hayder, and Lawrence Ziring. S. M. Haider was Braibanti's student and on his advice wrote a dissertation on the writ jurisdiction in Pakistan. He worked for the Law Reform Commission until his death.[340]

Administration under Juridico-Bureaucratic Structure[341]

The judiciary was in a marriage of convenience with the bureaucracy in the first two formative decades (1947-67) of Pakistan. The Chief Justice Anwarul Haq (1970) appreciated the role of civil services in policy making and execution during the 1950s and 1960s. He particularly mentioned how civil services produced men of judicial acumen like Shahabuddin, Cornelius, Rahman, and Kayani.[342] He was also from the Civil Services of Pakistan. The relation of the judiciary and the bureaucracy is also described

[340] After Braibanti and Cornelius, this tradition travelled through Supreme Court Chief Justice Nasim to Hamid and Pervez Hassan (1990s). Hamid represented the emerging middle class lawyers and their politics during Zia's regime and after.
[341] Cornelius gave a summary of development of writ jurisdiction in *Merajuddin case*; see *State of Pakistan v Mehrajuddin*, (1959) Pakistan Supreme Court Reports (PSCR) 34.
[342] Justice S. Anwarul Haq (1970), "Civil Service of Pakistan and its Critics" in Justice Anwarul-Haq, *supra* note 20 at 301-302, address of welcome to the president of Pakistan, General Yahya Khan, on the annual dinner of West Pakistan Civil Services of Pakistan-C S P on April 10, 1970.

by Mr. Justice Amin Ahmad, Chief Justice of the East Pakistan High Court during Ayub. He explained in 1970 that the judiciary in Pakistan never disturbed the executive.[343]

The writ jurisdiction of the superior courts introduced in 1954 was retained in 1956 Constitution. Power to issue the writs of *habeas corpus, mandamus, prohibition, quo-warranto,* and *certiorari* were vested with High Courts.[344] But the courts, even the Supreme Court, only used writ jurisdiction in those matters which were judicial in nature.[345] The first case was *Muhammad Saeed v Election Petitions Tribunal*[346] where an effort is made to create a formula of judicial resistance by Munir. Later, the *Tariq Transport Company case*[347] is an example of this judicial restraint. Chief Justice Munir made clear that pure administrative actions do not come under the control of the judiciary with the power conferred by Article 70 of the 1956 Constitution. Only actions of *ultra vires*, refusal to exercise jurisdiction and deviation from prescribed procedure can come under judicial control. From 1955 to August 1962, 14,000 writs were filed in two High Courts and many reached the Supreme Court. This made Pakistan "the most litigious

[343] Justice Amin Ahmad, "Independence of Judiciary in Pakistan" (1970) XXII PLD 135-143 at 138.
[344] Articles 22, 163, 170 of the 1956 Constitution, see Khan (2009), *supra* note 9 at 108-109.
[345] *Tariq Transport Company v Sargodha Bhera Bus Service* (1958) 2 PSCR 71.
[346] PLD 1957 SAC 91.
[347] *Tariq Transport Company v Sargodha Bhera Bus Service* (1958) 2 PSCR 71. A decision by a Regional Transport Authority about granting a route to a bus company without authority came under review for *certiorari* and HC nullified the decision of RTA.

society in the world" at that time.[348] These dynamics were commented upon in *Snelson's* case.[349]

In 1960, after the retirement of three of the five judges of Munir's Court and with the new Constitution of 1962, the old terminology was abandoned and judicial review jurisdiction was re-defined in clear and precise terms in Article 98 which has continued in Article 199 of the present Constitution.[350] Cornelius was in favour of *droit administeratif* with its *Conseil d' Etat* (administrative tribunals of Franceh Administrative Law). S. M. Haider explained this scheme of A.R. Cornelius towards the administration tribunals in Ayub era. According to Cornelius, the state's involvement in social development projects made doctrines and precedents of ordinary law inappropriate. If disputes arising from increasing the role of the state were to go through ordinary courts, they would be chock full. Furthermore, these disputes generally do not involve merely a question of fact or of law, but question of policy also. For this, administrative tribunals would be needed, and this is the justification for his turn to the system of administrative tribunals of French Administrative Law: *Counseil d'Etat*. Cornelius gave such a proposal in the 1959

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[348] Braibanti (1999), *supra* note 58 at 42.

[349] *The State v. Sir Edward Snelson*, 1961 PLD Supreme Court 237. Mr Snelson's talk titled "The Transitional Constitution of 1958" was distributed during his address to section officers in Secretariat Training Institute Karachi. In it, he remarked that the High Courts, while exercising the prerogative writs, were interfering with the government and causing "chaos, disruption, friction, usurpation of function, uncertainty, and public confusion." These remarks were found to be in contempt of court by the Lahore High Court of Chief Justice Kayani. The Supreme Court of Cornelius CJ upheld the decision. Snelson was fined, though this was later suspended by the governor.

[350] Justice Sabihuddin Ahmed, CJSHC (2006) *Good Governance and the Role of Judiciary*, International Jurists Conference, Islamabad on 50th birthday anniversary of the Supreme Court of Pakistan in the year 2006. Online: http://www.supremecourt.gov.pk/ijc/ijc.htm>. Last visited Nov 27, 2013. Hereinafter referred as International Jurists Conference, Islamabad, 2006.

convocation of Punjab University Law College and then in 1960 in a Rotary Club function in Lahore and finally in the form of a full analysis addressing the All Pakistan Lawyer's Association. He expressed the appreciation for such a system in *Farid Sons Ltd. Case*.It is pertinent that Cornelius did not find Supreme Court prerogative powers to confine public officials inappropriate as it had been found in Great Britain.[351]

The point I have tried to make here is that the judiciary, as a part of the juridico-bureaucratic structure during modernization, did not clearly or easily consent to give powers to the executive to run administrative tribunals. [unclear—rephrase or delete following sentence: Those? were required for a new pace of developmental role of the state led by bureaucracy.] Rather, the judiciary expanded old writ jurisdiction and judicial review on the U.S. model and firmly remained in place as one of the power brokers in the early phases of state formation. This tool {which? Specify} was a pivot for its involvement in economic to political development of the country. This was not an issue in economic development being capitalist as an 'elite agreement,' but has clear implications for political development.

Elite Democracy as a Model of Controlled Democracy

During modernization, elite jurists, including Cornelius, supported the notion of a controlled democracy – a version of U.S. liberal democracy with indirect elections of the

[351] Dr. S. M. Haider, "Plea for Administrative Tribunals: Scheme Visualized by Justice A.R. Cornelius" (1969) XXI PLD 164-168; see also *Farid Sons Ltd v. Govt of Pakistan*, 1961 PLD S. C. 537.

president, a strong presidential system like the U.S., bureaucracy leading modernization and administrative courts with judicial review vested in Superior Courts, and fundamental rights as a substitute for the deficit in the above controlled democracy.

Ayub wanted a presidential system and argued that even the founding father of Pakistan, Jinnah, did not want a parliamentary system. He set up a Commission to deliberate on the issue in 1959, and promised to accept the recommendations of the Commission.[352] The Commission admitted that they were free from any pressure.[353] Hamid Khan presents the head of this commission, Justice Muhammad Shahbuddin,[354] as a person with high integrity but under severe pressure from the Ayub.[355] On the other hand, W. G. Choudhry stated that this Commission was free from any duress.[356] The Constitution Commission of 1960 headed by Justice Shahabuddin, while in favour of a parliamentary form of government recommended a presidential form of government like the U.S.[357] The reasons were the parliamentary failures, due to the absence of well-organized parties. The outcome of the recommendations of the Commission was the constitution of 1962, which allowed for a strong president, indirect franchise, quite contrary to the requirement of parliamentary system. Ayub called it "a blending of democracy with discipline – the two prerequisites to running a free society with stable

[352] Address to the Karachi High Court Bar Association, 15 January, 1959.
[353] Constitution Commission Report (Karachi: Government of Pakistan, 1961) at 2-3.
[354] He became CJSC, May 3, 1960 to May 12 1960, after Munir CJ and was from Indian Civil Services.
[355] Khan (2007), *supra* note 9 at 138.
[356] As claimed by Khan (2007), *supra* 5 at 136.
[357] It is pertinent to mention here that Justice Shahbuddin also came from the civil services recruitment of the judiciary like Cornelius.

government and sound administration."[358] He was obsessed with this constitutional arrangement. His concern was that if the main pillars of the constitution like the presidential system and Basic Democracies are shifted or removed, the whole structure will fall as a whole.[359]

In the minds of the judiciary, like that of executive and bureaucracy, the idea was not the project of securing democracy but of planting a democracy that would slowly emerge. The later court decisions of Cornelius can better be understood in their relation to the Basic Democracy system.[360] According to Cornelius, the Basic Democracies Order of 1959 gave power to the people who were behind the 1962 Constitution, and would get rid of the colonial legacies of ancestry, wealth and class. This is the core of the political theory of Cornelius.[361]

The involvement of the entire population in the political life in post-colonies was a serious issue for modernization scholars. This participation of the population in the social order in the form of 'popular sovereignty' is usually called power-sharing, power diffusion, politicization, mobilization, or participation explosion. According to Braibanti, the ruling elite had no concern about the quality of participation in regards to "literacy, responsibility, understanding of issues, to the quality of civic culture generally." The only emphasis was on increasing participation. Participation as power sharing was good but

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[358] Broadcast on March 1, 1962 in Ayub-Khan *supra* note 52 at 216.
[359] *Ibid* at 220-231.
[360] This was really the project of modernization theorists, Huntington in particular (see Amin-Khan, 2012) *supra* note 26.

[361] Justice A.R. Cornelius, "Constitution of Pakistan" (1967) PLD Journal 78-90. The essay was an address to the Pakistan Council for National Integration, Dacca, 15 June 1967.

"nevertheless, we cannot overlook the stress and crisis caused by accelerated power-sharing." Braibanti is very clear that the collapse of systems of newly independent states are not caused by corruption or infiltration or even institutional weakness but accelerated participation. He called it "demand-conversion crises." The solution is either to control this demand-conversion crisis through bureaucracy and increasing the strength of the judiciary to handle crises like in Pakistan or prevent them as in India. In India, according to Braibanti, demand is contained, diffused and spatially diverted by a competent single mass part.[362] The same problem was faced by Ayub and Cornelius.

How did Chief Justice Cornelius view democracy? He found that elections, which raise ideological differences, were dangerous, for there was the "virus of revolution just below the surface."[363] Socialism was not an option for him as Muslims did not have freedom there. Cornelius found the armed forces had a distinguished position among 'responsible' (not representative) sections of the community.[364] The Basic Democracy model of Ayub seems perfectly suited to his philosophy.

Up to now, the point I have tried to establish is that the U.S. model of liberal democracy in its particular regime form was implemented as a way to block popular or deeper democracy. This statement may have implications for the U.S. system itself but

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[362] Ralph Braibanti (1964), "The Role of Law in the Political Development of Pakistan" in Braibanti (1999), *supra* note 61 at 95-97. This essay was first published in Robert R. Wilson, ed. *International Comparative Law of the Commonwealth* (Durham, N. C.: Durham University Press, 1968).

[363] Justice A.R. Cornelius (1978), "Letter to Braibanti" in Braibanti (1999), *supra* note 58, 196-8 at 198.

[364] Justice Cornelius (1963), *supra* note 23 at 1. Address delivered at a gathering of Military officials at G. H. Q., Rawalpindi on 11th July 1962.

this is beyond the scope of my dissertation. My concern here is to show how this understanding is absolutely missing in all the liberal 'institutional' literature encapsulated within the dichotomy of dictatorship and democracy in Pakistan.[365]

The Cornelius "rights" approach to substitute for the democratic deficit?

I will explain the exaggeration in the differences of the Cornelius Courts with Ayub on the issue of fundamental rights, which is widely cited in regards to cases like *Moudoodi case and Shorish Kashmiri case*.[366]

Ayub's modernization was liberal and some of its aspects were not liked by the Islamic forces such as the family ordinance. Reacting to this, Ayub condemned the Jamaat-e-Islami leader, Maulana Abul Ala Maudoodi, and declared Jamaat-e-Islami as an

[365] As explained in chapter two of this dissertation.
[366] Hamid Khan's (2009) analysis of Cornelius court is that his court kept its independence and gave a ruling to protect fundamental rights which set the path of future judicial activism, constitutional interpretation under judicial review, and due process of law. See Khan (2009) *supra* note at 187. According to S. M. Haider (1967), a balance was struck between public order concerns and individual liberty by the Cornelius courts while using judicial review of administrative tribunals. See S. M. Haider, "Judicial Review of Administrative Discretion in Pakistan" (1967) PLD 1967 as cited by Newberg (1995), see Newberg, *supra* note 65 at 106.

'unlawful association' under section 16 of the Criminal Law Amendment Act, 1908 as amended by Ordinance of XXI of 1960. This declaration was challenged in the West Pakistan High Court as well as by Maudoodi in the Dhaka High Court. The former dismissed the petition, whereas latter accepted the petition and declared the notification to be without binding effects.[367] In appeals against both the decisions, the Supreme Court accepted the appeal of Maudoodi and rejected the appeal of the government unanimously.[368]

There are some other cases where the judiciary's defence of fundamental rights is exaggerated under the leadership of Chief Justice A.R. Cornelius, like *Malik Ghulam Jilani's* case, *Shorish Kashmiri's* case, and *Abdul Baqi Balooch's* case. Through these, according to Hamid Khan, a strong foundation of 'judicial review' and 'due process of law' was laid down by the courts of Pakistan.[369] During protests against the Tashkent Declaration,[370] many political leaders like Jilani, Nawabzada Nusrullah and Sradar Shaukat Hayat Khan were kept in detention under the Defence of Pakistan Rules and the Defence of Pakistan Ordinance of 1965. The West Pakistan High Court rejected their petitions. The Supreme Cout, in its judgment, accepted appeals of Nawabzada and rejected that of Hayat and Jilani.[371] Here the court laid down some broad principles and guidelines for cases of political detainees. Against the detention of a known journalist,

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[367] *Tamizuddin Ahmad v. The Government of East Pakistan*. 1964 PLD Dhaka 795.
[368] *Maulana Abul Ala Maudoodi v. Govt of West Pakistan*, 1964 PLD S. C. 673.
[369] See Hamid Khan, *Constitutional and Political History of Pakistan,* 2nd ed. (Karachi: Oxford University Press, 2009) at 187.
[370] Ayub signed this declaration after the1965 war with India and politicians presented this agreement as losing after winning the war.
[371] *Malik Ghulam Jilani v. The Governmentr of West Pakistan*, 1967 PLD S. C. 1967 373 .

Shorish Kashmiri, the High Court of West Pakistan accepted the petition and the Supreme Court upheld this judgment.[372] Abdul Baqi Balooch, as a Baloch activist and a strong opposition of Ayub, was under detention. West Pakistan High Court (Karachi Bench) rejected his appeal.[373]

These judgments defended against the arbitrary use of laws like the Defence of Pakistan Ordinance. But this does not explain what was really going on. Let us discuss the nature of rights in these cases as it evolved from courts proceeded by Chief Justice Munir to Chief Justice Cornelius. The 1956 constitution used the term 'fundamental rights' and these rights were justiciable.[374] On the other hand, the 1962 constitution did not use the words fundamental rights but included a few of these rights (speech, association and religion) in a chapter titled 'Principles of Law Making and Policy'; however, they were not justiciable. Later, with an amendment, the label 'fundamental rights' was given to these rights and their enforcement was assured through courts.[375] It was claimed by the Law Minister, Chief Justice (Ret. as he then was) Munir, as a kind of Bill of Rights. Putting in a modernization design, we can understand that the judiciary had already been empowered to check the excesses of the administration or executive under Article 98, and through this amendment the legislature was made subordinate to courts.

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[372] *Govt. of Pakistan v. Begum Shorish Kashmiri*, 1969 PLD S.C. 14.
[373] *Abdul Baqi Balooch v. The Govt of Pakistan*, 1968 PLD S. C. 313.
[374] Articles 5(1), 5(2), 6, 22, 14, 16, 17, 15, 8, 10, 11, 18, 13, 20..
[375] *Constitution [First Amendment] Act*, 1963, According to Hamid, it was due to pressure of the people, restoration of political activities and the election of Moulvi Tamizuddin as speaker and Muhammad Ali Bogra as Prime Minister. (Remember Prime Minister Bogra was a staunch supporter of U.S.type constitutional arrangements), see Khan (2009), *supra* note 9 at 157 .

First of all, the strong presidential design of the constitution half-heartedly wanted a legislature and now the grip around it was tightened by the juridico-bureaucratic design of fundamental rights. Secondly, this 'supremacy of judiciary' is a part of political but not economic modernization. This means that the judiciary was tied with a 'qualifying clause' to not to interfere in economic modernization, which included the ordinances and regulation regarding land reforms, family ordinance, and other socio-economic concerns within the design of capitalist modernization. The interesting point to be noted here is the perceived contrast in the views of Chief Justices Munir and Cornelius around their approaches towards rights and democracy.

After retirement, Chief Justice Munir became the Law Minister of Ayub and Cornelius was the Chief Justice. After retirement Cornelius was the law minister of the next dictator, Yahya Khan. I will now develop the critique of the key cases on the issue of rights.

Firstly, the nature of rights in Cornelius's Court is not very different from that in Munir's Courts. The difference in the concept of rights between Justice Cornelius and Chief Justice Munir in the *Dosso* case[376] was that Cornelius believed that natural rights theory in the absence of fundamental rights guarantees a positivist form in a constitution. He found rights apart from the 1956 constitution. Chief Justice Munir, on the other hand, relied on legal positivism, but did not refute Cornelius's concept of natural rights. What happens when the constitution is abrogated? Munir's position was these rights are fundamental, cannot be taken away and do not need law. Justice Shahabuddin, Amiruddin

[376] *The State v Dosso* and another, (1958) 2 PSCR 180.

Ahmad and Cornelius agreed on that point, but Cornelius wrote a separate opinion. He based his opinion on natural rights but noted that when the constitution is not in force, there is concern about violation. This position is not very different than Munir's.

The difference between the Chief Justices was more clear in the *Mehdi Ali Khan* case. The courts kept the position taken around fundamental rights in *Dosso* case and declined to review it.[377] Justice Cornelius accepted the presence of fundamental rights as natural rights in the *Dosso* case, but argued they are not justiciable. They can only be justiciable when present in a constitution. Chief Justice Munir was clear not to challenge the regime and allowed it to alter the state structure. So the court accepted the presence of fundamental rights but absence of judicial powers. This shows the extent of the difference between Cornelius's and Munir's courts. Even in the *Mian Iftikhar-ud-din* case,[378] courts refused their power to challenge the regime. In appeal, Justice Kaikaus accepted the plea of the government to amend and interfere with the fundamental rights and gave immunity to those acts from judicial scrutiny, stating, "Even if the central government did contravene a principle of natural justice, its order would not be liable to challenge in a court."[379]

After the promulgation of the 1962 constitution, Cornelius's court began a review of cases involving justiciable rights. The first case was *Fuzlul Quader Chowdhury*. Here the court looked at the power of the president to amend the constitution. Ayub wanted his

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[377] *The Province of East Pakistan v. Md Mehdi Ali Khan Panni*, 1959 PLD SC 387.
[378] The Progressive Papers Ltd (PPL), a privately owned newspaper, was led by leading socialist writers like Faiz Ahmad Faiz, Syed Sibte Hassan, and Ahmad Nadeem Qasmi. It was taken under government control by Ayub.
[379] *Mian Iftikhar-ud-din v Muhammad Sarfraz*, 1961 PLD S. C. 585.

members of the executive body to speak in the National Assembly though they were not its members, and hence he tried to amend the constitution accordingly. A member of the assembly moved the point in Dacca High Court as to whether president can amend the constitution. The Dacca High Court held that the constitution should not be so easily changed.[380] The Supreme Court did not accept the appeal and Chief Justice Cornelius warned the government about the powers of the courts to judicially review any changes in the constitution.[381]

The controversy was that the judiciary should act more as a custodian of the operational form of the Constitution than as the guardian of fundamental rights. Chief Justice Cornelius strongly defended presidential form of the government against "anomalous Parliamentary form" or a "semi-Parliamentary from of Government." For the judges, according to the "main fabric"[382] in the presidential form, a government minister should not be a member of the House, cannot have the right to vote, does not depend upon support of the assembly, nor is responsible to the assembly. The point I want to make is that the Justice Cornelius, who later became the Chief Justice of the Supreme Court in these rights cases, protected the presidential form of the government and the idea of necessary rights to overcome the democratic deficit in this form of government, but not the rights themselves.

Now let me move to the next level of evaluating these rights, that is, procedural and substantive rights. The courts in the *Moudoodi* and *Sorish Kashmiri* cases, according

[380] *Muhammad Adbul Haq v. Fuzlul Quader Chowdhury*, 1963 PLD Dacca 669.
[381] *Fuzlul Quader Chowdhury v. Muhammad Adbul Haq*, 1963,PLD S. C. 486.
[382] Comments of A.K. Brohi on behalf of the respondent in the *Fuzlul Quader Chowdhury case*.

to Newberg, differentiate between procedural right of review and how the protection to substantive rights is possible with this review. Then, in the *Ghulam Jilani*, *Fazlul Qauder Chowdhry*, and *Sirajul Haq Patwari* cases, the courts stood away from contestable substantive rights guarantees and only extended judicial review in formal sense. In a way, the judiciary stuck to procedural rights and refused to enter the domain of substantive rights, seeing that domain as an exclusive arena of legislature and politics. Newberg objects, noting that when the legislature and elected assemblies are weak, the political environment is also weak. Can the court strengthen the legislature and political environment? Newberg said the court's position was that the "route to stronger legislature was not through judicial action but through active politics."[383] Newberg objected to this "deliberate judicial strategy" to use judicial review as "strange and twisted compact as any attempt to build democracy from authoritarianism without revolution must surely be,"[384] and "courts put reform before revolution as an acceptable mode for political change."[385] Disappointed, Newberg came to the conclusion that "while an independent judiciary might be a prerequisite for the life and sustenance of a developing country, it could neither create the conditions for equity and development nor guarantee those results."[386] Newberg is correct here but this rubs against her problematic regret that the judiciary could not properly judge the state. In my view, the judiciary (in the Cornelius tradition) aimed only to protect the presidential form of constitution and rights. Let us explore the nature of politics underlying the rights cases.

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[383] See Newberg, *supra* note 62 at 105.
[384] *Ibid* at 105.
[385] *Ibid* at 106.
[386] *Ibid* at 108.

The Nature of Politics in Rights Cases

In order to add some structural context to this rights discourse, it is necessary to study the nature of the political and economic nature of the evolving opposition to Ayub. Islamacists were among the 'cultural' opposition to the modernization project of Ayub. During Ayub's regime, the All-Pakistan Women Association started a campaign against polygamy and for the right to divorce. The response was the *Family Laws Ordinance* of 1961. Its evaluation is a compromise between the liberal agenda of Ayub and the religious opposition. The legal system was split: issues regarding the personal status of the women such as marriage, divorce, inheritance and custody of the child were included under Islamic Law, whereas all other issues came under secular legal tradition.[387] Maulana Maudoodi, the founding leader of Jamaat-i-Islami, opposed the "enlightened modernization" of Ayub. The government used the Political Parties Act of 1962 and the Criminal Amendment Act of 1908 to ban the party. Jamaat-i-Islami contested this decision in East as well as West Pakistan in criminal as well as civil petitions. The West Pakistan High Court dismissed the criminal petition[388] but the East Pakistan High Court admitted the appeal.[389] Both were heard in a joint appeal by Supreme Court. The court upheld the rights of forming a political party and particularly the right to do the activities for which the party is formed. The court examined the nature of new ongoing political

[387] Shahnaz Rouse, "Liberation from Above or Within: Nationalism, Gender, and Space in Pakistan" (March-April 2002) 97 *Against the Current*, at 14.
[388] Criminal Appeal No. 43, 1964.
[389] Civil Appeal No. 19-D, 1964.

developments under Basic Democracy, which was a kind of guided and controlled democracy. The court looked at the cases in terms of rights, and how these rights allow political parties and their activities and the courts' role in protecting these rights. Courts were confronted between the controlled nature of democracy and the absolute nature of these rights. Cornelius was of the opinion to have an independent judicial investigation into government complaints about Jamaat-i-Islami and hence probably wanted a context for these absolute rights on which they can be evaluated and tested. The court did not accept this proposal. In the *Moudoodi* case, not only was the right of judicial review of the legislative acts asserted by courts, but the principles in this regard were enumerated.[390] In these terms, from a political analysis, the *Moudoodi* case represented the mild opposition against Ayub by Islamists and an inclination of Chief Justice Cornelius towards Islamization.

The actual opposition to Ayub since 1958 came from the National Awami Party, which was an alliance of communists and nationalists. These two forces opposed the state-building project of the juridico-bureaucratic structure as we have already discussed. So in the *Siraj Pitwari case*, the Cornelius court failed the test. Cases such as *Sirajul Haq Patwari* show that Chief Justice Cornelius and Justice Hamoodur Rahamn of the Supreme Court defended the Basic Democracy (BD) system of Ayub, while Chief Justice Murshad of the East Pakistan High Court reflected the unrest of East Pakistan. The division of provincial and legislative powers in the BD system and the executive were the

[390] Ralph Braibanti, "The Socio-Judicial Context of the Cornelius Era – 1950-70" in Braibanti (1999), *supra* note 61, 108 at 153. This essay was first published in Ralph Braibanti *Research on the Bureaucracy of Pakistan* (Durham, N. C. Duke University Press, 1966).

issue in *Sirajul Haq Patwari case* in East Pakistan High Court in 1965.[391] Chief Justice Murshad of the East Pakistan High Court made clear the separation of central and provincial powers in the 1962 constitution and argued that the Act of 1965 transgressed these powers. He relied on the *Fazlul Qauder Chowdhry* case and exercised the power of judicial review. The court decision strongly protected provincial autonomy. In an appeal in 1966, the Supreme Court of Chief Justice Cornelius reversed the judgment.[392]

I agree with the Newberg that , "when the court took on Ayub Khan, it was for his transgression of private rights, not the organization of his state."[393] But I want to add that both are not separate, for we keep emphasizing "more rights" in exchange for the lack of democracy. The Cornelius tradition of judicial review and rights discourse proved antithetical to the notion of a broader and deeper popular democracy, which could not accommodate other small and oppressed nationalities. Actually, the Islamic 'national' spirit of Cornelius could not accommodate the nature of contradiction involved in politics of suppressed nationalities. Justice Murshad resigned on January 6, 1967. Ayub received his resignation through the law minister and commented that he was brilliant but "impulsive and unstable" and that Ayub from the very beginning was doubtful of his success as a Chief Justice of East Pakistan.[394] Later, Chief Justice Murshad entered in Bengali politics and participated in the negotiations of the independence of Bangladesh.

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[391] *Sirajul Haque Patwari v. Sub-divisional Officer, Chandpur*, 1966 PLD Dacca 331.
[392] *Province of East Pakistan v. Sirjul Haq Patwari*, 1966 PLD S. C. 854.
[393] Newberg, *supra* note 65 at 101.
[394] Ayub-Khan Diaries, *supra* note 105 at 45.

A further test came for the Cornelius court in the *Roshan Khan* case.[395] Here again the court was to decide between public order and individual rights. Chief Justice Cornelius was of the opinion that if a bona fide arrest is made, there is no question of individual rights and judicial review. Justice S.A. Rahman, thought that executive action should be within constitutional and legal confines. Justice Hamoodur Rahman and Justice Kaikaus dismissed the case. Here the court hardly passed its own test in the *Moudoodi* case.

But the judiciary failed the test in the *Malik Ghulam Jilani* case.[396] Ayub signed the Tashkent Declaration with India after the 1965 war. The opposition protested and the police made arrests. The Lahore High Court considered police action justified for concerns of public order. The Supreme Court also upheld detention to prevent disturbance in public order but found Lahore High Court's approach restrictive. Lahore High Court should have looked into the reasonableness of the government action. The decision in the *Shorish Kashmiri* case[397] upheld its right to review executive actions that are arbitrary, unguided, and uncontrolled. Two points are worth mentioning here, one that Shorish Kashmiri was a right wing anti-communist like Moudoodi of Jamaat, and secondly, Chief Justice Cornelius had now retired. The protective constitutional structure of Ayub was deteriorating with his downfall. The level of judicial chaos was to the extent that while hearing Shorish Kashmiri's writ under Defence of Pakistan Rules (DPR),

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[395]*The Government of Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan,* 1966 PLD S. C. 286.
[396] *Malik Ghulam Jilani v. The Govt of West Pakistan,* 1967 PLD S. C. 373.
[397]*The Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri* 1969 PLD S.C. 14.

Justice Shaukat and Bashir called the advocate general a liar. For Ayub this was the "most unbecoming on the part of a judge" and an "ugly incident."

Again in the *Agarthala conspiracy* case, the judiciary was tested around nationality politics. Mujeebur Rahman (who was leading the movement for Bangladesh), was accused of revolt and taken into custody under DPR, along with 35 other individuals. Ayub's intention was to try such people under Court Martial. Ayub immediately called General Yahya and informed him that DPR has been destroyed by the Supreme Court on behest of Cornelius and Yahya should take them in military custody otherwise High Court will let them go.[398] No one was convicted as the trial was not completed after Ayub Khan resigned. Mujeeb was tried by a special tribunal headed by Chief Justice S.A. Rahman, and Chief Justices M. Khan and Muksumul Hakim of East Pakistan. The making of this tribunal under the 1968 Special Criminal Law Amendment (Special Tribunal) ordinance was challenged in High Court and was refused.

The judiciary also supported Ayub in this most aggressive anti-communist act after the *Pindi Conspiracy case*.[399] In the *Mian Iftikhar-ud-din* case, the Progressive Papers Ltd (PPL), a privately owned newspaper, was led by left-leaning socialists including landmark writers like Faiz Ahmad Faiz, Syed Sibte Hassan, and Ahmad Nadeem Qasmi.[400] The government removed the owners and director of the newspaper on

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[398]Ayub-Khan Diaries, *supra* note 105 at 203, entry Jan 13, 1968.
Craig Baxter, ed. *Diaries of Field Marshal Mohammad Ayub Khan: 1966-1972* (Karachi: Oxford University Press, 2007) at 382, entry April 30, 1970.

[400] Here again, Newberg (1995) did not comment on this ideological position of the newspaper and just mentioned that its publications were outspoken and against the government.

the ground of 1952 Security of Pakistan Act.[401] The High Court accepted the order of the Govt under the *Dosso* case and *Mehdi Ali Khan* case.[402]

Newberg's analysis is worth summarizing to properly evaluate the rights discourse under Chief Justice Cornelius and later Chief Justice S.A. Rahman. For her, it was a mixed bag of decisions oscillating between judicial reviews of constitutional rights and accepting state limits on politics. Chief Justice Cornelius did not go beyond constitutional limits while defining natural rights. S.A. Rahman was more into positive rights and judging the law by its letters On the civil liberties front, Cornelius was in favour of the Frontier Crimes Regulations, which were ruthlessly used by Ayub to suppress opposition, particularly from the NAP. Similar provisions were in the Criminal Code of West Pakistan. This means that rights protections and procedures are not guaranteed if not applied fairly.[403]

I have tried to establish how the debate around the rights discourse in these cases hides the politics behind them (by omitting any analysis of class formations and class struggle), but also obscures what is going on with state apparatuses and their politics. I have thus tried to explain why the decisions of Cornelius's court in rights cases were a "mixed bag" as claimed by Newberg. These decisions show a bias against nationalists, progressive and communist politics (represented around NAP).

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[401] *Security of Pakistan (Amendment) Ordinance*, 1959 (XXIII of 1959), Security of Pakistan (Amendment) Ordinance 1961 (XIV of 1961)
[402] *Mian Iftikhar-ud-din v. Muhammad Sarfraz*, 1961 PLD 1961 Lahore 842.
[403] Newberg, *supra* note 62 at 104.

Chief Justice Cornelius's position on rights can also be understood from his speeches.[404] He criticized the universality of the United Declaration of Human Rights and its authoritative form and found that some of its Articles were explosive.[405] He rejects Article 21 of the UDHR, which declared the will of the people is the basis of authority of the government and this will is only made possible through free, secret voting in periodic general elections. Cornelius's objection to this is that its validity as a human right is questionable and people can be and had been more happy and well governed under other modes of governance than democratic systems. He objected to the fact the UDHR ignored a nation's right to choose its own form of government and ideologies (political and economic).[406] He went further and declared this type of democracy as divisive and in opposition to integration.[407] Cornelius also objected to Article 19 (freedom of opinion and expression), Article 13 (freedom to leave the country) and Article 14 (right to seek asylum). For him, these Articles are averse to the concept of loyalty with country and community. The Articles of the UDHR, Cornelius found "over-stress on the freedom of the individual citizen" [p.283] at the price of the individual's obligations to the state or nation to which he or she belongs.[408]

Cornelius did not accept Western human rights discourse. His view was that the inclusion of human rights in written constitutions was a local phenomenon of democracy

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[404] Justice A.R. Cornelius (1977), "Islam and Human Rights" in Braibanti (1999), *supra* note 61 at 278-296. Address delivered at the Pakistan Academy for Rural Development, Peshawar, 8 November 1977.
[405] *Ibid* at 280.
[406] *Ibid* at 283.
[407] *Ibid* at 281.
[408] *Ibid* at 283.

and not necessarily based on the Magna Carta and the Bill of Rights of 1688 in England, for those were between kings and privileged nobles. Based on the work of A. K. Brohi, Cornelius further made it clear that fundamental rights in the written constitution are meant to stop the interference of majority rule in individual matters, as the people are distrustful of legislative supremacy in newly independent countries. In my opinion, greater rights in the hands of the courts were another form of stress on the already weak legislature in Pakistan.

As far as the relation of rights with popular democracy is concerned, the position of Chief Justice Cornelius is illustrative and very conclusive for our dissertation. For him the rights in the constitution of newly independent countries like Pakistan are remedies "necessary for dealing evils that follow on each other, all stemming from the same source, namely, popular democracy."[409] For him, democracy based on the social contract and participation in representative government is illusion. He wrote, "The price of democracy is partisan politics."[410] Cornelius is very clear that developing countries had shown that self-government *per se* is no substitute for good governance. He claimed further good government cannot be assured under self government but only under autocratic rule.[411]

In a nutshell, we can see that the rights discourse of Cornelius courts stood behind the nation-building project in postcolonial development. Due to his religious inclination he stood for the rights of the right wing opposition. His rights discourse failed when the

[409] Ibid at 287.
[410] *Ibid* at 288.
[411] *Ibid* at 291.

rights of the oppressed nationalities were presented. After reading his views on rights, we can see that he places rights against popular democracy. This is done under the veneer of Islamicism. Let me show more closely the manifestation of Islam with a controlled liberal democracy. This way we can understand the rights discourse as a stopgap remedy for a democratic deficit. Let me add another cultural layer to this formation.

Islam and Jirga System in Nation-building

The nation-building project under modernization in post-colonies lacked the cohesion that underpinned the West during the Industrial revolution.[412] To create this cohesion, Cornelius, in line with Liaqat's Objective Revolution,[413] used Islam. In order to accommodate local hierarchies, the Jirga (in the North West Frontier Province) or the Panchyat (in Punjab-Sindh) was kept. This is the judicial system in the mind of Cornelius under the Basic Democracy system. It is best illustrated in his essay about giving judicial

[412] Modernization was an imperialist project, while Enlightenment modernity was an indigenously European project, and contributed to the expansion of European colonization of Asia and Africa.
[413] The Objective Resolution was a part of the preamble of the Constitution and could not control the constitution. Later Zia made this Objective Resolution as the part of the constitution.

responsibility to the people.[414] He concluded that the best arrangement would be a mix of the Jirga system and Islam.

First of all, he appreciated communal or village courts as they can dispose of cases without any expense and enforce a solution that is purely punitive or a deterrent. Imprisonment is needed only in cases of serious nature or public danger. He complained that British colonizers took away this judicial responsibility of the people suddenly, rather than in stages, as had been the case in England. Later, political responsibility was returned though only partially in the Reforms Act of 1919, but judicial responsibility was never returned to the people of India, for instance, the jury system was never tried in India.[415]

The Basic Democracy system of Ayub, for Cornelius, was the only attempt that tried to return justice to the people.[416] Cornelius found an "indigenous" justice system in the Panchayat system, which offered a design of a controlled democracy. He appreciated the Jirga system in the Northwest Frontier Crimes Regulation, which he had earlier appreciated seven years earlier in the *Dosso case*.[417] At that time he appreciated the patriarchy in the Jirga system and kinship system as leading to less juvenile crimes. Similarly he found "there are restraints imposed upon the freedom of behavior of women, which are effective to lessen the need for law to intervene for the purpose of checking excesses by both." He admired the work of British legal commissions to codify these

[414] See for details, Justice Cornelius (1963), *supra* note 23.
[415]Justice Cornelius (1963), *supra* note 23 at 11.
[416] Justice Cornelius (1963), *supra* note 23 at 11.
[417] He gave the example of the Frontier Crimes Regulation enacted in 1872 by British deriving its history from Sir Olaf Caroe's book, "The Pathans."

laws.[418] But the critique of Cornelius remained, namely that the justice system was imposed upon the people and "did not derive from the life of the people themselves."[419]

Rather than looking at the culture of his own country and its people, he saw the roots of culture in the 'universality' of Islam and hence the Middle East.[420] He confused the concept of Islam with that of culture. His quest for the roots of the culture let him to "the external source of all legality", that is, *wahdat* (oneness of God) and Islam,[421] as opposed to his own claim of the law as growing out of the society. A work that inspired Cornelius to graft Islam onto the Western system of Pakistan was *Mujallah*.[422] He went to the extent of favoring the amputation of hands as a deterrent, which according to him, could be done with a small surgery instead of by cutting the hand. He appreciated the

[418] Communal courts, for him, were not at all organized. They worked in highly irregular fashion, and the conception of laws administered in these courts was not great. Four British law commissions were made with British personnel from 1834 to 1879 to codify these laws. He admired the work of British jurists who for 200 years had endeavored to figure out how the system should work. See Justice Cornelius (1963), *supra* note 23 at 8.
[419] Justice Cornelius (1963), *supra* note 23 at 8.
[420] A.R. Cornelius (1965) "Crime and the Punishment of Crime" in Braibanti (1999), 249-271at 262-63, speech delivered at the Third Commonwealth and Empire Law Conference in Sydney, Australia 27 August 1965.
[421] Justice Cornelius (1963), *supra* note 23 at 13.
[422]This was an effort of the Turkish Sultans in the 19th Century to frame a general law of the Empire on the lines of the Napoleonic Code of France. *Mujallah* was abolished after the secular revolution of Atta Turk. Cornelius thinks that this spirit is the basis of *Sharia* and is uncommon in our law as it is based on British Common law. See Justice A.R. Cornelius (1968), "Paramountcy of Islam: The Example of Majelle (Mujallah) of Turkey" in Braibanti (1999) *supra* note 61 at 272-277, addressing the Karachi High Court Bar Association Dinner, 15 February 1968; see also A.R. Cornelius (1965), "Crime and the Punishment of Crime" in Braibanti (1999) *supra* note 58 at 249-271, speech delivered at the Third Commonwealth and Empire Law Conference in Sydney, Australia 27 August 1965.

Saudi system of criminal justice administration on the ground of deterrence. He also advocated the Jirga system, amputation, and Zakat.[423]

On the other hand, the Jirga system, for Braibanti, was a blending of the elite and popular will and spheres of juridical norms.[424] The Frontier Crimes Regulation of 1901 was not a "return" to simple tribal justice, but according to Braibanti, the "institutional and normative adjustment" of tribal law and British criminal law. Here, normative content is more western then tribal. One of the problems of a written constitution based on western values for nation-building was its confrontation with indigenous values.[425] This grafting of Islam onto the justice system paved the way for a state-Islamization of Zia in the 1980s and onward.[426] Furthermore, it heavily relied on religion and clearly ignored other forms of culture. This effort seemed to rationalize the suitability of these value systems for an already existing colonial system of governance.

The Collapse of Modernization and Revisiting the Role of Law

[423] Justice A.R. Cornelius (1969), "A Plea to Introduce Zakat" in S. M . Haider, ed. *A.R. Cornelius, Law and Judiciary in Pakistan* (Lahore: Lahore Law Times Publications, 1981) at 360-71. Address in Peshawar, 2 May 1969.
[424] He based his opinion on the work of J. N. D. Anderson, L. C. Green, and S.A. de Smith. The Frontier Crimes Regulation of 1901 was not a "return" to simple tribal justice, but according to Braibanti, "institutional and normative adjustment" of tribal law and British criminal law. Here normative content is more western then tribal. See Braibanti (1999), *supra* note 58 at 95.
[425] See Braibanti (1999), *supra* note 58 at 95.
[426] Braibanti (1999) found it a process that was "relatively insulated from politics." But we will see how this tradition continued as a part of juridico-bureaucratic structure.

One of the many reasons for the downfall of Ayub was inter-elite conflict.[427] As a whole, there were three problems with Ayub's modernization that led to its collapse: 1) The concentration of wealth as patronage was confined to industrialists; 2) The benefit only went to big landlords, and; 3) Ayub did not accommodate the new middle classes in the political process.[428]Also, his policies, such as that which promoted the Green Revolution, resulted in growing class conflict. The rural inequality in terms of availability of cash, agricultural inputs, tube wells and tractorization was more visible and widespread as only the big landlords could afford these resources but not small farmers. The urban inequality was far greater than the rural one in real terms, at least in the industrial sector. The green revolution changed the landscape of social formation and gave birth to new subordinate classes, which changed the political scene. What was Ayub's explanation?

Ayub was told by Amjad Ali that the problems he faced were due to the lack of inclusion of the intelligentsia and rising prices. Ayub responded that prices seemed comparable with other countries, whereas the intelligentsia felt that there was participation only where there was a direct vote.[429] This seems nuanced and compatible with above analyses to understand political development and reflected the analyses in those days of dying capitalist modernization. The crux was popular participation and its expression under socialist modernization, which capitalist modernization under Ayub

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[427] Robert LaPorte, "Succession in Pakistan: Continuity and Change in a Garrison State" 1969 *Asian Survey* 835; also Feroz Ahmed. "Structure and Contradiction in Pakistan" in K. Gough and H. Sharma, ed.s, *Imperialism and Revolution in South, Asia* (New York: Monthly Press Review, 1973) at 179-80.
[428] Burki 1980 as quoted by Waseem (2007), *supra* note 11 at 223.
[429] Ayub-Khan Diaries, *supra* note 105 at 297, entry Jan 7, 1969.

could not control. All the key commentators: Huntington, Braibanti, Cornelius, and even Ayub, were aware of this. This realization is the key to understand the current emphasis of the centrality of law by good governance paradigm of the World Bank and institutionalists.

Law as a part of the modernization project[430] was in infancy when modernization came under crisis. This cast doubts on the role of law to the extent that Manzor asked "Is law dead?"[431] This raised concern about the role of law in political and economic development in Third World countries and hence demanded a social theory of law. Trubek's diagnosis was that the Eurocentric evolutionism and generalization in theory behind liberal legalism was a reason behind this fall.[432] Connected to this, according to him, was the creation of a strong central state under liberal legalism in modernization and

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[430] Trubek has cited an extensive list of the work in this area of law and development like Rheinstein, Problems of Law in the New Nations of Africa in old Societies and the New States: The Quest for Modernity in Asia and Africa 220 (C. Geetz ed. 1963); David, A Civil Code for Ethiopia: Considerations on the Codifications of the Civil Law in African Countries, 37 Tul. Law Rev. 187, 1963; Allot, Legal Development and Economic Growth in Africa in Changing Law in Developing Countries, JND Anderson ed. 1963; Merilet. Law and Developing Countries 60 AM. J. Int'l L. 71, 1966; Galanter, The Modernization of Law in Modernization: The Dynamics of Growth 153, (M. Weiner ed. 1966); Karat, Law in Developing Countries, 60 L. Library J. 13 1967; Friedman, Legal Culture and Social Development, 4 L. & Society Rev. 29 (1969); Friedman, on Legal Development, 24 Rutgers L. Rev. 11 (1969); Konz, Legal Development in Developing Countries, 1969, Proceedings of the Am. Soc'y Int'l L. 91; Rosenn, The Reform of Legal Education in Brazil, 21 J. Legal Ed. 251 (1969); Mendelson, Law and the Development of Nations, 32 J. OF Pol. 223 (1970); Steinberg, Law, Development and Korean Society 3 J. Comp. Ad. 215 (1971); Steiner, Legal Education and Socio-Economic Change: Brazilian Perspective 19 Am. J. Comp. L. 39 (1971); David Trubek Law, Planning and the Development of the Brazilian Capital market, Yale Law School Studies in Law and Modernization No. 3; Kozolchyk, Towards a Theory of Law in Economic Development: The Costa Rican U.S.AID-ROCAP Project 1971 L. & Social Order 681; Seldman, Law and Development: A General Model, 6L & Society Rev. 311 (1972) as cited by Trubek in Trubek (1972) "Towards a Social Theory of Law: An Essay on the Study of Law and Development" (1972) 82:1 The Yale Law Journal.

[431] Manzor, The Crisis of Liberal Legalism 81, Yale Law Journal 1032 (1972) as cited by Trubek (1972), *supra* note 243.

[432] *Ibid* at 1-2.

the wish to govern social life by purposive rules.[433] For Trubek, this is statist legal instrumentalism, looking towards bureaucratic-administrative entities. He concluded that the economy and polity merged together to some extent in a developmental state. Law in an authoritarian regime for him is not supportive of democracy, rather the opposite. It resulted in the legalization of politics and politics came in the hands of the specialized elite. As opposed to this type of functionalism, Trubek suggested that legal purposiveness itself is not enough to explain the relationship between law and politics.[434] So we need varying degrees of purposiveness in law and hence pluralist legal instrumentalism, which should be more competitive and representative. Trubek correctly critiqued the functionalism of Parsons and the problems of liberal legalism. But to accommodate increasing competiveness and representation does not solve the problem. My argument is that the problem identified by Trubek, that is that law stops representation, was in fact found as a solution by institutionalists in the aftermath of collapsing modernization. Let me expand this argument.

My argument is that 'institutionalism' (particularly legal institutions) was a response to failed modernization and its consequences, that is, increasing participation and representation. The behaviourial aspect of institutions was brought to functionalism to deal with the crisis of excessive participation. Based on Huntington's approach,[435]

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[433] As far as the relation of law and political development is concerned, he is convinced that the core conception is based on D Apter, The Politics of Modernization (1965) and S. Huntington Political Orders in Changing Societies. See Trubek (1972), *supra* note 246 at 10.
[434]Trubek (1972), *supra* note 243 at 37-40.
[435] Braibanti also claimed that Huntington (who in turn used the criteria of Ward and Rustow, Emerson, Pye, and Eisenstad) is behind his analysis. See Ralph Braibanti (1968), "The Role of Law in the Political Development of Pakistan" in Braibanti (1999), *supra* note 61 82-107 at 90.

Braibanti was worried about the declining role of law in modernization project.[436] He argued political development treated law in its institutional aspect and did not try to find functional or behavioural schools of jurisprudence. He did not agree with the dichotomy between institutions and functions and thought institutions perform functions and affect behaviour. There was a need for institutions as was emphasized by Huntington. For Braibanti, the decline of institutional study and importance of law was due to the expansion of political participation and popular sovereignty, which relies on extra-legal norms.[437] He accused social scientists of devaluing law through their involvement in social activism and physical agitation called 'confrontation politics' for immediate change. For him "agitation minimizes and eventually corrodes the vitality of law and institutions."[438]

The suppression of popular sovereignty and the restructuring of the center-periphery relation of Pakistan were the focus of Ayub's reforms. For this, as I have explained, he relied on controlled democracy and controlled participation. Ayub also noted that the attempt to bridge the gap between the state and society through the Basic Democracy system did not work. He wanted the science of social behaviour to develop first.[439] Social restraints are deeply embedded in habits of the people in accepted social

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See Samuel P. Huntington. "Political Development and Political Decay" (1965) XVII *World Politics* 386-430.

[436] *Ibid* at 84-85.

[437] In spite of the efforts of John Commons and Wesley Mitchel, Old Institutional Economics was a marginal theory until the 1960s. Until this time, Marxism and institutionalism were totally hostile. Kirsten Ford, "The Veblenian Roots of Institutional Political Economy", Working Paper No. 2011-07, Department of Economics Working Paper Series, University of Utah, at 11.

[438] Ralph Braibanti (1968), *supra* note 248 at 87-89.

[439] Ayub-Khan Diaries, *supra* note 105 at 129 , entry August 3, 1967.

arrangements. He correctly referred to these social arrangements as "institutions." For him, "Habits of thought and conduct are the most stubborn obstacles to development."[440] What can give stability meanwhile? For him, these were the constitution, law and the Supreme Court. He accepted that he could have lifted the emergency after the 1965 war was over and particularly after the judgment of the Supreme Court to insist on scrutinizing the emergency laws. He did not follow the courts and there emerged the rights cases as we discussed above. For Ayub, the Constitution was amended so that there was no need of Martial Law and emergency laws could be enough. Ayub thought about this but the law minister insisted on amending the law rather than the constitution. So the Supreme Court struck down those laws.[441] The political situation did not let Ayub amend the constitution, as the members of the parliament were scared of the victimization and terrorization of agitators.[442] The point I want to make is that Ayub shared the same values and approach as that of Cornelius towards the people. The only issue was that Cornelius believed in conditional individual liberty to avoid social unrest, which Ayub could not understand.[443] This finding was taking the shape of 'institutions' as a restraint for the participation 'crisis' as is explained below.

Braibanti called the problem of popular will and its accommodation in modernization the 'demand-conversion crisis.'[444] This needed a demand-diversion

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[440] Ayub-Khan Diaries, *supra* note 105 at 322- 323, entry July 24, 1968.
[441] This was the background of most of the "rights" cases in the Cornelius Courts.
[442] Ayub-Khan Diaries, *supra* note 106 at 331, entry Sep 21, 1969.
[443] Interestingly, after his downfall, Ayub realized that he could have accepted the idea of civil liberties. See Ayub-Khan Diaries, *supra* note 106 at 331.
[444] Burki (1998) also found that the 1960s development created a divide deepening between the social and political realms, giving birth to a crisis of political participation. Ayub's political

method. Some of this adjustment could be found in law and legal institutions. The political system tried to create ambiguity to blunt the demands of the presidential and parliamentary system in Pakistan and to create ambiguity around detention laws. The judiciary tried to decrease the ambiguity and helped the political system to adjust to demands. But Braibanti was not sure how law can increase or decrease ambiguity. Furthermore, the natural justice approach of the law as applied by the Pakistani judiciary helped in silencing these demands. In that sense, the political system is like a twelve-cylinder engine with noisy tappets and a gummed-up cylinder and the natural justice approach of law is like a foam on it covering those noises, "quieting the noises and smoothing the ride."[445] Braibanti was scared of the risks of artificially removing law from its contextual tissues in this process. The reason behind his doubt could be that law as a means of social change and engineering had not yet been set up. The Law and Society Review had not yet started.[446] The point I have tried to make is that one should not assume the central role of law in this stage of modernization, but rather that the collapse of this phase of modernization led to the idea of using law and institutions to "prevent" democracy. This was not clear to Braibanti at that time.

The Legal Community, not the Judiciary, as part of the problem

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engineering (BD system) narrowed the political base while allowing social and economic development. See Burki (1998), *supra* note 25 at 57.

[445]Braibanti (1968), *supra* note 248 at 100.

[446] Nov 1966 saw the first issue. See Braibanti (1968), *supra* note 248. This essay was originally printed as a chapter in Robert R. Wilson ed., International and Comparative Law of the Common Wealth (Durham, N.C., Duke University Press 1968.) The writer has modified the title of this essay.

For Braibanti, the legal community was probably the most powerful elite group, outside government services.[447] He wrote, "At the pinnacle of prestige were the barristers who studied in England at one of the Inns-of-Court."[448] The community also had "close identification with the ideology and techniques of modernization."[449] One more source of strength of the legal community was that most of the leading political leaders, including H.S. Suhrawardy of East Pakistan, Khan Abdul Qayyam Khan of Frontier province, Mian Mumtaz Daultana and Mahmud Ali Qasuri were lawyers. Later in the country's development, however, it was possible to have too many lawyers in politics and hence the "consequent disproportionate emphasis on legal modes of thought as antithetical to the needs of development." [450]

Chief Justice Cornelius did not like the comments of the Bar Association on political matters.[451] Ayub was also annoyed with the legal profession, which he found "overmanned" but producing poor material.[452] He looked at the judges from a military perspective.[453] He selected three judges out of 11 and found practicing lawyers

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[447] Ralph Braibanti (1963), "The Socio-Judicial Context of the Cornelius Era – 1950-70" in Braibanti (1999), *supra* note 58, 108-176 at 113. This essay was first published in Ralph Braibanti (1966) *Research on the Bureaucracy of Pakistan* (Durham, N. C. Duke University Press, 1966).
[448] *Ibid* at 115.
[449] *Ibid* at 119.
[450] *Ibid* at 118.
[451] Justice A.R. Cornelius, 'Speech at Annual Dinner of High Court Bar Association', 1969 PLD Journal, 107-112 at 110. Addressing Karachi High Court Bar Association on June 1964, in Ralph Braibanti (1963), "The Socio-Judicial Context of the Cornelius Era – 1950-70" in Braibanti (1999), *supra* note 61 at 123. This essay was first published in Ralph Braibanti (1966) *Research on the Bureaucracy of Pakistan* (Durham, N. C. Duke University Press, 1966).
[452] After interviewing judges for the West Pakistan High Court. SeeAyub-Khan Diaries, *supra* note 105.
[453] Talking to the Lahore High Court Chief Justice Inamullah 1965-67. See Ayub-Khan Diaries, *supra* note 105, Entry Feb 19, 1967.

impressive but session judges a poor lot. He wanted " justice" instead of courts of law.[454] Supreme Court Chief Justice Fazal-e-Akbar requested and asked Ayub to give administrative powers to the Supreme Court over High Courts as High Courts were delaying decisions, giving stay orders automatically, even on false allegations about works on projects, leaving Fazal-e-Akbar helpless. Ayub told Fazal-e-Akbar that he wanted to grant these powers at the time of framing the constitution but "legal pundits" found it against the independence of judiciary. Ayub then said that he made a supreme judicial body which judges are reluctant to use. They imprison and hang other people but do not lift a finger against each other.[455] Before swearing in Supreme Court Chief Justice Hamood-ur-Rahman, he had separate talks about discipline in courts and bureaucracy, and about the language of Article 98 of the constitution, which gave unlimited powers to the courts. Ayub wanted to deal with it by legislation otherwise he argued there would be utter lawlessness. But the cabinet advised him not to do it and to rather use security acts and provincial detention laws.[456]

Ayub was annoyed with lawyers because he argued that as a class they were ready to listen to any nonsense.[457] It was observed that the lawyers' role as gentlemen pursuing justice was no longer possible. The legal profession was close to a business and for some people was a "dying institution."[458] Chief Justice Anwarul Haq found lawyers

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[454] Addressing West Pakistan High Court Centenary by reception of HCBA. See Ayub-Khan Diaries, *supra* note 105, entry Feb 17, 1967.
[455] Ayub-Khan Diaries, *supra* note 105, at 264, entry Sep 25, 1968.
[456] Ayub-Khan Diaries, *supra* note 105 at 284-85, entry Nov 18, 1968.
[457] Response to Bhutto's speech. See Ayub-Khan Diaries, *supra* note 106 at 282, entry Nov 11, 1968.
[458] Waheed Farooqi, "Dimensions of the Legal Profession" (1968) XX PLD 73-78 at 78.

predominantly defended the established order, as their principal clients were mostly individuals with property and corporate owners.[459] On the opening ceremony of the High Court building, Ayub repeated the slogan that the rule of law and independence of the judiciary was not an issue but what was real was the suffering of the people due to the legal system. After the function, the Chief Justice accepted that the legal profession had become sordid. The Chief Justice gave the idea to appoint a legal advisor to guide litigants at the union council level. Ayub liked the idea but thought that lawyers will become further alienated from him.[460]

It is yet too early in the story to understand how legalism and institutionalism would pacify the rising lawyers in the years to come. In this chapter, I have argued that 'institutionalism' (particularly legal institutions) came as a response to failed modernization. In the next chapter on the 1990s, we will see that institutionalism acted as a continuity of modernization in the age of globalization.

Before moving on, let me briefly unpack my use of the terms 'capitalist modernity', 'socialist modernity,' and 'modernization theory'. At the end of the first quarter of 20th century, world politics saw two competing models of political modernity, namely socialist and capitalist models. Most anticolonial struggles came to be inspired by the experience of socialist modernity in the middle of the 20th century. These national mobilizations hoped for real democracy - economic and political - in the newly independent countries. To counter these hopes, the capitalist bloc, under the hegemony of

[459] Justice S. Anwarul Haq (JSC, as he then was) (1976), "Role of Law in a Developing Society" in Justice Anwarul-Haq, *supra* note 20 at 96.
[460] Ayub-Khan Diaries, *supra* note 105 at 258-59, Sep 24, 1968.

the U.S., theorized its own experiences into what it pushed as 'modernization theory', or the material benefits of the capitalist path to modernity.

Both models were linked to different law and development theories, as theorized by David Trubek[461]. For the socialist model, law was an instrument of a vanguard party and legitimacy came from faith in the vanguard and/or from popular participation, rather than constitutional fidelity.

It should be noted both models assumed a dissolution and transformation of pre-capitalist social and social structures.[462] Hamza Alavi, the best known Pakistani theorist, was clear that theories of "modernization" are implicitly or explicitly theories of capitalist development because they were based on the premises of capitalist societies, such as private property and mass consumption. He wished for Pakistan to see a "revolutionary change" to break with its internal feudal structures as well as from the encompassing global capitalism. He wished, in other words, for a version of a socialist modernization model.

In my dissertation, I adhere to the view that the ethos of capitalist modernity (modernization in 1950s-60s) rested on an elitist democracy which was also aimed to

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[461] See David M. Trubek, "The Owl and the Pussy-cat: Is there a future of "Law and Development "?" (2007) 25 Wisconsin International Law Journal 235..

[462] See Hamza Alavi, "State and Class Under Peripheral Capitalism" in Hamza Alavi & Teodor Shanin eds, *Introduction to the Sociology of "Developing Societies"* (New York and London: Monthly Review Press, 1982) 289-307 at 289.

actually prevent wider and deeper democracy. Law was only to support such capitalist economic and political (under)development. However, when capitalist modernization was challenged in postcolonial states in the 1970s, but the socialist bloc was also unstable, the architects of modernization theory, now chose law (working through rules and institutions) as a response to the popular challenges. Now capitalist modernization was to work through the imposition of legal, enforceable rules, where the spread of market economic and social values had failed. This was a new kind of modernization, which is pervasive to this day in our common understanding of the centrality of 'rule in law' in any democracy. Samuel Huntington and Douglas North were the architects of this new order.

With this background in place, I will next show the place of law in the socialist modernity experiment of Zulfikar Ali Bhutto of the 1970s; I will also show how law was later re-deployed upon the demise of popular aspirations for a deeper democracy.

Chapter Four

Law under Bhutto's Socialism (1970-1980s)

This chapter has three parts: in the first, the judiciary confronts popular democracy; in the second, the judiciary confronts a popular autocrat; and in the third, the judiciary restores a controlled democracy. Thus I show how the judiciary became complicit in murdering popular Prime Minister Zulfikar Ali Bhutto.

Bhutto's regime extended over two periods. In the first, he had real popular support and tried to change the basic social, economic and state structures of the country. Only when Bhutto lost popular support, did he start relying on the judiciary. The judiciary's legal formations, devised during Munir and Chief Justice Cornelius's terms, were incapable of assisting "socialist modernization", for this process required sharp structural changes and deeper popular participation. The courts also responded by offering "a rights discourse" against the democratic deficit in Bhutto's withering democracy. This process then became used against him, causing his judicial murder.

Judiciary Confronting Popular Democracy: 1968-1973

The task is to understand changing state formation during the first stage of Bhutto's rule. This requires an understanding of how 'liberals' and quasi-liberals/Islamists' (in the Cornelius tradition) looked at Bhutto's politics; how class

politics were muddled with ethno-nationalism (through the National Awami Party and the Bengali nationalist leader Mujib) and confronted Bhutto; and how class struggle with and against Bhutto tried to change class formations and state formation.

Dismantling 'Liberal' Political and Judicial Analysis of Bhutto

Political scientists have very controversial and differing opinions about Bhutto. They have found his regime to be Bonapartist, or patrimonial, but not popular. He has been variously described as fascist,[463] two faced man,[464] and patrimonial ruler[465], while his socialism has been referred to as Fabian socialism,[466] or naïve socialism.[467] For this latter tendency, Bhutto was feudal, and he destroyed Ayub's modernity, which could have made Pakistan an Asian Tiger.[468] Toor has argued that retired Supreme Court and former law minister, Justice S. A. Rahman (a close colleague of Cornelius) was an "established Cold Warrior" who actively countered Bhutto's 'indigenous' version of 'Islamic Socialism.'[469]

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[463] Eqbal Ahmad, "Pakistan: Signpost to a Police State" (1974) Journal of Contemporary Asia, online: <http://www.bitsonline.net/eqbal/articles_by_eqbal_view_13B7A1E1.htm>, last visited Feb 27, 2014.
[464] Salman Taseer, *Bhutto: A Political Biography* (London: Ithaca Press, 1979) at 193.
[465] Gerald A. Heeger, "Politics in the Post-Military State: Some Reflections on the Pakistani Experience" (January 1977) World Politics 254-61.
[466] Shahid Javed Burki, "Is Pakistan's Past Relevant for Its Economic Future?" in Craig Baxter & Charles Kennedy, ed.s, in (1998) *Pakistan: 1997*, (Boulder, Colorado: Westview Press, 1998) 17 at 18.

[467] Shahid Javed Burki, *A Revisionist History of Pakistan* (Lahore: Vanguard, 1998) at 69.
[468] *Ibid* at 71-72.
[469] A. K. Brohi was also involved who was a known jurist and prosecutor in *Pindi Conspiracy case*. Karimbaksh Allahbuksh Brohi (A. K. Brohi), "Reflections on Islamic

For Musharraf, Bhutto was a despotic leader and the worst thing that had yet happened to Pakistan.[470] Mushahid and Akmal, meanwhile, saw populism, liberal democracy, and feudal despotism in Bhutto.[471] It is perhaps not surprising that intellectuals, like Newberg, also did not accept that the popular elected government of Bhutto resembled democracy, even in the first years.[472] Hamid's analysis of Bhutto and his legacy shows how the Cornelius tradition looked at Bhutto. While admiring the brilliance of Bhutto, he also found arrogance, impulsiveness, and overarching ambitions.[473] Supreme Court Chief Justice Anwarul Haq expressed these views clearly after his appointment as Chief Justice by Zia. He described a stress and strain as placed on judiciary by the Bhutto regime.[474] Khalid M. Ishaq also hammered the "bureaucracy ridden welfare state" which was causing greatest injustice under the cover of secrecy.[475] Chief Justice Sajjad Ali Shah evinces surprise that even being a barrister himself and with more than half of his ministers being lawyers, Bhutto could not help the judiciary get a better deal.

These views may be justifiable if Bhutto's regime is viewed in totality. But if we break his period of governance into two, we can see that he had real popular support at

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Socialism" in Haider Mehdi, ed, *Essays on Pakistan* (Lahore: Progressive Publishers, 1970); also Karimbaksh, Allahbuksh Brohi (A. K. Brohi), "Iqbalian Ijtihad and the Concept of Islamic Socialism" (April 1968) Iqbal Review as cited by SaadiaToor, *The State of Islam: Culture and Cold War Politics in Pakistan*, (London: Pluto Press, 2011).

[470] Pervez Musharraf, *In the Line of Fire: A Memoir* (New York: Free Press, 2006) at 58.

[471] Mushahid Hussain & Akmal Hussain, *Pakistan: Problems of Governance* (Lahore: Vanguard, 1993) at 125.

[472] Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi: Cambridge University Press, 1995) at 120.

[473] Hamid Khan, *Constitutional and Political History of Pakistan*, 2nd ed (Karachi: Oxford University Press, 2009) at 340.

[474] 1977 PLD, Journal at 253-58.

[475] Khalid M. Ishaq, "Independence of Judiciary" (1975) PLJ 5 at 53.

first. We can contrast the changing nature of law and legal institutions and their design and understanding during the two periods. My concern is to bring to light the nature of the politics Bhutto was representing (which was popular democracy), and how the tools of the Cornelius tradition he used to support this political development did not have the capacity to keep pace.

The rising class and liberation struggles

The last chapter discussed the nature of the forces rising against Ayub and his consequent downfall. These were middle class forces that offered rights and civil liberties discourses. But 'subaltern classes' problems were not solely problems of formal rights. The policies of Yahya Khan (henceforth, "Yahya") reflect how he tried to counter the imbalance created by capitalist modernization of Ayub. He promoted 'social justice and egalitarianism' to prevent concentration of wealth and hence promulgated a Control and Prevention Ordinance 1970.[476]

From Ayub's diary, which covers the period from the rise of Bhutto (1968-1970) to the 1971 liberation of Bangladesh, we can recognize the class forces of the time.[477] Ayub pointed out his fear of rising socialism as seen in fights between Suharto and Adam

[476] Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asian Partnership-Pakistan, 2008) at 70.

[477] Craig Baxter, ed. *Diaries of Field Marshal Mohammad Ayub Khan: 1966-1972* (Karachi: Oxford University Press, 2007.

Malik; it meant for him that communism could take over even in a Muslim country.[478] He pointed out Red Shirts were creating problems in the Air Force.[479] He showed a fear of communist takeover by Bashani,[480] who had reached the countryside. He was worried about the students and unions taking over.[481]

The problem of the rise of communism was the 'fanatic' belief in equality, freedom from exploitation and foreign domination. [482] The landed elite came to Ayub, as well as the industrialists Adamjees and Hyesons.[483] He remarked that they were shaky.[484] The actions against them were demoralizing,[485] particularly Yahya's reforms against civil bureaucracy as, he stated, we should not be deprived of intelligent people.[486] Pakistan credit rating had gone down, a businessman told him. The only thing Ayub liked was Yahya's warning to the politicians while giving Legal Framework Order[487] but he found it to be late.[488]

The second major contextual consideration was the rise of the independence movement for Bangladesh. On the political scene of former East Pakistan, there were two political tendencies. The first was headed by Suharwardy and later Mujib of the Awami

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[478] *Ibid* at 129.
[479] *Ibid* at 143, entry Sep 1967.
[480] *Ibid* at 328, entry Sep 8, 1969.
[481] *Ibid* at 333, 337, 343, entries of October02, 07, and Dec 2, 1969; also at 417-418
[482] *Ibid* at 322-323, entry July 24, 1969.
[483] *Ibid* at 326, entry Aug 30, 1969.
[484] *Ibid* at 359, entry Jan 26, 1970.
[485] *Ibid* entry May 25, 1969.
[486] *Ibid* at 347, entry Dec 8, 1969.
[487] It laid down the basic principles for the future constitution of Pakistan. *Legal Framework Order*. 1970. President's Order No. 2 of 1970, PLD 1970 Central Statutes 229.
[488]See Ayub-Khan Diaries, *supra* note 15 at 374, entry Mar 28, 1970.

League. Their base was the 'Sardari lineage' of rich landlords who were capable of controlling the votes until the independence of Bangladesh in 1971.[489] In the East Pakistan provincial elections of 1954, their party, the United Front, swept 299 seats leaving 10 seats for the Muslim League out of 309. The success of the Awami League in the 1970 election was due to the fact that the rural elite jumped on the bandwagon of the Awami League.[490] But, since the early 1950s, there was also a movement for the Bengali language led by grassroots Left cadre. The movement echoed with the ideology of social justice and was marked with consciousness of demands of workers and peasants.[491] This second tradition also contained the rural populist tradition of Bengali peasants led by Maulana Bashani. They were intertwined in the Bengali language movement but remained distinct.[492] After the crackdown by the Pakistani army, the populist Marxist cadre in the first tradition joined the armed liberation struggle. That made India intervene, "to forestall the liberation of Bangladesh by popular forces and to install the Awami League elitist leadership in power."[493] The Marxist Left in East Bengal, according to Alavi, was on the forefront of united armed liberation struggle in Bangladesh, along with sections of the Left in Awami League.[494]

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[489] Hamza Alavi, "The State in Post-Colonial Societies: Pakistan and Bangladesh" (1972) 74 New Left Review 59at 66.
[490] *Ibid* at 79.
[491] Hamza Alavi, "Bangladesh and the Crisis of Pakistan" (1971) The Socialist Register 289-317 at 310
[492] Alavi (1972), *supra* note 27 at 77.
[493] Alavi (1972), *supra* note 27 at 80.

[494] Alavi (1971), *supra* note 29 at 294.

Let us look at Bhutto's views on this movement. He found the Bengali nationalist leader Mujib to be "a pro-western moderate" backed by Big Business, and someone who gave lip service to socialism, and did not attack capitalism but the people of West Pakistan.[495] The support of the establishment for Mujib, according to Bhutto, reflected its prejudice against the Left.[496] Interestingly Bhutto did not use nationalist phrases but spoke instead to the economic interests at play. Later we will see that Bhutto's enemy came to be ethno-nationalism itself. Meanwhile, U.S. anxiety had reached such an extent that Yahya had to dispel the impression of rising communism, and Bhutto came to the U.S. before the elections.[497] Ayub himself, as seen through his entries in his diary, was less concerned with Mujib than Bashani (the working-class Maoist leader from East Pakistan).

General Yahya Pacifying Popular Upsurge and Asma Jilani case

General Ayub left the presidency in 1968 to be replaced by the Chief of the Army Staff, General Yahya, who became the third President of Pakistan. Yahya immediately purged 300 high level bureaucrats[498] and curtailed the powers of judiciary.[499] Through a

[495]Zulfikar Ali Bhutto, *The Great Tragedy* (Karachi: Pakistan People's Party Publication, 1971) at 13-14.
[496] *Ibid* at 60.

[497] While Yahya Khan visited the U.S. for the U.N. special session of the General Assembly. See Ayub-Khan Diaries, *supra* note 15 at 410, entry Oct 29, 1970.
[498] Charles H. Kennedy, *Bureaucracy in Pakistan*, (Karachi: Oxford University Press, 1988) at77.
[499]*Jurisdiction of Courts (Removal of Doubts) Order*, 1969, Presidential Order 3 of 1969, 1969 PLD Central Statutes 119.

presidential order, judges of the superior courts were told to declare their assets before the Supreme Judicial Council on a prescribed form.[500] Justice Fazle Khan of Lahore High Court resigned and Justice Shaukat Ali was removed from the service on the recommendation of Supreme judicial Council.[501] Yahya brought back the Cornelius Report of 1962 (which was critical of the old type of bureaucracy) and published it. Similarly, he appointed Cornelius to be in charge of the Pay Commission. He agreed to democratic institutions, political parties and elections.

Though Yahya's coup was similar to Ayub's in term of the continuity of the power structure, and though it was also bloodless,[502] it was not tolerated by the juridico-bureaucratic structure, which was quite comfortable with Ayub. Yahya instituted a parallel judicial structure which the courts also vigorously opposed. Yahya established special and summary military courts and any appeal in High Courts and the Supreme Court could not override the orders of these courts .[503]

Yahya had to face a humiliated departure due to the defeat of Pakistan in the 1971 war, which led to the founding of independent Bangladesh. The *Asama Jilani* case[504] was the judicial response to this major political development. In it, one sees a confused understanding of the political shifts under way. Supreme Court Chief Justice Hamoodur

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[500] *Judges (Declaration of Assets) Order*, 1969, 1969 PLD Central Statutes 119.
[501] *President v Justice Shaukat Ali*, 1971 PLD S. C. 585.

[502] Mohammad Waseem, *Politics and the State in Pakistan*, 3rd ed (Islamabad: NIHCR, 2007) at 234
[503] *Jurisdiction of Courts (Removal of Doubts) Order*, 1969. President's Order 3 of 1969. PLD 1969 Central Statutes 119.
[504] *Asma Jilani vs Government of the Punjab*, 1972 PLD S.C. 139.

Rahaman was the head of the commission to investigate "the loss of Dhaka". He himself was from the former East Pakistan. He concluded that Yahya was a usurper of Ayub. The decision was not made in favour of the new democracy under Zulfikar Ali Bhutto, but to prove that Bhutto himself snatched power from a dictator. In order to reject Martial Law, the court found an alternative law in *Sharia*.

The 'Cornelius tradition' was facing a new situation. Newberg has claimed that the courts were "unprepared" for Bhutto.[505] I disagree. They were fully ready to confront Bhutto but *Asma Jilani* and *Ziur Rahman* cases were indicative of the transitory nature of politics, which was marked with popular democracy. Courts, trained and equipped under the juridico-bureaucratic mindset were cautious, reluctant and could not understand the changing politics and what legal tools were required. Most of the jurists and political scientists alike did not agree that Bhutto's democracy was a popular democracy or one they could support.

Law and Democracy for Bhutto: Contrasting the Approach of Bhutto with the Cornelius-Ayub Juridicial-Bureaucratic Structure

Bhutto was appointed as Minister of Commerce by President Sikandar Mirza after the *coup d'etat* of October 7, 1958 by General Ayub. In January 1960 he became the Minister of Information and then the Foreign Minister. After leaving Ayub's cabinet, he

[505] Newberg, *supra* note 10 at 123.

attacked the Basic Democracy system as having nothing democratic in it,"[506] calling its supporters as "Brahmins of this country."[507] Bhutto attacked the classes on which Ayub and his juridico-bureaucratic structure relied upon and appealed to those of who Ayub was scared.

A brief review of Bhutto's thought helps locate his stance as clearly distinct from any that had preceded him, except possibly Jinnah. Bhutto found Western democracy as responsible for considerable troubles left behind in decolonized countries. He argued that leaders of newly independent countries should have started with a clean slate and evolved a system from below. He was against elitist democracy and believed the right to vote should not be based on property or education.[508] He wanted a substantive democracy as opposed to a formal one and commented that democracy cannot arise out of inequality like that which existed in India.[509] For him, economic objectives could not be abandoned. Furthermore, he argued, "we want democracy as well as socialism."[510] He wanted a

[506]Zulfikar Ali Bhutto (1968), "Role of Women" in Hamid Jalal & Khalid Hasan, ed.s, *Zulfikar Ali Bhutto (1969): The Politics of the People: Awakening the People Vol Two 1966-69* (Lahore: Classic, 1969) 51 at 55. Address to PPP Women Workers Lahore, January 29, 1968

[507] Zulfikar Ali Bhutto (1968), "Starting with a Clean Slate" in Bhutto (1969), *supra* note 44, 43 at 46. Address to the Muzaffargarh Bar Association, January 17, 1968.

[508] Zulfikar Ali Bhutto (1968), "Political Situation in Pakistan" in Bhutto (1969), *supra* note 44, 89 at 91. A Pamphlet, April, 1968.

[509] Zulfikar Ali Bhutto (1967), "My Debut in Journalism" in Bhutto (1969), *supra* note 44, 22 at 28. The Pakistan Observer, Dacca, 12 January, 1967.

[510]Zulfikar Ali Bhutto (1968), "The Struggle Continues" in Bhutto (1969), *supra* note 44, 186 at 193. Speech at a Meeting, Peshawar, November 5, 1968.

socialist economy,[511] with socialist modernization as "objective sciences" like mathematics.[512]

Distancing himself from Cornelius and Ayub's coup tradition, he stated that the *coup d'etats* in Pakistan were not revolutions "as those who were ousted were brought back."[513] Revolution and *coup d'etat* are different for him, with revolution having a "motor of ideals in it." A coup gave the impression that it has solved the problem but it did not. So instead of the status quo or coup, he argued we should be in favour of revolution,[514] and revolution could produce socialism as only two systems were possible in our age, either capitalism or socialism.[515]

Bhutto also saw the importance of delinking center periphery-relations for the countries of Asia and Africa;[516] and the importance of connecting with the other nations of the world including the communist, Islamic or emerging nations of Asia, Africa and Latin America. Bhutto was opposed to the closed western bloc of Ayub, and the Islamic world of the Cornelius tradition. Even during his time with Ayub, he had understood the

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[511] Zulfikar Ali Bhutto (1968),"Starting with a Clean Slate" in Bhutto (1969), *supra* note 44, 43 at 45. Address to the Muzaffargarh Bar Association, January 17, 1968.
[512] Zulfikar Ali Bhutto (1968), "Starting with a Clean Slate" in Bhutto (1969), *supra* note 44, 43-50 at 47. Address to the Muzaffargarh Bar Association, January 17, 1968.
[513] Zulfikar Ali Bhutto (1968) "A New Class of Landlords" in Bhutto (1969), *supra* note 44, 80 at 82. address at Larkana Bar Association, March 12, 1968.
[514]Zulfikar Ali Bhutto (1968), "Political Situation in Pakistan" in Bhutto (1969), *supra* note 44, 89 at 91. A Pamphlet, April, 1968
[515]Zulfikar Ali Bhutto (1968), "Revolution Brewing" in Bhutto (1969), *supra* note 44, 159 at 160. Speech at Ismalia, Peshawar, October 28, 1968.
[516]Zulfikar Ali Bhutto (1965),"Asian African Solidarity" in Zulfikar Ali Bhutto (1965) *The Quest for Peace: Selection from Speeches and Writings 1963-65* (Lahore: Classic, 1965) 31 at 38. Address at the Afro-Asian Seminar, Lahore, Feb 11 1965.

need to not unnecessarily extend principles of attachment to the U.S. in lieu of China and the U.S.S.R.[517] Yet, he claimed to also not wish to delink from the West.[518]

Bhutto found law to be a "great profession" but was not himself passionate about it.[519] He reminded the Bar that there was no arrogance in him when he addressed them as a minister and that he did not interfere with any bar association or judiciary. He never called any judge as a Minister and even refused, if a judge wanted to meet him. He criticized the attempt to intimidate the bar and told the judges never to deliver predetermined judgments.[520] He warned them to mend their ways as one day they had "to appear before the court of the people."[521]

His view was that, in 1954, people were not aware of their rights, leadership was weak, and resistance was just a writ petition (in the *Moulvi Tamizzuddin* case). But it was not possible to destroy dictatorships by filing writ petitions. The overthrow of Ayub was by the people, and not a writ petition, and was a warning for the dictators of the future.[522] He noted that the economic successes of the U.S. were because of vast resources and a small population. Pakistan has a large population and fewer resources, so the U.S. model

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[517] Anwar Hussain Syed, *The Discourse and Politics of Zulfikar Ali Bhutto* (London: Macmillan, 1992) at 108.
[518] *Ibid* at 37.
[519] Zulfikar Ali Bhutto (1967), "My Debut in Journalism" in Bhutto (1969), *supra* note 44, 22 at 26. The Pakistan Observer, Dacca, 12 January, 1967.
[520] I think Cornelius appreciated the point of view of the judges. These comments were not contempt of court for him, or even if it was, the truth was more important. See Zulfikar Ali Bhutto (1968), "A New Class of Landlords" in Bhutto (1969), *supra* note 44, 80 at 81-82. Address at Larkana Bar Association, March 12, 1968.
[521] Not the Cornelius court. Zulfikar Ali Bhutto (1968), "The Government" in Bhutto (1969), *supra* note 44, 119-113. address at Sind Convention, Hyderabad, September 21, 1968
[522] Zulfikar Ali Bhutto (1969). "Why Ayub Fell" in Bhutto (1969), *supra* note 44, 232 at 234-35. Address at the District Bar Association, Hyderabad, June 26, 1969.

could not work.[523] His distance from Cornelius was an indication of his disagreement with this juridico-bureaucratic structure and its institutional arrangements. Cornelius served in Yahya's regime as the Minister of Law. When Yahya requested Cornelius and G. W Chaudhry of East Pakistan to draft a new constitution in 1971, Bhutto, then Foreign Minister and President, objected to this assignment and called Cornelius a "Dhimmi' who could not write a constitution of a Muslim State.[524]

We learn from Bhutto's speeches, that he thought it was an inalienable and fundamental right for people to participate in governing.[525] People can surrender some of their rights for a collective purpose. A regime can win the cooperation of the people if individual rights are protected, or, in an ideological state where civil liberties are suspended until the achievements of high ideological objectives/ends are met. An authoritarian system can work, but the people should believe in the objectives so that they can sacrifice for their rights.[526] He rejected the West's criticisms of the leaders of poor countries.[527]

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[523] Zulfikar Ali Bhutto (1968), "Why People's Party?" in Bhutto (1969), *supra* note 44, 153 at 154. Speech at Party Meeting, Peshawar, October 27, 1968.

[524] But after that, Cornelius refused to support Bhutto for seeking support from the Christian countries for the release of prisoners of war in India. See Ralph Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Karachi: Oxford University Press, 1999) at 18.

[525] Zulfikar Ali Bhutto's address to Nawabshah Bar Association, February 21, 1968 in Bhutto (1969), *supra* note 44, 161 at 63.

[526] The examples are when Nehru faced famine, he asked for cooperation from the people but he did not accept terms against India's national interest. Same was Nasser facing a ban on the supply of wheat. See Zulfikar Ali Bhutto (1967), "On Accusation by the Ayub Regime" in Bhutto (1969), *supra* note 44, 38 at 39. address to Young Lawyers' Circle, Lahore Feb 25, 1967.

[527] Zulfikar Ali Bhutto (1965), *"The Role of Great Powers"* in Bhutto (1969), *supra* note 44, 24 at 25. Address to the Foreign Press Association, London, May 6, 1965.

Bhutto also departed from Ayub and the Cornelius tradition in his view against the imposition of Islam. Ayub should not have suppressed indigenous cultures, rather, Bhutto argued, he should have "encouraged the flowering of a variety of cultures within our state to enrich the development of a synthesized national culture."[528] Bhutto emphasized the need of synthesis of modernity and tradition[529] as opposed to the grafting of Islam on liberalism. In fact,his political style indigenized and nativized Pakistani politics through the participation of people for the first time in it.[530]

In other words, Bhutto's perception of the role of politics was totally different than Ayub's. Whether Bhutto believed it or not, Bhutto was responding to people's restlessness, the subaltern classes (a mix of class and ethno-nationalist groups[531]), who gradually rose beginning from mid-1960s. Let us look now at the role of law and people in the new socialist modernization program.

Bhutto's Ideas in Action

Bhutto, joined by J.A. Rahim, wrote the founding document of a new party, the Pakistan People's Party (PPP), in English in 1967.[532] Dr. Mubahsar Hassan and Hanif Ramay wrote the Urdu version. The document criticized Ayub's model of development,

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[528] Bhutto (1971), *supra* note 33 at 3.
[529] Bhutto (1965), supra note 54, 31 at 39. Address at the Afro-Asian Seminar, Lahore, Feb 11 1965.
[530] Hussain-Syed, *supra* note 55 at 254.
[531] S. Akbar Zaidi, *Issues in Pakistan's Economy*. (Oxford: Oxford University Press, 2005) also Khalid Ben Sayyed. *Politics in Pakistan: nature, and direction of change* (New York: Praeger,)
[532] Foundation documents of the Pakistan People's Party, Lahore, November 1967.

stating that its origin was Anglo-Saxon and that it neglected heavy industry and had resulted in the decline of the quality of life for workers, students, and peasants. Bhutto argued that socialism alone could restore Pakistan through nationalization and land reforms. The 1970 Election Manifesto had even more classic Left rhetoric than the founding document. These incurred a uniformly strong negative response from the civil and military officers as well as the propertied classes.[533]

The 1970s elections, the campaign and its results, are indicative of Bhutto's wide popularity. People were approached directly during campaigning, which was unique. The supremacy of the people, not the supremacy of the constitution, was a recurring theme in Bhutto's speeches. Additionally, the election results brought into political positions little-known lawyers, engineers, and other political novices. In Sindh, some large landowners were nominated on the condition they would respect the PPP platform.[534] Horizontal solidarities among subordinate classes was struck based on class consciousness. The party furthermore responded to regional issues, recognizing that in Punjab, class issues were dominant, whereas in Baluchistan, Sindh and East Pakistan, ethno-nationalist discrimination were serious concerns. Only in the NWFP did the prior political regime hold sway.

[533]Aasim Sajjad Akhtar (2008) Overdeveloping State: The Politics of Common Sense in Pakistan, 1971-2007. (Submitted to SOAS, University of London for the degree of PhD).
[534] Hussain-Syed, *supra* note 55 at 70.

Asma Jilani case to Zia-ur-Rehman case: Bhutto's Transition for structural changes and Reluctant Judiciary in Cornelius Tradition

In 1971, Bhutto inherited a smaller country (as Bangladesh had now seceded) and "a baffled people".[535] He emphasized economic change more than political change so as to break with economic inequality.[536] Pakistan was forced to "squeeze centuries into decades" but not through a "pernicious doctrine"[537] of functional inequality[538], rather through economic strength as there is no power without economic strength.[539]

Within days of Bhutto assuming office, passports of 22 business families were confiscated and two main industrialists, Ahmad Dawood and Fakhruddin Valika, were shown handcuffed on TV. The landed class now faced land reforms based on principles of rationalization. On March 10,[540] and later on March 12, 1972, 1300 civil servants[541] were dismissed, retired or reduced in rank. These actions were not reviewed in any court of law. Bhutto retired 43 top rank officers from three armed forces in four months. On March 4, 1972, Commander-in-Chief of the Army Lt. General Gul Hasan and Air Marshal Rahim, the head of the Air Force, were dismissed. Bhutto brought the command structure of the military under the Prime Minister. He declared any subversion of the constitution as high treason in the 1973 constitution. Bhutto's labour, education, and

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[535] Zulfikar Ali Bhutto, *The Third World: New Directions*, (London: Quartet Books, 1977) at 14.
[536] *Ibid* at 20.
[537] *Ibid* at 22.
[538] *Ibid* at 22.
[539] *Ibid* at 86.
[540] *Martial Law Regulation 114*, 1972, Removal from Service (Special Provisions) Regulation No. 114. 1972 PLD, Central Statutes.
[541] 572 from Sindh, 251 from Punjab, 109 from NWFP, 393 from center, none from Baluchistan

health reforms became directed by rational policies.[542] Labour policy was the continuity of Noor Khan's policy.

Bhutto began to get tremendous resistance from the power structures. Provincial assemblies gave concessions to landowners, making land reforms blunt. Landlords started entering the PPP. As a result, the eventual land reforms did not hit the landed class. Martial Law was not yet lifted and the issue of detention of political opponents of Bhutto came before the courts. Lahore High Court dismissed the case challenging the detention of Malik Ghulam Jilani, by relying on the *Dosso* case and declaring that it had no jurisdiction under Jurisdiction of Courts (Removal of Doubts) Order 1969[543] of Yahya's regime. Through this Order, the jurisdiction of the courts was ousted. A similar decision was made in the Sindh High Court in a case challenging the detention of Altaf Gohar. Both cases came before the Supreme Court in an appeal. The Supreme Court got a chance to reflect on *the doctrine of necessity* and Kelsen's theory and found it to be an inappropriate law. The Court also declared that as Ayub had no power to hand over power to Yahya under the Constitution of 1962, Yahya had illegally usurped the power, Provisional Constitutional Order 1969[544] was illegal, and hence the jurisdiction of the courts was not ousted.[545]

Bhutto lifted Martial Law on April 20, 1972 after putting an interim constitution in place. This constitution was parliamentary, with the president as supreme commander

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[542] Waseem (2007), *supra* note 40 at 302.
[543] *Jurisdiction of Courts (Removal of Doubts) Order*, 1969, President's Order No. 3 of 1969, PLD 1969, Central Statutes 119.
[544] *Provisional Constitution Order*, PLD 1969 Central Statutes 41.
[545] *Asma Jilani v. Government of the Punjab*, PLD 1972 S. C. 139.

of the forces. The President could promulgate ordinances only when the National Assembly was not in session. In the first six months, between December 1971 and May 1972, Bhutto had controlled the potentially hostile centers of power.[546]

This is the context that gave birth to the *Zia-ur-Rahman* case. Bhutto arrested his political opponents - Mukhtar Rana (member of National Assembly and a very popular mass leader), Altaf Hussain Qureshi and Dr. Ijaz Hussain Qureshi (editors and publishers of *Urdu Digest* respectively), and Majib-ur-Rahman Shami (editor of the weekly *Zindigi*)[547]. The arrests were challenged through several writs filed by the relatives in the Lahore High Court and came for hearing on July 6, 1972. The judgment was challenged in the Supreme Court by the government and was heard on January 1973.[548] The Attorney General came out very strongly against the attempt of the judiciary to interfere in the acts of the executive in the guise of Objective Resolution. As in the judgment, a judge in Lahore High Court had tried to declare the Objective Resolution as "supra constitutional instrument which is unalterable and immutable." He further commented that the National Assembly has no power to enact any constitution or law which is indirectly contravenes any of the provisions of the Objective Resolutions. "The courts in Pakistan being repository of judicial power, as a trustees of the people and the Almighty Allah, shall not, and have no justification to accept any tinkering with it by anybody including any assembly."

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[546] See Hussain-Syed, *supra* note 55 at 119.
[547] Right wing leaders.
[548] *The State v. Ziaur Rahman*, 1973 PLD 1973 S. C. 49.

An elected assembly found this judgment to be a clever attempt to undermine the legislature. The debate included the view that the judiciary cannot question the policy of the government nor could it strike down the constitution. Substantive provisions of the constitution could not be controlled by its preamble or even by the Objective Resolution.[549] The argument was made that the Objective Resolution is still just a resolution and the judiciary has no power to use it to declare an organic law of the country, that is the constitution. The Supreme Court clearly accepted that it has no power to strike down any provisions of the constitution, but it can declare legislation unconstitutional. In this way, the court accepted its limits and came to the conclusion that judicial power is not superior to the legislative power.

The judiciary also accepted that Objective Resolution is not the *grund norm* of the constitution, but the *grund norm* is the doctrine of legal sovereignty accepted by the people of Pakistan and consequences would flow from it.[550] The judiciary commented that it is not a representative as 160 out of 300 members from East Pakistan were not present. The court decided the Interim Constitution was not a valid document and the 1962 Constitution was still in place, relying on *Asma Jilani* case. The court went further and attacked the Validation Clause of the Interim Constitution (Articles 280 and 281) through which the jurisdiction of the courts were ousted. The courts insisted to still adjudicate upon on the acts done *corum non judice* or without jurisdiction or *mala fide*.

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[549] The Objective Resolution was the part of the preamble of the Constitution.

[550] In 1985, Zia made the Objective Resolution as a substantive part of the constitution. My position is that it was to bring the legal and constitutional arrangement and state formation in line with Cornelius tradition to halt the progress of popular democracy.

Later, Bhutto amended Article 281 and inserted an expression "not withstanding any judgment of any court," to counter *Ziaur Rahman case* judgment.[551]

To sum up, the *Asma Jilani* case decided that Military Martial Law authority acquired a constituent dictatorship. This was very weakly defended by Awami Martial Law of Bhutto "who really wanted to shift reliance to the impending exercise of popular sovereignty."[552] The doctrine of necessity was used to validate the transition to the constituent dictatorship of Bhutto's elected Assembly and to declare "the legitimacy of the present government is thus beyond the shadow of doubt," as per Justice Yaqoob Ali. There was no challenge before the Supreme Court.[553] Retired Chief Justice Munir who was condemned for his use of the doctrine of necessity asked the courts, in his comments, about the *obitar dictum* which gave legitimacy to Bhutto. Then he asked if Dosso's case was rejected, and declared that a regime established in consequence of a *coup d'etat* as a Revolution is not a legitimate law-giving body, therefore the 1962 constitution that the courts derived their power in the *Asma Jilani* case was invalid. He further asked from where Bhutto derived the power to become Chief Martial Law Administer-CMLA and put forward an interim constitution, and pointed out that an assembly charged with a duty

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[551]*Constitution 6th Amendment Order,* 1973. President's Order 3 of 1973. 1973 PLD, Central Statutes, 418.
[552]Dieter Conrad, "In Defense of the Continuity of Law: Pakistan's Courts in Crisis of State" in Wolfgang Peter Zingel, Stephanie Zingel, & Ave Lallemant, eds, *Pakistan in the 80s: Law & Constitution* (Vanguard: Lahore, 1985)123-207 at 133.
[553]Jan Mohammed Dawood, *The Role of Superior Judiciary in the Politics of Pakistan*, Karachi: (Royal Book Company, 1994) at 35.

to form a constitution could only create a constitution for West Pakistan. *Ibid* as cited by Dawood from Highways & Byeways of Life at 224.[554]

The Interim Constitution was passed on April 17, 1972, came into in force on April 21, 1972 and did not derive its validity from the 1962 Constitution. On April 21, the Supreme Court had held that it was applicable on April 20, 1972 because in appeals hearings, Supreme Court Chief Justice Hamoodur Rahman was answering the question raised by the detainees in appeals regarding whether the High Courts had jurisdiction under Article 98 of the Constitution of 1962.[555] So the Interim Constitution became recognized as a successful revolution in *State vs Zia-ur-Rehman* and it "had been validly passed by a competent body."[556] This was to be a temporary victory.

Socialist development and the judiciary

Bhutto put the judiciary "in its place" through his plan of socialist modernization. Bhutto nationalized basic industries through the Economic Reforms Order, 1972, dated January 2, 1972.[557] The Supreme Court and High Courts could not question any of the provisions of this constitution and no injunction could be granted against anything done under this Order. The Land Reforms Regulation 1972 was promulgated on March 11, 1972, which also barred the courts from challenging its provisions and injunctions against

[554] *Ibid* as cited by Dawood from Highways & Byeways of Life at 224.[554]
[555] PLD 1972 SC 158.
[556] Conrad, *supra* note 90 123-207.
[557] *Economic Reforms Order*, 1972, President's Order I of 1972. 1972 PLD, Central Statutes, 86.

any act under this regulation.[558] The management of schools and colleges was taken over under another Martial Law Regulation and the jurisdiction of courts was completely ousted.[559] In order for the implementation of his socialist restructuring of the economy, Bhutto also reshuffled the bureaucracy by the Removal from Service Regulation dated March 10, 1972.[560]

Bhutto's new 1973 constitution was socialist-oriented in its nature. The relevant clauses were Article 3, which laid down the principle of "from each according to his ability" to each "according to his work"; Article 253, which was against concentration of wealth and put a limit on property; and Article 34 gave full participation of women in all spheres of life. The Constitution also provided a right to property under Article 23, subject to restrictions for many social objectives without fair compensation.

The courts could not grasp that the procedure of the law was no longer supreme, but the popular will was. There was no need to check every legislative action by the judiciary as the legislature was popular. The judiciary did not have to look for an excuse to intervene against executive actions. There was a need to rethink the purpose of the government, the new emerging foundations of the state and the place of legislature in it.

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[558] *The Land Reforms Regulation*, 1972 Martial Law Regulation No. 115, 1972 PLD, Central Statutes 388.

[559]*Martial Law Regulation No. 118*. 1972 PLD, Central Statutes 441. The courts were not happy with this and then in 1987 reacted to this nationalization. In *Board of Foreign Mission of Presbyterian Church v Govt of the Punjab*, 1987 PLJ 1987 S. C. 464, the SC found that in the nationalization of the high quality education provider institutions only the management of the schools is transferred and not the property.

[560]*Removal from Service (Special Provisions) Regulation No. 114*, 1972 PLD 1972 Central Statutes.

But class was a new idiom or term of art for the judiciary. I have shown this bias in Chief Justices Munir's and Cornelius's courts. This prejudice continued in later superior courts during and after Bhutto. For the judiciary, class struggle and class consciousness were a "class prejudice" and the best way to get rid of this class prejudice was to legislate like England and achieve a welfare state.[561] Chief Justice Nasim found the economic reforms of Bhutto "radical to the extreme."[562] Chief Justice Sajjad Ali Shah called socialist economic reforms of Bhutto as "extreme measures" to resuscitate the economic life of the country.[563] Chief Justice Ajmal Mian (as a Chief Justice of Baluchistan High Court) started visiting prisons in mid 1980s. While on such an inspection tour of a Qazi Court of District Turbat, he saw a young man with scarf around his neck who entered the court, did not greet anyone and did not seek permission from the Qazi. Qazi told Chief Justice Ajmal that he was a court clerk and one of many young people from Baluchistan who went to the U.S.S.R. "illegally" for further education and were "taught" communism. Chief Justice Ajmal admonished the young clerk and "tried to impress upon" the young clerk that he should be respectful to the elders and to the courts.[564]

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[561]Justice Anwarul Haq (1964), "You can Legislate against Prejudice" in S. Anwarul Haq CJSC (Ret., as he then was) *Revolutionary Legality in Pakistan* (Lahore: Pakistan Writers' Co-operative Society, 1993) 357 at 359.

[562] Justice Nasim Hassan Shah CJSC (Ret., as he then was), *Memoirs and Reflections* (Islamabad: Alhamra Printing, 2002) at 166.

[563] Justice Sajjad Ali Shah CJSC (Ret. As he then was), *Law Courts in a Glass House: An Autobiography* (Karachi: Oxford University Press, 2001) at 57.

[564] Justice Ajmal Mian CJSC (Ret. As he then was), *A Judge Speaks Out: An autobiography* (Karachi: Oxford University Press, 2004) at 80-81.

I wish to ask here, why did Bhutto take this approach? I suggest that Bhutto merely honoured the promises of the Foundation Document.[565] For Burki, however, these steps were due to the presence of the Left in the party.[566] For Waseem, the explanation is found in the second-wave revolutionaries/modernizers and the the intermediate-regime model of Michal Kalecki.[567] As a student in California, Bhutto used liberal reasoning to reach socialist conclusions and wanted to be known as socialist rather than liberal.[568] Sayeed called it "eclecticism."[569] According to Jalal, this popular mobilization made a dent in agrarian Punjab but did not affect rural notables in Sindh.[570] Whatever the interpretation, people were empowered as never before in Pakistan's history. For example, in 1972, police went on strike with the knowledge of their superior officers.[571] The PPP governor of Punjab called a huge public meeting and told the people to take over the police stations if they do not stop their strike. The strike ended in 24 hours.

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[565] As claimed by Dr. Mubashar Hassan, the finance minister of Bhutto. See Hussain-Syed, *supra* note 55 at 125.

[566] J. A. Rahim was a Minister of Production, K. H. Meer Establishment Division, Sheikh Rashid was the Health Minister, etc.

[567] After the nationalist Arab uprising of the 1940s, there was popular socialist mass uprisings like the Ba'ath party in Syria in 1963 and Iraq 1968, Libya 1969, and Allende in Chile between 1970 to 1973. Indira Gandhi and Julius Nyerere also took up the socialist transformation task. This is the background of change in Pakistan. John H Kautsky, *Political Consequences of Modernization* (New York: John Wiley and Sons, Inc., 1972) at 177; K. N. Raj. " The Politics and Economics of "Intermediate Regimes" (1973) Economic and Political Weekly at 1189 as cited by Mohammad Waseem (2007) *supra* note 40 at 346.

[568]Piloo Mody, *Zulfi My Friend* (New Delhi: Thompson Press, 1973) at 49-50.

[569] Khalid Ben Sayeed, "How Radical is Peoples Party" (1975) Pacific Affaires at 45.

[570]Ayesha Jalal, "The State and Political Privilege in Pakistan" in Ali Banuazizi & Myron Weiner, ed.s, *The Politics of Social Transformation in Afghanistan, Iran and Pakistan* (Syracuse: Syracuse University Press, 1994) at 162 .

[571] This strike was the response to January 1972. OnMarch 10, Martial Law Regulation 114 and on March 12, 1300 civil servants (572 from Sindh, 251 from Punjab, 109 from NWFP, 393 from center, non from Baluchistan) were dismissed, retired or reduced in rank. The action taken was not supposed to be reviewed in any court of law. Charles H. Kennedy, *Bureaucracy in Pakistan*, (Karachi: Oxford University Press, 1988) at 80-81.

However, the reforms began to slow down, and there began a new unity between the opposition from Left and the Right, and thus began the second phase of Bhutto's leadership over the country.

Reaction against the Place of Law under Bhutto 'Socialism', 1973-1977

No check on the legislature

The Cornelius tradition produced a detailed reminder on the need for the judiciary to curb the legislature. The military was demoralized after their 1971 war defeat and the judicial arm was in search of a balance of power. The best piece of writing chronicling this fact is the 1975 work of Khalid M. Ishaq.[572]

Khalid Ishaq was a Senior Advocate of the Supreme Court and an eminent jurist and scholar of law and Islamic studies. He found the judicial arm of the state had been curtailed, all the powers had been concentrated in the executive and there was no counter balance either in the legislature or judiciary. Ishaq complained about the exclusion of the

[572] It is pertinent to understand why this essay represents a tendency and approach. A number of judges of the superior courts came from the chamber of the writer. Justice Abdul Qadir Sheikh, Justice Amir Raza, Justice Nasir Aslam Zahid, Justice Majida Rizvi, Justice Nizam Ahmad, Justice Sabihuddin Ahmad, Justice Ghulam Nabi Soomro, Justice Mujeebullah Siddiqui, Justice Amir Hani Muslim, and Justice Mushtaq Memon. The writer's father was DIG of Bombay Sind Presidency before partition. At the age of 32, he was appointed Additional Advocate General of West Pakistan in 1958, and Advocate General in 1964. He became the project Director of Islamic Research Institute and was the member of Council of Islamic Ideology (1969-72) and again from 1977-80 (which is Zia regime, and note that he had no such post during Bhutto's regime). He taught *Seerut-un- Nabi* (the life of the prophet, a trend as one of Zia's steps to promote Islamization) from 1976-77 in Sind University. The writer was clearly embedded in the Cornelius tradition.

jurisdiction of the courts from social disputes and the creation of administrative tribunals. He was annoyed with the judicial restraint of the courts to avoid confrontation with the executive. He pushed the courts to be the final protector as found in the constitution. He found that there was greater suffering under Bhutto than the colonial period, and he blamed British precedents for this.

According to Ishaq, the judiciary's aversion to adjudicate upon policy matters during Bhutto's regime was flawed and was not followed by libertarian countries like U.S. and France. He also did not like the sovereignty of the parliament. He wanted it to be under rule of law, meaning, the "Objective Resolution" which had subordinated the sovereign parliament under Allah. For him, Bhutto's period mirrored the U.K., and Pakistan should and move to a more U.S. type of system where the court is the final arbitrator. He did not like state intervention in economic activity and he accused this state intervention as always excluding the jurisdiction of the courts. He criticized legislation that was passed only to gain popular votes, legislation that promoted welfare oriented goals but was indifferent to individual needs.[573]

Recall for a presidential System

The 1973 constitution promoted "parliamentary democracy with a vengeance."[574] A. K. Brohi has given an account of popular disenchantment with parliamentary

[573]Khalid M. Ishaq, "Independence of judiciary" (1975) PLJ 5 at 7, 13.
[574]C. M. Shafqat, "Constitutional Development in Pakistan" (1984) PLJ 41 at 55-56. The writer is not only skeptical about this constitutional position of the president but is sarcastic about it. At the time of writing he was a Law Consultant at Cornelius, Lane & Mufti in Pakistan. This law association and its tradition is directly linked to Cornelius CJ.

democracy.[575] He cited Lord Hailsham's critique of parliamentary democracy in England[576] and declared it valid for all parliamentary democracies, on the grounds that the political requirements and economic necessities of the modern state have "outpaced" the growth of its parliamentary institutions. The solution, for Brohi, was a "non-sovereign law-making" body in place of an omnipotent parliament which can judicially review the federal structure of the federation. He supported a pure "*centrally directed line*". For him, parliamentarians should support their government. On the basis of this, he concluded that "serious thought should be given to the remodeling of government on the presidential pattern." He rejected Ayub's presidential system as "*having the worst features of both the parliamentary democracy as well as of the presidential type*". He brought Justice Shahabuddin's report as a reference which supported a presidential system of governance over a parliamentary system of governance. He gave few suggestions to amend the constitution to bring it close to an American type of constitution.[577] A. G. Chaudhry also claimed that the 1973 Constitution had the defect of not holding the balance of power between the three organs of the state (which, he says, is why Bhutto seized all the power) as in England under Mrs. Thatcher and the period of the 20 months emergency in India under Indira Gandhi.[578]

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[575] A. K. Brohi was the lawyer of Zia (Federation), Yahya Bakhtiar was on behalf of Bhutto. A. K Brohi was made Federal Minister for Law and Parliamentary Affairs by Zia.

[576] Lord Hailsham's talk on BBC and published in "The Listener", an organ of BBC on 21st October 1976.

[577] A. K. Brohi. "Disenchantment with Parliamentary Democracy" (1977) XXIX PLD 81-90.

[578] A. G. Chaudhry, "Undesirability of Parliamentary Democracy" (1995) PLJ at 99-103. He wrote this essay in the background of his dissatisfaction with the parliamentary democracy in 1990s in Pakistan which was polluted with horse trading and political defection as a result of patronage. It

The judiciary in Pakistan was not asking for a balancing role. It was cautious in the face of popular support for Bhutto. To put it correctly, the Chief Justice of Pakistan in 1973 made it clear that the power of judicial review in the Constitution of 1973 did not mean supremacy of the judiciary over the executive or legislature. In the face of wide-ranging changes, the judiciary in Pakistan was facing a dilemma of identity. Courts in Pakistan, according to Justice Kamal Mustafa, decided to perform a function in between extremes. The courts never tried to assume the functions of the parliament.[579] A very important aspect of the polemics of dissatisfaction with parliamentary democracy during the Bhutto regime was the protection of the legislature from the executive. The judiciary tried to interpret law according to the intention of the legislature. But we will see that this was a temporary position of the judiciary. As soon as Bhutto lost popular support, the idea of the democratic deficit emerged, and the judiciary assumed a central role in granting rights to fill the deficit.

Rights under the Bhutto Regime: Confrontation or a Substitute for Democratic Deficit

In the Constitution of 1973, and in politics around this period, Bhutto tried to regulate and confine the powers and jurisdiction of the superior courts. He was clear that no court should have any jurisdiction except that which was conferred or would be

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should be noted thatChaudhry was hopeful about gaining socialism through the 1973 constitution even in the mid-1990s.

[579]Justice Kamal Mustafa Bhukhari, "The Role of Judiciary in a Developing Country" (1976) XXVIII PLD 5 at 6, a paper read at the Pakistan's Jurists Conference, 1975. The writer was a justice of Lahore High Court at that time.

conferred in the future on it by the constitution or by or under any law.[580] Bhutto, through the Fourth Amendment, forbade the courts from making orders against preventive detention. No debate was held in the assembly about this.[581] The sum of the amendments made by Bhutto was to remove the perceived hurdles on his path of reforms. This was easily defined by his opponent as uncontrolled powers[582] and by critics as "removing legislature and judicial oversight from his personal and party program."[583] For Newberg, the process of modernization of Baluchistan, through the abolition of the Sardari system of large land holdings, was done in a "heavy-handed manner." She concludes that, "both sides were right and wrong."[584] Note that, in this analysis, personal and party programs are presented as negative, as opposed to the very highly placed doctrinal ideals of law.

The Supreme Court Chief Justice Hamoodur Rahman stated in 1975 that the court avoided judicial interpretation that might create confrontation with legislature; rather, the courts tried to protect rights of the citizens.[585] He was clear that democracy alone could not guarantee liberty, it needed the rule of law.[586] The place of judiciary in the constitutional scheme of 1973 was the same as that of previous constitutions. However, no other power and jurisdiction was given to the courts except those given in the

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[580] Article175 (2) of *the Constitution of Islamic Republic of Pakistan*, 1973.
[581] *Constitution (Fourth Amendment) Act 1975. Act*, LXXI of 1975. 1975 PLD Central Statues 337.
[582] Khan (2009), *supra* note 11 at 317-318.
[583] See comments of Newberg, *supra* note 10 at 139.
[584] Newberg, *supra* note 10 at 141.
[585] Justice Hamoodur Rahman CJSC (1975), "Presidential Address to Second Pakistan Jurist Conference 9-12 January 1975" (1975) PLD Journal 8-12.
[586] Justice Hamoodur Rahman, "My Concept of Rule of Law and Civil Rights" (1974) XXVI PLD 84-90 at 85.

constitutional scheme (Article 175(2)), in an effort to avoid "judicial activism."[587] The judiciary adjusted slightly and stepped back in the *F. B. Ali* case.[588] This case made clear the status of emergency provisions and the scope of the Army Act. The court agreed with the scope of the military courts (which Bhutto established to deal with the unrest) but upheld its own powers. It relied on the judgments in the *Fazlul Quader Choudhry* and *Sirajul Haq Patwari* cases. This was at a time when a number of cases regarding the detention of politicians were coming into the courts. Courts' responsibilities to protect the rights of the citizens like in the case of *Malik Ghulam Jilani* were reinforced.[589] Along with detailed guidelines, the Supreme Court made the points clear that detention should be based on reasonable ground, objective criteria, and consideration. Secondly, detentions are open to judicial review.[590] The courts were also strictly instructed to observe due process of law.[591]

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[587]This declining power of the judiciary is evident from *Ch Zahoor Elahi, MNA v the State,* 1977 PLD S. C. 273, where the Yaqub Ali CJSC accepted the exclusion of jurisdiction of court over offences under amendments in Defence of Pakistan Rules in 1976. Cases illustrating this situation are *Sher Ali and others v Sheikh Zahoor Ahmad,* 1977 PLD S.C. 545; see also *Riaz Ahmad Khan v Province of Sind and others,* 1977 PLD Karachi 604.

[588] Here some army officers planning an aborted coup against Bhutto were tried by a military court. They came before the LHC and SC on the ground that they were retired and should not be tried by the military courts. SC refused relief and stated that ordinary courts should not interfere with military courts. See. *F. B. Ali v the State,* 1975 PLD S. C. 506.

[589]This case is discussed in chapter three of this dissertation. It was a detention case of many politicians in a protest against Taskent Declaration. Lahore High Court found the detention orders *bona fide,* whereas SC accepted the appeal of Nawabzada Nusrullah Khan, but rejected that of Sardar Shoukat Hayat Khan and Jilani. See *Malik Ghulam Jilani v The Govt of West Pakistan*, 1967 PLD S. C. 373.

[590] Some other important cases of this nature were the *Zafar Iqbal v Province of Sind and 2 others* 1973 PLD Karachi 316; *Abdul Hamid Khan v the District Magistrate, Larkana and 2 others* 1973 PLD Karachi 344; and *Liaqat Ali v Government of Sind through Secretory Home Department,* 1973 PLD Karachi 78.

[591] *Nawab Begum v Home Secretary, Govt of Punjab,* 1974 PLD Lahore 344; *Maulana Abdus Sattar Khan Niazi v. the State* 1974 PLD 324; *Kh. Muhammad Safdar v the State and another,*

Legislature's Reaction

The political opponents of Bhutto continued using the courts, however, and Bhutto responded strictly. The legislature passed an amendment in Criminal Procedure prohibiting granting bails before trials.[592] This was followed by the fourth amendment in the constitution.[593] The High Courts were ordered to stop interfering in the detention orders of the executive, and from matters of stay of recovery, assessment or collection of public revenues. On September 1, 1976, the Fifth Amendment brought changes in the transfer terms of the appointment of judges, separation of the judiciary from the executive, and the establishment of separate courts for Sindh and Baluchistan. Its main feature, however, was restrictions on the grant of interim bails.[594]

The debate in the Assembly is helpful to understand the differences brought about by the Fifth Amendment. Federal Education Minister, Abdul Hafeez Pirzada (a known jurist), complained about the encroachment of the judiciary upon the functions of the legislature and executive. While emphasizing the co-existence of three organs of the state, Bhutto (himself a Lincolns Inn graduate) made clear that independence of the judiciary does not mean supremacy or sovereignty of the judiciary. Sovereignty according to him lies in the legislature elected by the people. He argued that the judiciary

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1974 PLD Lahore 200; and *Mrs. Habiba Jilani v the Federation of Pakistan through secretary, Interior Ministry*, 1974 PLD Lahore 153.

[592] *Code of Criminal Procedure (Amendment) Ordinance*, 1975, 1976 PLD, Central Statutes 57; *Code of Criminal Procedure (Amendment) Act* 1976 (Act XIII OF 1976) 1976 PLD, Central Statutes 175. Section 498 A was added to the Code of Criminal Procedure.

[593] *Constitution (Fourth Amendment) Act*, 1975Act LXXI of 1975, 1975 PLD Central Statutes 337.

[594] *Constitution (Fifth Amendment) Act*, 1976, Act LXII of 1976, 1976 PLD Central Statutes 538.

should be subordinate to law and should not try to become a parallel legislature or executive.[595] This episode of confrontation with the judiciary coincided with Bhutto's losing popularity, using state apparatuses against people,[596] and law and rights replacing democratic deficit.

Bhutto's Downfall: Countering the 'Suppression Explanation'

Bhutto's complicated era is reduced to suppression when analyzed by the Right,[597] and the betrayal of socialism when analyzed by the Left. Bhutto's downfall has been linked to the alienation of the middle class and to campaigning by the opposition (Pakistan National Alliance). Waseem suggests that Bhutto's regime should be characterized as an intermediate regime, representing both the old elite and the newly aspirant lower middle class [598]

We are to go beyond this description to grasp the relation of law with democracy in the last years of Bhutto (1975-77), with a more dynamic analysis. Let us first agree that the first genuinely populist leader of Pakistan was Bhutto.[599] However, Bhutto was not

[595] As discussed by Khan (2009), though in a negative tone, see *supra* note 11.
[596] See *The Constitution (Third Amendment)*, 1975, Act XXII of 1975, PLD 1975.
[597] See Khan (2009), *supra* note 11 at 293.
[598] Waseem (2007), *supra* note 40 at 346-47.
[599] Waseem (2007), *supra* note 40 at 844. But the question can be asked why the working class also turned against Bhutto. According to Kamran Asdar Ali "hopes [of the working class] were raised as Bhutto assumed control of the country." See Kamran Asdar Ali, "The Strength of the Street Meets the Strength of the State: The 1972 Labour Struggle in Karachi" (2005) 37 Int. J. Middle East Stud. 83-107 at 89.

able to deliver the goods to the working class or the middle classes, due to the resistance of the old state structure.

The opposition to Bhutto first came from Civil Services of Pakistan-CSP, business people, industrialists, landlords, and retired military officials. A party-based opposition was formed out of landlords in United Democratic Front under the leadership of Pir Pagaro.[600] The National Awami Party came under the influence of autonomists (ethno-nationalists) and some urban radicals. At the same time, landlords moved into the PPP and hence their opposition was weakened.

PPP ticket holders in the 1977 elections were big landed families as opposed to middle class candidates of the Pakistan National Alliance. Forty of the 100 previous Members of National Assembly-MNAs of the Pakistan Peoples Party-PPP were refused party tickets.[601] The Bhutto regime showed a bias towards small-scale industry, trading and merchant classes.[602] State patronage by Bhutto could only co-opt the salariat segment to some extent while traders and merchants who were in the secondary and tertiary layers of production were not integrated.[603] Thanks to nationalization, there were jobs that were used at the discretion of the regime to accommodate supporters and to remove opponents.[604] During first two years of Bhutto's rule, bureaucrats were bypassed, but Bhutto indulged them after nationalization.[605] Bhutto did bring the bureaucracy under

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[600] A big landlord of Sindh province.
[601] Sharif Mujahid, *The 1977 Pakistani Election* as cited by Waseem (2007), *supra* note 40 at 332.
[602] S. Akbar Zaidi, *Issues in Pakistan's Economy* (Oxford: Oxford University Press, 2005) at 150.
[603] Akhtar, *supra* note 71 at 164.
[604] Hussain-Syed, *supra* note 55 at 125.
[605] Waseem (2007), *supra* note 40 at 310.

political supervision or oversight.[606] While responding to the accusation that he misused civil services, Bhutto said that bureaucrats holding high political offices during his regime were chosen through elections. Above all, he explained that in a multiparty democratic system, watertight segregation is impractical. In the U.S., top administrative posts are filled by the party, he argued. Similarly, in the parliamentary system, civil services and the other services are not considered islands running parallel to the governments – "the myth of segregated, neutral civil servant was needed by colonialism." The neutrality and facelessness was fraudulent.[607] In the first two years, Bhutto tried to undermine the military but later used it. Raza had advised Bhutto that the military has a permanent place on the political scene of Pakistan and not to eliminate it.[608]

Why did Bhutto not strengthen the legislature and the party, but rely on the bureaucracy and military? Legislators were mostly absent. Even with a two-third majority, the legislature could hardly pass any bill. Ministers were absent when issues concerning their department were raised. The presence of Bhutto always made attendance better but he himself neglected the legislature.[609] The party was rife with factions.[610] By

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[606] See Shahid Javed Burki, "Twenty Years of the Civil Service of Pakistan: A Re-evaluation" (1969) 9 *Asian Survey* 239-54.; Hasan Askari Rizvi, *Military, State and Society in Pakistan* (Basingstoke: Macmillan, 2000); Charles Kennedy, *Bureaucracy in Pakistan.*(Karachi: Oxford University Press, 1988).

[607] Zulfikar Ali Bhutto, *If I am Assassinated* (Lahore: Classics, 1979) at 55.
[608]Rafi Raza, *Zulfikar Ali Bhutto and Pakistan, 1967-77* (Karachi: Oxford University Press, 1977).

[609] Hussain-Syed, *supra* note 55 at 205-07.
[610] In Punjab there was fight among the Ramay and Khar groups in 1972. In 1970 Khar and Rao were rivals. There were bloody clashes among peasants and landlords and employers and workers. Sheikh Rasheed lost control and Khar was brought in. After much cruelty Khar was

1976, the provincial governments were placed under Nawabs and the landed aristocracy, and conservatives dominated the PPP .[611] This divided the party and left no choice for Bhutto but to rely on the state machinery.

Liberal Rights, but No to Ethno- nationalism- the National Awami Party case

By notification on February 1975, Bhutto banned the National Awami Party for its alleged activities against the sovereignty and integrity of Pakistan. On February 24, 1975, a reference was filed in the Supreme Court by the government under Section 4 of the *Political Parties Act*, 1962. The court held that the National Awami Party (NAP) was acting in a manner prejudicial to the sovereignty and integrity of Pakistan.[612] In the *NAP* case, the judiciary agreed to put reasonable restrictions on fundamental rights when they come in conflict with state security. The Supreme Court verdict in NAP was followed by an Ordinance as an amended Political Parties Act to ban NAP leadership to qualify for Members of National Assembly or Member of Provincial Assembly. A Special Tribunal on anti-state activity was established and bail in such cases was disallowed.

It should be noted that this decision did not mean that the courts were favouring Bhutto. The NAP controversy was an ethno-national question in which the courts had a unitary position. The most important aspect of the decision is how the court separated

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removed and Ramay was brought in but Khar soon started factionalism. He went to the extent of contacting opposition parties. The same thing happened in Sindh.

[611] Hussain-Syed, *supra* note 55 at 212.

[612] *Islamic Republic of Pakistan v Abdul Wali Khan*, 1976 PLD S. C. 57.

nation from nationality. It rejected the idea that Pakistan was not a 'nation' but a country consisting of different nationalities (as is the claim of nationalities like Sindhis, Pukhtoons and Baluchies in Pakistan). The court asserted the idea of Pakistan as one 'nation' based on 'Muslim Millat.'

To sum up, the period after 1970 was a period of popular democracy. The courts could not exert themselves and stepped back. The *Asma Jilani* case and *Ziur Rahman* cases were representative of this transition. Around 1975, Bhutto lost popular support. This forced Bhutto to rely on the military, the bureaucracy and the judiciary. The common story of courts confronting Bhutto with the importance of rights is the story of a lack of democracy and not the strength of judiciary.

1980s: Juridico-Bureaucratic Cornelius Tradition Restored

In the 1977 elections, the Pakistan People's Party won four-fifths of the seats of the National Assembly, but there were allegations of rigging in the polls. A strong agitation against Bhutto arose on the streets and he declared a partial Martial Law in Karachi, Lahore and Hyderabad under Article 245 of the Constitution. It was challenged before Lahore High Court and a full bench declared the Martial Law unconstitutional.[613] Between July 4 and 5, 1977, the Chief of the Army Staff, General Zia-ul-Haq, imposed Martial Law in the country. He did not abrogate the constitution but held it in

[613] *Dervesh M. Arbey, Advocate v. Federation of Pakistan,* 1977 PLD Lahore 846.

abeyance.[614] (As opposed to two previous Martial Laws of Ayub and Yahya where the constitutions of 1956 and 1962 were abrogated.) The powers of the High Courts and Supreme Court to issue writs under Article 199 were taken away. Later these courts were allowed to have writ jurisdiction except against Chief Martial Law Administrators or Martial Law Administrators working under him.[615]

The judiciary welcomed Zia without resistance, with the sole exception being Supreme Court Chief Justice Yakub, who had been given an extension in his job by Bhutto. Zia met with Chief Justice Yakub the same night of the overthrow of Bhutto on July 5, 1977. Four High Court Chief Justices were appointed governors of respected provinces and they happily moved. Writ jurisdiction of the High Courts and Supreme Court was restored within two days of taking a new Oath on Provisional Constitutional Order which all the judges took. Two Chief Justices forced three judges of the Lahore High Court and two judges of the Supreme Court appointed by Bhutto to take the Oath using Supreme Judicial Council.

While Advocate Hamid was "shocked" by the way the judiciary fell into the lap of Martial Law,[616] I am not so surprised. It was a forceful and quick return of the quasi-liberal institutional setting under Ayub and Cornelius. I find that the judiciary found it as an ideal period in terms of its center-periphery relations (in the height of its relations with the U.S. in the Cold War) to establish the US model. This model includes a strong

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[614] *Proclamation of Marshal Law*, 5 July 1977, 1977 PLD, Central Statutes 326.
[615] *Laws (Continuous in Force) (Amendment) Order*, 1977. 1977 PLD, Central Statutes 325.

[616] Khan (2009), *supra* note 11 at 342.

president, judicial review to take care of fundamental rights, and Objective Resolution as the substantive part of the constitution, which had not even been available to Cornelius courts. This judicial period was different than Ayub's only in the sense that Ayub tried modernization with a liberal face whereas Zia implemented capitalist modernization with an Islamic veneer.[617] This was the only 'shortcoming' of the 'Cornelius tradition' under Ayub. Judges sat on tribunals with Brigadiers to disqualify politicians. Supreme Court Chief Justice Anwarul Haq acted as president during Zia's absence on foreign tours. Judicial review was being used consciously and cautiously. Relief was found in about 10% of the cases brought before the superior courts.[618]

As stated, Zia did not abrogate the constitution but held it in abeyance.[619] He issued one ordinance to guarantee constitutional continuity.[620] Writ jurisdiction of the High Courts and Supreme Court was restored, except against Chief Martial Law Administrators or Martial Law Administrators or any person working on their behalf and exercising authority or jurisdiction.[621] The fifth and sixth amendments of Bhutto had increased the age of retirement of judges so that Supreme Court Chief Justice Muhammad Yakub could be retained. Zia through his Chief Martial Law Administrators order withdrew this extension. Supreme Court Chief Justice Muhammad Yakub was retired as he had admitted the case of the wife of Bhutto against the overthrow.[622] The next

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[617] Zia's period further continued with modernization and was a success. See Ishrat Husain, (1999) Pakistan: The Economy of an Elitist State, (Karachi: Oxford University Press, 1999).
[618] Khan (1999), *supra* note 11 at 343.
[619] *Proclamation of Martial Law*, 5 July 1947, 1977 PLD, Central Statutes 327.
[620] *Laws (Continuance in Force) (Amendment) Order*, 1977, 1977 PLD, Central Statutes 325.
[621] *Laws (Continuance in Force) (Amendment) Order*, 1977. 1977 PLD, Central Statutes 325.
[622] *Laws (Continuance of Force) (Fifth Amendment) Order*, 1977. 1977 PLD,Central Statutes 441.

Supreme Court Chief Justice appointed was Anwarul Haq, who had been denied this position for six months due to this amendment.

A full Supreme Court bench, consisting of nine judges, began hearing the *Nusrat Bhutto* case in 1977.[623] This case challenged the coup. The position of the Federation presented by its counsel A. K. Brohi was that Martial Law is not imposed to displace the constitutional authority but to bridge and return the country to the constitutional path. Similarly, newly appointed Attorney General Sharifuddin Pirzada also explained that the Chief of the Army Staff had not usurped the state power but he had ousted the usurper, who was elected through massively rigged elections.[624] The Chief Justice concluded that the extra-constitutional step taken by armed forces of Pakistan was justified keeping in view the state of necessity and welfare of the people. He found it a constitutional deviation rather than a revolution. The 1973 constitution kept the Supreme law of the land with certain parts held in abeyance due to state necessity, and the courts were allowed to work. Supreme Court Justice Qiaser Khan advised the court to avoid conflict with the *de facto* regime.

For Dieter Conrad, the judicial verdict will not significantly alter the course of events in revolutionary change cases. So the courts are to decide whether to resign or continue working under the regime. The Supreme Court has to look at these matters from the perspective of constitutional legitimacy but has a day-to-day administration of justice. So arises a need of deliberate restraint or giving legitimacy to the regime.The path

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[623] *Begum Nusrat Bhuttoo v Chief of the Army Staff and Federation of Pakistan*, 1977 PLD S. C. 657.
[624] 1977 PLD SC 673.

adopted by the courts was a principle of limited dictatorship (which included the doctrines of necessity, implied mandate, the principle of minimum recognition etcetera).[625] Yet this characterization is another form of looking at the judiciary as a 'neutral' and 'autonomous' institution facing events under pressure. It does not reveal how the courts themselves are the part of the juridico-bureaucratic structure. The decision in the *Asma Jillani* case against the dictator did not stand on the shoulders of the judiciary, rather it was the mass support that led the way to a decision like this. Similarly, the decision in *Nusrat Bhutto case* was one for state formation, which could handle the rising tide of the Cold War. I also do not consider it sufficient to describe the courts as pragmatic.

Rehabilitating the Old State Structure

General Zia resurrected the old juridico-bureaucratic structure with the military leading it. He disengaged some of the landed elite from the Pakistan People's Party with little effort. Soon, the landed elite was evicting tenants. Zia's economic and administrative policies and anti-nationalization stance pleased business. The family of Nawaz Sharif (who later became Prime Minister), which had suffered from nationalization of 1972 and had lost Ittefaq Steel Industries, now rose up again in the 1980s due to the patronage of Zia. Punjabi industrialists replaced Gujarati

[625] Conrad, *supra* note 90 at 145-47.

industrialists.[626] The Zia regime was also the first truly military regime in Pakistan with the military as his constituency, with many direct benefits to them.[627] Government officials invited made personal contacts with military officers and inducted many of them into the civil services. Zia was welcomed by the bureaucracy and Chief Justice Anwarul Haq headed a Civil Service Commission to recommend policy measures. His report was full of conservative measures.[628] This Martial Law regime was accompanied with the strongest ever hold by the metropolitan bourgeoisie (hegemonic class) on this military seat of power in light of the Cold War being at its height after the invasion of Soviet Union in Afghanistan.

Rolling Back Popular Democracy to the extent of "Judicial Murder" of Bhutto

The Zia regime suppressed the subordinate classes, ensured that popular forces could not influence state policy and hence eliminated their potential to capture the state.[629] It went to the extent of committing the "judicial murder"[630] of Bhutto. Bhutto was charged with the murder of Nawab Muhammad Ahmad, father of Ahmad Raza Kasuri, on November 1974. Bhutto was implicated in this case under abetment. The case was directly moved to Lahore High Court and a five-member bench headed by Maulvi

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[626] Shahid–ur-Rahman, (1997) Who owns Pakistan, online: <http://www.scribd.com/doc/125960792/ Who-Owns-Pakistan> , last visited Nov 21, 2013.
[627] Ayesha Siddiqa, *Military Inc.: Inside Pakistan's Military economy* (Karachi: Oxford University Press, 2007) at 149.
[628] Report of the Civil Services Commission 1978-79 (Islamabad: Government of Pakistan, 1979)
[629] Akhtar, *supra* note 71 at 41.
[630] As Benazir called it. See Benazir Bhutto, *Daughter of the East: An Autobiography*, 2nd ed (London: Simon & Schuster, 1988, 2007) at 389.

Mushtaq conducted the trial. The other judges were Ziauddin Paul,[631] Aftab Hussain, who was very close to the Chief Justice and two other judges who were very weak.[632] The High Court, vide its judgment in this case dated March 18, 1978, convicted all the accused for criminal conspiracy and murder and sentenced them to death.[633] In an appeal against this conviction, a bench of nine judges of the Supreme Court, with an opinion of four to three, supported the High Court decision.[634] Bhutto was hanged by the military in spite of a plea for clemency by Kurt Waldheim (Secretary General of U.N.), President Jimmy Carter of the U.S., Prime Minister Pierre Trudeau of Canada, Chancellor Helmut Schmidt of West Germany, President Giscard d'Estainge of France, and Prime Minister James Callaghan of the U.K. The hanging took place on July, 4 1979 at 2 am in the morning at Rawalpindi Central Jail.

It is well know that it was not a fair trial from the beginning to the end.[635] An appeal against the order of the Lahore High Court was heard by a full bench of nine judges of the Supreme Court headed by Chief Justice Anwarul Haq. Bhutto raised the issue of biased trial which was rejected by the Chief Justice.[636] The judgment was four to three. The review petition against this judgment was dismissed on March 24, 1979 unanimously by all the seven judges of the Supreme Court.[637]

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[631] Known for his hostility against Bhutto and an old Muslim League supporter
[632] Khan (2009), *supra* note 11 at 335
[633] *State v Zulfiqar Ali Bhutto and others*, 1978 PLD Lahore 523.
[634] *Zulfiqar Ali Bhutto v The state*, 1979 PLD S. C. 53. All the judges in favour were from Punjab and three dissenting judges were from the other provinces.
[635] Khan (2009), *supra* note 11 at 335.
[636] *Zulifqar Ali Bhutto v. State*, 1979 PLD S. C. 53.
[637] Zulifqar Ali Bhutto v. the State, 1979 PLD S. C 74.

The role of the judiciary in this 'judicial murder' needs explanation to fully expose what occurred. After the premature retirement of Chief Justice of Lahore High Court, Sardar Iqbal, Maulvi Mushtaq was supposed to be the Chief Justice of Lahore High Court, according to the fifth amendment. But Bhutto had appointed Justice Aslam Riaz as Chief Justice by superseding seven other judges including Justice Maulvi Mushtaq. After Bhutto's overthrow, Zia obliged Justice Maulvi Mushtaq by making him Chief Election Commissioner and Acting Governor of Punjab as well as acting Chief Justice of Lahore High Court. Bhutto called him "a man known to be after my blood."[638] Bhutto explained the roots of this enmity. Justice Maulvi Mushtaq met Bhutto after he became president in the early 1970s and revealed his ambition to become Chief Justice of Lahore High Court. Instead, after a few months, Justice Sardar Muhammad Iqbal was made Chief Justice of Lahore High Court by Bhutto. Maulvi Mushtaq showed his resentment and suggested to the Punjab Chief Minister to put a "shot through the head" of Bhutto. Mushtaq Ahmad faced a second blow when Justice Aslam Riaz Hussain was made Chief Justice of Lahore High Court. After Zia's coup, however, he was invited and made Chief Justice of Lahore High Court as well as Chief Election Commissioner during the trial of Bhutto.[639] Maulvi Mushtaq's appointment as Chief Justice of Lahore High Court and as Chief Election Commissioner consolidated the "mockery of the separation between the executive and the judicial branches of the government."[640]

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[638]Bhutto (1979), *supra* note 145 at 37.
[639] Bhutto himself told this story. See Bhutto (1979), *supra* note 145 at 37-38.
[640] Benazir Bhutto (2007), supra note 168 at 120.

During the trial Zia published a white paper and accused Bhutto for rigging the 1977 elections. He presented him as "modern Machiavelli" and Bhutto in turn called his 'White Paper' a "white lie." [641] Bhutto did not expect justice from courts but from the people of Pakistan.[642] He did not believe in this trial. The courts even criticized his lack of faith in Islam. In this regard the comments of Hamid (2009) are very important "they (comments of the judges) only reveal the mindset of the judges and betray their innate dislike for Bhutto and his style of governance."[643] This statement is very peculiar to reducing the Bhutto's regime to a style of governance. All the accused were sentenced to death.[644]

Zia's Constitutional Engineering: Fine Tuning of the Juridico-Bureaucratic Structure

The judiciary was careful not to use judicial review against Martial Law. A constitutional amendment, Article 212-A was added in the constitution to establish military courts. This actually gave constitutional recognition to already existing courts and empowered them to the extent that no High Court could grant any injunction, and make an order against them. So the Supreme Court was deprived of the fruits of judicial review, which it secured in *Nusrat Bhutto* case.

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[641] Bhutto (1979), *supra* note 149 Zulfikar Ali Bhutto, *If I am Assassinated* (Lahore: Classic, 1979) at 6.
[642] Benazir Bhutto (2007), *supra* note 168 at 145, 136.
[643] Khan (2009), *supra* note 11 at 336.
[644] *State vs. Zulfikar Ali Bhutto*, PLD 1978 Lahore 523.

The courts continued to use rights against the regime, for instance, the *Mumtaz Bhutto* case.[645] It is considered a sound judgment against the military. It challenged detention without trial as an arbitrary act of the executive. After that, courts started reviewing the decisions and actions of military courts.[646] Then, with consecutive constitutional amendments, the High Courts and the Supreme Court were totally deprived of any action against Martial Law authorities.[647] But this was not enough for Zia. He made wholesale constitutional amendments in the constitution through a Provisional Constitutional Order on March 25, 1981. It was like a hammer on the powers of Judiciary.[648] This Provisional Constitutional Order was challenged in the Lahore High Court and was easily upheld by a divisional bench, without going into the details of the case.[649] This Order was a humiliation or a restructuring of the judiciary, but according to Chief Justice Anwarul Haq (he stood retired), this constitution did not hold support of the people as its character has changed.[650] It was called a "coup within coup."[651]

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[645] *Mumtaz Ali Bhutto and another v. The Deputy Martial Law Administrator, Sector I, Karachi and 2 others*, 1979 PLD Karachi 307.
[646] See Mr. Justice M. Dilawar Mahmood's judgments in M. Farani ed. *Tyranny and Justice in Pakistan (1993) A selection of the judgments of Mr. Justice M. Dilawar Mahmood delivered against Martial Law orders* (Lahore: Idara Mutalia-e-Tareekh, 1993); See also *Syed Essa Noori v Deputy Commissioner, Turbet and 2 others*, 1979 PLD Quetta 189; *Satar Gul and another v Martial Administrator, Zone "B",NWFP, Peshawar and 2 others*, 1979 PLD Peshawar 119; A*nwar Ali v Chief Martial Law Adminsitrator and 3 others* 1979 PLD Karachi 804.
[647]*Constitutional (Amendment) Order,* 1980, 1980 PLD, Central Satutes 89; *Chief Martial Law Administrator-CMLA Order*, 1979, Order number 72, 20th October 1979, 1979 PLD Central Statutes 568; Chief Martial Law Administrator-CMLA Order, 1990, order number 77, 2June 1980, 1980 PLD, Central Statutes 152.
[648] *Provisional Constitutional Order*, 1981. CMLA's Order 1 of 1981, 1981 PLD, Central Statutes 183.
[649] *Tajjamal Hussain Malik v Federal Govt of Pakistan*, 1981 PLD Lahore 462.
[650] Justice Anwarul Haq CJ (Ret. as he was then) interview with *the Muslim* on March 8, 1985.
[651]Justice Anwarul-Haq, *supra* note 99 at 31.

Sajjad Ali Shah J took the Oath under Zia's Provisional Constitutional Order. His reasoning is similar to that of Nasim Hassan Shah. Senior judges at that time, according to Sajjad J, thought that the Provisional Constitutional Order was using the word 'law' to defend everything under the purview of law. Another argument the conservative judiciary made was that the judiciary can be protected better from within and from not allowing the handpicked judges to fill the judiciary.[652] But if someone does not consider the interplay of structural relations between the judiciary and the civil-military bureaucracy, he/she cannot stop him/herself from the shock, like that which Hamid had about "the way the judiciary fell into the lap and ultimately the trap of the Martial Law."[653] Other analyses suggest that the new political leadership came from the lower and middle class who were more conservative and politically less sophisticated than president Ayub.[654]

I have two alternate explanations of what was going on. I argue the intensified class struggle and close presence of the metropolitan bourgeoisie in the light of Afghan war and Iranian revolution (1979), made the dominant classes (the 'historic bloc') react strongly as compared to during Ayub's regime. So this was not a matter of more or less sophistication of the middle classes. In terms of class struggle, the climax was reached in the period from the overthrow of Bhutto to 1981-82. During this time, fragmented left forces, the PPP left and the nationalist forces (the pro-Moscow National Awami Party) fought tooth and nail in a war against U.S. imperialism, but unfortunately under the leadership of Benazir Bhutto . When the class struggle was defeated, the period of 1985-

[652]Justice Ali-Shah, *supra* note 101 at 122.
[653] Khan (2009), *supra* note 11 at 342.
[654] Rodney W. Jones, "The Military and Security in Pakistan" in Craig Baxter, ed., *Zia's Pakistan* (Lahore: Vanguard, 1985) at 71-72.

88 saw the restoration of a presidential system like that was formed under Ayub. But this involved changing the 1973 constitution altogether into one promoting a presidential system.

Revival of the Constitution of 1973 Order, 1985- RCO: Back to presidential system

From 1973-77, Bhutto made seven amendments but Zia promulgated 26 constitutional amendments by 1985, when Martial Law was withdrawn and democracy was restored. Out of those amendments, the 26th amendment, that is, Revival of the Constitution of 1973 Order- RCO of 1985 made as many as 65 amendments in the constitution. Furthermore, the insertion of the Objective Resolution 1949 amended 60 Articles of the constitution, and add five new Articles and added six new clauses. After that, the quasi-democratic regime of Juneju (1985-88) made the eigth amendment, which was followed by the Tenth and Twelfth amendment were also made.

According to A. G. Chaudhry, this total of 36 Amendment Acts and orders hardly left any Article of the constitution untouched.[655] These amendments made the constitution the worst kind of presidential system. Now, the cabinet had to work to advise the president and not the other way around. The president could promulgate emergency ordinance, and was the supreme commander of the Armed Forces. He had also full authority on financial and political matters. Above all, the president could dissolve

[655] A. G. Chaudhry, "Balancing the Constitution" (1994) PLJ 137-181.

parliament in the national interest.[656] Zia's amendments were found valid in the *Yaqoob Ali case*.[657] The dissenting opinion of Justice Hussian Mirza was a cry in the desert.

Zia's Islam: The Final Nail in the Coffin of Popular Democracy

After the extreme act of Bhutto's murder, Zia imposed Islam as the final nail in the coffin of popular will. Women were reduced to 'half' status through the Hadood Ordinance and very suppressive punishment was included in the criminal code. It terrorized the poor, who were the victims of these harsh punishments.[658] According to Waseem, Islam was helpful for the manipulation of power, to claim a right to rule, and was not a new factor indicating a change in politics.[659]

Objective resolution[660] was part of the preamble of the 1973 constitution but in 1985, Zia made it a substantive part of the constitution by adding article 2-A (*Revival of the Constitution of 1973 Orde*r, 1985). It is a controversial article with regard to its

[656] Article 58(2)(b) through 8th amendment in the 1973 Constitution.
[657] *Yaqoob Ali v. Presiding Officer*, Summary Military Court, Karachi, 1985 PLD Karachi 243.
[658] The worst punishment was lashes and only the poor were given the punishment. Musharaff observed this while serving as Martial Law Administrator as Lieutenant Colonel and he requested Major General Rafi Alam not to lash poor people. See Musharraf, *supra* note 8 at 63-64.
[659] Waseem (2007), *supra* note 40 at 390.
[660] The Objective Resolution was passed by the first Constituent Assembly of Pakistan after independence in March 1949. In it, sovereignty belongs to Allah (God Almighty) and He delegates this authority to the State of Pakistan which will be exercised by the representatives of the people. Judiciary used this article to enable itself to judicial activism for Islamic right to justice (examples are *Akbar Ali v Secretary, Ministry of Defence, Rawalpindi*, 1991, SCMR, 2114, *Hakia Khan v Government of Pakistan* 1992 PLD S. C. 595; *Sabina Bibi v Federation of Pakistan* 1992 PLD Lahore 99.) The point to be noted here is that judiciary played on the discourse of Islam by the military to control the masses. Secondly, it was the same tool as Cornelius wanted. That is why I called the judiciary under Zia as part of the Cornelius tradition.

implications on the secular nature of fundamental rights and pushes them more towards Islamic rights. But the judiciary used it to enable itself to undertake judicial activism, citing the Islamic right to justice.[661] When we look at rights from an Islamic (or Objective Resolution) perspective, we can recall Cornelius and in a way, we see the completion of his juridico-bureaucratic structure.

Judiciary and the Mustafa Khar Case of 1988: Was it too Late to Mend?

Zia introduced Article 270-A in the constitution to validate all Martial law regulations, Martial Law Orders, etcetera between July 5, 1977 and the Revival of the Constitution of 1973 Order -RCO. It gave protection to all his constitutional engineering and avoided judicial review of the courts. Later during the eighth amendment, this validation clause was substituted with the word "affirmation," which means there was no point of judicial review of these Acts. Even after lifting Martial Law, military courts continued to work and their convictions were not challenged in civil courts. The Judiciary took a long time to reach the *Mustafa Khar* case, which was only at the end of Martial law regime.[662] The Lahore High Court in the *Mustafa Khar* case held that Article 270-A

[661] Examples are *Akbar Ali v Secretary, Ministry of Defence, Rawalpindi*, 1991, SCMR, 2114; *Hakia Khan v Government of Pakistan* 1992 PLD S. C. 595; *Sakina Bibi v Federation of Pakistan* 1992 PLD Lahore 99.

[662] See, for example, the declaration of fifth jurist conference 1986 about the attitude of judiciary towards military courts, 1986 PLD, Journal, 306-7.

cannot be struck down on the assumption that parliament was not sovereign.[663] This decision came before Supreme Court for interpretation.[664] The court held that there is no clog on the judicial review of acts, actions and proceedings made if they are defected with regard to jurisdiction or were *coram non judice* or were *mala fide*. The Lahore High Court could not properly judge the convictions of military courts in the *Attock Conspiracy case* in 1986. The response of courts was mixed in the *Bachal Memon case*.[665]

Benazir Bhutto's Legacy: Cooperating with Liberalism

While the juridico-bureaucratic structure along with the ruling feudal and capitalist elite was restructuring during Zia regime, Benazir Bhutto became a leader of the Pakistan People's Party. She revived her relation with her closest ally in the power structure, that is, the landed elite. The Movement for the Restoration of Democracy (MRD) was a movement of the landed class with some Left support.[666] The landlord class, according to Benazir Bhutto in 1988, provided logistics like tractors and trucks to transport supporters and supplied better communication technologies.[667] Her excuse for taking the money is simple, that the PPP had always been a multi-class party and a coalition of many different socio-economic groups, namely "Marxists, feudal landlords,

[663]*Ghulam Mustafa khar v. Pakistan*, 1988 PLD Lahore 49.
[664] *Federation of Pakistan v. Ghulam Mustafa Khar*, 1989 PLD S. C. 26.
[665]*Muhammad Bachal Memon v Govt of Sind through secretary Department of Food*, 1987 PLD Karachi 296.
[666] Comments of Sheikh Rasheed. See Benazir-Bhutto (2007), *supra* note 168 at 165.
[667]Benazir-Bhutto (2007), *supra* note 168 at 242.

businessmen, religious minorities, women, the poor."[668] The small and middle business class did not support the MRD.[669] Ayesha Jalal (1994) called it a "politics of compromise," that is, the interest of the landed class as well as the state can be the same but not necessarily all the time.[670] The MRD bore fruit and the landed class was capable of reemerging in the 1985 elections.[671] There was no fear of land reforms because in 1981, a Federal Shariat Court was created and declared land reforms un-Islamic. This ruling has remained as a hurdle for any popular movement in relation to land distribution.

Qazalbash Wakf case

The Federal Shariat Court declared land reforms as un-Islamic.[672] In an appeal against this decision, in the *Qazalbash Wakf* case, the Supreme Court also declared land reforms un-Islamic.[673] An appeal against this case is pending on the grounds that the Supreme Court wrongly decided the issue in the *Qazalbash Wakf* case. The main ground raised is that there was an erroneous assumption of jurisdiction, that is, "it has affected Article 17 and Article 51 of the Constitution, rendered Article 24(3)(f), and Article 253 (1)[674] and redundant and nugatory and affected the jurisdiction of this honourable court [S. C.]." This simply means, according to the

[668]Benazir-Bhutto (2007), *supra* note 168 at 267.
[669]Waseem (2007), *supra* note 40 at 394.
[670]Ayesha Jalal, "The State and Political Privilege in Pakistan" in Ali Banuazizi & Myron Weiner, ed.s, *The Politics of Social Transformation in Afghanistan, Iran and Pakistan* (Syracuse: Syracuse University Press, 1994).
[671] In non- party elections of 1985 landlords won 66% of the national seats (158 out of 238) and in 1988 landlords won 76% (156 out 207) seats, see Saeed Shafqat, "Democracy and Political Participation in Pakistan" in Soofia Mumtaz, Jean-Luc Racine & Imran Ali, eds, *Pakistan: The Contours of State and Society (*Karachi: Oxford University Press, 2003).
[672] *Qazal Bash Waqf v. Chief Land Commissioner, Punjab, Lahore and others*, PLD 1981 FSC 23.
[673] PLD 1990 S. C. 99.
[674] Article 253 (1) is about maximum limit of the property which legislature can decide.

appellant, that the jurisdiction was wrongly assumed by the appellate court.[675] The appellant's counsel called it a 'reluctant' judgment because out of five judges, one judge dismissed the appeal, one expressed reservation on the assistance provided to the court, and one judge only declared a few provisions as un-Islamic.

Recalling People vs. calling on the U.S.

Unlike her father, Benazir Bhutto enlisted the help of the U.S., viewing its policy of standing against Soviet aggression in Afghanistan as the correct one. Her only complaint was that the U.S. had supported General Zia.[676] She naively claimed that it was the CIA that was involved with Zia and that was separate from the U.S. state. Lacking popular support, she was left only with a rights discourse to challenge Zia. Based explicitly on Locke, Rousseau, and John Stuart Mill, she insisted on the guarantee of the rights in her understanding of the nature of state and society. Her model of change was thus starkly within a liberal set of terms.[677] Liberalism and the rights of emancipation was the context for the entry of public interest litigation around Benazir Bhutto's cases in Pakistan, a move which the judiciary supported, developing the 'rules of the game' and 'institutional arrangement' in the years to come.

[675] Petition pending *Workers Party vs Federation of Pakistan* filed by Abid Hasan Minto at 6.
[676]Benazir Bhutto, *Wither Pakistan: Dictatorship or Democracy?* Dr Iqbal Narejo, ed, (Lahore: Al-Hamd Publications, 2007) at 35, 67.
[677] She described her struggle similar to that of Corazon Aquino against Ferdinand Marcos, indicating that the U.S. should help her like it was helping Aquino.

The point which I want to prove in the following pages is that once Benazir Bhutto made a class compromise, the state was ready to accommodate her. The judiciary also gave her relief. The courts were ready to accommodate Benazir Bhutto against Zia until the end of 1987. The cases following from this situation are considered as the judiciary's new phase of judicial activism around the Public Interest Litigation. Let us look at this era more closely.

Benazir Bhutto cases: Democracy, but how much?

The Revival of the Constitution of 1973 Order (RCO) turned Juneju's government into a quasi-civilian regime. The year 1985 saw a move from the prime-ministerial to presidential system. [678] The Assembly could be controlled due to the RCO, but what to do with the support for the opposition Movement for the Restoration of Democracy (MRD) among the masses? The Juneju launched the Muslim League formally on January 18, 1986. It was an 'internally created' party (as was *Islami Jamhori Itehad* in the 1990 elections). The next step was the Political Parties Amendment Bill, which was passed in the National Assembly after the Assembly rejected nine suggested amendments of the opposition. This bill allowed parties to get registered in the Election Commission through a lengthy process. Now the Martial Law could be lifted and it was on Dec 30, 1985. All

[678]Charles H. Kennedy, "Presidential-Prime Ministerial Relations: The Role of the Superior Courts" in Charles H. Kennedy & Raul Bakhsh Rais, ed.s, *Pakistan: 1995* (Lahore: Vanguard, 1995)17-30 at 17.

this was done before the challenge arriving with the return of Benazir Bhutto on April 10, 1986.

Finally, Zia dissolved Juneju's assembly in 1988 and announced an election on a non-party basis on July 20, 1988. This was ridiculed by the media. He was also not holding them after 90 days as per the requirement of the constitution. Benazir Bhutto was ready to challenge Zia through democratic and legal means and filed a petition in the court. In the *Benazir Bhutto* case, the court accepted the right of political participation, but did not challenge Zia's constitutional set up. They agreed on the transitional nature of this period but did not establish boundaries or time limits of dictatorship and democracy in this continuum. This way courts could "aspire to the role of Chief Justice Cornelius's courts twenty-five years before: as a watchdog for civil rights in a constitutional order."[679]

In *Benazir Bhutto v Federation of Pakistan*,[680] the court struck down the law denying election symbols for political parties. The court found that provisions of section 21(1)(b) of the Representation of Political Parties Act, 1976 violated the fundamental rights enshrined in Article 17(2) of the constitution. While commenting on Benazir Bhutto's case of election symbols, Newberg found it similar to *Moudoodi's case.*[681] Actually the Supreme Court set up party regulations and supports to promote Islamic ideologies, morality and public order. Benazir Bhutto gave credit to 'international

[679] Newberg, *supra* note 10 at 203.
[680] *Benazir Bhutto v. Federation of Pakistan,* 1989 PLD S. C. 66.
[681] Newberg, *supra* note 10 at 204.

community' for all this. She commented that, "what else could Zia men do with the whole world watching?"[682]

The judiciary protected the constitutional set up while criticizing the decision of Zia to dissolve Juneju's regime. Zia had dissolved the National Assembly of the Juneju government on May 29, 1988 using Article 58(2)(b) of the constitution on the accusations of deteriorated law and order, and dangers to the ideology of Pakistan etcetera.[683] This dissolution was challenged in Lahore High Court and a full bench and the courts declined relief to the petitioner.[684] This decision was challenged in the Supreme Court and the court declared that the discretion of dissolving National Assembly was not absolute and the action was not justified by the law. But the Supreme Court denied the relief of restoration of assemblies.[685] It is to be noted that the decision of the court in Haji *Muhammad Saifullah Khan's* case came after the death of Zia on August 17, 1988 and his son commented that no such judgment would have come had his father been alive.[686]

Public Interest Litigation: a Deficit for Democracy?

Public Interest Litigation existed before the Benazir Bhutto case of 1988 but was not acknowledged or given a formal status.[687] Malik Muhammad Qayyum did not find a developed concept of Human Rights in Pakistan before 1990. In the *Moudoodi* case, a

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[682] Benazir-Bhutto (2007), *supra* note 168 at 385.
[683]Reproduced in 1988 PLD Lahore 725 at 756-7.
[684] *Muhammad Sharif v. Federation of Pakistan*, 1988 PLD Lahore 725.
[685]*Federation of Pakistan v Haji Muhammad Saifullah Khan*, 1989 PLD S. C. 166.
[686] Khan (2009), *supra* note 11 at 390.
[687] Mehreen Kasoori Raza, "Reviewing the Law of Public Interest in Pakistan" in Werner Menski, Ahmad Rafay Alam & Mehreen Kasoori Raza, eds, *Public Interest Litigation in Pakistan* (London: Platinum publishing limited and Karachi: Pakistan Law House, 2000) 64 at 86.

"restrictive approach" was taken to human rights with the Lahore High Court refusing to effect the Universal Declaration of Human Rights. Until the 1980s, in most cases the bar did not play an important role except a traditional one. In the late 1980s, however, judgments started with explicit expression of rights.[688]

Credit for raising the rights profile is usually given to Supreme Court Chief Justice Haleem and Nasim Hasan Shah.[689] Supreme Court Chief Justice Haleem identified that the inability of people to demand their rights, due to illiteracy etcetra meant that the judiciary should accommodate their needs, and for this, the judicial process should change. Supreme Court Chief Justice Nasim found individual rights lagging behind group rights.[690] Then 'group rights' became public rights. This happened in 1988 in the *Benazir Bhutto v. Federation of Pakistan* case. In this case, the court attempted to create a general consensus of the superior role of the judiciary in a democratic society.[691] Supreme Court Chief Justice Haleem did this through the use of Article 2-A, a controversial tool specially invented by military ruler Zia as explained

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[688] Malik Muhammad Qayyum, *The Role of the Bar in Protection of Human Rights in Pakistan,* International Jurists Conference 2006 Islamabad at ii and iii . The writer was the president of Supreme Court Bar Association-SCBA. International Judicial Conference organized by the Supreme Court of Pakistan during its Golden Jubilee Celebrations from 11-14 August 2006. Online: < http://www.supremecourt.gov.pk/ijc/ijc.htm>.

[689] Ahmad Rafay Alam. *Public Interest Litigation and the Role of the Judiciary*, in International Jurists Conference, Islamabad, 2006, International Jurists Conference, Islamabad on 50th birthday anniversary of the Supreme Court of Pakistan in the year 2006. http://www.supremecourt.gov.pk/ijc/ijc.htm, Last visited Nov 27, 2013. Hereinafter referred as International Jurists Conference, Islamabad, 2006 at 2; see also Ahmad Rafay Alam, "The Public Interest Litigation in Pakistan" in Menski et al., *supra* note 230, at 22-63.

[690] Justice Nasim Hasan Shah CJSC, "Public Interest Litigation as a means of Social Justice" 1993 PLD Journal 31 at 33.

[691] Justice Sabihuddin Ahmad CJSHC, *Good Governance and the Role of Judiciary*, paper read at International Jurists Conference, Islamabad, 2006, *supra* note 227.

above. He loosened the criteria of *Locus standi* and *bona fide* representation.[692] He first attacked the weakness of the existing judicial system as adversarial and declared it a mimic battle according to the rules of evidence in which the judge is acting as a neutral umpire. This Anglo Saxon tradition made the rule of law selective.[693] Chief Justice Haleem also developed a purposive interpretation of Article 184(3) of the Constitution. He thus deviated from ceremonial observance of the rules and usages of interpretation to the object and purpose of the Article. Using 2-A, he allowed *bona fide* representation for those seeking fundamental rights. He further relaxed the rule that the court in the lower hierarchy should be involved first.[694] Supreme Court Chief Justice Haleem did not let Benazir Bhutto's petition wait on the High Court's decision and said that procedural rules should also be relaxed in cases dealing with fundamental rights. Article 184(3) did not identify which procedure should be followed.

Chief Justice Haleem was not interested here in a parallel government but in judicial activism.[695] A case had to have public importance, which was defined in *Benazir Bhutto's* case, but later Supreme Court Chief Justice Saeed-u-Zaman restricted it to be decided case by case.[696] In later cases different issues were identified as having public

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[692]*Benazir Bhutto v. Federation of Pakistan*, 1988 PLD S. C. 416.
[693] *Bandhu Mukti Morcha v Union of India,* 1984 AJR S. C. 802 - 815.
[694] Established in *Ch, Mazoor Elahi v. Federation of Pakistan,* 1975 PLD S. C. 66 by Hamoodur Rahman CJ at 79.
[695] Ahmad Rafay Alam, "The Public Interest Litigation in Pakistan" in Menski et al. eds, *supra* note 225 at 22-63.
[696]*Shahida Zahir Abbasi v. President of Pakistan,* 1996 PLD SC 320.

importance and decided as Public Interest Litigation. Until the 1990s, there was no precise definition and it lay in the discretion of the judges.'[697]

Supreme Court Chief Justice Haleem's ideas are illustrative of the transitory role of law in modernity, i.e. moving towards generating political and economic change. For him, the law is an aid to the overall development of society and is in equation with the process of development. This approach to law as an instrument of social engineering (which Chief Justice declared as new theory of liberal legalism with reference to Trubek[698]) can be very useful. "It can be perceived as both an instrument of *social control* and change that can be used in both direct and indirect ways and private behavior." [emphasis is mine] The law is "integrator of ecological, cultural, social, economic, institutional and political dimensions of a given society." The Chief Justice further explained that it is a move away from mechanical jurisprudence to welfare-oriented law. Justice here is expressed in terms of economic, social and political philosophy of the state concerned and the law is an instrument for this justice.[699] Thus, he sowed the seeds of 1990s hyper judicial activism.

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[697] During Haleem's period there was a case of *In the Matters of Enforcement of Fundamental Rights Re: Bonded Labour in the Brick Kiln Industry*, PSC, 1988, 1171; see also *Bonded Labour System (Abolition) Act*, 1992 [Act III of 1992].

[698] L. Michael Hager (1985) also quoted Trubek, while declaring Islamization of Zia and his 'social engineering' a 'Great Experiment.' See L. Michael Hager, "The Great Experiment: Law and Development in Pakistan" in Wolfgang Peter Zingel& Stephanie Zingel, Ave Lallemant eds, *Pakistan in the 80s: Law & Constitution* (Vanguard: Lahore, 1985) 209-230.

[699] Justice Muhammad Haleem CJSC, "Law, Justice, and Society" (1988) XXXVIII PLD, 205 at 207-8. Paper read at Fifth Pakistan Jurist's Conference held at Karachi from 28th to 30th March 1986.

Some associates of Cornelius suggest that he should be treated as the first Public Interest Litigation lawyer in Pakistan,[700] but Werner Menski disagrees. He accepts Cornelius a "post-colonial jurist" who wanted to make the Supreme Court of Pakistan the "edifice of justice." But Cornelius was not in favour of opening the courts and activist courts. Rather, he supported the French system of administrative tribunals as self-cleansing mechanisms for bureaucracy. His approach was to trust the bureaucracy, whereas Public Interest Litigation begins with a presumption of distrust of the executive and legislature.[701]

I see the rise of Public Interest Litigation in the late 1980s as linked to the strong presidential system under Zia. Full-scale constitutional amendments under Revival of the 1973 Constitution Order- RCO, particularly 58 (2)(b) turned it into a presidential system. According to this amendment, the president can dissolve the national assembly. A loud rights discourse always comes with a deficit of democracy in the presidential system. The inclusion of Objective Resolution in the Constitution convert it into a model quite like that the Cornelius tradition had dreamed of. Added to this was the legalism of the rising middle class, which I am going to explain below.

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[700] That seems to be the position of Nasim and Hamid. Their claim is that leadership of CJ Cornelius established the basis of the independence of the judiciary, and gave rulings about fundamental rights and civil liberties. This movement gave birth to judicial activism, liberal interpretation of the constitution and strengthened concepts of judicial review and due process of law. See Khan (2009), *supra* note 11 at 187.

[701] Werner Menskie (1997), "Public Interest Litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture" in Menski et al., ed.s, *supra* note 225, 106 at 107.

The Rise of Liberal and Quasi-Liberal (Islamic) 'Legalism' and the Dying Working Class Struggle

The question before us is, why was 'legalism' acceptable for all class formations as a form of political development in late 1980s and throughout 1990s-2000s? Particularly, why did the rising middle class 'liberal' as well as 'quasi-liberal'(in terms of ideological contestation) support this project? This question demands to figure out the relation of state patronage, political/class struggle ('political society') and 'legalism' of 'civil society' (in which takes us straight to this discourse as promoted in the 1990s-2000s).

Akhtar (2008) used Antonio Gramsci's ideas of hegemony, historical bloc and common sense to develop a historicized theory of the post-colonial state. He attempted to dialectically look at the relationship of accumulated power and capital, and emphasized their logic and practice in wider society. He observed that intermediate classes[702] and the religio-political movements/clerics are part of the ruling coalition.[703] Intermediate classes in Pakistan, according to Akhtar (2008), owe their economic power to the deepening of capitalism and derive their political influence from their access to the state.[704]He added

[702]Akhtar's study is based on Harriss-White, Barbara (2003), see Barbara Harriss-White, *India Working: Essays on Society and Economy*(Cambridge: Cambridge University Press, 2003). Intermediate classes are internally differentiated across the dimensions of urban and rural, organized and unorganized, wage labour and self -employed, see Akhtar, *supra* note 71 at 160.
[703] The military-bureaucratic oligarchy and three propertied classes - landlords, industrialists (the indigenous bourgeoisie), and foreign capital (metropolitan bourgeoisie).
[704]He differentiates between clientalism and patronage. Patronage is the exercise of the power of the patron unchallenged by dependents. Clientalism meant the dependent can negotiate and secure more benefit from the patron. Akhtar drew this distinction from Christopher Clapham, *Private*

the understanding of how intermediate classes are structurally a part of ruling coalition and in turn how subordinate classes are tied to this coalition through intermediate classes.[705] All this is through patronage. Subordinate classes are not tied in personalized market relations with intermediate classes but through patronage and also in exploitative condition.[706] Subordinate classes, are also connected with this patronage through lower bureaucracy and if they resisted are punished. The court and police at the lower level are to control dissent to protect patronage. So these intermediate classes, according to Akhtar (2008), isolate the historical bloc from counter-hegemonic challenges. [707] As a result, "the structure of power remains exclusive despite the great objective changes in the wider society.[708]"

The problematic aspect of this explanation is that patronage explained here seemed a deliberate attempt of the state (military) to kill the politics of resistance. From 1977-1985 (Zia's regime), coercion from the military along with legal and constitutional arrangements was not enough and hence military rule effectively devised the politics of patronage to replace politics of confrontation. This meant that the state delivered political and economic power. This preposition stands on state's 'rationality (though not good) 'will' to give or not to give patronage. It acts as a 'subject' that is not neutral (though it should be). Thus, certain state formation is not just the product of class formation and

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Patronage and Public Power: Political Clientelism in the Modern State (London: St. Martin's Press, 1982).

[705] Examples of intermediate classes are Arti, transporter, contractors.

[706] Landless wage labour, workers of small industry are included in this category. See Akhtar, *supra* note 71 at 169.

[707] Akhtar, *supra* note 71 at 169.

[708]He concluded this on the basis of struggles in districts of Okara and Charsada.

politics, rather certain state formation is creating all kind of class formations and struggles. Let us first correct this causal relation.

It is true that a new middle class emerged in 1980s. The remittances of those who had migrated to the Arab world for employment and the increase in the service sector,[709] and informal economy became connected with big industrialists through patronage links, particularly in Central Punjab. Gulf migrant families are the dominant explanation of the popularity of Zia.[710] According to Burki, Zia belonged to groups of urban middle class professionals (actually the groups which resented Bhutto). Based on this, Burki said that Zia knew the pulse of "middle Pakistan."[711] These classes came in local body elections and later Federal and Provincial non-party based elections. Local bodies of Zia in 1979 undermined Pakistan People's Party national politics through the localization of politics. In the 1985 non-party base elections, 52.9% registered voters cast their vote. Voters connected through patronage were pulled out by the candidates who were rival landed factions. These elections were without issues or ideologies. Similarly in the 1987 local body elections, 40% of candidates were backed by the Muslim League and they all were fearful of disqualification. The remaining 60% were contesting elections under a rigged system. The PPP lost.

Putting the legislature back into state formation, we will see how patronage in horizontal and vertical directions binds the Prime Minister as a head of the legislature

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[709] 40% of total labour force (Govt. of Pakistan 2007).
[710] Jonathan S. Addleton, (1992) *Undermining the Centre: The Gulf Migration and Pakistan*. (Karachi: Oxford University Press, 1992) at 23.
[711] Burki (1998), *supra* note 5 at 79.

within state formation in the late 1980s and early 1990s. Horizontally he/she had to hold all the legislators, or they would defect. Vertically legislators were to bind intermediate classes in 'hegemonic bloc' of the three fundamental classes as explained in chapter two of this dissertation. So, the dynamics of class formation are responsible for patronage. On the other hand, the explanation of patronage as an excuse for the non-existence of 'politics of resistance' in Akhtar ignores the structural issue, which is the non-representation of the working class in all of these state formations. Any change in this particular state formation needs struggle within class formations and the key is class struggle. Class struggle is buried in Aasim's prevailing 'politics of common sense.'

We should see that the legislature (made up of the reigning landed and capitalist class and, through it, the new entrant intermediate classes as the part of 'historical bloc') contributes to state formation. Furthermore, it is not a matter of 'access to the state' (the way patronage is usually explained) with the state conceived as outside the classes. This mistaken position leads to solutions from 'civil society' to go to the state and fix it through the rule of law or the control of corruption. Rather, the middle class is the part of class formation embedded in certain modes of production and which needs class struggle to change the class formation. This can explain how the working class struggle and its effects on consequent class formations (of the 1950s, 60s and 70s) gave birth to a politics of resistance and a consequent ideology in Bhutto. Its results were 'welfare' through the state. The demise of politics of resistance was not because of Bhutto or Zia or the military, but because of the inability of the working class to project its politics. Patronage did not stop the politics of resistance, rather the absence of politics of resistance has

resulted in the current class formations and class struggle, and hence patronage has been allowed to grow.

Why did the 'intermediate class' as a part of the 'historical bloc' express its own politics (or was accommodated) in contradictory relation with the landed, capitalist and metropolitan bourgeoisie? To understand this, first of all let us depart from the conception of class on economic criteria very particular to American political science. Instead of taking intermediate classes outside or alongside classes, we can look at their positions in the economic and production spheres and particular politics and we can assume that they are a part of the petty bourgeoisie. At an ideological level, they believe in individualism, the status quo and fear of revolution, the myth of 'social advancement' and aspirations to bourgeois status, a 'neutral state' above classes and political stability. They also have a tendency to support a 'strong state.'[712] Based on this we have seen how these aspirations are addressed by a presidential system like that of the U.S. with safe political advancement in 1960s to 1980s in relation to three fundamental classes to stop working class participation. The only contrast was Bhutto's era of 'politics of resistance' (with its focus on the support of the working class). After this period, both the Cornelius project as well as the liberal project of Benazir Bhutto, along with newly emerged petty bourgeois (1980s), chose 'legalism' and 'constitutional' struggles. Macro-economic populism was replaced by macroeconomic stability.[713] The following chapters, focusing

[712] Nicos Poulantzas (1972) "On Social Classes" in James Martin ed., *The Poulantzas Reader: Marxism, Law, and the State*, (London, New York: Verso, 2008) 186-219 at 198-99.
[713] As Ishrat Hussian, the governor of the state bank put it. For him, countries which experienced 'populist' episodes were poor in macroeconomic policy. See Ishrat Husain, *Pakistan: The Economy of an Elitist State* (Karachi: Oxford University Press, 1999) at 358-59.

on the 1990s and 2000s, will demonstrate the rising role of judiciary within this transition.

Chapter Five

A Strong Judiciary in a Weakening State (the 1990s)

In the 1990s and 2000s, the judiciary evolved through a number of stages. It began with the separation of power structures (1989-1990), went on to a period of questioning the independence of the judiciary (1991-1994), and then focused on issues around the appointment of judges (1996-1998). In the early 2000s, the supremacy of the constitution was prioritized (1999-2006), while changes in the latter half of the decade mean that the supremacy of judiciary was prioritized (2007), and, finally, I argue, a 'judicial dictatorship' was established (2008). This chapter will explain this progression as linked to a changing state that was dynamically responding to developing class formations.

Class Formations under Neoliberalism

The start of Neoliberal Globalization and the Rise of New Institutionalism

With the 1970s came global economic stagnation, the toll of the Vietnam war, the 1972 oil shock, and the abandonment of the gold standard by the U.S., all of which resulted in in significant material and ideological shifts, debates and conflicts. The

promotion of top-down development thinking started losing priority.[714] The eventual response, a decade later, was neoliberalism, on the one hand, and post-development in development thinking, on the other. The former attacked the state in the name of market-led development and the latter returned the favour in the name of anti-development.

The collapse of modernization was translated by Samuel Huntington as a problem with human behavior,[715] and the New Institutionalism school of thought began to adopt that assumption.[716] Huntington found the dichotomy of modern and traditional as asymmetrical where modernity is abstractly defined to create a category of tradition.[717] He rejected the ideal of a liberal universalistic cultural model. Modernization and

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[714]See Olle Tornquist, *What is Wrong with Marxism: On Capitalists and State in India and Indonesia* (New Delhi: Manohar, 1989). He studied Indian and Indonesian non-capitalist development strategies and outcomes. Vivek Chibber (2003) found that in India, the state intervention was purely supportive, doling out subsidies and offering protectionism to emerging sectors and gradually the capitalist class started gaining influence over the state, see Vivek Chibber, 2003, *Locked in Place: State-Building and Late Industrialization in India* (Princeton: Princeton University Press, 2003).

[715] As we have discussed while concluding chapter three (1960s) with reference to Ralph Braibanti and Huntington. See Ralph Braibanti (1968), "The Role of Law in the Political Development of Pakistan" in Ralph Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Karachi: Oxford University Press, 1999) 82 at 90 and Samuel P. Huntington, "Political Development and Political Decay" (1965) XVII *World Politics* 386-430.

[716] For Douglas North, the neoclassical model has a dilemma. On the one hand, there is a rational self-interested individual and on the other hand there is a need to control this self- interest, which itself gives rise to free rider problems, and hence a need of a Hobbesian model of state. This needs some constraints on behavior, which is provided through institutions. These constraints are norms, but there are also constitutional rules fundamental to maintain property rights So "a theory the structure of (and change in) political and economic institutions must incorporate a theory of ideology," to further the development of transactional cost theory," and to resolve the free rider problem.[716] See Douglas Cecil North, *Structure and Change in Economic History* (New York, London: W. W. Norton & Company 1981) at 203, 44, 18-19, 55 and 32.

[717] Samuel P. Huntington (1970), "The Change to Change: Modernization, Development and Politics" in C. E. Black, ed., *Comparative Modernization: A Reader* (New York: Free Press, 1976) 34, 63.

development do not necessarily produce cultural westernization.[718] He suggested replacing modernization with a "neutral" shift, and advised the U.S. not to promote modernization as a counter to communist revolution, but to rather follow the rules of stability. Why did he do this?

American political life was in chaos in the 1960s. Huntington and others found the norms of this period excessively liberal and wanted the re-imposition of authority both at home and abroad. The chaos arose from "an excess of democracy," according to Huntington, and so a higher degree of government was needed, that is, more imposition of the will of the government on the people.[719] The World Bank moved to a "Basic Needs" approach instead of large infrastructure projects like under President Robert McNamara.[720] It is not irrelevant to mention here that one of the main proponents of this approach was Finance Minister of Pakistan Dr. Mahboobul Haq. In a nutshell, modernization was dead by the 1980s. Yet for a while it lived in truncated form and had an explicit revival around the1990s. The salient structure of the old building was not ready to collapse.[721]

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[718]Samuel P. Huntington, "The West: Unique, not Universal" (1996) 75:6 Foreign Affairs 28-46 at 37.
[719]Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968) at 1, 64.
[720]Nils Gilman, "Modernization Theory, The Highest Stage of American Intellectual History" in David C. Engerman, Nils Gilman, Mark H. Haefele & Michael E. Latham, ed.s, *Staging Growth: Modernization, Development, and the Global Cold War*, (Amherst, Boston: University of Massachusetts Press, 2003) 47 at 70.
[721]Christopher Lasch, *The True and Only Heaven: Progress and its Critics* (New York: W. W. Norton & Company, 1991) at 162.

Modernization returned with American hegemony as "the unstated, undefended, but nevertheless omnipresent liberal vision of historical change." This hegemony was spearheaded and firmly defended by the Japanese-American Hegelian philosopher Francis Fukuyama.[722] Lucian Pye, while addressing the American Political Science Association in 1989, gave the verdict that the collapse of communism is the proof that the modernization theory was right.[723] The point I want to make is that globalization and neoliberalism were the continuity of the modernization project.[724]

1990s: The State for the Market and not for the People

The metropolitan bourgeoisie first pushed the idea of a non-interventionist state. The reigning theory was that "trade openness," or free trade, is conducive to industrialization and development.[725] The policy reforms of this time are commonly termed as the Washington Consensus.[726] The thinking was that only a "market" with

[722] Gilman in Engerman et al. eds, *supra* note 7 at 72-73.
[723] Lucian W. Pye, "Political Science and the Crisis of Authoritarianism: The Vindication of Modernization Theory" (1990) 84:1 *American Political Science Review* 3-19.
[724] Though modernization was a particular response to the Cold War I argue that it continued pushing the capitalist path of development and modernity.
[725] Mehdi Shafaeddin (2006), *Does Trade Openness Favor or Hinder Industrialization and Development?* Online: < http://mpra.ub.uni-muenchen.de/4371/1/MPRA_paper_4371.pdf> downloaded on April 19, 2008.

[726]The Washington Consensus was described by John Williamson (2004) as deregulation, decentralization, liberalization and hence with no need for a state for development. John Williamson (2004) *The Washington Consensus as Policy Prescription for Development*, A lecture in the series "Practitioners of Development" delivered at the World Bank, on January 13, 2004, Downloaded on June 22, 2008, online: <http://web.nps.navy.mil/~relooney/3041_ WashingtonConsensus_2.pdf>.

individuals responding to price signals and thereby "allocating resources to their most productive use," would eliminate the difference between developed and underdeveloped countries. The market could hence bring an end to the traditional development path of underdeveloped countries with its stages of growth, "take off" and industrialization.[727] As a result, local state formations faced a pressure for restructuring from International Financial Institutions that promoted the withering away of the state.[728] Marxist theorists rejected this diminishing of the state approach[729] for the theories of the weakening state paid little attention to the difference between the state of the North or the South. Further, North-South integration was presented as a win-win situation whereas for critical and Marxist theorists, this was patently false. Marxist theorists posited the Washington Consensus as a new phase of restructuring of the world economy, and accumulation of capital along with a new international division of labour, which resulted in the re-colonization of the developing countries and exploitation of workers (in export processing zones). The changes were perceived as quantitative and transitory and not qualitative, for the extractive and imposed exploitation of capitalism was the same. States continued to play their role in the capitalist economy, with tight borders kept intact for

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[727] David Kennedy, "The "Rule of Law," Political Choices, and Development Common Sense in David M. Trubek & Alvaro Santos, ed.s, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) at 129.

[728] Susan Strange (1995) describes a "defective state" to meet the needs of globalization and call this phenomenon the "erosion of the state". The weak state idea has been projected by both neoliberals and much post-development thinking. For neoliberals, the third world state is too weak to institute a market for multinational capital, both in developed as well as developing economies. Post-developmentalists are critical of state because of its repressive role towards subaltern and marginalized and are against any role of the state in their alternate models. See Susan Strange, "The Defective State" (1995) 124:2 *Daedalus, What Future for the State?* 55-74.

[729] See Leo Panitch, "The New Imperial State" (March/April 2000) New Left Review, second series 5-20.

the protection of national capital. Marxists posited that the nation state in the third world while weak as compared to the imperial powers, is strong against its people.[730]

Changing state formation and class formation

In Pakistan, scholars diverged widely in their understanding of the character of the changing state in the 1990s and 2000s. Mushahid and Akmal argued that qualitative changes were apparent in politics at the end of the 1980s, with a decline of Left-Right polarization, greater affluence and national self-assurance.[731] As such, they reiterated the 'End of Ideology' thesis. I will discuss their views on the judiciary later. For Ayesha Siddiqua, the relationship among different institutions of the state affect the capacity of the state to deliver, and hence can determine relatively how strong or weak the state is.[732] In established and institutionalized democracy, multiple interests are accommodated and the state is considered strong internally and externally. For Cheema, bureaucracy was rule-based until Ayub in terms of patronage to large industrialist groups. It became 'non-rule-based' from the Bhutto period onward, with the state distributing patronage at the local level and hence proving to be a weak state.[733] Furthermore, Cheema found

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[730] For Amin-Khan (2012), most of the postcolonial states are "firmly ensconced in implementing neoliberal policies". See Tariq Amin-Khan.*The Post-Colonial State in The Era of Capitalist Globalization: Historical, Political, and Theoretical Approaches to State Formation* (New York: Routledge, 2012) at 67-86.

[731]Mushahid Hussain & Akmal Hussain, *Pakistan: Problems of Governance* (Lahore: Vanguard, 1993) at 52.

[732] Ayesha Siddiqa, *Military Inc.: Inside Pakistan's Military economy* (Karachi: Oxford University Press, 2007) at 31.

[733] Ali Cheema (2003) "State and Capital in Pakistan: The Changing Politics of Accumulation" in Ananya Mukherjee Reed ed., *Corporate Capitalism in Contemporary South Asia: Conventional*

considerable change in the state's ability to affect social formations. A.S. Akhtar deduces from this that the importance of bureaucracy has increased to distribute patronage.[734] Distribution through the lower bureaucracy is actually used to control of the politicians on patronage. This development for A.S. Akhtar does not *weaken* the state per se [emphasis added by the writer]. Oligarchy's dominance was restored within a decade. A.S. Akhtar also thinks that the state is losing a source of its power to affect or direct change. For Hasan, the state structure remains unchanged in spite of changes in social formation.[735] He looked at how the operation, management and implementation of the fiscal system and the structure and governance of the Pakistani state do not reflect any demographic, social, cultural and economic changes.[736] Addelton describes how, during the 1970s and 1980s, gulf migration undermined the Pakistani state's ability to centralize economic decision-making.[737] This resulted in insulation of the oligarchy and the dominant classes from counter-hegemonic challenges. In this view, the state is not weakened, but has in fact negotiated change in such a manner to consolidate its power.

These theories have not looked at Pakistan sufficiently within the wider geopolitics in which it is located. In this wider context, the metropolitan bourgeoisie increased its grip on the economy through International Financial Institutions. The ruling

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Wisdoms and South Asian Realities (Basingstoke: Palgrave Macmillan, 2003) as cited by A.S. Akhtar Sajjad Akhtar (2008) Overdeveloping State: The Politics of Common Sense in Pakistan, 1971-2007 (Submitted to the SOAS, University of London for the degree of PhD) at 159.

[734] Akhtar, *supra* note 20 at 74.

[735]Arif Hasan. *The Unplanned Revolution: Observations on the Process of Socio-economic change in Pakistan* (Karachi: City Press, 2002) as cited by Akhtar, *supra* note 20 at 159-160.

[736]*Ibid*.

[737]Jonathan S. Addleton. (1992) *Undermining the Centre: The Gulf Migration and Pakistan*. (Karachi: Oxford University Press, 1992).

class, though in control of democratic institutions, was not hegemonic, and most of the deals were brokered according to the priorities of International Financial Institutions, sometimes with interim Prime Ministers to make quick fixes in the economy and polity.[738] The state was indeed weakened with the entry of International Financial Institutions, Structural Adjustment Programs, and their related conditionalities, as well as through being denied control of resources. Furthermore, unequal and uneven development raised the additional crisis of how to gain control of people who were increasingly discontented. The growing poverty put pressure on the fragile democratic polity. The state's administrative authority, which is linked to its cohesiveness, was weakened or compromised due to the deepening of capitalism, with the new middle class emerging as a contender of power. The encroachment of capitalism was also marked with an unorganized economy outside the formal economy and polity. New local spheres of power like the regional political party Muttahida Qaumi Movement- MQM, as well as NGOs, also became contenders of power.

A.S. Akhtar saw this middle class as co-opted by the already defined historic bloc. I argue that it is not quite so simple, and moreover, he never defines the dominant class within the hegemonic bloc, or how state formation and the liberal project was affected. In

[738] After the failure of each democratic regime in the 1990s, a care taker prime minister, from the World Bank or IFIs was appointed. After the dissolution of Nawaz Sharif's assembly, the Vice President of the World Bank, Moeenuddin Ahmad Qureshi was appointed as a care taker Prime Minister from July 13, 1993 to October 19, 1993. Similarly after the dissolution of Benazir Bhutto's government in 1996, Regional Vice President of the World Bank for Caribbean and Latin America, Shahid Javed Burki became a care taker Finance Minister (1996-97 for 67 days). That was not enough, so during Musharraf's regime, Executive Vice President of Citibank, Shaukat Aziz was elected (actually 'selected') as the Prime Minister from August 20, 2004 to November, 2007). For a very detailed account of this unfortunate aspect of the history of Pakistan, see Shahid ur Rehman, *Pakistan: Sovereignty Lost* (Islamabad: Mr. Books, 2006).

my explanation, the Pakistani state was structurally dependent on the metropolitan bourgeoisie (through their International Financial Institutions) and it became more dependent on it under rising neo-liberalism. Civil society of late 1990s allied with legalism and constitutionalism, and this alliance became a check on the corrupt 'political elite' until the end of the 1990s – but all of this was within the priorities of the hegemonic bloc. I will now demonstrate this by analyzing the judiciary, its decisions and particular legal discourses around the separation of power, the appointment of judges, the independence of the judiciary, and the loud rights discourse under Public Interest Litigation (PIL) that emerged through the 1990s.

Judiciary in Transitional Governance (1988-1990)

Class Formation: Which is the hegemonic class?

Mushahid and Akmal point out that the U.S. worked hard in the 1988 transition of Pakistan away from a pro-American dictatorship toward a pro-American democracy (like in the Philippines, South Korea and Panama). U.S. Ambassador Arnold Raphael met Zia on May 29, 1988, just an hour before dismissing Prime Minister Juneju, and himself died with Zia in an airplane crash. Ghulam Ishaq Khan met Robert Oakley, the next Ambassador, for five hours before dismissing Benazir Bhutto.[739] Benazir Bhutto records that she saw the U.S. as important to stay in government but feared that the Western

[739] Hussain & Hussain, *supra* note 18 at 39-40, 156

intelligence elite was more comfortable with generals and not with her and looked at her as the daughter of a socialist fire brand[740].

The daughter however carried little of her father's thought. Benazir Bhutto sent a team of experts to London to study how the Prime Minister's office at 10 Downing Street worked.[741] She admired Thatcher[742] and in her 1988 party manifesto, promoted the idea of privatization. She wished to break the dominance of public sector units by giving impetus to the private sector.[743] She did not find this inconsistent with her father Bhutto's policies,[744] and some writers claim the lack of ideology in her politics.[745] In spite of

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[740] Benazir Bhutto, *Daughter of the East: An Autobiography*, 2nd ed. (London: Simon & Schuster, 1988, 2007) at 403.

[741] *Ibid* at 398.

[742]Shah Nawaz Bhutto, a rebel son of Bhutto, accused Benazir Bhutto having a soft corner for Thatcher in the1980s, but she refused the comparison saying that Thatcher was right wing giving the example of high unemployment. Later she got impressed with how Thatcher's policies created a middle class whose actual center was privatization. According to herself, she launched the program of privatization for the first time in South Asia and Middle East. See *Ibid* at 283.

[743] She felt proud that deregulation happened under her leadership and Pakistan was integrated into the global economy as one of the emerging markets. Her successes are the introduction of the private banks, and financial institutions comprising of stock market, Central Revenue Department, making State Bank autonomous, and reforming corporate law. See Benazir Bhutto (1999), "I am Determined not to let Down those who Believe in a Democratic, Modern, Moderate, Muslim State" in Senator Sajjad Bokhari ed., *Benazir Bhutto: Speeches and Statements* (Islamabad: Musawat Publications, 2006) 7 at 16-17., address at SDPI Seminar, Islamabad, March 5, 1999.

[744] According to Benazir Bhutto, her father followed socialism as route to economic emancipation and she was following deregulation for the same goal. For her information replaced ideology as the idiom of action, see Benazir Bhutto, *Wither Pakistan: Dictatorship or Democracy?* Dr Iqbal Narejo ed., (Lahore: Al-Hamd Publications, 2007) at 119, 239.

[745]Wilder (1998), Waseem (2007) on the basis of elections. Their results show how the wide ranging and ideological politics before 1970s is converted into very functional and localized politics. For Wilder (1998) *biradari* or kinship is the main the reason for voters, but this is connected with patronage networks as the candidate can deliver patronage to supporters. Similarly, Waseem (2007) found the loss of ideology as a reason for less vote turn out in 1988 elections [at 429]. According to him Benazir Bhutto replaced Islamic socialism with social democracy [at 140]. Disappointed from no ideology, Pakistan People's Party and Pakistan Muslim League are presented respectively as Left and Right of the center parties [at 436], see Mohammad Waseem. *Politics and the State in Pakistan* (Islamabad: NIHCR, 2007); see also

impressive growth, under her watch, Pakistan opted for the infamous IMF Structural Adjustment Program, though it did not economically need the program, as well as other liberalization measures.[746] In a nutshell, the post-1988 era was a 'Period of the Return to Democracy' and an 'Era of Structural Adjustment'[747] as well as one of 'Competitive Democracy.'[748] Let us now examine struggles in the state.

The Cornelius Tradition in the Judicial Office

The 'political governance structure' left by General Zia for Benazir Bhutto, who was appointed as Prime Minister in 1988, might be summed up by the phrase "Ali Baba may be gone, but the forty thieves remain."[749] Section 58(2)(b) of the Constitution was a powerful tool through which the president could dissolve the National Assembly. The structures, institutions and dominance of the military in the country remained intact. Above all, the judiciary was accustomed to Zia's set up and had been long connected with the Cornelius tradition[750] of judicial thinking through jurists like Supreme Court

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Andrew R. Wilder, *The Pakistani Voter: Electoral Politics and Voting Behaviour in Punjab* (Karachi: Oxford University Press, 1999).

[746] Ishrat Husain, *Pakistan: The Economy of an Elitist State* (Karachi: Oxford University Press, 1999) at 300

[747] S. Akbar Zaidi, *Pakistan's Social and Economic Development: The Domestic, Regional and Global Context* (New Delhi: Rupa Co., 2004) at 22.

[748] Shahid Javed Burki, *A Revisionist History of Pakistan* (Lahore: Vanguard, 1998) at 87

[749]Nusrat Bhutto commented while addressing in Larkana on November 10, 1988. See Benazir-Bhutto (2007), *supra* note 28 at 388.

[750] It is just that the old guard, Brohi and Pirzada, who brought legitimacy to the Ayub era were also significantly involved in promoting *the doctrine of necessity* when Zia overthrew Bhutto. The judiciary during the Bhutto era was altered, yet its post-1958 vestiges remained. In my analysis, the Cornelius tradition is a particular kind of state formation, as defined at the end of Ch.3. It required a strong presidential system, rights to compensate for the democratic deficit, and

Justice Nasim Hasan Shah.[751] Meanwhile, its counterpoint, that is the legislature, was tied up with the web of patronage and riven with political defection.

Zia dissolved Juneju's assembly on May 29, 1988.[752] He died on August 17. Nobody challenged this dissolution. Only after his death was the dissolution of assembly challenged in Lahore High Court.[753] The court did not find reasons that could be used to dissolve any assembly. But no relief was granted, as dissolution meant the death of assembly. Counsel was asked to cite an example of the assembly ever having been restored. They could not give examples.[754] In hearing an appeal, the Supreme Court decided the matter in the *Haji Saifullah Khan* case.[755] The court did not allow the use of Section 58(2) (b) for dissolution of assemblies as an absolute discretion without reasonable grounds, and hence made it subject to judicial review. These "bold reversals" from 'usurper's position' in both the *Asma Jilani* case and Juneju's assembly dissolution case, only came about when the persons concerned were not in power. Post-Zia courts checked the validity of the dissolution order of each ground on merit, but this 'merit' was open to interpretation.[756] For Charles H. Kennedy, the post- Zia courts' activism resulted

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it used the idiom of Islam as a centrifugal force for nation-building. I term it a quasi-liberal project.

[751] He called Cornelius his mentor.

[752] See the order on pages 756-7, *Muhammad Sharif vs Federation of Pakistan,* 1988 PLD Lahore 725.

[753] Jan Mohammed Dawood. *The Role of Superior Judiciary in the Politics of Pakistan* (Karachi: Royal Book Company, 1994)

[754] *Muhammad Sharif v. Federation of Pakistan*, 1988 PLD Lahore 725.

[755] *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, 1989 PLD S. C. 166.

[756] Charles H. Kennedy, "Presidential-Prime Ministerial Relations: The Role of the Superior Courts" in Charles H. Kennedy & Raul Bakhsh Raise, ed.s, *Pakistan: 1995* (Lahore: Vanguard, 1995) at 17 at 20, 24.

in an ambiguous system of "mixed presidential-prime ministerial authority."[757] My argument is that this state formation represents a continuity of a juridico-bureaucratic structure in the Cornelius tradition that had been present under president Ayub and Supreme Court Chief Justice Cornelius of the 1960s.

During her first regime, Benazir Bhutto was hostile to Supreme Court Justice Nasim as the only remaining judge who had convicted her father. Benazir Benazir Bhutto thought Nasim as a "murderer" of her father, for she thought of her father's conviction as "judicial murder."[758] She removed him from the chairmanship of the Pakistan Cricket Control Board. Justice Nasim responded with judicial indifference. He thought that he gave the judgment on merit and, moreover, Bhutto's lawyer did not respond.[759] Bhutto also refused to sit at the same table as Justice Nasim (he was second most senior judge of the Suprem Court at that time) during the ground breaking ceremony of the Supreme Court building, which was held on October 25, 1989.[760]

Benazir Bhutto's conflict with her father's detractors was clearly visible and extended well beyond a particular individual. Benazir Bhutto granted clemency and commuted all death sentences of persons sentenced by both military and civilian courts to life imprisonment, on December 6, 1988 using Article 45 of the constitution. This was to benefit the Pakistan People's Party workers, who were brutally suppressed during Zia's regime. The Lahore High Court found these Prime Ministerial orders repugnant to the

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[757] *Ibid.*
[758] Benazir-Bhutto (2007), *supra* note 28.
[759] Justice Nasim Hassan Shah Chief JusticeSC (Ret., as he then was), *Memoirs and Reflections* (Islamabad: Alhamra Printing, 2002) at 199, 193, 308.
[760] See Justice Sajjad Ali Shah Chief Justice SC (Ret. as he then was), *Law Courts in a Glass House: An autobiography* (Karachi: Oxford University Press, 2001) at 160-61.

Article 2-A of the constitution. The court went to the extent to say that only heirs of the deceased can commute, remit or pardon, and the president had no powers in this regard.[761] This protective attitude of the judiciary toward Zia's legacy was shown very openly in the decision of dissolution of Benazir Bhutto's Assembly.

The Dissolution of the Benazir Bhutto Assembly Case

On August 6, 1990, President Ishaq used Article 58(2)(b) of the constitution to dissolve the national assembly (as well as provincial assemblies) under the charges of corrupt practices, political defection (horse trading), encroachment on provincial powers, nepotism, deteriorating law and order, ridiculing the judiciary, and undermining civil services.[762] A full bench of the Lahore High Court upheld the order of dissolution of assembly by the president.[763] The court criticized the assembly for not completing legislative work. During twenty months, 50 ordinances or bills were presented before the assembly; only fifteen were passed and 35 did not proceed and were allowed to lapse. The dissolution of the Sindh Provincial Assembly was also challenged as was the judgment of the Sindh High Court.[764] The Supreme Court upheld the judgment of the

[761] *Mst. Sakina Bibi v. Federation of Pakistan,* 1992 PLD Lahore 99

[762] The only difference between Ishaq and Zia was that Zia only gave 4 reasons to dissolve the assembly whereas Ishaq gave 13 along with voluminous files prepared by Ministry of Justice and Parliamentary Affairs. See Charles H. Kennedy, "Presidential-Prime Ministerial Relations: The Role of the Superior Courts" in Kennedy & Rais (1995), *supra* note 43 at 21.

[763] *Ahamad Tariq Rahim v Federation of Pakistan,* 1991 PLD Lahore 78.

[764] *Khalid Malik v. Federation of Pakistan,* 1991 PLD Karachi 1.

Lahore High Court by a majority.[765] The first important aspect of this judgment is the observations of Justice Shafiur Rehman against political defection. The second is the dissenting views of Justice Abdul Shakoor Salam, who did not agree with the grounds of dissolution, and Justice Sajjad Ali Shah, who found the order of dissolution of the assembly mala fide, but did not find relief in restoration as the election had already been held and a new government was in place (as had happened in *Haji Saifullah case*).

When the dissolution of the provincial assembly of North Western Frontier Province- NWFP was challenged in Peshawar High Court, a surprising verdict came. A full bench of the Peshawar High Court accepted the petition and declared the impugned order *ultra vires* of the constitution, without lawful authority, and therefore of no legal effect. The court also restored the assembly and cabinet.[766] The problem with Chief Minister *Sherpao's case* in the decision of Peshawar High Court was that it was based on technicalities, though his position might be called principled. The point here was that there were structures to correctly dictate the rules of the game. Within a few minutes, the judgment was presented before a single bench of the Supreme Court in Peshawar, which suspended the operation of the judgment. This was later upheld by a full bench of the Supreme Court.[767] One of the concerns of the Supreme Court was the political defection, which affected the representative character of the assembly. The Suprem Court judges who did not uphold the decision of Peshawar High Court were AjmalMian and Nasim

[765]*Khawaja Ahmad Tariq Rahim v. Federation of Pakistan,* 1992 PLD S. C. 646.
[766]*Aftab Ahmad Khan Sherpao v. The Governor of NWFP,* 1990 PLD Peshawar 192.
[767]*Federation of Pakistan v. Aftabahamd Khan Sherpao,* 1992 PLD S. C. 723.

Hasan Shah.[768] It is pertinent to note that these judges came to be seen as defenders of 'democracy' to a fraction of the ruling class in the years to come.

What happened to those Peshawar High Court judges who restored the assembly? The President responded by not promoting Chief Justice of the Peshawar High Court Sardar Fakhre and Alam, nor Supreme Court Justice Inayat Elahi Khan. In addition, Nazir Ahmad Bhatti was sent to the Federal Shariat Court as a punishment, and Justice Qazi Muhammad was blocked from becoming a permanent judge. The dissenting judge was, meanwhile, made a permanent judge.[769] Even a cursory analysis of these judgments can show us how the judiciary fully supported the constitutional and political arrangement of the juridico-bureaucratic structure of Zia's legacy. But declaring these decisions as explicitly political does not add much to our analysis. Let us evaluate some of the allegations or excuses for the dissolution of the assemblies from a class perspective.

Did the Legislature not Legislate or were there Legislative Hurdles?

One of the allegations against the legislature was that it did not legislate. However, the fact of the matter was that the legislature could not legislate as the Pakistan People's Party government did not have representation in the Senate. The senate was elected under Zia in 1985, a time when the Pakistan People's Party did not participate in elections. As a result, only 15 ordinances and bills out of 50 could be presented in the

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[768] *Ibid.*

[769] Hamid Khan, *Constitutional and Political History of Pakistan*, 2nd ed. (Karachi: Oxford University Press, 2009) at 411, footnote 37.

parliament. The National Finance Commission could not operate as the opposition of Pakistan Muslim League-N was strong in the largest province of Punjab and was denying access to the central government. The court could not understand the basic inadequacies within the constitutional structure, as the wholesale amendments by Zia (in the early- to mid-1980s) had converted a parliamentary system into a presidential system. Furthermore, these were also the inadequacies of the division of political power during a time of transition regarding the governance of the country.

Political Defection: a Weak Democracy in a 'strong State'

The next allegation was that members of the legislative opposition were bought by Benazir Bhutto. A vote of no confidence was moved against Benazir Bhutto on Nov 1, 1989. It was defeated and political chaos erupted. The government of Benazir bribed and bought the opposition members. The members of opposition who defected were rewarded with ministries and loans from the nationalized banks. In the *Humayun Saifullah Khan* case,[770] the question of political defection came before the Supreme Court. The judiciary was not only reluctant to address this issue but thought it to be a domain of the legislature.[771] Though the dissenting judge, Ajmal Mian, declared later that floor crossing thrived, flourished and polluted the political culture of Pakistan, the Supreme Court did

[770]*Humayun Saifullah Khan v. Federation of Pakistan and two others,* 1990 PLD S. C. 599-612.
[771]A bench comprising Justice Shafi-ur-Rehman, Justice Abdul Qadeer Chaudhry, Justice Rustom S. Sidhwa and Justice Ajaml Mian heard the case and did not declare section 8-B of the Political Parties Act 1962 as *vires* of the Constitution by a majority of 3 to 1. AjmalMian J in his dissenting opinion wrote that legality of section 8-B of the Act will encourage floor crossing.

not decide on this issue in 1990.[772] Wilder made it clear that the Pakistan People's Party was greatly weakened by the practice of patronage that was started by Zia and could be manipulated by the bureaucracy.[773]

While rigging of elections is generally mentioned as a problem, patronage is not, because is an indispensable part of South Asian democracy.[774] For example, Benazir Bhutto and Sharif gave land of Rs 9.7 billion to their friends.[775] In order to check that discretion, Moeen Qureshi in August 1993 promulgated an Ordinance and brought that distribution under a committee. Benazir Bhutto did not let this Ordinance become a law.[776] In 1993 and 1994, 100 members of the Punjab Assembly and two members of North Western Frontier Province-NWFP defected to other side. Presidential ordinances of 1990, 1991 and 1993 were put forward to stop floor crossing but could not pass, as they were not placed before the parliament. "Parliamentarianism" for Benazir Bhutto was merely a headcount in the assembly.[777] The decision in the case challenging the dissolution of Benazir Bhutto's assembly, however, merely judged it as a deviation from an 'ideal type' of democracy.

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[772] Justice Ajmal Mian Chief JusticeSC (Ret. As he then was), *A Judge Speaks Out: An autobiography* (Karachi: Oxford University Press, 2004) at 217.
[773] Wilder, *supra* note 33 at 132-133.
[774]Mushtaq Khan, "Patron-client networks and the economic effects of corruption in Asia" (1998) 10 European Journal of Development Research 15-39.

[775]Dennis Kux. The United States and Pakistan 1947-2000: Disenchanted allies, (Baltimore, Md.: John Hopkins University Press, 2001) at 324-5.
[776] Interview of Ayesha with Moeen Qureshi in Siddiqa, *supra* note 19 at 105.
[777] Mohammad Waseem, "Pakistan Elections 1997: One Step Forward" in Craig Baxter and Charles Kennedy, ed.s, *Pakistan: 1997* (Boulder, Colorado: Westview Press, 1998) 1 at 9.

Appointment of Judges(1988-1990)

Questions around the appointments of judges had come before the judiciary in the *Haji Saifullah Khan* case.[778] Zia had dissolved Prime Minister Junejo's government but did not appoint a caretaker Prime Minister. With Zia's death, Pakistan was 'deprived' of a president, prime minister or provincial assemblies.[779] This state of vacuum continued until Benazir Bhutto took over the office in 1988. The question in the *Haji Saifullah Khan case* was about the legal status of all the governmental actions in that period.

The Supreme Court declared the office of Prime Minister was necessary and its absence led to the altering of the character of the constitution to become a presidential system rather than a democracy.[780] What about the appointments of 30 judges of superior courts during this period? On March 1989, the ruling Pakistan People's Party issued a notice suspending appointments of judges during the period of the caretaker government. Courts reacted to this and instructed the government to retract its notice.[781] The government insisted on removing three judges.[782] These judges could not work for a week until the matter was resolved in a review petition, heard by a bench of four judges, whereas the actual petition was heard by 11 judges. In this review, the judges were

[778] *Federation of Pakistan v. Haji Muhammad Saifullah Khan,* 1989 PLD S. C. 166.
[779] Charles H. Kennedy, "Presidential-Prime Ministerial Relations: The Role of the Superior Courts" in Charles H. Kennedy & Raul Bakhsh Rais, ed.s, *Pakistan: 1995* (Lahore: Vanguard, 1995) at 17-30 at 19.
[780] *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, PLD 1989 SC 166.
[781] *Muhammad Akram Sheikh v. Federation of Pakistan*, PLD 1989 SC 229.
[782] *Federation of Pakistan v. Muhammad Akram Sheikh* , PLD 1989 SC 229, and *Haji Muhammad Saifullah v. Federation of Pakistan,* 1989 PLD S. C. 690.

reinstated.[783] The conclusion was drawn that the Pakistan People's Party had reacquired its reputation for meddling with the justice system.[784]

Articles 177 and 193, read with Article 48, made it clear that the appointment of judges should be made by the president on the advice of the Prime Minister and hence the president had no discretionary powers. In the *MD Tahir* case, the Lahore High Court had given the verdict that consultancy with the Prime Minister in these appointments was not mentioned in Article 193.[785] The Federal Government challenged that decision and a full bench of 11 judges of the Supreme Court heard the case. The judiciary was divided with 7 to 4 in favor of the Prime Minister. There was a great deal of pressure on the judiciary to side with the president.[786] Due to this uncertainty, Benazir Bhutto, during her first term in the office of Prime Minister, could not make any appointments in the judiciary.

The tug of war between the Prime Minister and the president can explain the importance of the appointments issue. The judiciary was divided on the president reference in 1989. Lawyers who were present during the proceedings were shocked by the remarks judges made in regards to each other. The judiciary could not decide the matter as the president and the Prime Minister entered into a compromise around the issue.[787] In MD Tahir's appeal in the Supreme Court, Sharifuddin Pirzada represented the

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[783] *Muhammad Akram Sheikh v. Federation of Pakistan*, PLD 1989 SC 229.
[784] Newberg, Paula R. *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi: Cambridge University Press, 1995) at 210.

[785] *MD Tahir v. Federal Government*, 1989, Civil Law Cases, 1369.
[786] See Khan (2009), *supra* note 57 at 410, foot note 21.
[787] The matter was disposed of in *Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad v. M. D. Tahir*, SCMR 1990 189-192. See Justice Ajmal Mian Chief JusticeSC (Ret.

president and Yahya Bakhtiar represented the federal government as Attorney General. Compromise arrived between the Prime Minister and the president, with the decision that the appointments will be made by the "mutual consent" of both.[788] The Federal Government challenged this decision in the Supreme Court and a full bench of 11 judges were divided on this issue. Before it could be decided, the petition was withdrawn by the federal government under pressure from President Ishaq.[789] Till this time judges were not clear about their role in the appointment of judges but only on the concept of separation of power. Only after 1989 did the judiciary began to claim the appointment of judges as their sole right. The point I tried to establish is that, until 1989, the judiciary was not the sole claimant of the appointment of the judges as it became in 1995 in the *Judges* case.

Not the unconstitutional act but Constitution itself was a problem

The judiciary also protected the constitutional set up of Zia in the *Haji Ahmad* case and *Abdul Mujeeb Pirzada* case. The Pakistan People's Party was left no option except to challenge the Eighth Amendment to change the character of the constitution.[790] The topics discussed in the *Haji Ahmad* case are representative of the nature of this short-lived transitional democratic government of Benazir Bhutto. After the Eighth Amendment had been implemented in 1985, many acts were done under the constitution,

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as he then was), *A Judge Speaks Out: An autobiography* (Karachi: Oxford University Press, 2004) at 119.
[788]Justice Ali-Shah, *supra* note 48at 143.
[789]*Federal Government of Pakistan v. M. D. Tahir*, 1990 SCMR.
[790] *Haji Ahmad v. Federation of Pakistan and 88 others*, Constitutional Petitions D-76, 163, 168 of 1989

including the elections of 1988, so it was difficult to declare this amendment unconstitutional. An interesting aspect in this case is the courts' attempts to avoid the controversy as a sensitive political question and not the subject of adjudication.[791] The court stated that whether the Eighth Amendment was passed according to the constitution or not can be adjudicated by the court, but the division of power between the President and Prime Minister should not be adjudicated by the court but resolved by the parliament. The lesson that Supreme Court Chief Justice Ajmal Mian tried to teach was "the courts cannot replace the constitution making place of sovereign elected bodies."[792] The main case in this regard was the *Abdul Mujeeb Pirzada* case.[793] It is pertinent to note again that until this point (1989), the judiciary was not claiming superiority over the legislature, as it started to do in the late 1990s. Whereas on the one hand, the judiciary was trying to protect the juridico-bureaucratic set up of the Cornelius tradition, at the same time it was slowly strengthening itself through Public Interest Litigation-PIL. I will discuss this later in this chapter.

[791]Which in the coming years judiciary could not keep in mind.
[792] Newberg, *supra* note 72 at 214.
[793]*Abdul MujeebPirzada v the Federation of Pakistan and other*, 1990 PLD, Karachi 9-156, later this matter came in *Mahmood Khan Achakzai& others v Federation of Pakistan & others*, 1997 PLD, S. C. 426-544. Abdul Majeeb Pirzada was a politician and wanted to become a senator. The Senate was a bottleneck for Pakistan People's Party to move any legislation. There were many other petitions which were pending challenging many issues of the constitution due to overarching effects of the amendment. Justice Ajmal Mian is of the view that SC upheld this view taken by him as Chief Justice SHC in the *Mahmood Khan Achakzai* case, see for comments of Justice Mian, *supra* note 60 at 109-110.

The First Regime of Nawaz Sharif (1990-93): Separating the Powers in a Weakening State

In 1990, Nawaz Sharif defeated Benazir Bhutto and emerged with a two-third majority in the assembly with the help of the juridico-bureaucratic structure, particularly a coalition formed and funded by Inter-Services Intelligence-ISI and led by President Ghulam Ishaq Khan.[794] Whereas Nawaz's appeal was a promise of economic reform and to make Pakistan an Asian tiger, which were popular slogans of 1990-91, his economic plan was deregulation, privatization and deep market economic reforms. He drew up the Protection of Economic Reforms Ordinance, 1991, followed by two more ordinances in 1991 and 1992.[795] All the Ordinances were finalized in an Act of the Parliament on July 1992 called the Protection of Economic Reforms Act, 1992.[796] Benazir Bhutto, as the leader of the opposition, did not accept the results of the election and confronted the Prime Minister and president. She had to face references against her for

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[794] Human Rights Case No. 19/1996, etc**.** A*ir Marshal (Retd.) Muhammad Asghar Khan. Applicant(s).v. Gen. Retd. Mirza Aslam Baig*, etc. It had been established in the case that the then president of Pakistan, Ghulam Ishaq Khan, in league with COAS General Aslam Baig, and intelligence head General Asad Durrani, established an 'Election Cell' "illegally." Mr. M. Younas A. Habib, the Chief Executive of Habib Bank Ltd. provided Rs.140 million belonging to public exchequer, out of which an amount of Rs.60 million was distributed to politicians. See for short order dated 19th of October, 2012. Online: <http://tribune.com.pk/story/453773/asghar-khan-case-short-order-full-text/>, last visited Feb 28, 2014.

[795] *Protection of Economic Reforms Ordinance*, 1991, (Ordinance XXVI of 1991) 19991 PLD Central Statutes 494; *Protection of Economic Reforms Ordinance*, 1991 (Ordinance XXXIX of 1991), 1992 PLD, Central Statutes 55; *Protection of Economic Reforms Ordinance*, 1992 (Ordinance III of 1992), 1992 PLD, Central Statutes 166.

[796]*Protection of Economic Reforms Act*, 1992, (Act XII OF 1992) PLD 1992 Central; Statutes 250.

disqualification.[797] However, these references were of no use except to harass her about the imprisonment of her husband, Asif Zardari.

Benazir Bhutto could not have brought any change in the judicial structure in her last tenure, due to the reasons mentioned in the above section, and could only show her resentment. As a product of the Zia period, Nawaz easily won the support of the juridical establishment. His support came from the senior-most Supreme Court Justice Nasim Hasan Shah, who later became the Chief Justice of the Supreme Court during Nawaz's first tenure, Supreme Court Justice Rafiq Tarar and Supreme Court Justice Ajmal Mian, who continued to show support in the years to come. This group represented a 'quasi-liberal,' legal, petty bourgeoisie project in Cornelius tradition. What was new was the formation of a 'liberal' legal project, which I'll explain below. Before this, we should not forget that both of these projects were the part of a class formation under the metropolitan bourgeoisie's advancing neoliberalism. The reigning classes were represented by two fractions (under Nawaz's Muslim League and Pakistan People's Party). So, particular legal developments (tools for judicial activism like separation of power and particularly Public Interest Litigation-PIL) can be explained as a crisis within these class formations.

[797] *Parliament and Provincial Assemblies (Disqualification of Membership) Order*, 1977. President's (Post-Proclamation) Order 17 of 1977, 1978 PLD Central Statutes 17.

Contours of the 'liberal legal project' in Pakistan

Based on the declining role of the state under neoliberalism, the 'intellectuals' redefined the role of state and law in Pakistan using a tendency I call a '*liberal project*' with legal interventions that I term as a *'liberal legal project.'* The intellectuals included a wide range of the liberal Left who were disenchanted with the socialist experience as well as the Pakistan People's Party but continued to fight democratic struggles through emerging NGOs. Their mandate was to cut the excesses of neoliberalism as well as restructure the state, society and democracy. Their critique did not fit perfectly within poststructuralist stance (a response opposing the thrust of formal legal institutions). They could not present 'local' or tradition as an alternative because that was represented by a quasi-liberal tradition of Cornelius in terms of some grafting of Islam on a liberal Constitution. Under these circumstances the liberal project and its associated liberal legal project could not develop a full critique of neoliberalism. This resulted in vulnerability of this project to be dominantly co-opted by neoliberalism in the form 'social' of good governance in 2000s.[798]

[798] Meaning incorporating social concerns into the agenda of market and development reforms, in the form of a Comprehensive Development Framework (CDF). Seeee Rittich, Kerry. "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in David M. Trubek & Alvaro Santos, ed.s, *Law and Development Theory and the Emergence of a New Critical Practice*, (Cambridge: Cambridge University Press, 2006); see also James D. Wolfensohn, A Proposal for a Comprehensive Development Framework, online:< http://web.worldbank.org/archive/website01013/WEB/0__CO-87.HTM>, last visited May 09, 2014.

The pioneering collective for this new mandate was the Sustainable Development Policy Institute, which was under the leadership of Tariq Banuri.[799] In the early 1990s, this tendency had a full plan, based on Alexis de Tocqueville 150 years earlier, that the transfer of power to elective officials must take place simultaneously with the transfer of power to judicial officials. All "successful" societies have "strong and independent" judiciaries, the intellectual collective argued. This 'vision' puts forward a full package of judicial reforms with judges with high paid salaries.[800] The plan also needed democratic decentralization, which for Banuri, was impossible without strong and effective judicial institutions at the local level.[801] He argued this case based on the collapse of the socialist pattern of national organization, which were the world's major centralized political and economic management systems. Banuri saw that there was enthusiasm for decentralization that was critical of the "state-centered view of the world.[802]" Redefining the role of the state could be done through institutional change and institutional reforms, particularly legal ones. This included changes to bankruptcy laws, environmental laws and the law to ensure the independence of the State Bank of Pakistan.[803]

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[799] A Harvard graduate (1986) deep in the 'sustainable development' paradigm of the IFIs. He provided advice to United Nations, the World Bank, ADB, Sida, EU, SAARC, USAID, and DfID.

[800] Tariq Banuri, *Democratic Decentralization and the Judiciary* (Islamabad: SDPI, Research Report, 1992) at 21-22. This plan bore fruit in 1999 with Asian Development Bank legal reforms project.

[801] He compared five countries around the world from the perspective of centralization and decentralization (UK, US, India, Pakistan, Japan.) See *Ibid* at 4.

[802] *Ibid.* at 4.

[803] The Eight Five Years Plan: Basic Framework for Justice in Pakistan, (Islamabad: SDPI- Policy Paper Series# 5, 1993) at 11.

This liberal project practically supported judicial activism through Dr. Faqir Hussain (a main proponent of Public Interest Litigation- PIL who helped the Supreme Court in its PIL intervention), who declared it a revolution with origins in the American and British legal systems.[804] Dr. Pervaz Hussan was on the board of Governors of the Sustainable Development Policy Institute and he brought forward the *Shehla Zia case*. Dr. Banuri was placed on different judicial commissions by Pervaz Hassan.

The quasi-liberal project under the Cornelius tradition already dominated the state, particularly in the judiciary as already pointed out. Common to the 'quasi liberal' and 'liberal' projects (under the two-party system of Nawaz Sharif's Muslim League and Benazir Bhutto's Peoples Party respectively) was the centrality of law. Both also were adherent to neoliberal project conditionalities.[805] This made the judiciary an arena of struggle for contending fractions of the same class formations. The judiciary was thus as a problem as well as solution emerging from changing class formation under neoliberalism in 1990s. Human rights, decentralization and constitutionalism, as new institutional arrangements, were substitute or forms of class struggle or used to accommodate subalterns. This is the class formation and changing structural relation under neoliberalism within which we are to evaluate the state formations and the rising role of the judiciary.

There is no doubt that the role of the judiciary was changing. Mushahid Hussain and Akmal Hussain identified that judiciary had to adjust to new realities. Before this, the

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[804] Dr. Faqir Hussain, (1993) *Public Interest Litigation* Working Paper Series# 5 (Islamabad: SDPI, 1993) at 1-2.

[805] The same economic policies were from both the parties. See Hussain, *supra* note 33 at 357.

judiciary as a political institution was conservative, upheld the status quo, and reflected a conservative mood. It now needed to play a role *above and beyond the call of duty*. Mushahid Hussain and Akmal Hussain called on the judiciary to protect democracy, in light of the failure of politicians and politics to do so, and to keep itself clean from 'plot and pajero culture.' Up until that time, writers found the judiciary clean as compared to other institutions.[806] There was also pressure to fashion changes in law so that economic conditions of the people could change.[807] "The performance of the judiciary"[808] slowly became a new indicator or hope for the development of a country, not the Human Development Index-HDI.

The point to remember is that both the above projects were allied with the rising petit bourgeoisie in bar politics and within the judiciary. They were also connected with the exclusion of the working class. Let me elaborate on these two points.

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[806] Hussain & Hussain, *supra* note 18 at 54-55, and 57-58.
[807] Justice Hasan-Shah (2002), *supra* note 47 at 300, speech delivered in Delhi in SAARCLAW conference on 28th January 1994.
[808] Justice Ajmal Mian (1990) Chief Justice SHC (as he then was), "Independence of Judiciary"(1990) XLII PLD Journal 8-19 at11, a paper read at a seminar in Lahore organized by the Center for the Independence of the Judges and Lawyers (CIJL), The International Commission of Jurists (ICJ), The Ministry for Law and Justice, Government of Pakistan and the Human Rights Commission of Pakistan, on 9th Nov 1989

Separation of Power and Independence of the Judiciary: A Gap in Parliamentary Democracy

For A. G. Chaudhry, the executive did not wish for a separation of powers.[809] This was the inherent defect of the parliamentary form of government in the British tradition.[810] The presence of service tribunals, special courts, military courts, as well as administrative courts in Pakistan in fact made it clear that the judicial power was not confined to the judicial organ of the state itself and could be conferred by the executive as well as the legislature and the executive. It was accepted that legislation could nullify a judgment. In this context, in the 1973 constitutional scheme, only judicial review could protect against tyranny.[811]

As the judiciary in the 1990s was more clear that its future is with the U.S. in a unipolar world, Justice Ajmal Mian insisted that the constitution be based on the trichotomy of power, as is the case with the U.S. constitution.[812] He was the main architect of the separation of power position in 1990 when he was Chief Justice of the Sindh High Court, and accordingly, he wrote the judgment in *Sharif Faridi case*.[813]

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[809] A. G. Chaudhry, "Understanding of Parliamentary Democracy" (1995) PLJ Magazine Section, 99-103.
[810] *Ibid.* at 103.
[811] A. G. Chaudhry, "Judicial Power and Jurisdiction in Context of Basic Structure of the Constitution" (1995) PLJ, Magazine Section, 149 at172.
[812] Justice Ajmal Mian J SC (as he then was), "Separation of Judiciary from the Executive" (1993) PLD, Journal, 54 at 55, Presidential address delivered at Sindh High Court Bar Association Karachi on 19th Nov 1992.
[813] *The Province of Sindh v Sharaf Faridi*, 1994 PLD S. C. 105-119. In 1973, the constitution clause (3) in Article 175 declared that " The judiciary shall be separated progressively from the executive within three years from the commencing day." Later, three years were extended to 5 and after the Martial Law of 1977 process could not be completed until 1987. Finally in *Sharaf*

Ajmal Mian argued that the separation of power is a "modern" concept as in the ancient times all the three powers were vested in one person, the Monarch or chief of the tribe.[814] He extended this view further that the separation of power not only ensures freedom from interference from the executive but from "all other pressures, considerations, and prejudices."[815]

Article 175(3) in the 1973 constitution, which pertains to the separation of power, was invoked in the case as self-executing and one that did not need legislative regulation for the judiciary to uphold it.[816] The then Supreme Court Chief Justice Haleem commented that Ajmal is intending to take over the government. Chief Justice Ajmal replied that he intended to do so with the kind support of the Supreme Court Chief Justice. This was a milestone toward the independence of judiciary.[817] In appeal, Nasim, who was then Justice of the Supreme Court, played an important role in finalizing the matter and was appointed by the Supreme Court Chief Justice as chairman of the committee to find how to implement the judgment. Benazir Bhutto did not implement the decision. In 1996, some steps were taken through an Ordinance.[818] But it took another year for it to become an Act of the Parliament.[819]

Faridi case, the court declared the above constitutional clauses as 'self-operating' and asked the government to complete the separation judiciary from the executive.

[814] *supra* note 96.

[815] *Ibid* at 11.

[816] See the dissenting view of the Justice Qazi JSHC in the *Sharif Faridi case.*

[817] Justice Mian, *supra* note 60 at 114.

[818] *Legal Reforms Ordinance* , 1996 (Ordinance XL of 1996) 1996 PLD, Central Statutes 300.

[819] *Legal Reforms Act*, 1997 (Act XXIII of 1997, 1997 PLD, Central Statutes 402. A detailed account of separation of judiciary from the executive is found in Mahboob Pervez Awan, "Separation of Judiciary: Bit by Bit" 2001 PLD 99-102.

On the other hand, Khoosa[820] is of the opinion that separation of power is an ideal and has never been achieved anywhere in the world, rather such rigorous segregation is sometime inconsistent. Therefore, it should be according to the practical requirements of the countries. Its roots are colonial but its reason is the current constitutions of newly independent countries following the Westminister model. In the 1970s, according to Khoosa, the steps taken by Bhutto, "swung the balance in favour of legislators"[821] but then legislators started asserting authority beyond their legitimate scope. The judiciary began restricting each organ of the state to restraint its limits.

The judiciary was becoming self-conscious of its place in the new state formation in local and global class formation. The separation of power concept was linked to the issue of the independence of the judiciary, a point that was linked to the appointment of judges[822] in the years to come. Behind the linear evolvement of these legal formations was 'legalism' of a quasi-liberal and liberal project alike as a class formation. Out of this quasi-liberal project emerged the rising judiciary under Public Interest Litigation-PIL in the early 1990s.

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[820]Justice Asif Saeed Khan Khosa, "Legislature, Executive and Judiciary: Conflicts and Cohesion" (1994) PLJ 65-73. A paper read at Third SAARC LAW Conference held in New Delhi, India on 30-01-1994.

[821] *Ibid* at 67-68.

[822] As claimed by Justice Ajmal Mian J SC (as he then was), "Separation of Judiciary from the Executive" (1993) PLD Journal 54 at 55, Presidential address delivered at Sindh High Court Bar Association Karachi on 19th Nov 1992.

Bar's Politics: Constitutional Politics and Rising Petit Bourgeoisie

An analysis of the rise of the judiciary in the 1990s is incomplete without explaining the increasing role of the bar. This was important because it was the ground for 'legalism,' which was linked to the rising middle class. The rise of the middle class in the 1980s, as explained above and in the last part of chapter four, was also accompanied with an apparent depoliticized version of politics. Politics were based on local (instead of national) issues and loyalties based on *biradari* (kinship, caste, clan). Bar associations were no exception. The 'political group' in the bar (hailing from Lahore and Punjab) was such an example – the lawyers in this group joined hands based on *biradari* to get support from the ruling party, led by Zia in that case. For example, the *Arian* caste group was led by Mian Asrar and A. Karim Malik (brother of Justice Khalil Ramday). Similarly, the *Jutt* caste group was led by people like Ashraf Wahla and Dr. Khalid Ranjha. They were themselves affiliated with the Muslim League and the conservative Jamaat-e-Islami.[823]

In this context, a group called the 'professional group' was formed by A. S. Salam and others during the regime of Z. A. Bhutto. It was opposed to the right wing politics and promoted liberalism, democracy, and progressiveness. The Pakistan People's Party supported it via members like Fakhrunnissa Khokar and Latif Khoosa. Wasi Zafar and Hamid Khan were young lawyers in that group. Later in the Zia period, this group distinguished itself from the former groupings, and came forward as a representative of a new middle class politics. This group proclaimed itself as 'professional' and against 'political influence' on the bar, but it was actually against 'big' politics.

[823]Interview with Pervaiz Anayat Malik, Dec 14, 2012.

In the era of the 'end of ideology,' this group became a hub for patronage seeking, with vacillating groups of *biradaris* in the bar. Its success was based on gaining positions in judiciary as well as attorney general offices and legal advisories in the state institutions and even law ministries for the upper class lawyers, as there grew an increasing demand for technocrats in neoliberal formations. The politics of this bar was part of the new state formation. I explore my argument through the trajectory and influence of lawyer Hamid Khan.

Hamid Khan became a representative of the rising petit bourgeoisie during the Zia regime. He developed under the Cornelius tradition, and wanted more lawyers in the legislature, noting the lack of competency of the legislature. He remarked that five out of the first eight Prime Ministers were lawyers. Yet he was worried that now the lawyers were coming from the middle classes and could not compete in elections.[824]

Nepotism was a chief concern. Hamid Khan spoke out very strongly against the hegemony of the judiciary in terms of appointments. According to him, Chief Justices, like the executive and legislature, were involved in appointing their relatives, and other favourites, to judicial offices of the Attorney General or Assistant Advocate Generals. During the Zia period (1979-1985), judges put their relatives first in judicial offices and then in the superior judiciary. During the Juneju regime (1985-88), for the first time, unknown and even unseen lawyers were appointed. The practice of appointing acting

[824] Hamid Khan (1992), "The Role of the Bar in Promotion of Human Rights, Civil Liberties and Legal Aid" in Hamid Khan, ed., *The Judicial Organ: Speeches and Articles* (Lahore: Freedom Forum for Human Rights and Development, 1999) 42-45 at 43-44, a welcome address on the second session of the Centenary celebrations of Lahore High Court, Nov 25, 1992.

Chief Justices and others continued. Furthermore, the loyalties of the judiciary were bought through gifts of plots of land.[825]

Hamid Khan was equally critical of the legislature and executive.[826] He found that the legislature was not competent, bureaucrats made laws in haste and the Pakistan Law Commission favoured judges. For him, democracy should be about consensus and not confrontation or disagreement. He stated that the legislature was a hangout for smugglers, dishonest politicians and former bureaucrats. In this context, he sided with the judiciary regarding any challenge to this juridico-bureaucratic structure.

He targeted the creation of special courts through the 12th amendment.[827] Prime Minister Nawaz Sharif, during his first tenure, made special courts for the trial of heinous offences, which were gruesome, sensational or shocking to public morality (and thereby could threaten his drive for foreign investment).[828] There were also allegations of political harassment under these laws.[829] Hamid Khan responded that special courts are a form of "no confidence in the regular courts." He also stated that the roots of law and order issues are politico-socio-economic structures and unless unemployment, distribution of land as

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[825] Hamid Khan (1994), "Judiciary- institution in decay" in Khan (1999), *supra* note 112 at 66-67. This also appeared in daily *The Nation* in two instalments, 14-15 Oct 1994.
[826]Hamid Khan (1992), "Judiciary: A Bastion of nepotism and favouritism" in Khan (1999), *supra* note 112 at 9, also published in daily *The News* in two installments on 23 and 30th of May 1992.
[827] *Ibid*. at 15; see also Hamid Khan (1992). "Special Courts for Speedy Trial" in Khan (1999), *supra* note 112 at 17-21, also published in the *The Nation* on August 3, 1992.
[828]*Terrorist Affected Areas (Special Courts) Ordinance*, 1991 (No XXIV of 1991) and then the *Speedy Courts for Speedy Trial Ordinance*, 1991 (No. XXV of 1991). The judges appointed were qualified for the appointment as a judge of HC, and were appointments made by government after consultation with Chief Justice. Appellate court was combined SC and HCs with three judges, one from SC and two judges from HCs. Here important point to be noted is that the government has the right to decide which cases were supposed to be sent to these courts.
[829] *State v. Syed Qaim Ali Shah,* 1992 PLJ 1992 S. C. 625.

well as over population and illiteracy are addressed, laws and special courts cannot help.[830] Thus he defended the existing judicial system.

In 1990s, after the return of Pakistan People's Party, an opposing 'liberal project,' emerged, reflecting the politics of the Pakistan People's Party in the bar. They argued the 'professional' group was only 'professional' in its aim to capture the profession and judiciary. For 'liberals,' connected with Peoples Party, professional group lawyers were professionals in terms of their practice as mostly company lawyers and nothing else.[831] But the Pakistan People's Party was unable to break the influence of the Cornelius tradition (Hamid Kahn's professional group) in bar politics until the 2000s.

What about the Working Class in the 'liberal' and quasi-liberal project?

Where was the working class in this rising politics of legalism and constitutionalism by both liberal and quasi-liberal projects? I explore this by looking at the legal treatment of the issues of privatization, liberalization and free market inequalities which directly affected the working class. When Benazir Bhutto decided to privatize 113 small industries in 1989, 'liberals' like Omar Asghar (a left social democrat and a main proponent of the project of decentralization in late 1990s) advised the workers to accept the privatization package of the government. Later, workers leader Yaqoob,

[830] Hamid Khan (1992). "Special Courts for Speedy Trial" in Khan (1999), *supra* note 112 at 20-21, also published in daily *The Nation* on August 3, 1992.
[831] Interview with Mian Hanif Tahir Advocate, Former President, People's Lawyers Forum, Punjab, Dec 13, 2012.

along with the leadership of All Pakistan Small Enterprises Union Association -APSEUA,[832] met with Farooq Laghari (the then General Secretary of the Pakistan People's Party) to seek help against Nawaz regime's privatization policies. Laghari strongly advocated for privatization, and forced the union to accept such a deal.[833] The response was the same from the nationalist Awami National Party. All Pakistan Small Enterprises Union Association -APSEUA was left with the option of 'legal' struggle, though Yaqoob stated that "we were not trained and owners were crooks with their legal advisors."

The judiciary and liberal project were responding to this absence of working class in state and legal formations through Public interest Litigation, constitutionalism, and the rule of law. In a nutshell, the working class became 'structurally restrained,' and the class formation became dominated by 'fundamental classes' and the 'legalism' of emerging petty bourgeoisie. Workers were the class for which the judiciary was least bothered. When Nawaz Sharif invited 3500 army personnel to the struggle at Water and Power Development Authority-WAPDA to ban the union, workers were not given judicial relief.[834] Similarly, when privatization of the Kot Addo power plant was challenged through advocate Asghar Gill, the court decided against the workers.[835]

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[832] Muhammad Yaqoob was the leader of All Pakistan Small Enterprises Union Association (APSEUA).
[833] Interview with Muhammad Yaqoob, July 17, 2010.
[834] Workers went to Supreme Court through Abid Hasan Minto but the SC rejected the petition. Interview with Khursheed Ahmad, General Secretary Pakistan Workers Confederation dated Sep 04, 2010
[835] *Ibid.*

Public Interest Litigation: A New Level of the Juridico-Bureaucratic Structure in the Cornelius Tradition

Public Interest Litigation emerged in the wake of a retreating welfare state, and as a new form of critique of democracy and legislature (in my view, in contempt of politics). It allowed the judiciary to exert itself against a weak legislature. The first official consolidation of this discourse was in the Quetta Declaration (August 14, 1991). Later a scheme was published.[836] Regrettably, boards were set up in few districts on a "trial and error" basis but could not succeed due to lack of commitment at the local level and a lack of resources.[837] The courts continued their work.

The Quetta declaration included about 35 Public Interest Litigation cases, which soon became 600.[838] In the *Darshan Masih* case,[839] the court sought fit to respond to a simple telegram from bonded labourers to free them, and so a letter was treated as a petition. Supreme Court Chief Justice AfzalZullah mentioned Fundamental Rights under Articles 9, 11, 14, 15, 18 and 25 of the constitution to invoke writ jurisdiction of the Supreme Court under article 184(3). The Chief Justice inquired of the matter in his

[836] A scheme for the Protection of Human Rights of all Classes of Society in the Country (Amended in the light of Memorandum of proceedings of Judicial Conference, held at Quetta (see 1991 PLJ, Mag. 151 which gave the scheme. Quetta Declaration was on 14th of August, 1991. Declaration derived its authority from Articles 2A, 4, 5, 7 to 40, 184(3), 187, 189, 190, 199, 201, 203, Chapter 3A of Part VII of the Constitution and the Objective Resolution and was a full multi-layer scheme from national to local level.

[837] Mehreen Kasoori Raza, "Reviewing the Law of Public Interest in Pakistan" in Werner Menski, Ahmad Rafay Alam & Mehreen Kasoori Raza, ed.s, *Public Interest Litigation in Pakistan* (London: Platinum publishing limited and Karachi: Pakistan Law House, 2000) 64 at 72.

[838] Justice Nasim Hasan Shah, "Public interest litigation: As a means of social justice" (1993) PLD at 32.

[839] *Darshan Masih v. the State*, 1990 PLD S. C. 513.

chambers, asked help from the bar and the police, and ordered an inquiry by the Advocate General of Punjab. In his orders, he banned bonded labour, without there being a complainant or accused or adversarial nature of litigation in the court. Superior courts began to declare that the need for a petitioner was immaterial and made a case between the court and the respondent.[840] Sometimes courts did not even allow the petitioner to leave the petition.[841] High Courts stepped in and started *suo moto actions*[842] like when women were being burnt by 'defective stoves.'[843] Others were the *Student Politics* case,[844] the *Ameer Bano* case,[845] the *Rashid Ahmad Khan* case,[846]and the *Shirin Munir* case.[847] To put this phenomenon in perspective, I will elaborate in the next section.

Public Interest Litigation in the Wake of the Retreat of the Welfare State

Werner Menski[848] has linked the rise of Public Interest Litigation with the demise of the welfare state.[849] Public interest, as opposed to public welfare, was the new norm

[840] Like in *Al-Jehad Trust v. Manzoor Ahmad Wattoo,* 1993 PLD Lahore 875 at p876.
[841] See *Pervaiz Elahi v. Province of Punjab* 1993 PLD, Lahore 595 at 655.
[842] In Re: (SuoMotu Notice) 1990 PCr LJ 1231 noticed miserable conditions of the prisoners in juvenile Jail, Landhi, Karachi.
[843] In *State v. Senior Superintendent of Police*, Lahore, 1991 PLD Lahore 224 Muhammad Munir JLahore High Court take a suo motu action and investigated families etc.
[844] In *M Ismail Qureshi v. M. Awaais Qasim,* 1993 SCMR 1781.
[845] *Mst. Ameer Bano v. S. E. Highways,* 1996 PLD Lahore 592. Here the court lifted a ban on hiring employees.
[846] *Rashid Ahmad Khan v. President of Pakistan*, 1994 PLD S. C. 36. The court gave a judgment on a loan defaulter but noted that there are no policy guidelines for the writing off of bad loans. The court ordered the State Bank to form a policy on that issue.
[847] *Shirin Munir v. Government of Punjab,* 1990 PLD S. C. 295. The court attacked the unfair quota system of medical colleges though it was not prayed. The case was not a writ petition.
[848] Professor Werner Menski MA (Kiel), PhD (London), Professor University of London (SOAS).

and even if an order was passed for public welfare but is in violation of the state or against the basic norms of justice, it cannot be protected.[850] He approved of the fact that South Asian judges refused to dream about absolute equality. It is not surprising that exactly at this time, the land reforms of 1972 and 1977 were declared as un-Islamic.[851] As a quasi-substitute, public interest litigation was necessary, to make some promise of equality. Finally, the judges were the "ultimate arbitrators" to decide what was Public Interest Litigation and what was not.[852]

Public Interest Litigation as a substitute of Democracy and a Critique of Legislature.

The main supporters of Public Interest Litigation found democracy to be connected with constitutionalism. Internationally and locally, human rights issues were now centre stage.[853] But democracy meant politics, so how far can Public Interest Litigation go to uphold democracy? I will show how Public Interest Litigation went on to undermine the legislature.

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[849] Werner Menski (1997), "Public Interest Litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture" in Menski et. al. eds, *supra* note 125at 112-113.

[850]*Anwar Muhammad Khan v. Director of Industries and Mineral Development*, (1994) PLD Lah 70 at 92.

[851]Federal Shariat Court declared land reforms un-Islamic in 1981 in*Qazal Bash Waqf v. Chief Land Commissioner, Punjab, Lahore* and others, 1981 PLD FSC 23. In an appeal against this decision, Supreme Court also declared land reforms un-Islamic in *Qazalbash Wakf case*. See PLD 1990 S. C. 99.

[852]Werner Menski (2000), "Introductory Over View of Public Interest Litigation in Pakistan; Past Future" in Menski et al. eds, *supra* note 125 at12-21.

[853] Dr. Faqir Hussain, "Access to Justice" (1994) PLD Journal 10 at 20. The writer was the Joint Secretary Pakistan Law Commission. The point to remember is that exactly during this period SDPI Tariq Banuri wrote on the same topic and Dr. Faqir Hussain's writing is included in his book.

The judiciary in Pakistan was trained in the juridico- bureaucratic structure of the Cornelius tradition, and thus to engage in political issues. As I have discussed, the Objective Resolution undermined the legislature by putting above it the undefined laws of *Sunnah* and *Sharia*. Justice Majid invoked an inquisitional jurisdiction as opposed to an adversarial or accusational one and hence made litigation possible by an aggrieved person who has no personal interest but needs the welfare of the general public.[854] He used Sections of 3, 4 and 5 of the *Enforcement of Shariah Act*, 1991, which he called the "statutorily recognized supreme law of the land." He said there is no provision in the constitution for the accountability of the state functionaries and hence *Sharia* filled this gap. This aspect of Public Interest Litigation and its association with Article 2-A had always posed the danger of further undermining an already undermined legislature. In the early 1990s with the beginning of Public Interest Litigation, the Cornelius tradition forcefully defended Article 2-A and its related Objective Resolution after the decision in the *Hakim Khan case.*[855] The court in this case declared that the Objective Resolution of Article 2-A was not a beacon light for legislation. This simply means that "Article 2-A changes nothing." As opposed to this, Sardar Sher Alam Khan argued that this provision is unique in the history of the constitution and had made the Quran and Sunnah above

[854] *Al-jehad Trust and another v. Mian Ahmad Nawaz Wattoo and 8 others*, 1993 PLD Lahore 875. Mian Ahmad Nawaz Wattoo was the CM of Punjab.

[855] *Hakim Khan v. Government of Pakistan*, 1992 PLD S. C. 595. This case was decided by Dr Nasim Hasan Shah, Shafi-ur-Rahman Saad Saood Jan, Abdul Shakrul Salam, and Muhammad Afzal Lone JJs SC. Dr. Nasim Hasan JSC wrote the decision and others agreed. Where the court declared that the Objective Resolution after becoming the substantive part of the constitution by Article 2-A could not guide them to formulate such provisions for the constitution.

man-made law and legislation. Furthermore, according to him, the court has the power to judicially review Article 2-A and not the legislature.[856]

The court went on to ban student politics as part of its drive to correct the ills of the democracy.[857] This had already been done by Zia during his regime. The same day, Supreme Court Chief Justice Afzal Zullah passed an order to remove restrictions on the marriage of air hostesses of Pakistan International Airlines-PIA and nurses in the military `hospitals. Public Interest Litigation increasingly showed an ambivalence toward addressing social discrimination while it targeted political and economic challenges.

There was a second strand of opinion that Public Interest Litigation should be separate from politics. There was a concern of public interest being misused,[858] as these types of cases are of personal interest and predominantly of political nature. It was argued that they were filed when the petitioner were was in opposition or had other an agenda

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[856] Comments of Sardar Sher Alam Khan. He quoted a writer from the Cornelius tradition, Khalid M. Ishaq's unpublished essay, *Is Islamization Business of Legislature Only?* And emphasized judicial review rather than legislative review guarding the limits of Allah by courts. So, according to this view, all disputes between individuals and public authorities are the natural characteristics of judicial power in Islam. Khalid M. Ishaq made it clear that, the constitution in Islamic state does not create judicial power, it only distributes it. This seems that the judiciary should create its judicial power, and distribute it through constitution by interpreting it. Sardar Sher Alam Khan Advocate. *The Role of Judiciary and Objective Resolution: A Plea for Reappraisal of Hakim Khan Case* (Islamabad: Institute of Policy Studies, 1994) at 17-18.

[857] In *M Ismail Qureshi v. M. Awaais Qasim,* 1993 SCMR 1781, the petition was brought by one person against another but the courts decided to interfere and held an inquiry out of that case. Hearing arguments from the students, teachers as well as politicians, they decided to ban student politics. Zia had done this to suppress dissent among students and the Pakistan People's Party government had just restored the right to dissent in 1988.

[858] Example are *Benazir Bhutto v. President of Pakistan,* 1998 PLD 1998 S. C. 388, and *Asad Ali v Federation of Pakistan* 1998 PLD 1998 S. C. 161. list of cases given are *Ittefaq Foundry v Federation of Pakistan,* 1990 PLD Lahore 121; *Pervez Elahi v Province of Punjab,* 1993 PLD 1993 Lahore 595; *Al-Jehad Trust v Manzoor Ahmad Wattoo,* 1993 PLD 1993 Lahore 875; and *Sabir Shah v Shad Mohammad Khan,* PLD 1995 S. C. 66.

that wasn't in the public interest.[859] Public Interest Litigation brought by impoverished people was being used for political ends and the decade to come was a witness of this. However, the judiciary was, overall, committed to the political dimensions of Public Interest Litigation.

Public Interest Litigation as a substitute for the State.

The definition of the state is found in Article 7.[860] The judiciary "interpreted itself to be the part of the state." The responsibilities of the state were felt and taken up by the judiciary.[861] It also used the rights discourse as protection against the state and as enforceable by the courts.[862] Thus the judiciary was filling policy gaps along with newly created spaces by restraining state and state institutions.[863]

Before 1988, Chief Justice Haleem's judicial activism was a state-directed judicial activism to direct the state to perform the duties owed to the citizen. Afterward, this role was extended from checking the violations of individual rights to directing the Prime Minister and executive to implement policies.[864] The law no longer focused on the

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[859] Mehreen Kasoori Raza (2000) "Reviewing the Law of Public Interest in Pakistan" in Menski et al. eds, *supra* note 125 at 98-99.

[860] Article 7 of the 1973 Constitution of Pakistan - "Definition of the State. In this Part, unless the context otherwise requires, "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."

[861] Justice Asif Saeed Khan Khosa, "Suo Moto Exercise of Writ Jurisdiction" (1993) PLD S. C. Journal

[862] A. G. Chaudhary, "Definition of the State" (1994) PLJ , Magazine Section,232 at233.

[863] For example, in *Fazal Jan v. Roshan Din,* 1990 PLD S. C. 661, Afzal Zulla Chief Justice SC ordered that women should be given free legal aid, rather than decided through legislation or policy. The height of this newfound power can be seen in the *Shehla Zia* case.

[864] Like in *Shehla Zia case*, where Principles of Policy were made justiciable (Article 9 of right to life) by the SC, and hence the courts to play a role.

maintenance of peace and order but on providing social justice.[865] The government was equated with the state and the "government" extended right down to the smallest civil servant who was abusing power.[866]

Official advocacy of PIL and Nature of Rights

The origin of Rights in Chapter 1 of Part II of the Constitution of 1973 of Pakistan is described as having its origin from the Bill of Rights of the U.S. Constitution, the 1789 Declaration of Rights of Man and Citizen of the French Revolution, the Irish Constitution of 1935 and the Universal Declaration of Human Rights of 1948. It also owes traces from the philosophies of Locke, Rousseau, the theory of natural law and English Common Law, and the economic theory of individualism that is, *Laissez Faire.*[867] Khan claimed that roots of Public Interest Litigation can be found in the U.S. system[868] Menski, on the other hand, claim its origin as purely South Asian.[869] My position is that in Pakistan, Public Interest Litigation developed very strongly within the ambit of western legal discourse of rights and constitutionalism. A poor grafting of Islam on Western ideals was done in the late 1980s.

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[865]Justice Hasan-Shah (2002), *supra* note 47 at 123, 30.
[866] Werner Menski, "Introductory Over View of Public Interest Litigation in Pakistan: Past and future" in Menski et al. eds, supra note 125 at 8.
[867] A. G. Chaudhary, "Definition of the State" (1994) PLJ, Magazine Section, 232 at 232.
[868] Mansoor Hassan Khan, "The Concept of Public Interest Litigation and its Meaning in Pakistan" (1992) PLD, Journal, 84-95; also Mansoor Hassan Khan, *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan* (Karach: Pakistan Law House, 1993).
[869] Werner Menski, "Introductory Over View of Public Interest Litigation in Pakistan: Past and future" in Menski et al. eds, *supra* note 125 at 18.

The debate on Public Interest Litigation in Pakistan was extensive. Asif Saeed Khan Khosa[870] objected to the relaxation of *locus standi* and the *suomoto* exercise of power by the High Court and found it ultra vires of the law and in violation of the Constitution. He advised the courts to follow the Common Law notion of judicial neutrality, impartiality and adversarial nature and not to play an activist role or that of a social reformer.[871] Dr. Faqir Hussain, Joint Secretary of the Pakistan Law Commission, on the other hand, supported the "liberalized standing" of the superior courts to hear the case of any person or citizen as an aggrieved person who claims to come on behalf of poor persons. He elaborated at length on the "genesis and evolution" of the law so to enable the jurists to meet the challenges of "modern time" and to benefit from the "rule of law."[872]

In spite of this, the last genuine critique of rights discourse came from A. G. Chaudhry which tried to cut across the liberal boundaries. Based on the UN Conference on Human Rights 1993 held in Vienna, he criticized the UDHR that 20 out of 30 articles are about civil and political rights, while 5 cover economic, social and cultural rights. The focus on individual political freedoms like the right to vote and hold public office along with rights like free speech and assembly were derived from Western jurisprudence and

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[870] Justice Khosa belongs to a "landed, well-known and well-placed" family of the Punjab. His late father Sardar Faiz Muhammad Khan Khosa ASC, worked closely with Jinnah in the independence struggle and was awarded the Tehrik-e-Pakistan Gold Medal. He was called to the Bar on July 26, 1979 at the Honourable Society of Lincoln's Inn, London, United Kingdom and was conferred the degree of Utter Barrister. Barrister Khosa was appointed as a Judge of the Lahore High Court, Lahore on May 21, 1998. He was elevated as a Judge of the Supreme Court of Pakistan on February 18, 2010. He is the son-in-law of Justice (Retired) Dr. Syed Nasim Hasan Shah.

[871] Justice Khosa (1993), *supra* note 149.

[872] Dr. Faqir Hussain, "Access to Justice" (1993) 1994 PLD Journal at 10-23.

liberal thought.[873] He argued that the UDHR "proclaims to have elevated the principles of government of Western civilization to the international level."[874]

According to the writer, the summary implementation of the abstract concepts of human rights is being pushed by the Western Governments, NGOs and human rights activists, especially in the United States, without cultural, social, political considerations. Chaudhry notices that "for many in the West, the end of the Cold war was not just the defeat or collapse of communist regimes, but it was the supreme triumph and vindication of Western system of governments and their values. There has been a tendency since 1989 in the West to measure all states by what the West regard as "democracy"; "The hard core of rights that are truly universal is smaller than many in the West profess"; "they do not realize that poverty, insecurity, and instability breads human rights abuses, while wealth creates security and stability."[875]

I present this critique to draw a contrast with the uncontested UDHR in the 'liberal' project of the 1990s. I agree with A. G. Chaudhry's above critique but also want to examine the limits of change within and through the constitution, and the limits of rights discourse and practice of Public Interest Litigation. Whereas A. G. Chaudhry had been a 'constitutionalist' who believed that socialism will come through enforcement of the constitution, he was clear that though the UDHR "recognizes in unmistakable terms

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[873] A G. Chaudhry, (1994) "Conceptualization of Human Rights"(1994) PLJ, Magazine Section,1-6 at 2. The writer is talking about the UN Conference on Human Rights 1993 held in Vienna where the Western countries accused Asian countries of undermining the idea of universality of Human Rights.

[874] *Ibid*.

[875] *Ibid* at 5-6.

the supremacy of individual rights to free speech and political expression, it lays great emphasis on the economic and social rights of the people. In view of these provisions, we have our own standard of Human Rights."[876]

Dissolution of Nawaz's assembly (1993)

There was a fresh dispute between the Prime Minister and the president around the appointment of Chief of the Army Staff. On April 1993, president Ishaq dissolved the National Assembly, accusing it of maladministration, corruption, nepotism, terrorising opposition and use of official resources for political ends.[877] The order of the dissolution was challenged in the Supreme Court and a full bench of 11 judges, headed by Nasim Hassan Shah, accepted the petition by a majority of ten to one. The dissenting judge was Sajjad Ali Shah.[878] This seems a very courageous decision but the 'rules of the game' were dictated somewhere else. The restoration did not last for more than two months, for a deal was brokered between the president and Prime Minister through the military, and both resigned! According to Supreme Court Justice Sajjad, Supreme Court Chief Justice Nasim was determined to restore the assembly and made a statement that he is not like

[876] Chaudhry (1994), *supra* note 155 at 5.
[877]The text of the order is reproduced on pp.572- 575 of *Muhammad Nawaz Sahrif v. President of Pakistan*, 1993 PLD S. C. 473.
[878]*Muhammad Nawaz Sahrif v. President of Pakistan*, 1993 PLD S. C. 473.

Chief Justice Munir and he would give good news to the nation.[879] The legislature itself noted that it was sitting in session because of the Supreme Court.[880]

To sum up, a structural analysis of the features of politics and judicial changes in the early 1990s shows that the replacement of the minimal welfare state and privatization was accompanied with two effects on the class formation. There was a new 'compromise' within the 'power bloc' going through undefined, complex mediations. The crisis of the state was the crisis of the new arrangement around privatization and consequent opportunities for the hegemonic metropolitan bourgeoisie as well as bitter competition among different fractions of the reigning landed and capitalist class. Privatization and neoliberalism brought increasing inequality, which demanded more pressure on the state to deliver what market was still not able to allocate. The legislature's open courts (*Khuli Kachehri* of Nawaz)[881] or the judiciary's populist Public Interest Litigation was a poor substitute in this context.

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[879] Justice Ali –Shah, *supra* note 48 at 176 as cited from *Jang Karachi* dated May 12, 1993.

[880]The remarks of the Prime Minister Nawaz after the restoration of the assembly in 1993 while the session of the parliament resumed as quoted by Justice Nasim Chief JusticeSC (ret) in his autobiography. See Hasan-Shah (2002), *supra* note 47 at 106-07.

[881] In similar fashion, Prime Minister Nawaz Sharif started publicly visiting sites of domestic violence, patted the heads of victim, and produced the slogan that justice should be provided at the door step and should be cheap and quick.[881] ["*jehan Zulm wahan Nawaz Sharif*" (wherever there was cruelty, Nawaz Sharif would be there to redress.] Sajjad, a justice of SC, started acquitting the accused and for this was silently removed by the Chief Justice SC. He made the observation in the appeal of *Sabiha* case that the new publicity was sensationalising them and was affecting the investigation in favour of one party. See Justice Ali-Shah, *supra* note 47 at 364.

Benazir Bhutto's Second Term (1993-96): the Judiciary and democracy confrontation

In her second tenure from 1993-1996, Benazir Bhutto attempted to fix loopholes and avoid the pitfalls that damaged her first regime (1988-90). She requested General Kakar to continue as COAS as extremists were increasing in the military, but he refused. To please the army, she supported the formation of the Taliban's control of Afghanistan but later insisted on breaking relations with the Taliban and warned that "strategic depth" would become a "strategic threat." When Kakar retired, and Javed Ashraf was transferred from the Inter-Services Intelligence (ISI) to be COAS, it was considered the "death-knell" for Benazir Bhutto's second government.[882]

The second loophole was the 8th amendment, or what she termed as allowing the possibility of a "military backed coup with constitutional dressing."[883] Hence, she elected Lagharia to be the president of Pakistan from her own party.

The unbridled allies were hard to keep let alone control when in the opposition. Benazir Bhutto's weak government tried to survive by encouraging political defection of the opposition. She gave residential plots and lands to members of assembly. Fifty-five opposition members were among the applicants for plots in the capital city of Islamabad. When this was challenged in the Lahore High Court, Justice Munir A. Sheikh rejected the writ of M. D. Tahir, an advocate against the grant of plots to members of assembly, on the grounds that if the lawyers and journalists can have plots, why not the members of

[882] Benazir-Bhutto (2007), *supra* 28 at 420, 242.
[883] *Ibid* at 408.

assembly?[884] Expressing real opposition, on June 9, 1996, the *Sunday Express London* reported that Benazir Bhutto had bought a £2.5 million mansion in Britain. Meanwhile the IMF saw corruption as a big hurdle to raising revenue in Pakistan. Aid donors were unhappy over government reluctance to curb the menace of corruption and accused the government of fudging figures. They put pressure on the IMF to go public over the level of corruption in Pakistan.[885]

Appointment of Judges: The democratic regime Exercising Constitutional Power?

Given the range of decisions, the regime of Benazir felt challenged. In these circumstances, the control of the judiciary was needed to hold the power of the state. The restoration of the Nawaz government was a clear indication of the emerging power of the judicial institution. When Benazir Bhutto herself dissolved the provincial assembly of North Western Frontier Province-NWFP, it was challenged in the Supreme Court, which accepted the petition by a majority of seven to two.[886] When again on September 5, 1995, the president imposed emergency in the province of Punjab to get rid of undesired Chief Minister Wattoo, Lahore High Court again accepted the petition in its judgment of October 30, 1996.[887]

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[884]*The Daily Pakistan*, May 14, 1996, at 8.
[885]*The Nation*, June 23, 1996.

[886]*Sabir Shah v. Federation of Pakistan*, 1994 PLD S. C. 738.
[887] *Manzoor Ahmad Wattoo v. Federation of Pakistan*, 1997 PLD Lahore 38.

Benazir Bhutto could not trust anyone at the highest post of judicial hierarchy, so she sought to appoint those who had shown favourable judgements to her regime. Chief Justice Saad was not confirmed, rather Sajjad was appointed as the Chief Justice of the Supreme Court in 1994, possibly since Sajjad was one of the two dissenting judges when her regime was dissolved in 1990 and he had observed that the purpose of the dissolution was to just to get rid of Pakistan People's Party. Sajjad himself thought that in India and elsewhere there was no problem with political appointments in judiciary.[888]

With Sajjad as Chief Justice of the Supreme Court, the government of the Pakistan People's Party removed the Chief Justices of the High Courts to strengthen its hold on the judicial system of the provinces. Chief Justices against the regime were removed or transferred to Federal Shariat Court- FSC, which was a kind of demotion. Chief Justice of the Sindh High Court and Nasir Aslam Zahid accepted these transfers while the Chief Justice of Lahore High Court refused. Two Supreme Court judges were sent to take their places as Acting Chief Justices. One of them was Muhammad Ilyas of FSC who was earlier denied as Chief Justice of the Lahore High Court by Nawaz, was sent back as Chief Justice Lahore High Court. Peshawar High Court-PHC was also headed by acting Chief Justice. With only three acting Chief Justices in three High Courts, the government had full control on the judiciary, because acting Chief Justices cannot give strong decisions against the regime.

Next were the political appointments in the High Courts. Soon the Sindh High Court and Lahore High Court were full of recent political appointees, with 9 and 20 new

[888] Justice Ali-Shah, *supra* note 48 at 199.

appointments of judges respectively. According to Hamid, only six High Court judges could hardly qualify as judges, and eight or nine could not appear in HCs as advocates.[889] The Supreme Court had 7 *ad hoc* judges as against 10 permanent judges. The Acting Chief Justices were acting like Benazir Bhutto's stamps for those appointments.

How were the ad hoc judges being used by Benazir Bhutto? The first service of Sajjad was to adjourn the appeal in the *Pir Sabir Shah* case on the request of the Federal Government and without notice to the appellant. The majority decision was seven to five. The Chief Justice was supported by six judges who were *ad hoc* and the minority was constituted of five permanent judges. On November 1994, the Pakistan Bar Council condemned the appointments in superior courts as being based not on merit. It also condemned the appointment of acting Chief Justices in the High Courts and the ad hoc judges of the Supreme Court. The Sindh High Court Bar Association and Karachi Bar Association went on strike, which was attacked by police and supported by the opposition.

The democratic government of Benazir Bhutto thus exercised its own 'constitutional powers', even though the Chief Justice was to be consulted on judicial appointments under Article 177(1), 193(1) and 203-C (4) of the Constitution and his opinion should be given due significance and weight. What if he was not consulted? Khosa went to the extent of saying that not consulting the Chief Justice is unconstitutional and not fulfilling this obligation is a high treason. Under Article 47(1)

[889] Hamid Khan (1998), "Government and Judiciary 1994 to 1997: the Crisis of State" in Khan (1999), *supra* note 112 at 133-34. Also published in seven installments in daily The News , March 2,3,4,11,13, and 15, 1998, and (1998) PLJ, Magazine 66.

the president can be impeached for this. But should the Supreme Court rewrite the constitution where there is a flagrant abuse of executive power? This is what it in fact did in the *Judges'* case.

Judges' Case: Appointment of Judges is Not the Right of a Democratic Regime[890]

In August 1994, 25 judges were appointed in the Lahore High Court in one go and again on April 10, 1995, notification of the appointment of nine judges came without any considerations to the recommendations of the Chief Justice of the Supreme Court.[891] The response to this was the *Judges'* case. Sajjad himself was involved in this despite his own political appointment. He called Supreme Court Justice Ajmal to help him.[892] The purpose was to correct the image of the judiciary.[893]

Before moving ahead, it is better to outline a critique of the case. There was the judges' own interests at play and there were constitutional and statutory interpretations

[890]Cases where judiciary talked about independence of judiciary, separation from the executive and then qualification for the appointment of judges are *Govt. of Sindh v. Sharif Faridi,* 1994 PLD, S. C. 105; *Aljehad Trust v. Federation of Pakistan*, 1996 PLD S. C. 324; *Malik Asad Ali v. Federation of Pakistan* PLD, 1998 S. C. 161.

[891] See for details Justice Ali-Shah, *supra* note 48 at 227-332.

[892]Justice Mian, *supra* note 60 at176.

[893]The important features of this judgment were to stop the appointment of *ad hoc* judges and acting judges against the permanent places of SC and HCs respectively and if done should be done permanently within 90 days. The Acting Chief Justices should not be considered a constitutional consultees. Permanent vacancies of judiciary should be filled within 30 days. Senior most judges should be Chief Justice except for reasons to be recorded by the president. SC judge should not be sent as acting Chief Justice to HCs. Consultation should be meaningful and purposive and consensus oriented. The opinion of the Chief Justices in the consultation is binding on the executive except for strong recorded and justifiable reasons on behalf of the executive. The requirement of 10 years practice does not mean enrolment but actual practice/experience. The appointment of Chief Justices of HCs to FSC should be with their consent.

made, which were beyond recognized principles. The invalidity of the appointment of judges on the advice of Acting Chief Justice was not extended to critiquing the appointments made during Zia's regime. In addition, one provision of the constitution was held to supersede another, which was unusual in the annals of the constitutional law, and a provision of the constitution was held to be inoperative and ineffective.[894] In terms of personal dynamics, Supreme Court Chief Justice Sajjad was uncomfortable whenever the question of the senior-most judge to be appointed as Chief Justice came, as he had informed Benazir Bhutto that there were in fact three judges senior to him before his own appointment.[895] Justice Manzoor Hussain Sial told Ajmal not to insist on this point, otherwise Sajjad will compromise with the government. Further Supreme Court Chief Justice Sajjad wrote his judgment on the basis of Ajmal's judgment but deprived him of his credit.[896]

The federal government did not want to proceed with the *Judges'* case. Sajjad faced several pressures from government quarters to adjourn these cases *sine die* as requested by Benazir Bhutto on several occasions.[897] When refused, "deliberate revenge" was taken against the Supreme Court Chief Justice and he was reminded about the personal favours he received from Pakistan People's Party government.[898] On March 19,

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[894]Hamid Khan (1998), "Government and Judiciary 1994 to 1997: the Crisis of State" in Khan (1999), *supra* note 110 at 138. Also published in seven installments in daily The News, March 2,3,4,11,13, and 15, 1998, also (1998) PLJ, Magazine 66.
[895]Justice Mian, *supra* note 60 at 179-181.
[896] *Ibid* at 189-190.
[897] It means Justice Sajjad Chief Justice SC was so easily approachable and did not live a secluded life as was the requirement of a powerful emerging power broker and player. See Justice Ali-Shah, *supra* note 48 at 240.
[898] See for detail Justice Ali-Shah, *supra* note 48 at 214-43.

1996, a day before a short order, Pakistan People's Party government confirmed ten additional judges in the Lahore High Court and seven additional judges in the Singh High Court. Benazir Bhutto ridiculed the judiciary publically in press and parliament. Even while the *Judges'* case was under hearing, while addressing the District Bar Association of Jacobabad and Nasirabad on April 4, 1996, Benazir Bhutto claimed that she had the constitutional authority to appoint Supreme Court Chief Justices and Chief Justices of High Courts. She went to the extent that she can appoint any member of the said bar for those posts.[899]

Hamid Khan, on behalf of the Pakistan Bar Council, showed extreme disappointment that the judge's case order was not implemented. Pakistan Bar Council also declared in its meeting that advice of the Prime Minister is necessary for the appointment of the judges in a parliamentary form of government. This in turn was not appreciated by Sajjad Chief Justice and he refused the help of Hamid Khan but accepted S. M. Zafar as *amicus curiae* in the case.

So it was clear that the judiciary needed independence. Refusing a ride with the democratic government in structural tension within the state structure left only one option for the judiciary, that is to strengthen the old juridico-bureaucratic structure. President Laghari, alongside his former colleagues from the 1968 Civil Services of Pakistan was in the president house, and the independence of judiciary was fought through the establishment. The point to remember here is that before this judiciary always sided with

[899] Justice Nasim Hasan Shah Chief Justice SC (Ret. as he then was in 1997), "Judiciary in Pakistan: A Quest for Independence" in Baxter & Kennedy, ed.s, *supra* note 65 at 76 footnote 15.

the establishment but as a junior partner. This time the judiciary sought the help of the establishment for its own independence. According to Benazir Bhutto, Sajjad was promised the Interim Prime Ministership by the President in this controversy.[900]

There were clear differences between the Prime Minister and the president.[901]Wahabul Khari Advocate Supreme Court-ASC filed a writ petition asking the president to appoint the judges, as the advice of the Prime Minister was not required. On September 21, 1996, the president moved a reference, asking the Supreme Court "whether the advice of the Prime Minister under Article 48(1) of the constitution was mandatory for the appointments of the Chief Justices and justices of the superior courts."[902] Sajjad was of the opinion that the advice of the Prime Minister is not necessary for the appointment of the judges. But Supreme Court Justices Ajmal and Saeeduzzaman were of the opinion that the Prime Minister cannot be excluded in a parliamentary form of government and other judges were also of the same opinion, as was the Pakistan Bar Council-PBC.[903]

On June 8, 1996, the committee of Chief Justices in Murree decided that five judges from Sindh High Court, three from Peshawar and nine from Lahore High Court would be laid off.[904] In an order on three review petitions and reference no. 1/1996 of the government, the Chief Justice demanded the record of confirmation of those additional

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[900] Benazir-Bhutto (2007a), *supra* note 28 at 421.
[901] Reasons usually given are the interference of Benazir Bhutto's husband Zardari in the affairs of the country and the death of her brother, Murtaza Bhutto.
[902]President's Reference No.2 of 1996.
[903] Justice Mian, *supra* note 60 at 209.
[904]Justice Ali –Shah, *supra* note 48 at 273.

judges of Lahore High Court and Sindh High Court, who were confirmed one day before the short order. The Prime Minister appealed the judgment of the *Judges'* case but had to withdraw when Chief Justice Sajjad insisted upon staying on the bench for this appeal. Benazir subsequently partially implemented the judgment. Permanent Chief Justices were provided to the High Courts within 30 days, ad hoc Supreme Court judges were also relieved, and some High Court judges who were not appointed on merit were laid off.

Dissolution of Assembly at the Alter of independence of judiciary

Sajjad, according to his own account, had no motive in the *Judges'* case except the rule of law,[905] but the result was the dissolution of Benazir Bhutto's assembly (1993-1996). On September 26, 1996, Laghari dismissed the government of Benazir Bhutto, using Article 58(2)(b) of the constitution, under the charges of corruption, inability to maintain law and order, accusing the presidency and the state agencies in the murder of her brother, deliberate delay in the implementation of the judges' judgment, humiliating the judiciary, violation of fundamental rights and nepotism. Benazir Bhutto and the speaker of the national assembly, Yousaf Raza Gilani, challenged the dissolution. As opposed to a full bench, the offended Chief Justice formed a seven judges bench and with a majority of six to one upheld the order of the President.[906]

[905]Justice Ali-Shah, *supra* note 48 at 268.
[906]*Benazir Bhutto v. Farooq Ahamd Laghari*, 1998 PLJ S. C. 27.

Since four democratic governments had now been dissolved due to Eighth Amendment,[907] it was under challenge in some petitions. The offending Chief Justice decided to hear these cases before the case of dissolution of assembly in the Benazir Bhutto case. The Supreme Court, after due consideration, upheld the validity of Eighth Amendment.[908]

The appointment of judges by the executive was also resisted by the bar as it reduced the judicial organ of the state to merely a department of the government.[909] The judgment in the *Judges'* case was welcomed as it restored the confidence of the public in the judiciary and hence its impact was healthy. Still, the story was not over, as it was noted by Hamid Khan that judicial consultees could not be trusted as they had a history of giving favours to their relatives and colleagues.[910]

'State Capture': Disenchantment with the Washington Consensus and Subalterns

Benazir Bhutto observed 'state capture' by juridico-bureaucratic structure. At the same time, the metropolitan bourgeoisie observed 'state capture' by the local elite (reigning class) in developing countries including Pakistan and raised the issue of

[907] Article 58 (2) (b) of the 1973 Constitution of Pakistan through which the President can dissolve the legislative assembly.
[908] *Mahmood Khan Achakzai v. Federation of Pakistan*, 1997 PLD S. C. 426.
[909] Hamid Khan (1996), "Mr. Justice Manzoor Husain Sial - an epitome of a judge" in Khan (1999), *supra* note 112 at 73. See also Hamid Khan, "Opening of Judicial Year 1996-9, Lahore High Court" address as Vice Chairman Pakistan Bar Council in Khan (1999), *supra* note 112 at 84. In this address, Hamid Khan informed about the dangers of misuse of this power.
[910] Hamid Khan (1996), "Mr. Justice Manzoor Husain Sial- an epitome of a judge" in Khan (1999), *supra* note at 112. This was an address of Hamid Khan as a Vice Chairman, Pakistan Bar Council in the reference on the retirement of Mr. Justice Manzoor Husain Sial, March 24, 1996.

"corruption" in developing countries. From this point onwards, 'civil society' with its 'liberal project' came as a watch dog on the corrupt political elite. Crumbs for subalterns (through basic needs development projects) were also not reaching the desired layers to pacify them resulting in disenchantment with market economy.

In these circumstances, critique of the 'liberal project' (NGOs-non -governmental organization) had two folds. On the one hand, it wanted to cut the excesses of Structural Adjustment Program, particularly its *ad hocism*. It attacked International Monetary Fund and World Bank's Structural Adjustment Programs as neoliberalism, a "naïve nineteenth century (European liberalism)" and gave a call for pro-poor initiatives.[911] Later when these policies were implemented, this project pointed out how this human development is not a part of economic development. That is why what is given through social action program is sucked back by indirect taxes under structural adjustment. How cuts on health and education expenditures had affected people. So Structural Adjustment Programs is anti-people and anti-state in one breath.[912] On the other hand, it wanted social development through NGOs as political elite was corrupt.

The Social Action Plan of Benazir Bhutto (from 1993-96) had been criticized for *ad hocism*, the community's ability to handle projects, and the inability of the federal and

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[911] Arshad Zaman, *Eradicating Poverty in South Asia by the Year 2002: Issues in a New International Dialogue with Donors*, Working paper series# 14, (Islamabad: SDPI, 1993) at 4-5.

[912] Jennifer Bennett, *Structural Adjustment and Social Development: A Agenda for the Poor*, Research Report Series# 17, (Islamabad: SDPI, 1998) at 6, 8.

provincial governments to fund the recurring costs of development projects.[913] When the case for the dissolution of Benazir Bhutto's government came before the Lahore High Court, the justices found *People's Works Program* violated Article 97. Rs. 8 billion was allocated for it without legislative backing. This means that the 'liberal' project and the judiciary alike were critical of political elite. So in the years to come, the discourse of the centrality of courts, legalism, and hopes placed on civil society, in both liberal and quasi-liberal projects, allowed for joining hands with metropolitan bourgeoisie.

Nawaz Sharif's Second Term (1997-1999)

Independence of the judiciary to judicial activism: Confronting Democracy "Actively"

In the light of rising worries of state capture by IFIs, President Laghari and his appointed caretaker Prime Minister, Meraj Khalid, raised the slogan of accountability before the 1997elections. Benazir Bhutto 's democratically elected government came under allegations of corruption by her own party-nominated president Laghari, and ex-speaker National Assembly.[914] This resulted in a new emphasis on accountability.[915] It is to be remembered here that the famous philanthropist of Pakistan, Edhi, told the Prime

[913]Moazam Mahmood, *A Model for Social Development Based on the Community*, Policy Paper Series#20, (Islamabad: SDPI, 1993) at 2, 5.
[914]According to Miraj Khalid, ex-speaker of the assembly, all members of the government are corrupt except for President Laghari. *The Daily Khubrain*, March 6, 1996.
[915]Statement of Wasim Sajjad, Chairman Senate. *The Nation*, March 12, 1996.

Minister that the accountability process is a waste of time. He rather urged the Prime Minister to focus on the socio-economic development of the country.[916]

But the decision to focus on corruption came out of pressure from outside. Pakistan was ranked second again in 1997 by Transparency International for corruption.[917] On October 22, at the end of his five day visit, World Bank president James D. Wolfensohn addressed a news conference along with Finance Minister Sartaj Aziz. He asked the Government of Pakistan-GOP to control corruption and offered help to reform the judicial system. He blamed the weak judicial system for being unable to check corruption.[918] It is not surprising that the same year Transparency International declared Pakistan the second-most corrupt country in the world, the caretaker Prime Minister admitted his failure in proving corruption.[919]

The Election Commission asked the legislatures to submit their asset statements.[920] A list of loan defaulters was published to stop some legislators from participating in elections. The State Bank of Pakistan gave this list to Election Commission which made it public. Where jurists were giving legal constitutional recipes for control of corruption like strict observation of article 62 of the constitution, there were also voices of not using judicial forum as laundries for washing dirty personal and

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[916] *The Dawn*, Nov 27, 1996.

[917] *The Muslim*, July 3, 1997, at 8.
[918] *The Muslim*, October 23, 1997, at 1.
[919] *The News*, December 24, 1996.

[920] *The Dawn*, July 1, 1996.

political linen especially where the political sovereign (voter) has given its verdict.[921] The point I want to make here is the focus of this anti-corruption campaign was politicians. When the Nawaz targeted the bureaucracy, the judiciary quickly reacted to stop it.

Old Juridico-Bureaucratic Structure Reacting to Democracy

In the 1997 election, Nawaz Sharif won with a two-third majority. His first act was to get rid of notorious Eighth Amendment without any discussion in the assembly.[922] It is interesting that just a few months ago, the judiciary had declared this amendment valid. Similarly political defection (or horse-trading) was a serious problem in assemblies and Nawaz, through the Fourteenth Amendment, prohibited this practice on July 3, 1997. This decision was again made without discussion in the assembly.[923] Now Nawaz Sharif was safe 'constitutionally' and 'politically,' but this was not enough protection.

Soon, Nawaz Sharif was in a controversy with the judiciary on the issue of interfering with the bureaucracy. He was questioned for openly handcuffing officers of the Water and Sanitation Agency in Faisalabad, who were later released by the courts as there were no registered charges against them; for establishing separate courts for combating terrorism; and on the issue of the appointment of judges. Nawaz Sharif used

[921]Justice Asif Saeed Khan Khosa, "Cleaning the Fountainhead: A Constitutional recipe for elimination of corruption" (1996) PLJ, 126 at142.
[922] *Act 1 of 1997*, PLD 1997 Central Statutes 323.
[923] *Act XXIV of 1997*, PLD Central Statutes 324.

an accountability campaign against the bureaucracy and military in an effort to strengthen himself. However, this campaign did not work.

The case of *Usman Farooqi,* a steel mill chairman prosecuted for the importation of pig iron was of political importance due to the involvement of Zardari, Benazir's husband. He was granted bail by Justice Amanullah, who was the judge Benazir Bhutto had appointed in the Sindh High Court.[924] The Capital Development Authority chairman, Shafi Sehwani, was also granted interim bail.[925] The Prime Minister pleaded for no bail in corruption cases. [926] The sacking of Naval Chief Mansurul Haq (taken up in the *Mansurul Haq* case) under allegations of irregularities and wrongdoings in Agosta 90-B deal was another important case. It was a rare happening in the country's history.[927] The Navy denied the charges and declared that French submarines were selected on merit.[928] Air Chief Marshal Khattak had to refuse kickbacks in a $2.66 billion Mirage deal to quell rumours.[929] After this Chief Of Army Staff Jehangir Karamat ordered a stop to the media trial of army officials.[930]

This was the environment in which Nawaz presented the Ehtesab Bill (which made measures to restore accountability) in the assembly. The government supported the amendments such that any person arrested on charges of corruption would not be able to

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[924] *The Dawn* March 6, 1997.
[925] *The Frontier Post*, March 25, 1997.
[926]*The Dawn*, March 4, 1997.
[927] *The Nation*, April 25, 1997.
[928] *The News*, April 24, 1997 at 8.

[929] *The News*, April 9, 1997.
[930]*The Daily Khubrain*, April 27, 1997.

get bails for two years.[931] The opposition protested, but the National Assembly passed the amended bill.[932] Opposition considered this bill "overwhelmingly discriminatory, arbitrary, and selective,"[933] and 'blind legislation'.[934] The Human Rights committee of the Pakistan Bar Council, headed by Chairman Rana Ijaz Ahmad Khan, rejected the Ehtesab Act and requested the president to hold a referendum on it. The initiator of accountability in Pakistan, Meraj Khalid (the ex-caretaker Prime Minister) declared that accountability was futile as the rulers had not risen above political considerations.[935] President Laghari urged Nawaz Sharif to review the Ehtesab Act and the Prime Minister assured the president that he would modify the Act in view of public criticism about some of its controversial clauses.[936]

A full bench, headed by Chief Justice of the Lahore High Court Sheikh Riaz Ahmad, heard the case against the Ehtesab Act, 1997. The Lahore High Court dismissed the petition on the ground that article 248(2) of the constitution exempted the president and the governors to be held under criminal litigation while in office.[937] The validity of Ehtesab Ordinance was upheld on Feb 17, 1997.[938]Meanwhile, Prime Minister Nawaz Sharif publicly arrested and handcuffed three officials of the Faisalabad Development

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[931] *The Muslim*, April 3, 1997 at 5.
[932] *The News*, May 30, 1997 at 1. , p1
[933]Imtiaz Alam, *The News*, 4/6/97 at 6. , p6
[934]Raza Rabbani, Pakistan People's Party senator, leader of opposition in the Senate, *The Frontier Post*, June 4, 1997, at 4.

[935]*The Dawn*, June 9, 1997.

[936] *The Nation*, September 19, 1997 at 1.
[937] *The Nation*, December 3, 1996.
[938]*The Dawn*, February 18, 1997.

Authority.[939] The government issued a list of 554 corrupt officials that had been compiled by the Prime Minister secretariat.[940] Seven officers of grade 22 among 87 were suspended.[941] The judiciary then launched a campaign against these arrests of bureaucrats. These arrests were considered political victimization on the ground as the judiciary argued the arrested bureaucrats were either close to the opposition Pakistan People's Party or were not obeying the political orders of Nawaz Sharif.[942]

Resisting a Parallel Judicial System of Special Anti-Terrorist Courts

The fervor for an independent judiciary was so high that newspapers commented that the judiciary was the "Courthouse of the Government" and it was needless to burden it with a prefix of independent.[943] I have already discussed that the second front of the struggle against the judiciary was the establishment of new anti-terrorist courts.[944] On August 13, 1997, *the Anti-Terrorism Bill* was passed. Writ petitions were filed in High Courts against this law, and when such an appeal was dismissed it came to the Supreme Court for leave to appeal. Notices were issued to the Attorney General. Nawaz's position

[939] *The News* March 11, 1997
[940] *The News* April 6, 1997.
[941] *The News*, April10, 1997.
[942] *The Frontier Post*, April 15, 1997.

[943] G. H. Abbasi Advocate, "Independence of Judiciary" (1998) PLD, Journal 88-91 at 89.
[944]Hamid Khan's reason was that Nawaz Sharif just wanted to accommodate Pakistan Muslim League-N's members as special judges. See Hamid Khan (1998), "Government and Judiciary 1994 to 1997: the Crisis of State" in Khan (1999), *supra* note 112 at 138.

was that this law was necessary. He gave examples of such laws in England to deal with terrorism by the Irish Republican Army and pointed to the Terrorist and Disruptive Activities Act in Indian Kashmir. Supreme Court Chief Justice Sajjad could not decide on the issue as he went on a direct strike with Prime Minister. Later, the issue was decided by the court in the *Mehram Ali* case.[945]

The judiciary attempted to stop the parallel judicial system again when Nawaz called the military to assist the civil power in Sindh Province against unrest. On October 20, 1998, the federal government promulgated an ordinance titled the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance 1998. Under this military courts that did not grant bails were set up in Sindh for speedy trials. The Supreme Court declared the military courts unconstitutional in an appeal on February 17, 1999. The Supreme Court also declared the cases should be heard by special courts (which had already been tuned to the existing judicial system) and guidelines were laid down for the trial of the cases. Later, in 1998, the Courts/Tribunals run by the executive without the control of the High Courts were found under Article 203 to be in violation of the requirements of the constitution.[946]

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[945] Ref. *Mehram Ali case*. The SC found several provisions of the Act unconstitutional and violations of fundamental rights. The SC was given (actually acquired) the right to appeal under this Act in this judgment and made possible its shape within the already existing judicial system. In a way, it did not let the parallel judicial system exist.

[946] PLD 1998 SC 1445; also 1998 SCMR 1156.

Tools beyond Judicial Means: From sou moto to Social Investigation and the Organ for "National Integration"

The growth of judicial power was apparent beyond its opposition to parallel courts. The Judiciary began taking *sou moto*[947] notices on the killings of people in Karachi on the premise that the federal as well as provincial governments had failed to control the situation.[948] Similar steps were taken by Sajjad on the issue of religious sectarian killing in Lahore, in a hearing in his chamber on July 1, 1997. Chief Justice Sajjad even summoned to the hearing leaders of both sects and their organizations, namely Sipah-e-Sahaba (a Sunni sect organization) and Sipah-e-Muhammad (a Shia sect organization). Apart from the judiciary's own "tacit active approval" of sectarian violence, prosecution, and intimidation of minority sects,[949] the judiciary also failed to understand the reasons for the emergence of socio-religious movements and sectarianism.[950]

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[947] Latin phrase meaning 'on its own motion.' Legal actions taken by the judiciary against any unjust and wrong doing in the state and the society.

[948] Justice Ali-Shah, *supra* note 48 at 380-81.

[949] According to Tayyab Mahmud, the sectarian violence, prosecution, and intimidation of minority sects is increasing with the tacit active approval of public authorities including judiciary as they are validated by superior judiciary. He relied on *Dard and others vs Pakistan*, Criminal Appeal 149/89. The pronouncement of the SC in the *Dard Case* July 3, 1993 was disturbing for it upheld Ordinance XX of 1984 prohibiting Ahmadis to publically practice and declared it as crime. See Tayyab Mahmud, "Protecting Religious Minorities: The Courts' Abdication" in Charles H. Kennedy & Raul Bakhsh Rais, ed.s, *Pakistan: 1995* (Lahore: Vanguard, 1995) 83 at 83; see also Osama Siddique & Zahra Hayat, **"Unholy Laws & Holy Speech: Blasphemy Laws in Pakistan - Controversial Origins, Design Defects and Free Speech Implications"** (2008) 17 Minn. J. International L. 303.

[950] For Robert Nicholas (1998), the socio-religious movements were the result of socially disrupted wars and wide open trade which Pakistani state interrupted in the mid-1990s. He called it the "the micro-politics of protests" on the basis of Migdal's state-in-society outline. Robert Nicholas, *"Challenging the State: 1990s Religious Movement in the Northwest Frontier*

Appointment of Judges: The Judiciary's Exclusive Right

Chief Justice Sajjad recommended five judges for the appointment in the Supreme Court. Under the judgment in the *Judges'* case, the Prime Minister was supposed to accept this recommendation or give reasons for not accepting it in writing. One of the judges in the list had decided some cases against the Prime Minister's Ittefaq Group of Industries while he was in opposition. Another judge had been a Federal Secretary with Benazir Bhutto's government. Instead of approving the appointments, the Prime Minister used a notification to reduce the number of judges in the Supreme Court from 17 to 12 as it was in 1986. Supreme Court Chief Justice Sajjad told the president that the strength of the Supreme Court can only be reduced if its jurisdiction is reduced.[951] The workload of the High Courts had increased many fold due to new laws such as the Ehtesab Act, Drugs Act ,and the Control of Narcotics Substances Act. Also, the judiciary was not letting any cases under these laws go through other judicial channels. The Chief Justice suspended the notification and the Prime Minister had to follow. The validity of this order, dated August, 21 1997, was challenged in the court but was withdrawn by the government on September 16, 1997.

Yet, the Supreme Court Chief Justice himself did not follow the *Judges'* case ruling. He did not appoint the senior most judges from the Sindh High Court, Lahore High Court, and Peshawar High Court, and the vacancies were not filled within 30 days,

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Province" in Baxter & Kennedy, ed.s, *supra* note 65 at 1-4, 25; see also Mumtaz Ahmad, "Revivalism, Islamization, Sectarianism,and Violence in Pakistan" in Baxter & Kennedy, *supra* note 65 at 101-121.

[951] Justice Ali-Shah, *supra* note 48 at 395.

but according to the schedule of the Chief Justice. Now, only two parties were left in the appointment of judges, that is, the bench and the bar, which was led by Hamid Khan. After the *Judges'* case, the elected government was reduced to rubber stamping the recommendations of the Supreme Court Chief Justice. Since the judges were picked from the bar or the lower judiciary, this created a tension between the bench and the bar. Chief Justice Sajjad was appointing only service judges whereas Hamid Khan was demanding that lawyers be appointed as judges.[952] Nawaz Sharif wanted the right to appoint judges back. We already discussed that the judiciary was resenting any effort of parallel judicial systems like anti-terrorist courts and special speedy trial courts. Below is the climax of this controversy.

Challenging the supremacy of the legislature

Under the leadership of Supreme Court Chief Justice Sajjad, the judiciary seemed determined to play an important role as, he noted, "Pakistan was passing through a very critical stage"[953] and therefore it was necessary to find the legislature as not legislating.[954] Speeches made by the Prime Minister and Chief Justice at the South Asian Association for Regional Cooperation in Law-SAARCLAW conference in Karachi from October 3 to

[952] Hamid Khan (1998), "Government and Judiciary 1994 to 1997: the Crisis of State" in Khan (1999), *supra* note 112 at 142-43.
[953]See Justice Ali-Shah, *supra* note 48 at 401.
[954] The legislature had not legislated and had issued 200 ordinances and imposed taxes of the amount of Rs. 2 billion without the approval of the parliament. See Justice Ali-Shah, *supra* note at 260.

5, 1997, were clearly indicative of this struggle for supremacy between the judiciary and the legislature.

A three-member bench headed by Chief Justice Sajjad suspended the operation of the 14th amendment.[955] The Prime Minister called it "illegal" and "unconstitutional" and a violation of the supremacy of the parliament. Based on these speeches, contempt of court proceedings were initiated by the court against the Prime Minister. The Prime Minister appeared twice before a bench of five judges headed by Chief Justice Sajjad but Sajjad did not drop the contempt proceedings. To counter this, the Parliament passed a Contempt of Court Bill (an Amendment) in which contempt could be appealed before another bench of the remaining Supreme Court judges, and the execution of the punishment couldn't happen for a 30-day period pending the appeal. President Laghari did not sign this bill as Chief Justice Sajjad restrained him to do so as President asked the court whether the president should sign it or not, though this was not required!

The Supreme Court, led by Chief Justice Sajjad, then took up the Inter-Services Intelligence-ISI case for hearing. The ISI was alleged to have spent money to bring Prime Minister Nawaz Sharif to government in the 1990s. This was a clear indication of the intent to disqualify the Prime Minister, but also the beginning of a fight within the judiciary that had not yet learned how to work consistently. A two-judge bench of the Supreme Court in Quetta entertained a petition against the appointment of the Chief Justice. The bench referred this case to the Chief Justice to form a large bench. On

[955] Nawaz Sharif stopped floor crossing through this amendment. *Constitution (Fourteenth Amendment) Act*, 1997, Act XXIV of 1997, PLD Central Statutes 324.

November 27, a five member bench of the Supreme Court, headed by the Chief Justice himself, suspended the order of the Quetta bench by 4-1. Members of parliament heckled the Chief Justice in the court room. This was a day before the commencement of contempt proceedings against the Prime Minister.

A bench headed by Chief Justice started the hearing of the contempt case on November 28, 1997. In order to prevent this hearing, members of the ruling party, ministers, parliamentarians and members of provincial assemblies stormed the Supreme Court building. The Chief Justice wrote a letter to the president requesting the army to protect him. He also requested references against the Supreme Court justices of the Quetta and Peshawar registries be sent to the Supreme Judicial Council. The next day, two separate cause lists were circulated for December 1, one by Supreme Court Chief Justice Sajjad of 5 judges and the second by a Chief Justice Saeeduzzaman Siddiqui of 10 judges. Each Chief Justice annulled the administrative orders of the other.

A group of retired judges was also active, led by Ret. Supreme Court Chief Justice Nasim Hasan, who restored Nawaz's government in 1993. They viewed the judicial activism of Supreme Chief Justice Sajjad as extending from fundamental rights violation to entering the domain of politics. Hasan warned the courts that they have curtailed executive powers but that Nawaz was elected with powerful support and that he may put his weight behind the appointment of judges.[956] He argued that this could result in bizarre consequences and the scope of the judiciary should be confined to wrongs done

[956] See Baxter and Kennedy ed.s, *supra* note 65 at 73-75.

to the citizens.[957] Supreme Court Justice Rafiq Tarar[958] was involved as well called Supreme Court Chief Justice Sajjad a "judicial terrorist", and influenced many judges against Justice Sajjad.[959] He was rewarded as the president of Pakistan for his role.

The climax of this crisis of state came when Jehangir Karamat, Chief of Army Staff, called a conference of Corps Commanders, as the President and Prime Minister requested him to act as an arbitrator. General Musharraf (as he then was) insisted that the elected government should stay in power. The Corps commanders decided to send a message to Sajjad "to behave himself."[960] President Laghari resigned and on December 23, 1997, a 10-member bench announced the appointment of Supreme Court Chief Justice Sajjad as void, as his appointment violated the principle of seniority. Hamid Khan opined that both the judges and the legislators were wrong. This was a drama with no hero.[961] This may be true, but what I am trying to prove is a linear rise of the judiciary since 1990. The judiciary did not become weak after the removal of Supreme Court Chief Justice Sajjad, and, relatedly, the supremacy of the legislature was not established. Let me explain.

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[957] Justice Hasan-Shah (2002), *supra* note 47 at 128.
[958]His famous decisionhe was when he held that PCO did not impinge upon or undermine functions and powers of judiciary, see *Tajamal Hussain Malik v Federal Govt of Pak*, 1981 PLD, Lahore 462. As the Chief Justice of Lahore High Court, he led a full bench upholding the dissolution of the Benazir Bhutto government in 1990, see *Khawaja Tariq Rahim case.*
[959]See for detail Hamid Khan (1997), "Fruits of Judicial politics: Mr. Justice (R) Muhammad Rafiq Tarar" in Khan (1999), *supra* note 112 at 127. It also appeared in daily *The News*, December 21, 1997.
[960] Pervez Musharraf. (2006) *In the Line of Fire: A Memoir*, (New York: Free Press, 2006) at 83.
[961]Hamid Khan (1998), "Government and Judiciary 1994 to 1997: the Crisis of State" in Khan (1999), *supra* note 112 at 151.

1998: supremacy of the parliament*?*

Nawaz got rid of 58(2)(b) of the constitution through 13th amendment. Now the president could not dissolve the elected assembly and Nawaz called it this amendment as the supremacy of the parliament.[962] Was this true on the face of a strong judciary? Before 1990, the dominant view was that the judiciary could not legislate or question the wisdom of the legislature,[963] though in reality the legislature also could not amend the constitution under Article 70 by adopting procedure laid down in Article 238 and 239, that is, the law should not be inconsistent with fundamental rights, or be repugnant to the injunctions of Islam. The doctrine of basic structure denied the right of the people to amend the constitution through their elected parliament.[964] The slogan to defend the parliament came up in the Nawaz and Sajjad controversy. Some members of the Pakistan Muslim League-PML thought that parliament was not protected enough against other organs of the state in the constitutional set up.[965] Addressing the South Asian Association for Regional Cooperation in Law -SAARCLAW Conference, Prime Minister Nawaz stated that the "the line of demarcation between interpretation and transformation should not be overlooked" by the judiciary when interpreting the constitution.[966] The argument against

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[962] See Huntingdon, "Preface" in Baxter & Kennedy, *supra* note 65 at vii.
[963] *The State v Zia-ur-Rehman*, 1973 PLD S. C. 49 at 70. Where it was held that court is not above the constitution nor it can strike down any provisions of the constitution.
[964] See Syed Kaleehm Ahmad Khursheed, "Whether Parliament is Supreme?" (1998) PLJ, Magazine Section, 45 at 47. But the writer at the same time stressed his dissatisfaction with the legislature and not the judiciary. Even for delays in the courts, according to the writer, the legislature was responsible as it did not amend the procedural laws. See also Syed Muhammad Kaleem Ahmad Khursheed, "Existing Laws Requiring Amendments" (1993) PLD , Journal, 69-72. .
[965] Justice Ali-Shah, *supra* note 48 at 496.
[966] As cited by Justice Ali-Shah, *supra* note 48 at 742, appendix 8.19.

this was that the magnitude of the damage to the judiciary was greater at the hand of politicians than at the hand of military dictators[967] and hence the judiciary was to keep a tight rein over the executive and should not give any leniency or indulge to its functionaries.[968] The powers of the judiciary were not supra legislative powers but were corrective in nature.[969]

The judiciary under Sajjad exhibited features of state institutions like the military in Pakistan, such as little accountability, strong ambitions, no internal democracy, and an elite class orientation. But why was it superior to the other institutions? The impression that "the judges generally led secluded lives"[970] was no longer valid. Supreme Court Chief Justice Sajjad met with Prime Ministers Benazir Bhutto and later Nawaz as well as president and Chief Of Army Staff General Jehangir Karamat several times.[971] These meetings were about future legislation.[972]

This was not driven, it must be stated, by the personal ambitions of Sajjad, but by the power that the judiciary had acquired during the era of the globalization period, when the state was going through a transition. The judiciary became strong enough to challenge

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[967]Arif Chaudhry, "Role of the Bar in Administration of Justice" (1998) PLJ, Magazine Section, 187, at 189. The writer was a member of the Punjab Bar Council at that time.
[968]Justice (Ret.) K. M. A Samdani, "Rule of Law" (1999) PLD , Journal, 91 at 92.
[969]Munawar Ahmad Mirza JSC, "Judicial System of Pakistan" (1998) PLD, Journal, 125 at 135.
[970] Hamid Khan (1997), "Judicial appointments in the perspective of Independence of Judiciary" in Khan (1999), *supra* note 112 at 112-121. A paper read at the 6th SAARC LAW Conference at Karachi, 3-5 October, 1997; also published in PLJ 1997, Magazine, 177.
[971] Justice Ali-Shah, *supra* note 48 at 335, 428.
[972] Justice Mian, *supra* note 60 at 218, 273.

the private interests of the military.[973] The judiciary had moved from a position of non-interference in election matters to monitoring the elections to checking the educational degrees of the members of the assembly.[974] Before 1994, a very consistent view of the Supreme Court was not to engage in election matters as there was a special mechanism for this in the constitution as established in the *Javed Hashmi* case in 1989.[975] But this view was reversed by the Supreme Court in the *Mustafa Jatoi* case in 1994.[976] Similarly, in the *Muhammad Muqeem case,*[977] the Supreme Court decided to disqualify a loan defaulter from a political post to eradicate corruption from the political culture. The dissenting judge was of the opinion that the loan should be recovered through banking procedures for it had nothing to do with elections. To complete the analysis, it is necessary to understand the nature of Public Interest Litigation at that time.

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[973] An example is the *Wahab-ul-Khairi* case. In a PIL case, he challenged the private interests of the military. The petition was dismissed on technical grounds [Re: Supreme Court of Pakistan case No. CP 1593/98].Without checking the title of the land 33866 acres of land owned were allotted to Brig (rtd) Muhammad Bashir in 1993. A landless peasant brought a case against in Lahore High Court and the court gave a decision in favour of Karim in spite of the fact that the district govt. favoured Brig Bashir. In appeal, the SC upheld the ownership of Karim on land in 2003 and quoted from John Steinbeck's *The Grapes of Wrath* and cautioned against accumulation of property in few hands [Civil Appeal No. 30 of 1999, dated 24, September 2003]. Detail given by Ayesha Siddiqa, See Siddiqa, *supra* note 19 at 204-4, 118, 159.

[974] Later in cases by Chief Justice SC Iftikhar in 2008.

[975] *Election Commission of Pakistan through its Secretary v. Javed Hashmi and others*, 1989 PLD S. C. 396-434.

[976] *Ghulam Mustafa Jatoi v. Additional District and Session Judge/Returning Officer, NA 158 and others*, SCMR 1994, 1299-1321. Ghulam Mustafa Jatoi (former caretaker minister) and Asif Zardari (husband of Benazir Bhutto and later president of Pakistan) were contesting elections. Jatoi was disqualified without notice being a defaulter in the list of Banking Council of Pakistan. SHC upheld the order in the light of Javed Hashmi case. But SC headed by Nasim Chief Justice SC reversed the order and let Jatoi contest the elections.

[977] *Muhammad Muqeem Khoso v President of Pakistan,* 1994 PLD S. C. 412-452. A member of the National Assembly and a defaulter of ADBP loan was disqualified for 7 years by the election commission on a reference sent by the president. He went in appeal and SC upheld the order with a majority of 2 to 1 under PPO 17 of 1977.

The Mid 1990s: Crucial Years for Public Interest Litigation

Rights can be suspended, not courts

This period was marked with judicial activism and respect earned through Public Interest Litigation, enhanced by the attacks from the legislature. Individual rights could be suspended but not the courts, according to *Farooq Ahmed Laghari v Federation of Pakistan*. While deciding this case, the courts articulated their own domain, accepted the suspension of fundamental rights to deal with emergency, but denied the second proclamation to stop the courts. Furthermore, it stated that the judiciary itself was not accountable and "no writ can be issued by a High Court of the Supreme Court against itself or against each other or its judges" when exercising their constitutional jurisdiction.[978] In another very important case, the court strongly defended its right to Public Interest Litigation in 1996.[979] The court did not allow any legislation to take away its jurisdiction.

Limits to Public Interest Litigation and political questions

At the same time, the limits of Public Interest Litigation (PIL) as an alternative stream of justice were becoming evident, including its use as a political tool. Khoosa pointed out that judges should not try to be wiser than the law while trying to do justice

[978] Justice Mian, *supra* note 60 at 108-109.
[979] *Shahida Zahir Abbasi v President of Pakistan*, 1996 PLD S. C. 632. The court defended its jurisdiction to hear the appeal against its decision of Field General Court Martial of the accused of a military coup.

and that judgments should not be used to restrict the rights of others.[980] PIL was also criticized as a key reason behind the backlog of cases. Courts refused cases of PIL which were considered frivolous and not genuine PIL cases, declaring them a "packing of the courts.[981]" In some cases, bona fide petitioners were not trusted by the courts and misuse of the PIL for personal benefit was checked by the courts.[982] M. D. Tahir filed many cases and was unmindful of criticism of frivolous action.[983] At the same time, genuine cases of PIL were refused like the case of Zainab Noor and the lawyers against VIP culture (an unnecessary given protocol to important persons).[984]

Menski ultimately found there was a decline of PIL in Pakistan because of "distractions of the big politics."[985] *Al-Jehad Trust v Federation of Pakistan* was a case he cites as, like in India, PIL was used in struggles over the division of power between the judiciary and the executive. In other cases, the judiciary sought to fill in gaps in legislation that were inconveniencing citizens.[986] Another objection was the misuse of

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[980]*Yusuf Haji Ismail v. Husain Mumtaz,* 1989 PLD Kar 299

[981]Comments of Ahmad Saeed Awan J in *Tariq Saeed v. Director, Anti-Corruption Establishment,* MLD 1864. The point to remember here is that Ahmad Saeed Awan J was one of those political appointees by Benazir Bhutto who were removed by CJ Sajjad. It should be considered that the period showed the height of use and abuse of judicial activism.

[982]*Hamid Majid v Discipline Committee*, 1991 SCMR 2317, *Farrough Ahmed Siddiqui v Province of Sindh*, 1996 PLD Kar 267.

[983]Human Rights Commission of Pakistan- HRCP (1997, 71).

[984] Human Rights Commission of Pakistan -HRCP 1998 report

[985] Werner Menski (1997). "Public Interest Litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture" in Menski et al., *supra* note 125 at 130.

[986]*Ameer Bano v. S E Highways,* 1996 PLD Lah 592. Residents of Bhawalpur complained that construction of the highway was slow and as a result the sewage system is disturbed. Muhammed Aquil Mirza J Lahore High Court resolved the issue "through consensus" using PIL. He ordered the lifting of the bans on jobs by the government so that the municipal corporation can recruit more employees to complete the construction.

PIL by middle class entrepreneurs for their personal gains.[987] Menski proposed a balance between public interest activism and private interest.[988] In his view, the judiciary could play a role in monitoring standards.[989] Yet, Menski argued there was a false dichotomy between 'normal' litigation and PIL.[990]

My conclusion is that Pakistan could not become an Asian Tiger in its economic development and PIL allowed for an alternative, weaker identity.[991] Supreme Court Chief Justice Ajmal found that because of PIL, public utility services did improve to some extent. But according to him, the judges did not use this facility sufficiently. The concept of the Quetta Declaration was valuable but remained only on paper.[992] By the end of the 1990s, PIL in Pakistan was of some use by cutting the excesses of free market capitalism, through consumer protection, and market-oriented environment protectionism. I explore this in the last chapter. The consolidation of PIL was also evident in the lawyers' movement, which swept through the country in the 2007 onwards. PIL and its principles had become an integral part of the constitution in spite of criticism and misuse.[993]

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[987] Hamid Khan (1998), "Role of Bar in the Administration of Justice" in Khan (1999), *supra* note 112 at 170. Essay was also published in 1998 PLJ, Magazine Section, 148. This was a paper read in the seminar held by the Punjab Bar Council.
[988] Werner Menski (1997). "Public Interest Litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture" in Menski et al., *supra* note 125 at 107.
[989]Ahmad Rafay Alam, "The Law of Public Interest Litigation in Pakistan" in Menski et al., *supra* note 125 at 63.
[990] Werner Menski (1997). "Public Interest Litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture" in Menski et al., *supra* note 125 at 131.
[991]Criticism mentioned but not made by the writer. Werner Menski (1997), "Public Interest Litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture" in Menski et al., *supra* note 123 at 106-132.
[992] Justice Mian, *supra* note 60 at145.
[993]Ahmad Rafay Alam, "The Law of Public Interest Litigation in Pakistan" in Menski et al., *supra* note 125 at 62.

Ultimately, I view PIL as a legal development that evolved with political developments in Pakistan but which became co-opted within the good governance paradigm.

'Good Governance': A Class Explanation of Musharraf's Coup (October, 1999)

The liberal project became disenchanted with democratic experience. Nawaz Sharif's success in the 1997 election was one step forward, yet it occurred in the context of a decade-long tradition of non-issue and non-policy politics or "de-ideologized" politics.[994] For Rasul Bakhsh Rais, the transition to democracy was not working due to the feudal political culture. The underdeveloped civil society was not in a position to enhance this democratic polity.[995] Devoid of structural issues, and class analyses, 'institutionalist' studies analyzed voting behaviour to solve the question of who is voting for whom and why?[996] One such study, by Andrew R. Wilder, examined the self-interested rational voter who sought patronage in order to reject the claim that social factors like traditional 'feudal' relationships and ties of family, clan or tribe determine voting behavior.[997]

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[994] Mohammad Waseem, "Pakistan Elections 1997: One Step Forward" in Baxter & Kennedy, supra note 65 at 14.

[995] Though his opinion is democracy will solve its own problems. See Rasul Bakhsh Rais. "Benazir's Return to Power, 1992-94" in Kennedy & Rais, *supra* note 43 at 14.

[996] The findings of Andrew R. Wilder (1999) are that the common perception is wrong that social factors like traditional 'feudal' relationships and ties of family, clan or tribe determine voting behavior. Rather, political determinacy like party, party leadership identification in urban areas and patronage orientation in rural areas are important in voting behavior. See Wilder, *supra* note 32 at 3.

[997] Wilder made the basis of rise of Pakistan Muslim League-N and decline of Pakistan People's Party in urban areas of central Punjab, along with increasing prosperity, a factor behind Nawaz Sharif's reliance on patronage in 1988 onward in central Punjab. For him this was also the reason

In terms of class formations, the tug of war between the two fractions of the reigning class saw both sides using the state apparatus of bureaucracy and judiciary against each other. The decade of 1985-95 led to the politicization of the bureaucracy, particularly the District Management Group and Police Group with large-scale postings.[998] According to Saeed Shafqat and Saeed Wahlah, every regime, whether civil and military, tried to curtail the powers and authority of the Civil Services of Pakistan, and break its "institutional will and capacity."[999] Apart from this, we can translate this change in Civil Services as class formations affecting the state formations. Every regime tried to re-mould the frame of the bureaucracy and judiciary. Nawaz suspended 87 civil servants in 1997 and formed a task force for civil reforms.[1000] Close to the end of the 1990s, all the class forces agreed to break the back of civil bureaucracy including the hegemonic metropolitan bourgeoisie and emerging petty bourgeois 'liberal' project. The World Bank worried about the high transaction costs of doing business in Pakistan.[1001] Until 1998, the World Bank clearly stood against over-centralized organizational structure and seriously eroded internal accountability as well as the politicization of civil-

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of decline of organized labour and hence decline of Pakistan People's Party as party of the poor in 1988-90. See Wilder, *supra* note 32.

[998] Saeed Shafqat & Saeed Wahlah,"Experimenting with Democratic Governance: The Impact of the 2001 Local Government Ordinance on Pakistan's Bureaucracy" in Charles H. Kennedy &Cynthia A. Botteron, ed.s, *Pakistan: 2005* (Karachi: Oxford University Press, 2005) 198 at 208.

[999] *Ibid* at 203.

[1000] Saeed Shafqat, "Pakistani Bureaucracy: Crisis of Governance and Prospects of Reform" (1999) 38:4 *The Pakistan Development Review* Part II, Winter 1999, 995-1017.

[1001] The Word Bank (2001), Bari et al, (2002); World Bank SME Policy Note, World Bank Islamabad, 2001; Bari, F. Cheema A., and Haque E., Regulatory Impediments, Market Imperfections and Firm Growth: Analyzing the Constraints to SME Growth in Pakistan, A Study Conducted for the Asian Development Bank (ADB) 2002. As cited by Bashir Ahmad Khan & Faisal Bari, "Pakistan: Economic Challenges for a New Millennium" in Craig Baxter, ed., *Pakistan on the Brink: Politics, Economics and Society* (Karachi: Oxford University Press, 2004) 131-154.

service decision making in Pakistan.[1002] Reformist economic managers of the World Bank were struggling hard to restrain and block the pursuit of populist policies by the political leaders.[1003]

The dilemma for the reigning class was that political leadership was given the task of the state's strategic imperatives and the economic needs of its populace, and they did not have the authority nor resources to meet these needs.[1004] Democratic regimes were vulnerable to both overthrow by a military-backed president and to voters' expectations. They reached short term 'politically optimal solutions' to stay in power.[1005] Aid programs, like the Rural Works Program, the Integrated Rural Development Program, the People's Works Program, and the *Tamir-e-Watan Program*, were established to bypass bureaucracy and so that the elite could direct patronage toward the members of the national and provincial assemblies.[1006]

Proponents of the liberal project were not happy with this situation. They vigorously attacked development planning, as the policy makers were asking local

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[1002] The World Bank, "Pakistan: A Framework for Civil Service Reforms in Pakistan, Report No. 18386-PAK, December 15, 1998.

[1003]Ishrat Hussain, 'Pakistan and IMF', a paper presented at the International Expert Workshop organized by the German Foundation for Development (DSE) at Berlin, Germany 1-2 July 2002, 2 As cited by Aqil Shah, "Aiding Authoritarianism? Donors, Dollars and Dictators" in Charles H. Kennedy & Cynthia A. Botteron, ed.s, *Pakistan: 2005* (Karachi: Oxford University Press, 2005) 51-81 at 78 footnote 41.

[1004] Ayesha Jalal, "Pakistan's Tangle: The Politics of Conflicting Security and Economic Interests, (Winter, 1999) 34: 1 *Government and Opposition* as cited by Aqil Shah, "Aiding Authoritarianism? Donors, Dollars and Dictators" in Charles H. Kennedy and Cynthia A. Botteron ed.s, *Pakistan: 2005* (Karachi: Oxford University Press, 2005) 51-81.

[1005] Merilee Grindle & John Thomas, *Public Choice and Policy Change, The Political Economy of Reform in Developing Countries* (Baltimore: John Hopkins University Press, 1991) at 62.

[1006] See Mohammad Waseem, "Local Power Structures and the Relevance of Rural Development Strategies: A Case Study of Pakistan" (1992) 17:3 Community Development Journal (Oxford) 228-32 at 1, 3.

Members of National and Provincial assemblies -MNAs -MPAs -where schools should be located. Funds were given as a prestige and to please MNAs and MPAs.[1007] Their conclusion was that "if the state can't deliver, it should leave the poor alone,"[1008] or that NGOs should lead development.[1009] Insofar as there was a critique of Structural Adjustment Programs[1010], the liberal project recognized the need for breaking the nexus of politicians and the bureaucracy with land reforms and decentralization. However, land reform was a 'structural issue,' and the quick solution was decentralization and 'good-governance,' which the metropolitan bourgeoisie (through International Financial Institutions) had already developed as a response to critiques of Structural Adjustment Programs. Suffice it to say, this milieu was ready for a regime change to one that prioritized the principles of 'good-governance' instead of democracy, and consequently welcomed the 'liberal' coup of General Musharraf.

[1007] Tasneem Ahmad Siddiqui, *Towards Good Governance*, (Karachi: Oxford University Press, 2001).

[1008] *Ibid* at 165. This confrontation between state and NGOs became high in flood relief of 2009

[1009] See a full formation of such a case in Shahrukh Rafi Khan and Safiya Aftab, *Structural Adjustment, Labor and the Poor in Pakistan*, Research Report Series# 8 (Islamabad: SDPI, 1995). See also Jennifer Bennett, (1998) *Development Alternatives: NGO-Government Partnership in Pakistan*, Working Paper Series#3, (Islamabad: SDPI, 1998).

[1010] See also Tariq Banuri, Shahrukh Rafi Khan &Moazam Mahmood. *Just Development: Beyond Adjustment with Human Face* (Karachi: Oxford University Press, 1997).

Chapter Six

Good Governance by Judiciary – the 2000s

After the painful struggles against four democratic regimes in 10 years, the judiciary was more than ready to welcome the coup of General Musharraf. This time the judiciary had its own agenda, as prescribed by the good governance paradigm. To implement it, it was necessary to restore the 'juridico-bureaucratic' structure. I argue that the main legal tool it used was Public Interest Litigation. The judiciary justified its actions by pointing to the supremacy of the constitution.

The strength, role, and morale of the judiciary as a custodian of a new phase of global modernity under the rubric of rule of law projects and good governance is evident from the papers presented at the International Jurists Conference Islamabad in 2006.[1011] The juridico-bureaucratic structure has become so strong that the Opposition (the Pakistan People's Party and Pakistan Muslim League-Nawaz) insisted the judiciary's powers must be put in check before democracy can be restored. The bar associations were upset with the judiciary-military bureaucracy alliance and, at its height, published a blunt white paper in 2003.[1012] The Opposition could, however, only act when a deal was signed

[1011] International Judicial Conference organized by the Supreme Court of Pakistan during its Golden Jubilee Celebrations from 11-14 August 2006, online: < http://www.supremecourt.gov.pk/ ijc/ijc.htm>.

[1012] See comments of the bar in the White Paper against Judiciary by Pakistan Bar Council, online:<http://pakistanbarcouncil.org/wp-content/uploads/2012/07/White-Paper_Complete_.pdf>. Last visited on Nov 01, 2012.

internationally between Pakistan People's Party and the western powers as well as Charter of Democracy was signed between the two main opposition parties (Pakistan People's Party and Pakistan Muslim League-Nawaz). This class formation caused cracks in the juridico-bureaucratic structure, which gave rise to the lawyers' movement of 2007. After the success of the lawyers' movement, in 2008, the judiciary was ready to go one step further, and argued for 'constitutional governance' and 'constitutional democracy' rather than parliamentary democracy. This concluded with the attempt to establish a 'judicial dictatorship.'

Institutional Rearrangement: Installing the Governance Structure

By the end of the 1990s, people were disenchanted with neoliberal policies. International Financial Institutions bestowed massive responsibilities on the shoulders of the corrupt elite. The projects of rule of law came in response. The main architect of the 'rule of law' in the World Bank is considered to be Ibrahim Shihata, who was the senior vice president of the Bank from 1983 to 1998. He emphasized governance, 'good order', and a system of rules and institutions as a prerequisite for the development of developing countries. This was accompanied with the famous declaration of Kofi Annan in 1997 to make good governance "the single most important factor in eradicating poverty and promoting development"[1013] and hence all the development agencies, namely the U.S.

[1013]United Nations, Annual Report of the Secretary General on the Work of the Organization, Document A/53/1, United Nations, New York, 1998, paragraph 114 as cited by Regina Birner, "Improving Governance to Eradicate Poverty and Hunger" online:

Agency for International Development, the Inter-American Development Bank,[1014] and the World Bank, became committed to this. The World Bank developed Global Governance Indicators, reflecting institution-building in transitional economies as explained in the first chapter of this dissertation. The 2000s was thus the decade of putting the state back in the analyses of International Financial Institutions, but this time in the name of good governance.

The Good Governance model did not push the developmental state, which had made the 'Asian Miracle' in the early 1990s.[1015] Instead, it was for the legal order that could make the market economy possible.[1016]

<http://www.ifpri.org/sites/default/files/publications/oc63ch42.pdf>. See also Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press 2013) at 194-99, where she has a detailed analysis of Shihata's rule of law writings at the bank.

[1014] See U.S. Agency for International Development, "At the Freedom's Frontiers: A Democracy and Governance Strategic Framework" (Washington, December 2005) online: <http://drg.usaidallnet.gov/dgpubs/document_details.php?document_key=8>. According to this "USAID and the State Department define democracy and governance programs as "technical assistance" which goes to "democracy programs" to promote the rule of law and human rights" etc. at 5-8; see also Inter-American Development Bank, "Strategy for Promoting Citizen Participation in Bank Activities" (Washington, May 19, 2004) online: <http://www.iadb.org/en/publications/publication-detail,7101.html?dctype=All&dclanguage=en&id=16746%20>.

[1015] The East Asian 'miracle' told a slightly different story. This development was the result of an activist 'developmental state' that aggressively promoted economic development and financial stability. See Woo-Cummings, M. ed. *The Developmental State*, (Ithaca: Cornell University Press, 1999). Amsden (1989) and Wade (1990) proved that success was due to the effective role of the state as initiator and coordinator in the process of development. See Alice H. Amsden, *Asia's Next Giant: South Korea and late Industrialization* (New York: Oxford University Press, 1989). Also Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton, NJ: Princeton University Press, 1990). Fukunari Kimura (2004) claimed that South East Asian development was due to the usage of dual track approach, that is, import substitution and export led growth. See Fukunari Kimura, "New Development Strategies under Globalizations: Foreign Direct Investment and International

The 'development policies' now proposed were to fight against corruption through legal reforms in the civil service, as well as criminal law, administrative law and judicial reforms. Terminology and rhetoric used by officials and intellectuals included meritocracy in the bureaucracy, guaranteeing transparency in public administration, ensuring the monitoring of government procurement processes, reducing red-tape, curbing arbitrariness and discretion in administrative and judicial decisions. The judiciary was to hold public officials or politicians responsible for their acts of interfering with market processes and private investment. Hence, the World Bank began giving 'technical assistance loans' for judicial reforms. The first was given to Venezuela in 1992. Now, these loans range from $2.5 million (in U.S. dollars) to Yemen to $58 million to Russia. According to one estimate, the World Bank was supporting 330 'rule of law' projects dealing with judicial reforms in 100 countries in early 2000s. According to the World Bank's Annual Report of 2003-2004, it spent $3.8 billion on loans for judicial reforms since 1993.[1017] All the above processes started in the beginning of the 1990s, with the transition from of the push for a non-interventionist state under deregulation, decentralization and privatization to a state set up to promote the formal market under good governance at the end of 1990s. These 'waves' of externally funded law reform in

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Commercial Policy in Southeast Asia" in Akira Kohsaka, ed., *Development Strategies: Beyond the Washington Consensus* (England: Palgrave Macmillan Ltd, 2004) 115 at 123.

[1016] Richard A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown and Company, 1992).

[1017] See Alvaro Santos, "The World Bank's Uses of the "Rule of Law" Promise in Economic Development" in Trubek & Santos, ed., *Introduction: The Third Movement in Law and Development Theory and the Emergence of a New Critical Practice*, (Cambridge: Cambridge University Press, 2006) at 253 footnote 1.

the transition economies of Eastern Europe and Asia were strongly influenced by 'new institutional economics' for their theoretical framework.[1018] According to this school of thought, good institutions can make an economy efficient, and benefit the individual as well as society (of course, with the implied assumption of a perfect market, competition and information). Furthermore, the thinking went that existing institutions can be reformed under a much wider and looser theory of social change. 'Pragmatic' or purpose-built, economic, political and particularly legal institutions are the focus of institutional economists. The official presentation on this front can be found in the World Bank document, *Comprehensive Development Framework*.[1019] Apart from the legal and development critique of this inclusion of the 'social' in preposition of the World Bank[1020] or this proper place of law in it,[1021] this dissertation is to evaluate the centrality of law for

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[1018] See chapter one for a detailed discussion of this.

[1019] James D. Wolfensohn, President of the World Bank Group started in 1995 with debt issue but after one year found "cancer of corruption" as the main issue. "The Challenge of Inclusion" of "the weakest and the most vulnerable from the margins of society" became the issue in 1997. This developed as CDF in 1999. See Address by James D. Wolfensohn, President of the World Bank Group, to the Board of Governors of the World Bank Group, at the Joint Annual Discussion. September 28–30, 1999 at 2 online: < http://www.imf.org/external/am/1999/speeches/pr02e.pdf>.

[1020] See Kerry Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in Trubek and Santos, eds, supra note 7 at 203-252 ; see Sally Engle Merry, "Measuring the World: Indicators, Human Rights, and Global Governance" in Damani Partridge, Marina Welker, & Rebecca Hardin, ed.s, *Corporate Lives: New Perspectives on the Social Life of the Corporate Form* (Wenner-Gren Symposium Series, (2011) 52:3 *Current Anthropology*, S83-S95.

[1021] John K. M. Ohnesorge (2008) rebutted the law and development approach of development agencies and its critics like Trubek (2006) as their experience was based on Anglo-American and Brazilian experience. He used the South East Asian 'miracle era' as a case study to give evidence for proper role of law in development. He drew on the work of Alice H. Amsden and Dani Rodrik to illustrate how the economic development used law instead of the formalist logic of law as found in law and development scholarship. My problem with his approach is it still does illuminate the relationship of state and class relations. For example, in South Korea and Taiwan, the U.S. as a hegemonic class successfully promoted land reforms which were vital to political and economic development. This did not happen in Pakistan where the U.S. kept the reigning class as a feudal class. Lag or lead of economic or political development in relation of law and

political development. In this perspective, we can see the relationship between the metropolitan bourgeoisie and the Musharraf regime and why it did not vocally object to this overthrow of the democratic regime of Nawaz. Furthermore, we can see how the rising petit bourgeoisie (or the 'civil society') joined hands with good governance and its emphasis on legalism and constitutionalism (or what I refer to as the 'liberal legal project'). That is how 'rule of law' became more important than democracy in Pakistan for the metropolitan bourgeoisie and 'civil society'. Below, I detail this state formation and its class formation under good governance in 2000s.

State Formation in the Era of Good Governance

General Pervez Musharraf served as the tenth president of Pakistan from 2001 until 2008. He had been brought to power through a military coup in 1999. His governing policies were a clear move from Structural Adjustment Programs to the good governance paradigm as "structural reforms cannot be successfully implemented if quality of economic governance remains poor."[1022] This 'governance' compliance was bolstered post-9/11 by the US connection and involvement politically and economically.[1023] The American threat for Musharraf was a threat of demodernization, that is to be sent back to

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development does not take us far if the nature of contradiction are not analyzed within which both processes travel. See John K. M. Ohnesorge, "Developing Development Theory: Law and Development Orthodoxies and the North East Asian Experience" (2008) 28.2 U. Pa. J. Int'L Econ. L. at 219-308.

[1022] Pervez Musharraf, *In the Line of Fire: A Memoir* (New York: Free Press, 2006) at 182.

[1023] Aasim Sajjad Akhtar (2008) Overdeveloping State: The Politics of Common Sense in Pakistan, 1971-2007 (Submitted to the SOAS, University of London for the degree of PhD) at 126.

the stone ages. Income inequality was not an issue and could be fixed by the right policies. He did not blame the International Monetary Fund for governance issues in Pakistan. In 2004, he appointed Shaukat Aziz, a Citibank employee with a humble 'middle class' background, as Prime Minister; Dr. Ishrat Hussain, who came from the World Bank, as the Governor of the State Bank of Pakistan; and a local industrialist Razzak Dawood as the Commerce minister.[1024]

For General Musharraf, the prior democratic regimes were "autocratic, usually plutocratic, and lately kleptocratic," with parties centred around shifting coalitions of clans and tribal leaders that led to poor governance when they come to power. Political parties were "no more than family cults, a dynastic icon at their head like old African dictators like Benazir Bhutto.[1025] He wanted a "sustainable democracy." Democracy should be tailored according to the needs of a nation. He also had a populist side, "I am no socialist, yet I share these ideals."[1026]

Musharraf passed a Local Government Ordinance in 2000, which he called a silent revolution. Later, the Pakistan Muslim League-Quid-e -Azam was formed with the help of the National Accountability Bureau and Intelligence Services of Pakistan. General Musharraf established the National Accountability Bureau, declaring that controlling corruption and improving economy major issues.[1027] The U.N. reported that Rs 100 billion was lost to corruption in Pakistan each year and Transparency International ranked

[1024] Musharraf, *supra* note 12 at 201, 185, and 145.
[1025] *Ibid* at 164.
[1026] *Ibid* at 154-155.
[1027] The Nation, October 27, 1999 at 5.

Pakistan twelfth in 1999 in the Corruption Perception Index.[1028] The U.S., U.K., and Swiss governments showed their willingness to help the National Accountability Bureau fight against corruption.[1029] Due to the rapid and ruthless pace of the National Accountability Bureau, the business community was horrified. Finance minister, Shaukat Aziz had to assure the business community it would not be harassed by the National Accountaiblity Bureau.[1030] Shortly after, the Bureau sent a message of confidence to the business community for out of court settlements.[1031] General Khalid Maqbool, Chairman of the Bureau, promised to pursue business-friendly policies to avoid any negative impact on the trade and investment climate.[1032] By pacifying and terrifying different fractions of the landed and capitalist elite through corruption cases, all the actors of the historical bloc (including the metropolitan bourgeoisie, landed and capitalist elite) came back in a new 'institutional arrangement' with the old structure intact. This time, 'civil society' also shared a place in this class formation under the banner of 'rule of law' and 'good governance.' Where was the judiciary in this?

[1028] The Nation, October 27, 1999.
[1029] As prosecutor General of NAB declared, Nation, 30/12/99 at 12.

[1030] Addressing the All Pakistan Cloth Exporters Association in Faisalabad The Nation, 12/3/2000, at 18.

[1031] Nation, 5/1/2000 at1.
[1032] News, 21/2/2001 at 10.

Judicial Decisions under Dictatorship: Restoring the Juridico-bureaucratic Structure

General Musharraf followed the same steps in relation to the judiciary as had previous military regimes, but there was a difference. The difference was the judiciary had its own agenda. The new role of the judiciary came as a part of a conditionality for aid for political and economic development. The Asian Development Bank, in December 2001, financed a $350 million loan for judicial reform in Pakistan. This Project Numbered 38612, was titled *Islamic Republic of Pakistan: Support to Governance Reforms in Pakistan (Financed by the Government of the United Kingdom)* for "Improving governance and preventing corruption." It was launched in Pakistan as the Access to Justice Program. The judiciary was now a 'coequal partner' of three organs of the state, rather the two organs of the state, as there was no legislature for the next two years.

Let us look at the self-awareness of the judiciary of its new role. After the episode of Chief Justice Sajjad, the new Chief Justice Ajmal (who served from Dec 23, 1997 to June 30, 1999) knew the limits of judicial activism. Being the main initiator of the separation of powers decision in 1989, and the being the main writer in the decision of *Judge's case* in 1998, he was well aware of the emerging power of the judiciary. He maintained the discourse set during the regime of Nawaz Sharif. Supreme Court Chief Justice Saiduzzaman Siddiqui (1999)[1033] now was able to claim that the struggle for an independent judiciary had been realized and now the judiciary was free and

[1033] Supreme Court Chief Justice (July 01, 1999 to Jan 26, 2000).

independent.[1034] However, in order to secure independence of judiciary, the procedure for the appointment of judges had to be put in the constitution.

Following his coup, General Musharraf enacted the Provisional Constitutional Order to govern the country in accordance with the constitution.[1035] The military takeover was challenged in the Supreme Court in a number of writs. In January of 2000, General Musharraf promulgated the Oath of Office (Judge's) Order, which required the judges to take a fresh Oath.[1036] The Supreme Court Chief Justice refused to take Oath[1037] and one Supreme Court judge from Punjab and four Supreme Court judges from Sindh followed. None of the Judges of High Courts refused to take Oath.[1038] The remaining team of judges, led by Irshad Hasan Khan as Chief Justice, took the Oath. Following this, a bench of 12 judges of the Supreme Court upheld the military takeover in *Zafar Ali Shah* case.[1039] The coup was validated on the basis of the doctrine of necessity and the

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[1034] Justice Saiduzzaman Siddiqui Chief Justice Supreme Court (as he then was), (1999) PLD 97 at 100. "Judiciary in Pakistan: An Overview" (2000) PLD 52-63 at 59. A speech delivered at National Defense College, Islamabad to the Senior Cadre Officers of the Armed Forces of Pakistan and Friendly Countries in Asia, Africa, Europe and North America. A speech delivered on a Seminar on Law Reforms dated 3-7-1999.

[1035] *Provisional Constitutional Order (PCO),* (1999) PLD Central Statutes 448.

[1036] *Oath of Office (Judges) Order*, 2000, (2000) PLD Central Statutes 38.

[1037] In Jan 2000, Musharraf discussed a new Oath with Supreme Court Chief Justice Saiduzaman Siddiqui and Siddiqui refused. On Jan 26, 2000, 89 out of 103 judges took oath under the Provisional Constitutional Order and these were six Supreme Court judges and the rest were HCs judges. Senior most Irshad Hasan Khan became Chief Justice of the Supreme Court. See Zulfikar Khalid Maluka, "Reconstructing the Constitution for a COAS President: Pakistan, 1999 to 2002" in Craig Baxter, ed., *Pakistan on the Brink: Politics, Economics and Society* (Karachi: Oxford University Press, 2004) 53-100 at 59.

[1038] Hamid Khan, *Constitutional and Political History of Pakistan,* 2nd ed. (Karachi: Oxford University Press, 2009) at 480.

[1039] *Zafar Ali Shah v General Pervez General Musharraf,* 2000 PLD S.C. 869. In the *Nusrat Bhutto case, the* petition was declared not maintainable. Whereas in the *Zafar Ali Shah* case judges declared the petition maintainable but made "lengthy declarations far from reality." See Maluka (2004), *supra* note 27 at 61.

principle of *Salus Populi Suprema Lex* as embodied in *Begum Nusrat Bhutto case*. Nawaz Sharif was sentenced in a hijacking case on April 6, 2000.[1040]

After gaining the stamp of the judiciary, General Musharraf promulgated an order in 2001, titled the President's Succession Order, declaring the office of the president vacant and therefore it was under his mandate to take on the presidents' functions until a successor was found.[1041] General Musharraf then announced a referendum to be held on April 8, 2002, for him to be elected as president.[1042] The referendum was challenged in the Supreme Court. It declared the petition premature and left the consequences of the referendum on the incoming parliament.[1043]

The *Zafar Ali Shah* case gave General Musharraf powers to amend the constitution and he initiated constitutional amendment packages for 'sustainable democracy' and 'institutional strengthening.' He revived the controversial Article 58(2)(b) which had been removed in the 13th Amendment by the elected parliament of Nawaz Sharif. He formed a National Security Council, putting chiefs of armed forces together with civilian government officials to give a constitutional cover to military

[1040] The Guardian, Friday 7 April 2000, online: <http://www.theguardian.com/world/2000/apr/07/pakistan.lukeharding>.
[1041] *President's Succession Order,* 2001 PLD Central Statutes 392.
[1042] *Referendum Order,* 2002 (Chief Executive Order 12 of 2002) 2002 PLD Central Statutes 218.
[1043] *Hussain Ahmad v Pervez General Musharraf,* 2002 PLD S. C. 853.

hegemony.[1044] The amendments were challenged in the Supreme Court, which held that parliament, not the court, is the appropriate forum to consider these amendments.[1045]

In 2001, the Supreme Court Chief Justice Irshad Hasan Khan was in a position to claim that after the 1999 coup, the judiciary continued its work and retained its independence by exercising judicial review, maintaining rule of law and securing fundamental rights. He argued the separation of powers between the judiciary and the executive was achieved and the judiciary is independent in Pakistan. He claimed the judiciary enjoyed administrative, financial as well as decisional independence.[1046] After retirement, he was appointed as Chief Election Commission, and helped to rig the 2002 elections.[1047]

In the 2002 elections, an undergraduate degree was a prerequisite to be a candidate.[1048] Musharraf's Conduct of General Elections Order 2002 was challenged before the Supreme Court in June 2002. After three days of hearing, the Supreme Court dismissed the petition in July 2002 and concluded that educational qualification did not violate the principles Pakistan's Constitution or democracy.[1049] The petition also involved

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[1044] *Legal Framework Order,* 2002 (Chief Executive's Order 24 of 2002) 2002 PLD Central Statutes (Supplement) 1604.
[1045] *Watan Party v Chief Executive*, 2003 PLD S.C. 74.
[1046] Justice Irshad Hasan Khan Supreme Court Chief Justice (as he then was), "Judicial system, Administration, and Training in Pakistan" (2001) PLD, Journal, 103-115 at 111-12. A paper read at National Judges College, Beijing, Peoples Republic of China, Sep 5, 2001.
[1047] See comments of bar in White Paper against Judiciary by Pakistan Bar Council, online: <http://pakistanbarcouncil.org/wp-content/uploads/2012/07/White-Paper_Complete_.pdf>. Last visited on Nov 01, 2012
[1048] *Local Government Ordinance*, 2001 and *Conduct of General Elections Order*, 2002 made Matriculation as a condition. See *Conduct of General Elections Order*, 2002, Chief Executive's Order 7 of 2002, PLD 2002, Central Statutes 193.
[1049] *Pakistan Muslim League (Q) v. Chief Executive of Pakistan*, 2002 PLD S. C. 994, 1011.

issues like gender, class, faith, religion, language, race, education etc. But the Supreme Court rejected those. The court found the 'right' to run for a public office as a statutory right and not a fundamental right. In countering the charge of supporting an 'elitist democracy' by this educational qualification clause, the court argued that the business of the state system requires competence. The institutional argument of the court was based not on the character of the officials but on 'political culture,' which it defined on the basis of David Sill's article in International Encyclopedia of the Social Science. This, for Cynthia A. Bottern, was very behavioural and led to the argument of education increasing good governance as "the hallmark and soul of democracy." The writer empirically made clear that this educational requirement made an impact in temporarily daunting its opponents.[1050]

Sheikh Riaz, the Supreme Court Chief Justice from February 2002 to January 2004, gave judgments in favour of General Musharraf, including appointments of judges he favoured to the Supreme Court,[1051] upholding the referendum of April 2002[1052] and

[1050] In Sindh, out of 204 Union Councils the membership of 36 union council and 66 Nazims were elected uncontested, indicating feudal/tribal power in the rural areas at 216. See Cynthia A. Botteron, "Validating Educational Qualification as a Prerequisite to Hold Elective Office: The Supreme Court and the Pakistan Muslim League (Q) Decision" in Charles H. Kennedy & Cynthia A. Botteron, ed.s, *Pakistan: 2005* (Karachi: Oxford University Press, 2005) 158 at 179.
[1051] *Supreme Court Bar Association v. Federation of Pakistan*, 2002 PLD S. C. 939.
[1052] *Hussian Ahmad v. Pervez General Musharraf*, 2002 PLD S. C. 853. While reviewing Provisional Constitutional Order No. 1 of 1999 read with Oath of the Office Order no. 1 of 2000, the judiciary commented on its Provisional Constitutional Order position in *Qazi Hussain Ahmad v Pervez General Musharraf*, PLD 2002, Supreme Court 813. The court defended its decision of taking the Oath declaring that it had three options, either refused causing closure of courts, leading chaos/anarchy and denial of justice to the ordinary citizens of Pakistan. Or the courts completely surrender the regime and refused all petitions against the regime. The last was to accept the situation and save the institution, save the fabric and save the guarantee of human rights. The courts opted for this.

the Legal Framework Order.[1053] General Musharraf tried to keep him as Chief Justice, despite that he crossed the age of retirement, by amending the Legal Framework Order in October 2002. Lawyers protested and this provision of retirement age was restored under the 17th amendment to the constitution and the Supreme Court Chief Justice had to retire. Sheikh Riaz Ahmad CJSC was highly corrupt and the military regime kept him just to serve the regime.[1054]

The new Chief Justice, Nazim Husain Siddiqui, who served from Dec 31, 2003 to June 29, 2005, also supported the military regime. His most important verdict was in favour of the 17th Amendment, through which General Musharraf could retain two offices, namely the President of Pakistan and the Chief of the Army Staff.[1055] Supreme Court Chief Justice Nazim also tried to revive the amendment that could delay the retirement age by three years[1056] but he was unsuccessful. General Musharraf then created a party, the Pakistan Muslim League- Quid-e-Azam, by pulling politicians away from the popular parties. Most, if not all, politicians faced corruption cases, and were vulnerable to the National Accountability Bureau and the Intelligence Services of Pakistan. Next, he promulgated the Conduct of General Elections Order on February 27, 2002.[1057] Under this law, elections were held on October 10, 2002, followed by allegations of rigging and state interference. His party won the elections. Rational theory followers like Andrew R. Wilder, who analyzed the 1997 elections, were stuck with legitimizing the status quo in

[1053] *Watan Part v. Chief Executive*, PLD 2003 Supreme Court 74.
[1054] Khan (2009), *supra* note 28 at 566.
[1055] *Pakistan Lawyers Forum v. Federation of Pakistan*, 2005 PLD S. C. 719.
[1056] Khan (2009), *supra* note 28 at 566.
[1057] *Conduct of General Elections Order*, 2002, Chief Executive's Order 7 of 2002, PLD 2002, Central Statutes 193.

the 2002 elections because there was open pre-poll manipulations, bribe and coercion. The reason behind Musharraf's success was an "inability of the politicians to rise above their narrow interests."[1058]

An alliance of religious parties (Muthida Majlis-e-Aamal-MMA) was formed and it drafted the 17th Amendment of which the Legal Framework Order was a part. The opposition of the MMA, while bargaining for the Legal Framework Order on the 17th Amendment, also got concessions including reducing the age of Supreme Court judges from 68 to 65 (because the elder judges were putting stamps on the decisions of Musharraf), removal of the National Security Council and the elimination of Chief of the Army Staff-COAS – concessions that remained in place until 2004. Musharraf undid all these 'institutional arrangements' by bringing the National Command Authority at the place of the National Security Council, and creating the President to Hold Another Office Act which was passed on October 2004.[1059] On December 27, 2003, the 17th Amendment was passed in the National Assembly, followed by its passing in the Senate on December 30, 2003, but without Article 152A (National Security Council).

The 17th Amendment 2003, Legal Framework Order 2002, and President to Another Office Act, 2004 were challenged in the Supreme Court and a five-member bench, headed by Chief Justice Nazim Hussain Siddique, heard all these petitions

[1058] Andrew R. Wilder, "Elections 2002: Legitimizing the Status Quo" in Craig Baxter, ed., *supra* note 27, 101 at 125-26.
[1059] Charles H. Kennedy, "Political Issues in 2004" in Kennedy & Botteron, ed., *supra* note 40 at 1-2. This essay was first published as Charles H. Kennedy, "Pakistan 2005: Running Very Fast to Stay in the Same Place" (January 2005) 24:1 Asian Survey.

together. They were all dismissed by a consolidated judgment on April 13, 2005.[1060] The court stated that the "remedy lay in the political and not in the judicial process. The appeal in such cases was to be made to the people not the courts. Constitutional amendments always pose a political question, which could be resolved only through the normal mechanism of parliamentary democracy and free elections."[1061] In the local elections in 2005, even the judiciary in Punjab was involved in rigging. The Chief Justice of Lahore High Court was an active participant.[1062] Iftikhar Muhammad Chaudhary had already signed the judgments favouring a takeover by the military, an unconstitutional referendum, the Legal Framework Order, and a statute know as President to hold Another Office Act 2004.

It is usually stated that the judiciary was under duress and vulnerable to undertake the dictates for the rulers. As we have seen, it had always been the part of the state structure. The same was true during Musharraf's regime. The judiciary was very much central to 'good governance' for Musharraf, as it allowed him to keep the main opposition away from politics and in exile.

[1060] *Pakistan Lawyer's Forum v. Federation of Pakistan*, 2005 PLD S. C. 719.
[1061] Khan (2009), *supra* note 28 at 501.
[1062] *Ibid.* at 503, footnote 32 on page 504.

Class Formations under 'Good Governance'

An Undermined Legislature

The usual reason given for why the judiciary opposed the legislature was the claim that it did not legislate. Khoosa concluded that, in the 1990s, legislators spent their time passing motions about breaches of their privileges. The "logical conclusion" was that under these circumstances, the judiciary in Pakistan had to arrest the repugnancy of parliamentary laws. Therefore, he noted the "judiciary is enjoying a sway over both the Legislature and the Executive.[1063]" It was also claimed that the legislators in Pakistan did not know rules for drafting legislation or the relevant jurisprudence, and judges are to apply these laws with responsibility.[1064] The reason for Public Interest Litigation itself rested on the understanding or inability/failure of the legislature and executive to bring about social and economic justice to the poor people.[1065] Also, if the elected governments are equally inept, then the remedy cannot even be regular and fair elections. Citizens do not find a forum to challenge their elected representatives as they are only accountable at

[1063] Asif Saeed Khan Khoosa ASC,"Legislature, Executive, and Judiciary: Conflict and Cohesion" (1994) PLD, Journal, 64 at 71, 67-68.
[1064] Jawaid Shaukat Malik, "Supreme Court: A Fountain of Justice" (1999) PLJ, Magazine Section, 146 at 149, 151; see also Justice Nasir Aslam Zahid Justice of the Supreme Court (ret., as he then was), *The Role of Judiciary Protecting the Rights of the People- Judicial Activism*, paper read at 6th International Jurists Conference 2006, *supra* note 1. Pervez Hasan has the same view about environment litigation. See Dr. Pervez Hassan, "*Shehla Zia v. WAPDA: Ten Years Later*" (2005) PLD 48-57 at 54, Presidential address at the First Annual Seminar of Pakistan Environmental Law Association held at Dr. Pervez Hassan Environmental Law Center, University of the Punjab (New Campus) Lahore on 14th March 2004 for the Lifetime Achievement Award conferred by PELA on Mr. Justice Saleem Akhtar (R).
[1065] Justice Nasir Aslam Zahid Justice of the Supreme Court (Ret), *supra* note 54.

polls. In conclusion, Public Interest Litigation provides such a forum.[1066] The other possibility is the separation of powers as a check on the legislature and executive,[1067] and this also enhances the responsibility of the judiciary. Furthermore, since there is widespread illiteracy, people could only get any accountability through the judiciary.[1068] In addition, the Supreme Court "shall have to fill-in the empty shows of the opposition" and to provide a dialogue.[1069] It was clear that it was thought that every function of the legislature needed to be done by the judiciary.

Struggle against the Judiciary's Encroachment on the Legislative Powers

The judiciary's main demand in 2000 was to bring in Service Tribunals, Custom Courts, Income Tax Tribunals, Banking Tribunals and even Revenue Courts under the administrative control of either High Courts or the Supreme Court as they were the forums which adjudicate most matters. They should gradually and progressively be separated from the executive, it was argued.[1070] This demand began to face a backlash. In

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[1066]"Superior courts contributing to the process of democracy through PIL". An example of the judiciary as a legislature is, for example, of PEPA-*Pakistan Environmental Protection Act*, 1997, and *Bonded Labour System (Abolition) Act*, 1992 (Darshan Masih Case). See Ahmed Rafay Alam, "Public Interest Litigation and the Role of Judiciary," paper read at 6th International Jurists Conference, Islamabad, 2006, *supra* note 1 at 6.

[1067] Kamaluddin Azfar, "The Role of Judiciary in Good Governance," paper read at the 6th International Jurists Conference, 2006, Islamabad, *supra* note1.

[1068]Justice Sabihuddin Ahmad, Chief Justice of Sindh High Court, "*Good Governance and the Role of Judiciary*," a paper read at the 6th International Jurists Conference, Islamabad, 2006, *supra* note 1.

[1069] Syed Ali Zafar, "*The Role of Supreme Court in Contemporary Age*," a paper read at the 6th International Jurists Conference, Islamabad, 2006, *supra* note 1.

[1070] Mahboob Pervez Awan, "Separation of Judiciary: Bit by Bit" (2001) PLD 99-102 at 102.

the *Sirtaj Bibi* case,[1071] the writer Irshad Ahmad gave a critique of the prior *Anwar Ali* decision and found that the judiciary was encroaching upon the powers of the executive.[1072]

The judiciary had exclusive rights to appoint the judges at this point. Earlier, the executive appointed the judges after consulting with the Supreme Court Chief Justice, who requested favours. Now the judges were appointing judges, except that the Chief Justice was in office 'for the pleasure of the president' and the president can appoint anyone through the Supreme Court Chief Justice. This did not make much difference, but the principle inspired the protest against the new 'exclusive' right of the judiciary in the appointment of the judges. Shahida Jamil, while criticizing this "Indian novelty" of the appointment of judges, reminded the judiciary that it had totally shifted the power of the appointment of judges to the judiciary in complete disregard to the *trias politica* percept. Due to this, an imbalance had been created.[1073] The discontent of the two main parties in opposition – the Pakistan Muslim League-PML-N and the Pakistan People's Party – was evident in the Charter of Democracy.[1074] What about the lawyers?

[1071]See *Government of Sindh and others v. Mst. Sirtaj Bibi and another,* 2001 PLD, Karachi 442. This case was about the *Land Acquisition Act* 1984 where the Sindh Government acquired land and took a possession of it but challenged the compensation evaluated by the collector. Later the govt. withdrew from the acquisition. District judge did not reduce the amount of compensation and the matter went into the High Court which ordered to de-notify all the notification regarding acquisition proceedings. There is no such provision in *Land Acquisition Act* such that the court can do this.

[1072] Irshad Ahmad, Former Federal Secretary, "Separation of Powers" (2002) PLD, Journal, 237-244.

[1073] Shahida Jamil, (2006) *The Independence of Judiciary,* a paper presented at the International Jurists' Conference, Islamabad, 2006, *supra* note 1 at 10-12.

[1074] They recommended an independent commission which would consist of 50% from the ruling coalition and 50 % from the opposition. This charter was signed between the leaders of the PPP

The bar had already given the idea of a Judicial Commission comprising the bar, the bench and people involved in the appointment and removal of the judiciary.[1075] This proposal was out rightly in favour of bench and bar minimizing the role of legislature. The proposal of the potential legislature (including the Pakistan People's Party and Pakistan Muslim League, PML-N) – an agreement signed as the Charter of Democracy – was critiqued by the bar, as it was obvious that the Charter conferred "a disproportionate high degree of discretion in the Prime Minister and the Joint Parliamentary Committee."[1076]

Supremacy of the Constitution as Supremacy of the Judiciary

Ultimately, the judiciary established its supremacy by invoking the supremacy of the constitution. In the 1970s, the judiciary had an explicit stance that it was not above

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headed by BB and that of PML-N headed by Nawaz Sharif in London on May 14, 2006. Paras 3 and 4 of Section A (Constitutional Amendments) were concerned with appointment of judiciary and the role of judiciary in constitutional manners. For the appointment of judges a commission was proposed consisting of judiciary and Bar Councils representatives and provincial and central law officers. This commission would forward three names for each vacancy to Prime Minister who will move one name for each vacancy to a Joint Parliamentary Committee consisting of fifty members of opposition and the ruling party. There were also provisions in the Charter for the abolition of Anti-terrorism and Accountability courts (3(d)). To bring about democracy within the judiciary itself Chief Justice was bound to exercise its powers with two senior most judges (3(d)). An important aspect of this Charter was the proposal of a Federal Constitutional Court to resolve constitutional and let the Supreme Court and High Courts hear regular civil and criminal cases.

[1075] This proposal of Pakistan Bar Council was published in "White Paper on the Role of Judiciary" on June 2003, at 43-6. The members of the bench included Chief Justice (chairman), two senior most judges of the Supreme Court, Chief Justices of the High Courts. Members of the bar in this composition are Vice Chairman of Pakistan Bar Council, the President of SCBA, four presidents of HCBAs at the principle seats of HCs. Members from the legislature were one member from the ruling party, one nominated by the leader of opposition, one member of senate from each province.

[1076] Khan (2009), *supra* note 46 at 567.

the constitution and could not strike down any provisions of the constitution, even if a particular provision ousted the jurisprudence of the Court.[1077] Until 1988, Pakistani courts were reluctant to assume the functions of the legislature and always interpreted under well-settled canons of construction.[1078]

From the mid-1990s, the new constitutional construction was done through three areas: constitutional litigation, alternate rulings that have social consequences, and through rulings regarding how to balance opposing societal interests or values.[1079] This opened up many possible methods of political governance.[1080] The constitution and amendments in it themselves undermined the legislature. Apart from 58(2)(b), the Shariat Bill of 1985 and the 1986 Constitution Bill (Ninth Amendment) created structures above the legislature. The former created a non-legislative body to oversee Islamicization programs, whereas the latter made the Federal Shariat Court as a kind of supreme government body.[1081] The Objective Resolution[1082] put a supernatural authority over the

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[1077] *State v Zia-ur-Rahman*, 1973 PLD S. C. 49 is a particular case in this regard which is already discussed in chapter four.

[1078] S. M. Haider (1988) claimed this on the basis of observation of Justice S. M Murshed Chief Justice East Pakistan High Court in *Abdus Sattar v. Arag Ltd. and others*, 1964 PLD, Dacca 773. See S. M. Haider, "American Constitution and Assimilation of Modern Legal Norms in Pakistan" (1988) XL PLD 121-131.

[1079] A G Chaudhry, "Half- Hundred Canons of Constitutional Construction" (1994) PLJ 74 at 75.

[1080] Journey of progressive approach from Munir to Haleem goes through from the comments of Munir Chief Justice Federal Court in *Jibendra Kishore v. East Pakistan*, 1957 PLD 1957 Supreme Court 942 to Cornelius Chief Justice Supreme Court in *Abdul Aala Mounddodi v. Govt of West Pakistan* 1964 PLD S. C. 673 to Chief Justice Haleem in *Benazir Bhuttoo v Federation of Pakistan* 1988 PLD S. C. 416 to *Benazir Bhutto v. Federation of Pakistan* PLD 1989 Supreme Court 66. Later in 1993 Nasim made a clear statement in favour of progressive approach in *Muhammad Nawaz Sharif v. Federation of Pakistan* PLJ 1993, 473.

[1081] Chaudhary M. Altaf Hussain (1986) Ninth Amendment and Shariat Bills - some aspects, The Dawn, 21 October 1986, as cited by Newberg. See Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi: Cambridge University Press, 1995) at 196.

[1082] It became the part of the Constitution in Article 2A as amended by Zia.

elective representatives. The Federal Shariat Court acquired the role of a supra-legislature body and, by declaring any law unconstitutional, it severely undermined legislature.[1083]

Sajjad Ali asserted the supremacy of the constitution to be a "positive contribution" and that it was the right of the judiciary to interpret the constitution, even to the extent of finding solutions to the legal and political crisis as a practical mechanism for the governance of a developed and a developing country.[1084] Similarly, his immediate successor or parallel Chief Justice Ajmal Mian[1085] also believed in a whole system of governance in accordance with the letter and spirit of the constitution. He considered the rule of law as *sine qua non* for good governance and the economic progress of a country,[1086] laying the basis for the full concept of constitutional governance in the future. This 'constitutional arrangement' should not be changed for a democratic regime[1087] but only when asked by a military ruler.[1088] Furthermore, it is argued the power of judicial review is given to the judiciary by the constitution, which is actually is made by the

[1083] Before 1979, HCs declared some laws as being against Holy Quran and Sunnah. Appeals were heard against this in Shariat Appellate Bench of the Supreme Court comprised of Ulema. The FSC bypassed the Supreme Court and heard appeals against the trials of *Huddood* cases. It infringed the independence and sovereignty of the parliament as it could review the law as being Islamic or not. But Nasim Hasan Shah, Supreme Court Chief Justice while reflecting on the future of judiciary in Pakistan clearly stated that Federal Shariat Court, Appellate Shariat Bench in the Supreme Court are not parallel judicial systems and they are integrated because of the supervision of Supreme Court over them. See Justice Nasim Hasan Shah, "*Administration of Justice*" (1994) PLD 123-32, an address to the course participants of the National Defense College, Rawalpindi, 31st October, 1993.

[1084] Justice Sajjad Ali Shah, Supreme Court Chief Justice (as he then was),"Process of Constitution-making in Pakistan and the Role of Judiciary" (1995) PLD 123 at 128.

[1085] Keeping in view the controversy during Nawaz regime in 1997 mentioned in chapter five.

[1086] Justice Ajmal Mian, Supreme Court Chief Justice (as he then was), "Seminar on the Rule of Law" (1999) PLD, Journal, 128 at 128-29. This was a speech delivered on 3-6-1999.

[1087] See *Mahmood Khan Achakzai v. Federation of Pakistan*, 1997 PLD S. C. 426.

[1088] As done by the judiciary in LFO case, *Pakistan Lawyers Forum v. Federation of Pakistan,* 2005 PLD S. C. 719, The case against the LFO was heard by a five –member bench headed by Justice Nazim Hussain Siddiqui Supreme Court Chief Justice, and dismissed on April 13, 2005.

people of Pakistan through their elected representatives and hence is a "democratic power.[1089]" Due to this role of judiciary in national life it was said that it had become "a national forum for achieving consensus.[1090]"

Opposition: Correcting the Judiciary before Democracy

In this situation, it was meaningless for the opposition to speak about democracy without reducing the powers of the judiciary. Here it is important to understand Benazir Bhutto's approach to 'political governance.' Benazir Bhutto needed support and aid from democracies[1091] like the the U.S. and U.K. For her, General Musharraf's decision to stand with America after 9/11[1092] was the right one and Professor Huntington correctly pointed out the clash of civilizations as, in her words, "Al-Qaeda will try to provoke the clashes of civilization."[1093] This was not inevitable[1094] and could be prevented, she argued, but only if the U.S. relied on her, as she claimed the Pakistan People's Party is the only

[1089] Justice Fazal Karim, Justice of the Supreme Court (Ret, as he then was), "*Judicial Review on Administrative Actions*, paper read at the 6th International Jurists Conference, Islamabad, 2006.
[1090] Syed Ali Zafar, *supra* note 59.
[1091] Commencement address at Harvard University, June 8, 1989.
[1092] Benazir Bhutto (2004), "Concentrating power in One Institution has Negative Consequences" in Senator Sajjad Bokhari, ed., *Benazir Bhutto (2006): Speeches and Statements* (Islamabad: Musawat Publications) 83 at 87. This was an address at Woodrow Wilson Center, Washington DC, Feb 9, 2004.
[1093] Benazir Bhutto (2005), "Democracies do not Make War Against Other Democracies" in Benazir Bhutto (2006), *supra* note 82, 139 at 140. This was an address to the Writers, Intellectuals in Florida, U.S, March 08, 2005.
[1094] Benazir Bhutto (2007) *Whither Pakistan: Dictatorship or Democracy?* Dr Iqbal Narejo, ed., (Lahore: Al-Hamd Publications, 2007) at 58.

civilian and political structure with popular support to form government outside the intelligence agencies and the military.[1095]

Benazir Bhutto did not forget that she was speaking in the era of good governance. Her views came to overlap with the trends in global modernization. The reliance on American concepts was inevitable as even the U.K. itself was relying heavily on this paradigm.[1096] She stressed the importance of rights and governance to undermine terrorism and the need to empower citizens and build a society "on the edifice of the majesty of law." Rights were the core value of her governance. She stated that debt relief should be tied to good governance. For her, rule of law came before democracy as a country needs the rule of law more than democratic elections.[1097] The move should be from a civil society to a democratic society, as this was the pattern around the world and was the case in Europe and America.[1098] She quoted George Bush, saying "men and women in every culture need liberty like they need food and water and air."[1099] She argued that poverty defamed the image of India and Pakistan[1100] and "good policy" was the key solution. For Benazir Bhutto, leadership is the courage to take actions that are

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[1095] *Ibid* at 243.
[1096] Dr. S. M. Haider, "American Constitution and Assimilation of Modern Legal Norms in Pakistan" (1988) XL PLD 121 at 129.
[1097] Benazir Bhutto (2001), "My Nation and I Remain Optimistic about the Future" in Benazir-Bhutto (2006), *supra* note 82 47 at 50. This was an address at the Conference to Commemorate Women's Week in South Africa, Johannesburg, August 7, 2001.
[1098] Benazir Bhutto (2003), "Freedom must be Reinvented in Every Generation" in Benazir-Bhutto (2006), *supra* note 82, 63-67 at 63-65. This was speech on Civil Society and Women's Participation in Political Process, Rome, Italy, July 18, 2003.
[1099] *Ibid*
[1100] Benazir Bhutto, "The Wheel of History Turns For Individuals and Nations" in Benazir-Bhutto (2006), *supra* note 82 at 81. This was an address at a meeting of professional Women San Jose-USA, Nov 18, 2003.

necessary in the long run but not popular.[1101] She claimed leaders should not follow opinion surveys for decisions, but like the American President Franklin Delano Roosevelt to know where the people stand and then educate them and lead them.

She was not in a hurry for democracy and wanted it to evolve, claiming that for this to happen, there needed first to be an independent and impartial judiciary. Democracy cannot function if a handful of judges follow their political agenda and distrust political leaders, she argued. Benazir Bhutto summed the last half a century as a "century of law, politics and a politicized judiciary" and complained that, as a Prime Minister, she was twice denied the right to appoint judges. During the Nawaz Sharif regime (1997-99) "we are crushed under a mountain of litigation," she said, as that regime believed in incapacitating the leader of the opposition through judicial abuse. Some examples of legal abuse given by her are that four hours before the judgment, there was a government order that froze her funds. No contempt petition against the regime was heard. Also, judges who worked for the Prime Minister's family business tried Benazir Bhutto. Some judges had loans from state banks and were under pressure. One judge's son was working with the lead parliamentarian of the ruling party. Another judge worked as the Deputy Attorney General when Benazir Bhutto was behind bars for nearly six months. His father sentenced Benazir Bhutto's father. Benazir Bhutto fired him but his brother was elected as a parliamentarian from Prime Minister's home constituency. He wrote the order to convict Benazir Bhutto before the trial was over. The nephew of a

[1101] Benazir Bhutto (1999), "I am Determined not to let Down Those who Believe in a Democratic, Modern, Moderate, Muslim State" in Benazir-Bhutto (2006), *supra* note 82 7-23 at 17-20. This was an address at SDPI Seminar, Islamabad, March 5, 1999.

General who hanged her father Bhutto was appointed unanimously by the Supreme Court to try her husband, Zardari. According to her, women-hating, bigoted judges with gender, political and theocratic biases were lined up against her and her family. This same judge who tried Zardari refused help when a woman was killed in an honour killing. Another judge trying Benazir Bhutto was so biased against women that the Human Rights Commission of Pakistan-HRCP complained against him. He believed that women have no right to work.[1102] Bhutto was so scared of the courts that she refused to return back to Pakistan and fight back for democracy as she thought that all her time would be wasted in courts.[1103]

For the solution, she asked the international community to step forward and assist in the process of instituting the rule of law in Pakistan. She wrote to the UN Rapporteur on Judges and the Judiciary, the former British Attorney General Sir John Morris and two American Chief Justices, outlining her judicial abuse. Morris and the two American judges found her conviction flawed. She complained that if judicial political victimization is condemned in Burma by the West, why not in Pakistan?[1104] She suggested that Pakistan needed "judicial accountability." She proposed changing the contempt law to allow free public scrutiny of judgments when delivered. She requested the UN Rapporteur on Judges and Judiciary fund NGOs to investigate wrongful prosecution and trials. "Unless judges and Generals are accountable along with Prime Ministers and

[1102] Benazir Bhutto (2000), "Strong Institutions Strengthen the Rule of Law" in Benazir-Bhutto (2006), *supra* note 82, 25-46 at 26, 33-34. This was an address at the Commonwealth Ethnic Bar Associations, October 30, 2000.
[1103] BBC interview in Benazir Bhutto (2007) *Supra* note 81 at 189.
[1104] Benazir-Bhutto (2007) ed, *supra* note 84 at 32, 181.

Parliamentarians, power can and will be abused," she explained. Referring to Pakistani Human Rights groups, she put forward a proposal for a separate constitutional court to deal with constitutional issues. She also suggested changing the law of conflict of interest. Judges having a conflict of interest with Benazir Bhutto and her party were insisting on sitting on the benches. Furthermore, the parliament is an independent organ of the government and there should be parliamentary investigation in case of impropriety, she said, adding that opposition leaders should be equally represented in this investigation.[1105]

The Liberal Legal Project

Those who championed the liberal project were disenchanted with the democratic regimes of the 1990s. By the 1999 coup, they came to the conclusion that decentralization was the solution and part of good governance. That is why the NGO elite[1106] was part of Musharraf's coup with Omar Ashgar (a Marxist turned social democrat) as a Minister in Musharraf's new set up. The dilemma for liberals was how to correct the 'overdeveloped state'[1107] as well as how to correct democracy because the feudals continued to be in power. Decentralization, as a part of 'good-governance,' seemed a point of compromise between the 'neoliberal' metropolitan bourgeoisie,' and the rising 'liberal' petit bourgeoisie (the liberal layer of 'civil society'). The former wanted to get rid of 'state

[1105] Benazir-Bhutto (2007), ed, *supra* note 84 at 31-33, 101.
[1106] I am using this term in a very loose sense of the term 'project.' I mean foreign funded NGO related liberal research and rights projects as a whole. SDPI and its writers are just one example, but there are many others. NGOs are dominated by upper class liberals in Pakistan. Their projects shifted with the changing priorities and politics of the IFIs. Omar Asghar was running a well-established NGO named 'Sanghi.'
[1107] The concept developed for postcolonial state by Hamza Alavi and discussed in chapter two of this dissertation.

capture' which was a nexus of politicians and civil bureaucracy. The latter wanted a share in the new developmental paradigm and the inclusion of 'social' in good governance.[1108] Practically they wanted to get rid of feudals by land reforms to correct democracy but who could do it?[1109] The only option was to at least get rid of 'centralized state.'

Shahrukh Rafi Khan gave a cost-benefit analysis of decentralization and local government to the National Reconstruction Bureau to convince them that the project was viable.[1110] He offered the example of Banuri's project[1111] and argued that the governance issue is a "power issue." For him, the district administration and courts served the large landlords. Therefore, even if the land is distributed, there would be police and court abuse, and that the courts would not let land reforms happen. The only solution to him was decentralization of financial and administrative authority.[1112] Women's rights-based NGOs welcomed the reserved seats for women in his local government plan.[1113]

This argument of good governance through decentralization was made on the basis of the liberal and connected liberal legal project of the Sustainable Development

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[1108] See Kerry Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in David M. Trubek & Alvaro Santos, ed.s, *supra* note 8.
[1109] Shahrukh Rafi Khan, Ali Qadir, Aasim Sajjad Akhtar, Ahmad Saleem & Foqia Sadiq, *The Case for Land and Agrarian Reforms in Pakistan*, Policy Brief Series #12 (Islamabad: SDPI, 2001) at 1.
[1110] Shahrukh Rafi Khan, *Costing the National Reconstruction Bureau's Local Government Plan* (2000), Policy Research Series #1 (Islamabad: SDPI, 2000).
[1111]Tariq Banuri, Ahmad, & Afzal, *Democratic Decentralization in Nature, Power, People: Citizen's Report on Sustainable Development* (Islamabad: SDPI, 1995).
[1112] Shahrukh Rafi Khan, *Devolution of Power to the Grassroots Level*, Policy Paper Series#25 (Islamabad: SDPI, 2000).
[1113] Saba Gul Khatak, *Women and Local Government*, Working paper series #24 (Islamabad: SDPI, 1996).

Policy Institute-SDPI collective. This was also built on SDPI's 1992 work.[1114] This suggested that the formal legal system in Pakistan is workable and the only problem is governance, case management, delay reduction, automation, the court information system, human resources and infrastructure.[1115] The 'liberal legal project' also clearly placed its position in line with recommendations of the S. A. Rahman Commission (1958), the Hamoodur Rahman Commission (1967-70), the Law Committee (1978), as well as the Commission on Reform of Civil Law (1993).[1116] It opposed the Jirga system (North Western Frontier Province-NWFP) and the Panchyat system (in Punjab) because, according to the writers, both were losing their effectiveness due to extraneous influences.[1117] Tariq Banuri, while suggesting these organizational reforms, pointed out that he avoided the topic of a parallel judicial system (because the judiciary was reacting to it) and hence gave the opinion of overhauling the existing mainstream system particularly at the lower level. He recommended four 'Is', namely, incentives, institutions

[1114] Mohammad Yasin & Tariq Banuri, ed.s, *The Dispensation of Justice in Pakistan* (Karachi: Oxford University Press and Islamabad: SDPI, 2004). Tariq Banuri included his essay of 1992 as a first essay in this book at 3-43. Dr. Faqir wrote a piece about PIL in the same book at 58-72.
[1115] Muhammad Yasin & Sardar Shah, "System of Justice" in Yasin & Banuri, ed.s, *supra* note 104 at 93-114.
[1116] Mohammad Yasin had contempt for lawyers and found that dropouts joined the legal profession. He himself had been a brigadier. He found the legal profession overcrowded. See Mohammad Yasin & Sardar Shah, "Administration of Justice in Pakistan" in Yasin & Banuri, ed.s, *supra* note 104, 75 at footnote 29, at 87; see Mohammad Yasin & Sardar Shah, "Attempts at Reforms" in Yasin & Banuri, *supra* note 105151 at 152.
[1117] The essay was concluded in 1993 but since then, according to the writer, the situation changed. HCs and the Supreme Court tried to bring Frontier Crime Regulation etc. under their regular court system. It backfired and a movement of Sharia and Qazi courts started which ended operation in Swat in 2000s. See Shaheen Sardar Ali & Kamran Arif, "Traditional/Alternative Dispute Resolution Mechanism in Pakistan" in Yasin & Banuri, ed.s, *supra* note 104, 115 at 133.

(internal and external accountability institutions), infrastructure for 'efficiency', and infrastructure (judicial courts buildings equipments).[1118]

The liberal project thus weakened the state apparatus without deepening democracy. In this effort, the stake of the metropolitan bourgeoisie was not neglected but was integrated along with the role of NGOs as 'civil society' to steer good-governance. These changes reflected a deep frustration with the liberal project, whose proponents were deeply confused as to what was going on.[1119] The clichés that Pakistan is not an agricultural country as well as Pakistan is a rural country were defeated.[1120] There was a 'statistically' proven middle class but why were the liberal institutional arrangements/ rearrangements not working? asked analysts of 'liberal' legal and political project. Why was there no socially responsible modern and democratic middle class?[1121]

While analyzing Musharraf after 1999, Akbar Zaidi ran out of room to comment after seven pages. He presented Musharraf's politics as the politics of opportunism and

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[1118] Tariq Banuri, "Improving the Provision of Justice in Pakistan" in Yasin & Banuri, ed.s, *supra* note 104 at 169-183.

[1119] S. Akbar Zaidi, "Continuity Rather than Change: Elections 2002" in S. Akbar Zaidi, ed.s, *Continuity and Change: Socio-Political and Institutional Dynamics in Pakistan* (Karachi: City Press, 2003) 175-180.

[1120]See Ch. 2 of S Akbar Zaidi, *Issues in Pakistan's Economy,* 5th ed. (Karachi: Oxford University Press, 2009). S. Akbar Zaidi claimed in his introduction that agriculture was now capitalist and the 'feudal lord' is now a capitalist farmer. There were only pockets of 'feudal' tendencies. His claim is based on Reza Ali's work, see "Underestimating Urbanization" in Ziadi (2002) ed., *supra* note 109, 127-132.

[1121] Zaidi pointed out the rise of *arthi*, transporter as the new middle classes in rural areas as well as the division of landholdings as a reason of demise of feudal power. See S. Akbar Zaidi, *Pakistan's Social and Economic Development: The Domestic, Regional and Global Context* (New Delhi: Rupa Co., 2004)11-12.

argued he was a person who "merely stated the obvious."[1122] The main anxiety of the liberal project was that the 'Good Governance' assistance in critical policy areas (administrative and political reforms) led to the disproportional policy influence of foreign donors. Musharraf used this discontent[1123] to strengthen himself, whereas it could have been used to bring much needed changes in the state's 'behaviour' and even 'identity' as a member of 21st century international society.[1124] The military was not providing sufficient finance for social development.[1125]

For the liberal legal project, the main objectives of international donors for improvement of the government was to make the country more 'market-friendly.' This objective was to be meant through supervision of the civil society though it was absent from practice.[1126] The project was not cost effective as an enormous amount was being spent on consultation and similar activities. Even if cost effective, laws are not necessary for improving justice for the poor, rather they are a burden, under the good governance approach. There is no word of participatory democracy in their project. There is no mention of obligations of a just state.[1127] They insisted that the Access to Justice Program should bind the state with the UN Conventions on Social, Economic and Political Rights and ILO Declaration of Principles. This way, the state will become pro-poor. This

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[1122] S. Akbar Zaidi, "The Politics of Opportunism" in Ziadi (2002) ed, *supra* note 109, at 85.
[1123] Aqil Shah, "Aiding Authoritarianism? Donors, Dollars and Dictators," in Kennedy & Botteron ed.s, *supra* note 40, 51 at 51-53.
[1124] Devin T. Hagerty, "The United States-Pakistan Entente: Third Times' a Charm?" in Baxter, ed., *supra* note 27 1 at 2.
[1125] Ayesha Siddiqa-Agha, "The Political Economy of National Security" in S. Akbar Zaidi, ed., *supra* note 109, 101 at 113.
[1126] A Ercelawn & M Nauman, "Market-Based Justice: The Asian Development Bank and Legal Reforms" in S. Akbar Zaidi, ed., *supra* note 109, 151 at 151-52.
[1127] *Ibid*.

critique emphasized the inability of Access to Justice Program-AJP in not considering the state as a part of the problem of injustice and how judiciary itself is the part of the state. [1128] While the liberal legal project was coopted with Musharraf in good governance, is it not an irony that the 'quasi liberal' project (Cornelius tradition) was on the forefront of fighting against the military-judiciary alliance. Lawyers from the exiled Nawaz and Hamid Khan professional groups were against the pretentious 'liberal project' under Musharraf. The Provisional Constitutional Order-PCO courts didn't decide a single case against the military regime, but rather supported it in cases such as imposition of emergency, the referendum, appointment of junior judges, graduation bar for contesting elections etcetera. All this frustrated the Cornelius tendency to the level that Hamid Khan took back the Junior Judges Elevation case submitting the statement that "since the judiciary is no more independent, we do not want to proceed with the case."[1129] This group was responsible for the lawyers' movement, which was later joined by Pakistan People's Party and the frustrated liberal project.

Judiciary as a Custodian of Global Modernity: Steering the Juridico-Bureaucratic Structure (2000-2006)

A simple electronic search on the main Pakistan law site of the words "good governance" nicely illustrates how the judiciary adopted the good governance paradigm

[1128] *Ibid.* at 156-161.
[1129] Zulfikar Khalid Maluka, "Reconstructing the Constitution for a COAS President: Pakistan, 1999 to 2002" in Baxter ed., *supra* note 27, 53-100 at 75.

of the World Bank. The phrase "good governance" appears in one case in 1996, and then again in one case in 1998. As soon as Musharraf announced "good governance" for the country and the Asian Development Bank efforts to loans for good governance in Pakistan started, the use of this word increases, to five cases in 2000, and five, six, eight, and nine in 2002, 2003, 2004 and 2005 respectively. This was a period of close alliance of the judiciary with Musharraf. In the disputed years of 2006, 2007 and 2008, the number of cases including the phrase of good governance is three, three and two, respectively. When again in 2009, 2010, and 2011 the judiciary turned up as a sole custodian of good governance in Pakistan, the phrase was referred to five, eight and sixteen times respectively. The details of these cases can further illustrate the nature of role of the judiciary in adopting the good governance discourse.

Whereas Musharraf was getting legitimacy around good governance, the courts were also harping on the chorus of "democracy, good governance [and] economic stability" and also ensuring that the judiciary is independent as a prerequisite of it.[1130] The judiciary agreed with the corruption campaign against the politicians for the sake of good governance.[1131] When Musharraf started his decentralization plan to cut down the powers of the bureaucracy, the judiciary claimed it stood with good governance as an idiom for "upright, honest and strong bureaucracy."[1132] Cases were launched that reflected on local

[1130] See *Zafar Ali Shah v. Pervez Musharraf,* 2000 SCMR 1137.
[1131] 2000 PLD 869 Supreme Court.
[1132] *Shamas-ul-Bahadar v. Nasir Ahmed,* 2002 PLD S. C. 68. See also *The Province of Punjab v. Ibrar Younas Butt,* 2003 PSC 1357 S. C.

governance and decentralization as package of good governance.[1133] We can see "settled principles of good governance" in judicial decisions .[1134] Good governance adopted the form of a "doctrine" for equality of justice, welfare of the people and to reduce income and earning inequality by the judiciary.[1135]

Over time, the judiciary's domain of 'good governance' expanded and started encompassing issues like norms of transparency,[1136] health education,[1137] allocation of welfare funds and schemes.[1138] The judiciary also opined as to future likelihood of good governance.[1139] For Supreme Court Chief Justice Nazim Hussain Siddiqui, "good governance is a key to progress, development and ultimate prosperity."[1140] Furthermore, for him, "rule of law is the most important thing."[1141] For Supreme Court Chief Justice Iftikhar, "institutions are the units of the system of governance," which indicate the

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[1133] See *Muhammad Ramzan and 3 others v. Govt of Pa*k., 2004 YLR LHC-Lahore 1865; *Clifton Centre Association (CCA) Clifton, Karachi v. City District Government,* 2003 PLD KHC-Sindh 477.
[1134] See *Zaka Ullah Bajwa v. Chief Secretary, Govt. of the Punjab, Lahore,* 2005 SCMR S. C. 13.
[1135] See *Ikram Bari and 524 others v. National Bank of Pakistan,* 2005 SCMR S. C. 100.
[1136] See *Sheri-CBE and others v. Lahore Development Authority,* 2006 SCMR S. C. 1202. See also *Govt. of NWFP v. Muhammad Tufail Khan,* 2004 PLD S. C. 313, *Iqbal Akbar v. Province of Sindh,* 2002 MLD KHC-Sindh 1835.
[1137] *University of the Health Science Lahore v. Sh. Nasir Subhani,* 2006 PLD S. C. 243 (against grace marks given to a student).
[1138]See 2007 PLD LHC-Lahore 61.
[1139] See In the Matter of: Reference No.2 of 2005 by the President of Pakistan 2005 PLD S. C. 873.
[1140] Justice Nazim Hussain Siddiqui, Supreme Court Chief Justice, "Speech: the 24th Certificates Awarding Ceremony for the Additional Districts & Session Judges/Participants of the 24th Training Course at the Federal Judicial Academy, Islamabad" (2004) PLD 65 at 66.
[1141] Justice Nazim Hussain Siddiqui, Supreme Court Chief Justice, "Address by Mr. Justice Nazim Hussain Siddiqui, Supreme Court Chief Justice on the Commencement of Judicial Year, 2004-2005" (2004) PLD 111-117.

strength or weakness of any polity.[1142] Rule of law as an 'essential component' of good governance[1143] became "the rule of good governance," until 2008.[1144]

After Musharraf, it seems that the judiciary was the only initiator and custodian of good governance. It actively intervened in different state departments around transfers, appointment, promotion and benefits.[1145] As the judiciary emerged from the struggle to uphold the rule of law through the lawyers' movement it strongly asserted its rule of law stance to steer the good governance of the country.[1146] The judiciary stood for overarching good governance, even when the elected government was in power in 2008. The range of the judiciary's good governance interference expanded not only in number but also in scope. For example, the judiciary took a stand against the discretionary powers

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[1142] Iftikhar Muahammad Chaudhry, "Address at the Opening Ceremony of Judicial Year 2006-2007" (2006) PLJ 353.

[1143] *Syed Yaqoob Shah v. XEN, PESCO (WAPDA), Peshawar,* 2002 PLD S. C. 667.

[1144] See *Mumtaz Sultana v. State Bank of Pakistan*, 2008 PLC KHC-Sindh.

[1145] *Safdar Ali Shahito v. Province of Sindh through Chief Sec. Sindh* 2011 PLC KHC-Sindh 956; *Atta Ullah Khan Malik v. Fed of Govt. of Pak. Through President of Pak*., 2010 PLD LHC-Lahore 605; *Lal Khan v. Employee Old Age Benefit Institution through Chairman,* 2010 PLC KHC-Sindh 1377 (against posting); *Muhammad Furqan v. Speaker of National Assembly,* 2010 PLC Islamabad 1013; *Tahira Qureshi v. Azad Govt. of the State of Jammu and Kashmir through Chief Sec.* 2010 PLC HC-Court-Azad Kashmir 209; *Sameena Parveen v. Govt. of Punjab through Secretary Education, Civil Secretariat , Lahore,* 2009 SCMR 1, (extending benefits in one decision to all) see also *Tara Chand v. Karachi Water and Sewerage Board, Karachi* 2005 PSC S. C. 368, see also *Muhammad Abbas v. Govt. of Punjab and others,* 2005 PSC 671 LHC-Lahore 671; *Haji Muhammad Ismail Memon, advocate v. Haji Muhammad Ismail Memon, advocate*, 2007 PLD S. C. 35 (incident of death of an old retired civil servant and his wife was brought in the notice of Supreme Court directly*); Binyamin Masih v. Govt of Punjab through Secretary Education* 2005 SCMR S. C. 1032 (lack of efficiency).

[1146] *Tariq Azizuddin v. Fed. Of Pak.,* 2011 1130 S. C. 1130; also *Mst. Iffat Nazir v. Govt. of Punjab through Secretary of Population Welfare Department,* PLC 1124 S. C. 2011, also 2010 SCMR S. C. 1301.

"without application of mind"[1147] by the bureaucracy, and it also intervened in issues relating to institution building,[1148] how institutions operated,[1149] hiring and firing in institutions,[1150] completion of government-contracted projects, policy matters,[1151] delegated legislation,[1152] tort law,[1153] police,[1154] law and order and security,[1155] confidence of investors,[1156] and not to mention fundamental rights.[1157] For the judiciary, good governance was the demand of the day.[1158]

The interesting aspect of all these cases is that governance is promoted quite apart from planning with its sequencing and pacing in political and economic development but a good for all times. Good governance is uncritically accepted and disconnected with

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[1147] *Majeeb Ahmad v. Province of Sindh through Chief Sec. of Sindh* 2011 PLC KHC-Sindh 1193.
[1148] *Imran Hussain v. WAPDA,* 2011 PLC 116 LHC-Lahore 116; *Imran Hussain v. WAPDA through chairman WAPDA* 2010 PLD LHC-Lahore 546.
[1149] *Muhammad Aslam v. Vice-Chairman* 2010 PLC LHC-Lahore 266.
[1150] Job contracts like the no reason clause (without assigning any reason) *Samina Kanwal v. Director Forestry Research Institute Faisalabad, Punjab,* 2011 PLC LHC-Lahore 1553.
[1151] Unreasoned orders, *Ashfaq Hussain v.Govt of Punjab,* 2011 PLC LHC-Lahore 799.
[1152] *Khalid Mahmood vv NWFP through Chief Sec Peshawar,* 2011 PLD Peshawar High Court NWFP 120; see *Messrs Gul Cooking Oil and Vegetable Ghee (Pvt.) Ltd. Through Chief Executive vv Pakistan through Chairman Revenue Division, CBR, Islamabad,* 2007 PLD Peshawar High Court, NWFP 39 (legislative powers of the president in the tribal areas cannot be delegated to provincial assembly).
[1153] *Islamic Republic of Pakistan v. Abdul Wahid* 2011 Supreme Court MR S. C. 1836.
[1154] 2011 PLD 277 Supreme Court; *Suo Muto* case no. 24 of 1010 and HR case Nos. 57701-P, 57719-G, 57754-P, 58152-P, 59060-P, 54187-P, & 58118-K of 2010.
[1155] *Watan Party v. Federation of Pakistan,* PLD 2011 S. C. 997.
[1156] *Engro Fertilizer Ltd. v. Islamic Republic of Pakistan and Federation of Pakistan,* PLD 2012 Karachi High Court Sindh 50. In this case, the plaintiff spent U.S. $ 1 billion and the government was not giving gas. See also Pakaposhi Flour Mills Jaglote through Manzoor Mir v. Provincial Govt. through Chief Sec. Gilgit-Baltistan (right of freedom of trade and business).
[1157] *Muhammad Yasin v. Federation of Pakistan,* PLD 2012 S. C. 132.
[1158] *Amir Farooq v. Govt of Pakistan through Ministry of Housing and Works* PLC 2012 153 Islamabad; also *Watan Party v. Federation of Pakistan,* PLD 2012 S. C. 292.

social and economic issues, as well as the overall state and society. Other options to advance political and economic development are absent from the judiciary's concerns.

The rule of law was *sine qua non* for good governance and economic progress of a country,[1159] and there is no need to emphasize that the same trajectory happened in the U.S. Just a cursory glance on the books in Pakistan's Federal Judicial Academy reveals that most texts focus either on the U.S. legal system or Islamic law. As a member of the World Trade Organization, each and every sphere of law in Pakistan was amended, repealed, and/or enacted in these years.[1160] These laws affected local industry and agriculture significantly, but there is no legal analysis of them. Instead, there is only rhetoric emphasizing these laws were necessary for market economy under the World Trade Organization legal regime and World Bank Good Governance.

The height of this thrust of internationalization of laws can be seen in the resolutions taken at the International Jurists conference held in Pakistan. It was emphasized there that developing countries should follow international commitments of

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[1159] Justice Ajmal Mian, Supreme Court Chief Justice (as he then was) in his speech delivered at a seminar on rule of law dated 3-6-1999. See (1999) PLD 128 at 128-129.

[1160] There was a range of laws which paved the path for the introduction of a market economy in Pakistan: *Anti-Dumping Duties Ordinance,* 2000, *Countervailing Duties Ordinance,* 2001, *Safeguard Measures Ordinance,* 2002 are a direct result of WTO regime. The laws not alluding to GATT and WTO are *Intellectual Property Organization of Pakistan Ordinance,* 2005, *Public Procurement Regulatory Authority Ordinance*, *Industrial Relations Ordinance,* 2002, *Board of Investment Ordinance,* 2000, *Privatization Commission Ordinance,* 2000, *Trade Marks Ordinance,* 2000, *Patents Ordinance,* 2000, *Registered Designs Ordinance,* 2000, *Registered Lay-Out Designs of Integrated Circuits Ordinance,* 2000, *Securities & Exchange Commission of Pakistan Act*, 1997. There were amendments also made in the *Customs Act,* 1969 lowering import tariffs.

Intellectual Property-IP laws as they are in the interest of the nation.[1161] Similarly, there was significant stress on adopting the Rules of Arbitration of the International Chambers of Commerce to get foreign investment. [1162] Alternative Dispute Resolution-ADR was the main component of judicial reforms and the assurance was given that the "necessary legal framework for Alternative Dispute Resolution-ADR in Pakistan is laid down."[1163] Until 2006, jurists were clear that Alternative Dispute Resolution-ADR was a necessary evolution from commercial litigation, without being tied to any juristic philosophy.[1164] International environmental standards, even market-led ones, like International Standard Organization-ISO certification, were seen as positive, as was child labor certification which refused goods from Pakistan produced by child labour.[1165] International human rights discourse was adopted, accepted, and acknowledged by national courts very

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[1161] Resolutions at the International Jurists conference Islamabad on IP Laws and Globalization; see also Khawaja Mansoor, *Intellectual Property Law and Globalization*, a paper read at the International Jurists conference, 2006, *supra* note 1; see also Hasan Irfan Khan. *Intellectual Property Law and Globalization*, paper read at the International Jurists conference, 2006, *supra* note 1.

[1162] Nabeel Sarwar, Bar at Law, Orr, Dignam & Co., Karachi., "New ICC Arbitration Rules to Enter into Force on First January, 1998" (1998) PLJ, Magazine Section, at 32.

[1163] Speech delivered by Justice Nazim Hussain Siddiqui, Chief Justice Supreme in a seminar on "Access to Justice and Alternate Dispute Resolution" in 2004. In this seminar, the advantages and disadvantages of ADR were considered on 2nd May 2004. See 2004 PLJ 372-378; see also the speech of Justice Iftikhar M. Chaudhry, (2004) PLJ 378-388; Justice Tassadduq Hussain Jilani JLHC, "The Maladies of Delayed Justice and Growth of A.D.R." (2004) PLJ, Magazine Section, 404-422; see also Syed Shabbar Raza Rizvi (2004) PLJ, Magazine Section, 423-426, the writer was Advocate General Punjab.

[1164] In the international jurists conference 2006, the jurists found it a matter of urgency that "the *Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance*, 2005 be made an Act of Parliament", "the Washington (ICSID) Convention 1965 be incorporated into Pakistan law", and "the *Arbitration Act*, 1940 be replaced by a law, embodying contemporary norms, which implements the UNCITRAL Model Law on International Commercial Arbitration, 198. Also Justice Tassaduq Hussain Jillani, *Delayed Justice and the Role of ADR*, a paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.

[1165] Dr. Pervez Hassan, *The Role of Judiciary and Judicial Commissions on Sustainable Development in Pakistan*, Paper presented at the International Jurists' Conference, Islamabad, 2006, *supra* note 1.

quickly.[1166] Given the largely unregulated market economy, consumer protection and related legislation was requested from the state.[1167]

Laws, the rule of law, and the role of the judiciary, according to the judiciary in Pakistan, were seen as a "qualified human good" as opposed to E. P. Thompson's "unqualified human good."[1168] Yet it has to be observed that foreign funds poured in from the Asian Development Bank to allow these developments. A Federal Judicial Academy to oversee judicial reforms was established.[1169] There was so much money for judicial reforms, that either funds were underutilized[1170] or they were forced onto Pakistan, and were then denied by the then Minister of Law, Justice & Human Rights, Shahida

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[1166] Shaheen Sardar Ali, *Applying Islamic Criminal Justice in Parallel Systems: Exploring Gender- Sensitive Judicial Responses to Hudood Laws in Pakistan*, a paper read at International Jurists conference, Islamabad, 2006, *supra* note 1.

[1167] See, for example, Dr. A. Salman Humayan, *Consumer v. Corporate Sector: Judicature's Role in Balancing the Equation*, a paper presented at the International Jurists' Conference 2006 Islamabad, *supra* note 1. The writer is a founding director of Consumer Rights Commission of Pakistan (CRCP).

[1168] Edward P. Thompson, *Whigs and Hunters: The Origins of Black Act* (Harmondsworth: Penguin Books Ltd. 1975) at 266.

[1169] The federal judicial academy was established in 1988 with the help of Asia Foundation. This idea was first given by Judge Clifford Wallace of a U.S. Circuit Court of Appeals and the Senior Advisor to the Asia Foundation on Legal Education and Judicial Administration to then Supreme Court Chief Justice Muhammad Haleem. See Justice Muhammad Haleem, "Speech delivered by on the inauguration ceremony of Federal Judicial Academy" (1988) PLJ, Magazine section, at 143. See also Justice Saleem Akhtar JSC, "In- Service Training for Civil Judges and Judicial Magistrates" (2006) PLD, Journal, 19-27; also Ch. Hassan Nawaz, "Federal Judicial Academy Training of Trainers Workshop Program- August 2002" (2004) PLJ, Magazine section, 158-161.

[1170] $350 million (Rs. 20 billion) were given by Asian Development Bank, but in 2005, Douglas Porter, the Senior Governance Specialist from President Mission of the ADB had to inform the government that the funds were underutilized. Punjab still has Rs 337 million out of Rs. 671 million, Sindh got Rs. 277 million but could only utilize Rs. 41 million, NWFP could only Rs. 91 million out of Rs. 226 million and Baluchistan got Rs 124 million but spent only Rs 61 million. See Waqar Ahmad, "Judicial and Legal Reforms in Pakistan" (2005) PLJ, Magazine section, 361 at 361. For a detailed analysis see also Livingston Armytage, "Pakistan's Law and Justice Sector Reforms Experience- Some Lessons" ((2004) PLJ 100-111.

Jamil.[1171] Is it not interesting that the judiciary was asking for financial independence from the executive, but that judicial reforms were a project of financial dependence on International Financial Institutions. The judicial reforms loans were criticized by one commentator on the grounds that a loan cannot be used to start a program, and only to maintain a program.[1172] A study by Osama Siddique published in 2013 analyzed in detail the law reforms of 2000 as an alien concept of justice but one that attracted disparate champions like Supreme Court Chief Justice, U.S. aid and the Taliban. I want to add liberals to the group of admirers. The speedy justice in the above pursuits, for Siddique, showed a "remarkable obliviousness to the historical, institutional and sociological factors that alienate Pakistanis from their formal legal system."[1173]

A further point worth remembering is that during the 2000s, while the demand of de-linking with U.S. was popular due to drone attacks,[1174] the connection of rule of law and legal projects is always presented as apolitical. There is no footnote even, except when raised by the Supreme Court Chief Justice, in the form of a "global, systematic, military, diplomatic, and financial strategy" to deal with terrorism.[1175] Gradually,

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[1171] Shahida Jamil, *The Independence of Judiciary*, a paper presented at the International Jurists' Conference Islamabad, 2006, *supra* note 1, 1-16 at 15. The writer is a Bar at Law and had been the Former Minister of Law, Justice & Human Rights during the Musharraf regime.
[1172] Riaz Hanif Rahi, "Access to Justice Program and the Prevailing Judicial System" (2006) PLD, Journal, 84-96 at 85.
[1173] See Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge: Cambridge University Press, 2013).
[1174] Since 9/11, anti-American sentiments grew with 74 % of Pakistanis viewing America as an enemy. See *the Global Post* dated June 28, 2012.
[1175] Justice Iftikhar Chaudhry, Chief Justice Supreme Court, *Terrorism and the Criminal Justice System*, a paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.

concepts from the "good governance paradigm" entered judgments of the superior courts, as explained above.

Public Interest Litigation until 2006: A Comfortable Substitute for Democracy

It was inevitable that the Public Interest Litigation tool in the arsenal was also altered to suit global needs. The future of the world was impossible unless Human Rights were guaranteed and recognized at the national, regional and international levels.[1176] Public Interest Litigation represented a new era of judicial culture where courts gave substantive justice and acted as a "catalyst for socio-economic change."[1177] Judicial activism and empowerment transformed Public Interest Litigation into a "silent revolution"[1178] or a social engineering project.[1179]

The legislature was the continuous target of Public Interest Litigation supporters, and an easy target, as the legislature was manned by feudal forces.[1180] The judiciary was to provide social justice.[1181] The job of "salvaging democracy" was on the shoulders of

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[1176] Justice Muhammad Nawaz Abbasi, J. Supreme Court, "Human Rights in Pakistan: Concepts and History of Human Rights" (2004) PLD, Journal, 90 at 90.
[1177] Justice Sabihuddin Ahmad, Chief Justice SHC, *Good Governance and the Role of the Judiciary*, a paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.
[1178] Samar Minallah, *Judiciary as a Catalyst for Social Change*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1. The writer was a Research Anthropologist and executive Director of Enthno-Media and Development.
[1179] Ejaz Afzal Khan, *Role of Judiciary in Good Governance*, a paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.
[1180] Justice Javed Iqbal, *The Role of Judiciary as a Catalyst of Social Change*, a paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.
[1181] Justice Nasir Aslam Zahid JSC, *The Role of the Judiciary in Protecting the Rights of the People- Judicial Activism*, A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.

judiciary.[1182] Public Interest Litigation represented the "democratization of access to justice."[1183] For Ahmad Rafay Alam Advocate Supreme Court (2006), Public Interest Litigation was nurturing a "stable democracy.[1184]" It was seen as a democratic tool as most petitions were against the state which meant that the litigation was a forum for a debate. The denial of writ petition on technical grounds meant denial of the democratic forum provided by Public Interest Litigation. Furthermore, the increase in Public Interest Litigation cases was seen as an indication that citizens needed an outlet. "In our burgeoning democratic environment, elections alone may be too little and too far apart," Alam explained. His genuine worry was that Public Interest Litigation and the judiciary shouldn't be the only democratic forum, so he suggested a Public Interest Litigation filter that could be a "democratic alternative"[1185] much like the constitution gives a filter of "alternative remedy" in writ jurisdiction. "In any event, it would be against the nature of the Public Interest Litigation jurisdiction to strictly enforce such protocols," he argued.[1186]

[1182] Syed Mansoor Ali Shah, ASC, *Salvaging Democracy- Judiciary our Last Hope: Going Beyond Public Interest Litigation.* A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1 at 1.
[1183]*Ibid* at 6.
[1184] Ahmad Rafay Alam ASC, (*Public Interest Litigation and the Role of the Judiciary*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1 at 13.
[1185] The petitioner for PIL had to prove that he or she had attempted to work with democratic institution to get his or her rights.
[1186] Ahmad Rafay Alam ASC (2006) *Public Interest Litigation and the Role of the Judiciary*, a paper read at the International Jurists conference, Islamabad, 2006,*supra* note 1 at 10-13.

Wasim Sajjad, Chairman of the Senate, expressed his concerns and suggested that the role of the court could be suggestive as far as social changes are concerned.[1187] Supreme Court Justice, Nasir Aslam Zahid, while appreciating Public Interest Litigation warned that the judiciary should not take over the functions of the legislature or the executive.[1188] Hamid Khan came forward in its favour and argued there was a need for a very strong judiciary to face down the government.[1189]

The above connection took its shape under Supreme Court Chief Justice Iftikhar. He took very popular steps against the land mafia to provide basic needs such as parks.[1190] Iftikhar first followed General Musharraf and decided cases in his favour but later he used Public Interest Litigation to fix prices against pharmaceuticals and oil and gas companies. According to the claim of the Supreme Court Chief Justice himself, Public Interest Litigation provided speedy and inexpensive access to justice for the common man.[1191] A further exhibition of such a 'pro-people' approach was the banning

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[1187] Wasim Sajjad, *The Role of the Judiciary as a Catalyst of Social Change*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1. . The writer is Bar-at –Law, Honorary Fellow, Wadham College, Oxford and Leader of the House in the Senate of Pakistan.
[1188] Justice Nasir Aslam Zahid, J. Supreme Court, *The Role of the Judiciary in Protecting the Rights of the People - Judicial Activism.* A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.
[1189] Hamid Khan, *Role of an Independent Judiciary in Countries of South Asia, Particularly Pakistan*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1 at 1-5
[1190] Commonly called as the Mini golf case, there was an attempt to convert a piece of land reserved as a park by CDA into a golf park for rich people. The court found it as an attempt to shut out deprived sections from the facility who are not in a position to afford luxury of joining the golf club. See Iqbal Haider, PLD 2006.
[1191] Anddress on May 5, 2007 in Multan during the lawyers' movement, as cited by Muneer Malik (2008). See Muneer A. Malik, *The Pakistan Lawyers' Movement: An Unfinished Agenda* (Karachi: Pakistan Law House, 2008) at 119-120.

of wasteful expenditures on marriage functions, because it led to frustration, anger and hostility among the poor.[1192]

2006: The Judiciary's own Consciousness of its Linear Development and Weaknesses in Leading Global Modernity

On the other hand, around 2006, the judiciary was also aware of its weaknesses. It felt that it was now at the "Final Frontier."[1193] Khoosa identified the developments in the judiciary in its historical trajectory. The first stage was the *cognitive stage*, where the need was to identify the constitutional hindrances. From this, the *Judge's* arose came accordingly.[1194] The second stage came when the judiciary consolidated its gain and that was *consolidation stage*. The third stage was the *Public Interest Litigation stage*, that is, the judiciary focused on how to deliver this gain to the public. For him, the *final frontier* was the stage to protect the judiciary from threats within the judiciary, including personalities, peer pressure, and the concentration of power in the hands of the judicial heads.[1195] Ijaz Ahmad, Justice of the Supreme Court, also spoke of removing personal prejudices. These personal prejudices cannot be controlled by regulations or laws.

[1192] Chaudhary Muhammad Siddique, PLD 2005 S. C. 1
[1193] Asif Saeed Khan Khoosa JLHC, "Independent Judiciary: The Final Frontier" (2007) LIX PLD, Journal, 1-9.
[1194] Asif Saeed Khan Khoosa (1994) PLD 1994 Journal 101. According to Asif Saeed Khan Khoosa, he gave copies to the judges. Based on this he claimed the credit of decision of Aljahad Trust case, PLD 1996, Supreme Court 324.
[1195] Asif Saeed Khan Khoosa JLHC, "Independent Judiciary: The Final Frontier" (2007) LIX PLD, Journal, 1-9 at 6-7.

External independence meant freedom from the control of the executive.[1196] These were not calls for judicial restraint[1197] and could only be translated as a call for the judiciary to act in an insular manner like the military and bureaucracy. That is why, when the lawyers movement was criticized about the Chief Justice's judicial activism, this criticism was not understood by the lawyers.[1198]

Lawyers' Movement: From Supremacy of the Constitution to Supremacy of the "Rule of Law"

The judiciary's image after the coup needed a boost. The relation of the bar and the bench as the two wheels of the chariot of justice were out of alignment.[1199] The superior judiciary was violating the fundamental rights by supporting unconstitutional forces. As a result, the legal fraternity was helpless. The position of the judiciary can be described in the words of an Italian proverb, "We condemn death penalty to tiny thieves and pass rewards to robbers and bandits." The judiciary was standing against

[1196] Ijaz Ahmad JSC, *Independence of Judiciary*, a paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.
[1197] Only one voice was a cry in the desert around the period of judicial activism of Justice Iftikhar Supreme Court Chief Justice. That was that of Malik Qamar Afzal ASC (2006). He wrote the first coherent, though incomplete dialogue against monologue of strong judiciary. See Malik Qamar Afzal ASC, "Judicial Review: A Study of Judicial Activism vis-à-vis Judicial Restraint" (2006) PLD, Journal, 67-70.
[1198] Munir A Malik (2008) replied to this criticism. See Malik, *supra* note 181 at 12.
[1199] Malik Muhammad Qayyum, President SCBA, "Welcome Address dated 21 January 2006 by the Supreme Court Bar Association's Dinner in the Honour of Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan" (2006) PLD, Journal, 12-17, at 12.

democracy.[1200] The potential legislature (including the Pakistan People's Party and Pakistan Muslim League, PML-N, which had leadership in exile) was annoyed with decisions in cases like *Javed Hashmi, Yousaf Raza Gilani* and then *Shahbaz Sharif*. The Supreme Court Bar Association-SCBA tried to bridge the gap between the judiciary and politicians and emphasized that the country's former leadership was in exile and should be called back and cases against them should be heard. The situation lasted till 2005.

Supreme Court Chief Justice Iftikhar, who was known for lacking the polish of leading Pakistani lawyers and graduated from the Ivy League university of Cambridge, according to the New York Times, [1201] started taking *Sou Moto* actions on issues involving human rights violations and public importance. He challenged land allotments to influential people in Gwader, as well as the *Murree Scheme case* of degradation of environment, and the *Steel Mill* case.[1202] Supreme Court Chief Justice Iftikhar also objected to the fact that 500 people had disappeared under the suspicion of terrorism by intelligence agencies and as a result 100 were quickly released.[1203] In the beginning of his judicial year, Iftikhar Supreme Court Chief Justice clearly stated that he'll continue judicial activism.[1204] The height of this activism came in *Steel Mill* case, where the Supreme Court stopped the privatization of Steel Mill Karachi. This was not acceptable

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[1200] Ali Ahmed Kurd, "Role of Bar in Protection of Human Rights" (2006) PLJ, Magazine Section, 342 at 343. This essay was read by the writer in front of Iftikhar Chief Justice and other judges of the superior courts as Vice-Chairman, Pakistan Bar Council.
[1201] Jane Perlez, New York Times, April 9, 2008.
[1202] Watten Party through its president v. Federation of Pakistan, decision dated 23 of June 2006 in Constitution Petition No. 9 of 2006 & Civil Petition Nos. 345 & 394 of 2006, online: <http://www.supremecourt.gov.pk/web/user_files/File/CJD_Pakistan_Steel_Mills_Case.pdf>.
[1203] Jane Perlez, New York Times, April 9, 2008.
[1204] Iftikhar Muahammad Chaudhry, "Address at the Opening Ceremony of Judicial Year 2006-2007" (2006) PLJ 353.

for General Musharraf. He called Iftikhar Chief Justice and demanded he resign. The Chief Justice refused and Musharraf filed a reference against him in the Supreme Judicial Council. On April 18, 2007, the Supreme Court Chief Justice filed a petition before the Supreme Court, challenging General Musharraf's reference against him. A full bench of thirteen members of Supreme Court accepted the petition on July 20, 2007.[1205] This happened due to the pressure of events that occurred between March 6 to July 2007 through the highly popular Lawyer's Movement. Protests of lawyers, the media with the wide inclusion of the general public against General Musharraf made the petition's acceptance possible. The election of the president was due and there was a controversy whether General Musharraf could hold two offices (president as well as Chief Of Army Staff). In a number of petitions, the vires of dual office law was challenged.[1206] A nine-member bench, headed by Justice Bhagwan Das, heard the petition and by a majority of six to three declared these petitions unmaintainable.

Emergency Against Judicial Activism and Public Interest Litigation

General Musharraf was re-elected as president on October 6, 2007. But there was a petition pending against the nomination papers of General Musharraf, which was fixed for hearing on November 5. General Musharraf panicked and imposed emergency on

[1205] *Mr. Justice Iftikhar Muhammad Chaudhary v. The President of Pakistan*, 2007 PLD S. C. 578.
[1206] *President to Hold Office Act*, 2004.

November 3, 2007. In orders of emergency, the constitution was held in abeyance.[1207] Seven judges of Supreme Court, headed by Chief Justice Iftikhar, overturned the Provisional Constitutional Order-PCO and restrained the Chief Of Army Staff and Corps commanders, and other military officers from acting under that degree. The order against Provisional Constitutional Order-PCO was overruled by a bench of seven judges headed by the new Chief Justice Abdul Hameed Dogar. It was declared as void, quorum non judice and without lawful authority.[1208] In the *Tikka Muhammad Iqbal* case of 2007 and the Provisional Constitutional Order case of the *Watan Party*, the Zafrullah Khan court strongly criticized the judicial activism of brother judges and justified the Provisional Constitutional Order.[1209] The order criticized Public Interest Litigation in cases like fixing prices of fruits and vegetables and stoppage of various projects like New Murree City, Islamabad Chalets, Lahore Canal Road and others. It was an emergency action against judicial activism and Public Interest Litigation, and was not against the legislature.

Under the Provisional Constitutional Order, fundamental rights were suspended, the Oath of Office (Judges) Order of 2007 was promulgated according to which judges not taking oath would cease to hold office.[1210] Of the Supreme Court judges, seventy two per cent of the judges did not take oath. In Sindh High Court, more than 70% refused. It was a revolt of the judiciary and was followed by a terrible attack on lawyers. The Proclamation of Emergency of General Musharraf on November 3 was against the

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[1207] *Proclamation of Emergency Act*, PLD 2008, Federal Statutes 108 and Provisional Constitutional Order 1 of 2007, PLD 2008 Federal Statutes 110.
[1208] Nasir Iqbal, The Dawn, Nov 7, 2007.
[1209] The Dawn, Nov 24, 2007. See *Tikka Iqbal Muhammad Khan v General Pervez General Musharraf*, 2008 PLD S. C. 6.
[1210] *Oath of Office (Judges) Order*, 2007, PLD 2008 Federal Statutes 112.

judiciary disturbing law and order itself, interfering with government policy, affecting economic growth, ordering the release of terrorists and hence outstepping the limits of judicial authority. General Musharraf claimed the judiciary was eroding the trichotomy of power[1211] and disturbing his so-called "third phase of transition to full democracy."[1212] Two points are important here. Before this, the charge sheet had always been against the legislature. Secondly, General Musharraf requested U.S., E.U. and Commonwealth countries to give Pakistan time to advance democratically as it was trying to reach their level. He gave ten examples of U.S. president Abraham Lincoln breaking laws and usurping rights to save the constitution.[1213] This confirms that in this era of good governance, the judiciary was sharing the seat of power of the hegemonic metropolitan bourgeoisie. Meanwhile, the affective legislature, in terms of the leadership of the two main parties of the reigning classes, was in exile. Finally, on November 28, 2007, General Musharraf handed over the command of the army to General Ashfaq Parvez Kayani and took the oath as a civilian president. Emergency Law and the Provisional Constitutional Order were challenged in the Supreme Court, decided by Provisional Constitutional Order judges and headed by Abdul Hameed Dogar on November 23, 2007, who declared the emergency proclamation void.[1214]

Rule of Law or Politics: Class Formation and the Lawyers' Movement

[1211] Complete order in Dawn Nov 4, 2007.
[1212] First phase was Martial Law (1999-2001), second was quasi-democratic regime (2002-07), 2007 was expected to be full democracy.
[1213] Ihtasham ul Haque, *The Dawn*, Nov 4, 2007.
[1214] *Tikka Iqbal Muhammad Khan v. General Pervez General Musharraf*, 2008 PLD S. C. 6.

The struggle around the lawyers' movement as seen in its slogans and aspirations was a struggle for the rule of law.[1215] It was fought between the military and the bench and the bar (between the khaki military coat and the black-lawyers coat) but it succeeded because of the support of the two main parties. The lawyers' movement paved the way for the political leadership to assert the supremacy of civilian institutions.[1216] Here, however, civilian supremacy is defined not as the supremacy of the legislature or people but as the supremacy of the rule of law and the constitution.[1217] Judges and lawyers were ready to negate Keith B. Callard's claim that "no one is willing to die for the preservation of the constitution in Pakistan."[1218] It was also translated into a fight to restore civilian supremacy as there is civil-military imbalance in the country,[1219] and that is what allowed the mainstream parties to join the movement, which, I argue, explains the 'success' of the movement.

The academic literature also relied on institutional explanations, focussing on the supremacy of one institute over the other or vice versa. Joel A. Mintz compared the

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[1215] Asma Jehangir (2008) in Foreword of the book of Munir A. Malik. See Malik, *supra* note 181 at iv.
[1216] Malik, *supra* note 181, at xii, preface of the book.
[1217] Address of the Chief Justice Iftikhar at Aiwan-e-Adal at 6.00 am dawn July 16th 2007, as cited by Munir A Malik. See Malik, *supra* note 181 at 122.
[1218] Counter claim made by Iftikhar Muhammad Ch. Chief Justice Supreme Court, "On the Occasion of Orientation/ Consultation Workshop on Access to Justice Development Fund" (2007) PLJ 342-345 at 345.
[1219] Remarks made Dr. Pervez Hassan at the Roundtable on Justice, Accountability, and International Experience organized by the Pakistan Institute of Legislative Development and Transparency (PILDAT), in partnership with No Peace Without Justice, supported by the European Union, and held at the Serena Hotel in Islamabad on 2-3 May 2007. See Dr. Pervez Hassan, "Establishing an effective Rule of Law in Pakistan - The Way Forward" (2007) PLJ 118-129.
[1219] Akhtar, *supra* note 13 at 236.

bravery of Supreme Court Chief Justice Iftikhar with the U.S. founding fathers to overcome tyranny and establish a regime of "laws and not men."[1220] Tariq Hasan called the Supreme Court Chief Justice a "judicial activist" on the basis of Public Interest Litigation. This was devoid of any political analysis about Public Interest Litigation.[1221] Tayyaba Ahmad also tried to connect judicial activism to the Public Interest Litigation of Chief Justice Iftikhar, who she saw as understanding the "ebb and flow of judicial independence in Pakistan. She analyzed the importance of this development to Pakistan's internal affairs and its role as an actor in the war on terror."[1222] Similarly, Shoaib A. Ghias found the reason for the Chief Justice's rise and conflict with Musharraf to be Public Interest Litigation and his opposition to economic liberalization, for instance, through challenging the Steel Mill privatization. He used the framework of judicial power and the legal complex in an authoritarian context, which comes from the old dichotomy of dictatorship versus democracy.[1223] Not to mention, Naveed Ahmad praised Iftikhar and declared the Lawyers' Movement as laying down "a foundation stone for the

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[1220] Nova Southern University gave an honorary Doctor of Laws degree to Chief Justice Supreme Court Iftikhar. He compared his bravery with U.S. founding fathers to overcome tyranny and establish a regime of "laws and not men." See Joel A. Mintz, "Introductory Note: A Perspective on Pakistan's Chief Justice, Judicial Independence, and the Rule of Law" (2008-2009) 15:1 ILSA Journal of International & Comparative Law 1 at 2.

[1221] Tariq Hasan, The Need of Judicial Activism and Chief Justice Supreme Court Iftikhar Chaudhry as a "judicial activist" on the basis of PIL" (2008-2009) 15:1 ILSA Journal of International & Comparative Law 9-14.

[1222] Taiyyaba Ahmad Qureshi, State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan, (2009-2010) 35: XXXV N. C. J. Int'l L. & Com. Reg. 485-538 at 489.

[1223] Shoaib A. Ghias, "Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf" (2010) 35:4 Law & Social Inquiry 985-1022 at 987.

reinstatement of rule of law culture in the country."[1224] Let me advance a class formation and structural analysis of this 'event.'

The Pakistan Muslim League-PML-N and Pakistan People's Party, who represented landed classes and indigenous bourgeoisie, were effectively removed from sharing power during Musharraf's regime.[1225] Most of the lawyers were connected with these two main parties and both the parties became united on the issue. Furthermore, religious forces were annoyed after the Lal Masjid operation and General Musharraf's support of the U.S. in its war against terror. In North Western Frontier Province-NWFP, Latif Afridi, the newly elected president of the bar, was from Awami National Party-ANP and was close to the leadership and was successfully bringing out workers. Qazi Muhammad Anwar of the Pakistan People's Party was member of Punjab Bar Council. Jamiat Ulmae-e- Islam- Fazlul Rehman, JUI-F and Jamat-e-Islami, JI lawyers were active in North Western Frontier Province-NWFP, where the main parties were in opposition to the government.[1226] There is no need to mention the support of Pakistan Muslim League-PML-N and Tehrik-i-Insaf, who were against Musharraf for his war against terror. For a while in the lawyer's movement, then, the support of politicians was needed; jurists abandoned their monopoly on wisdom and accepted the political leadership to safely navigate the ship of the state.[1227] At the same time, the lawyer's movement was told that only independent judges could provide them any kind redress from Waderas (Feudalism),

[1224] Naveed Ahmad, "The Rule of Law- A Substratum of Justice" (2012) 8:2 Journal of Commonwealth Law and Legal Education 11-21 at 1.

[1225] Akhtar, *supra* note 13 at 236.
[1226] Malik, *supra* note 181 at 88-89.
[1227] Malik, *supra* note 181 at xiii.

Seths (capitalists) or police bureaucrats,[1228] which actually pointed to the composition of the legislation.

To sum up, the lawyers' movement was political, if not opportunist, to the core, as opposed to being 'neutral'. The reigning class (the Pakistan People's Party and the Pakistan Muslim League-PML-N), and the 'liberal' and 'quasi-liberal' projects (led by Muthida Majlis-e-Amal-MMA and Pakistan Tehrik-e-Insaf-PTI) and even extremist parties joined hands. The metropolitan bourgeoisie slowly played its hegemonic role to help this transition.

Lawyers' Movement: A Political Movement for a "Non-Political" Judiciary?

Contempt towards the legislature, both by military and judiciary, had always been accompanied by contempt for politics. The lawyers' movement was "political struggle to the core" but claimed to not be about electoral politics.[1229] It claimed it should not be understood as partisan politics.[1230] The Bar Associations were claimed to be a professional group with diverse political opinions and it was argued their unity meant that no political party was backing any of them. The lawyers' movement insisted that the issues of the removal of the Chief Justice and opposition to the military were connected; later, the lawyers' movement made Musharraf leave and they continued agitating against

[1228] Malik, *supra* note 181 at 76.
[1229] A detailed answer of the allegations of politicization of judiciary was given by Munir A Malik in *Dawn* on May 11, 2007, in an article titled, "Not Motivated by Politics."
[1230] Also speaking in Chakwal on June 16, 2007 and on May 26, 2007. Seminar was held by the Supreme Court building with the Chief Justice as keynote speaker on the principles of Separation of Power. Lawyers there raised slogans against General Musharraf. See Malik, *supra* note 181 at 114, 109.

the elected government. Chief Justice Munir stated that the lawyer's movement did not invite political parties but parties joined for their own agendas.[1231]

The judiciary wanted every institution of the state to be held accountable except for itself. The Supreme Judicial Council was a "dormant body" as it had not investigated any case against a judge of superior courts for his misconduct for the last 20 years or so.[1232] Chief Justice Iftikhar could have been brought before the Council, but wasn't due to resistance of lawyers movement.[1233]

It was stated that there should be caution about the accountability of the judges, so the Chief Justice should be suspended, not removed, and there should be an acting Chief Justice. If judges under inquiry are objecting to some judges, new judges should be found. So the impeachment of the Chief Justice was legally allowed. The Supreme Judicial Council was a legal forum, andsuspension was the normal course of action. If the charges were under political motives, political offences could be separated from legal ones.[1234]

[1231] Malik, *supra* note 181 at 103; see also Dr. Pervez Hassan, "Environmental Protection, Rule of Law and the Judicial Crisis in Pakistan" (2007) PLJ 2007, Magazine Section, 278 at 280. Remarks made at the International Congress on Environmental Law held in Rio de Janeiro, Brazil on 22-24 May, 2007 in tribute to Professor Charles O. Okidi.

[1232] Mian, Justice Ajmal. CJSC *A Judge Speaks Out: An autobiography* (Karachi: Oxford University Press, 2004) at 348.

[1233] Arguments of Sharifuddin Pirzada. See Malik, *supra* note 181 at 189.

[1234] See for a detailed analysis, Misbah Saboohi, "Article 209 of Pakistan Constitution: Dilemma or Possible Explanation?" (2007) PLJ 2007, 413-441 at 440-41. This essay was written to address the different legal positions and discusses impeachment of judges around the world and offers, particularly, a detailed comparison of U.S. and U.K. It found that in Pakistan impeachment takes place by the peers themselves [at 417]. Accountability of judges is left to Pakistani rulers and it lacks public confidence [at 421]. Only the president can initiate impeachment [at 424].

In this scenario, the image projected of the maligned Chief Justice was that of custodian of the constitution and his office was "most strong, protected, non-accountable and untouchable" as per the constitution.[1235] He was entitled to more security protocol than the president of Pakistan and hence could use government helicopters and airplanes, as these were public property.[1236] Chief Justice Iftikhar was told to hold dual office after restoration, firstly, Chief Justice of Supreme Court of Pakistan and secondly, Chief Justice of Peoples of Pakistan.[1237] The height of this romance of judges was that judges were told to be pro-people.[1238] The irony of the lawyers movement was this: while the judges were expected to support the people, in effect, the people's courts were established before a people's democracy.

Finally it should be noted that on March 28, 2007, the Chief Justice did not follow the speech written by Barrister Gohar Ali Khan and Munir A. Malik while addressing Rawalpindi High Court. Rather, h had his own prepared written speech titled, "Access to Justice" after the name of the judicial reform project of the Asian Development Bank in Pakistan. It was about separation of power to ensure the rule of law and good governance.[1239] Munir's approach was also full of good governance concepts.[1240] The

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[1235] Rao Naeem Hashim Khan, Former Judge LHCL, "Supreme Judicial Council" (2007) PLJ, Magazine Section, 134 at 134.
[1236] *Ibid* at 138.
[1237] Malik, *supra* note 181 at 197.
[1238] Malik, *supra* note 181 at ix.
[1239] This can be assessed even from the summary found in Muneer A. Malik, *The Pakistan Lawyers' Movement: An Unfinished Agenda* (Karachi: Pakistan Law House, 2008) at 81.
[1240] Even the title of the chapter seems like a package of good governance. Malik, *supra* note 181 at 127-128, xi.

nature of this 'external' support for the lawyers' movement speaks to its acceptance within the governance project.[1241]

After the Lawyers' Movement: Reclaiming Parliamentary Sovereignty

After the restoration of democracy, the relationship of democratic, civilian and legislative leaders with the restoration of judges was a reluctant one. On December 2007, Benazir Bhutto made clear that she was with the "independent judiciary" but "not the judges." Her position to not support the involvement of the judiciary in politics like in Bangladesh is also telling.[1242] General Musharraf lifted emergency on December 16, 2007 and 14 Supreme Court and Federal Shariat Court judges took the oath on December 16, 2007.

. Zardari entered into an agreement with the Pakistan Muslim League, PML-N, called the Murree Declaration, on November 3, 2007. This was a move to restore the judiciary, including Chief Justice Iftikhar, within 30 days of the formation of government. Elections were held on January 8, 2008, a month after Benazir Bhutto's assassination. Zardari and PPP won the elections.

[1241] This is not to make an accusation of 'foreign hands' in the lawyer's movement but to focus attention on the nature of the discourse promoted in the support. See particularly the support of Human Rights Watch mentioned in page 136-137 of Munir's book. Similarly, Harvard's Law School award of a Medal of Freedom to Chief Justice Ch. The Canadian Bar Association president participated in a march of Ontario lawyers. The Quebec Bar and Law Society of Upper Canada were also concerned. See Malik, *supra* note 181 at 251.

[1242] *The Pakistan Observer*, December 14, 2007.

The federal government was formed on March 31, 2008 but Zardari was now reluctant to restore the judges. He was interested in seeing the criminal charges against him removed and to get rid of the condition of graduation for his election in the national assembly. The Provisional Constitutional Order court did this on April 21, 2008. This paved the path for Zardari to become president after the resignation of General Musharraf on August 7, 2008. Zardari reneged from the promise of the restoration of judiciary. Pakistan Bar Council-PBC and other Bar Councils decided to boycott the Provisional Constitutional Order judges and it continued for a period of two months.

Particularly in Lahore High Court Bar Association-LHCBA, the lawyers were clearly divided amongst the 'professionals' (rejectionist parties like Imran Khan's Tehrik-e-Insaf, jamaat-e-Islami-JI, etcetera) and the 'Khoosa' group (or the Pakistan People's Party).[1243]

Zardari offered a constitutional package, which was rejected by the Pakistan Muslim League, PML-N.[1244] The amendments of this package related to the judiciary were considered to be violating independence of judiciary. These were related to the appointment of Chief Justices and judges of superior courts and their removal, as well as the amendments that curtailed the *sou motu* jurisdiction of Supreme Court.[1245] Talks among Pakistan Peoples Party and Pakistan Muslim League-Nawaz in Dubai did not succeed and Zardari made it clear that the mandate is given to Pakistan People's Party for *Roti, Kapra aur Makan* (food clothes and houses) and not to restore the judges. He called

[1243] Editorial *Daily Times* Feb 24, 2008.
[1244] *Pakistan Observer*, April 12, 2008.
[1245] Malik, *supra* note 181 at 272.

the Muree Declaration a political statement and made clear that he had been in jail for eight years and had been the victim of the judiciary. He said the Supreme Court reverted back a case against him to the accountability court though he had already served the sentence. He even denied the fact that a change happened in the country due to the historic 'no' of the deposed Supreme Court Chief Justice and the subsequent lawyers' movement, which resulted in lawyers having their legs broken. He even stated that international powers were behind the return of democracy in Pakistan. He reminded the public that Benazir Bhutto was not in favour of restoring the judiciary.[1246]

Finally, the situation was that the opposition was stuck with the law and constitution (or the restoration of judiciary) and government with law and order (in terms of fighting terrorism). The Pakistan People's Party wanted "slow" and "constitutional" change to remove constitutional engineering by General Musharraf, whereas "quick change" or "radicalism" meant the restoration of judiciary and was necessary.[1247] Finally, the guarantors moved and brokered another deal[1248] under the hegemonic bloc. Supreme Court Chief Justice Iftikhar met with Asif Zardari and with retired Justice Tariq Mahmood, who was the Supreme Court Bar Association former president and leader of the lawyers' movement. Supreme Court Chief Justice Iftikhar also met a six-member delegation of the U.S. congress led by Tiernerry, head of National Affairs of the sub-committee of the House Oversight and Government Reform Committee.[1249]

[1246] *The News*, April 29, 2008, *The Pakistan Observer*, April 29, 2008, *The Dawn* April 29, 2008.
[1247] Politics of Change through Amendments, Editorial, *the Dawn* May 21, 2008.
[1248] Dana Perino White House Press Secretary, report Anwar Iqbal, *The Dawn*, March 5, 2008.
[1249] Nasir Iqbal, *The Dawn* March 27, 2008.

From Parliamentary Democracy to Constitutional Democracy

Until 1998, the concept of Constitutional Governance through judicial review was not considered to be "super legislative," or above the Constitution, and was instead considered to be "corrective in nature with anxiety to protect the constitution."[1250] Later, the judiciary was considered the "custodian" of the constitution and a "watchdog" on the other organs of the state. It became a "safety valve" or the "balance wheel" of the constitution.[1251] This role was required, especially when the judiciary felt marginalized after military coups when there was no constitution.[1252] Thus, in a way, the supremacy of the constitution meant the judiciary's own supremacy.

After the lawyers' movement, the judiciary was clear that it was not bowing down before parliamentary democracy. For Barkat Ali Khan, parliamentary democracy was not enough because the written constitution itself was limited and the parliament in Pakistan deviated from this principle and ignored its basis of fundamental rights and the rule of law. That is why we need constitutional democracy and constitutional governance, whereby the majority is restrained within the framework of the constitution and hence there is legal restraint. Constitutional democracy and constitutional governance make the

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[1250] Munawar Ahmad Mirza, Justice of the Supreme Court, "Judicial System of Pakistan" (1998) PLD, Journal, 125-137 at 135; also Saleem Akhtar Justice of the Supreme Court. "In- Service Training for Civil Judges and Judicial Magistrates" (2006) PLD 19-27 at 20.

[1252] Dr. Javed Iqbal JLHC (Ret), *The Independence of Judiciary*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1, 1-4 at 1.

government "responsible," Khan argued. Does this mean that a constitutional government is a responsible government rather than a representative government? The writer went further and made clear that Pakistan followed the principle of British parliamentary democracy but does not accept English doctrine of absolute supremacy of the legislature. So it is a system of constitutional supremacy, not parliamentary supremacy.[1253]

We should recall that during the period of early modernization (the 1950s to the 1970s), it was clearly argued that a controlled type of democracy like a strong presidential system was needed. Afterward, in 1980s under Zia, the constitution (with the judiciary as its custodian) was to envisage democracy, understood as "not a system of self-government but a system of control and limitations of the government."[1254] Has Pakistan entered in the era of judicial dictatorship (2008 and onward) in the name of good governance? Let me close the dissertation of the role the judiciary has played in democracy in Pakistan on these remarks. Below is the conclusion regarding the judiciary's second claim, that it had protected the human rights.

'Loud' Rights in a 'Shallow Democracy': A Structural Analysis

[1253] Barkat Ali Khan (2008) at 632-633; see also Dr. Faqir Hussain, (2008) PLJ, Magazine Section. The author was Secretary of the Law and Justice Commission of Pakistan
[1254]Comments of Supreme Court Chief Justice Haleem, (1988) PLD S. C. 416, 515-16.

"I picked up my daughters one by one from their cots to the courtyard of the house and slaughtered them. I had learnt over time that I would never be able to generate enough resources to give honourable lives to my daughters."[1255]

Of course the event referred to in the quote is disturbing, but I am concerned with its interpretation. The statement that, "I had learnt over time that I would never be able to generate enough resources" shows that the poverty is deeply structural. There is a helplessness that settles in after decades. What role can 'hope' play, the buzzword courts used to justify Public Interest Litigation? The man is questioning his "ability" to "generate enough resources" and charity in the form of legal aid and court directions are not his issue. He points out the relation of "enough resources" and "honourable lives" and not a mere 'right to life' as is romanticized by the judiciary in the *Shehla Zia case*.

In Pakistan, Public Interest Litigation began with the court intervening in political matters like the *Benazir Bhutto* case and the *Khar* case of 1988. It started with these 'high profile' political cases and, after a few gestures of being for the 'public,' became a tool in the hands of the privileged legal players. New business opportunities in Public Interest Litigation has led new lawyers to become interested in it and it became the focus of middle class in the 1990s.[1256] After the more than one decade, it intervened in issues in *non-class* terms around women, widows, orphans, children, condemned prisoners, and

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[1255] Confession of a father surrendering before the police, as quoted by Mrs. Rashida Mohammad Hussain Patel ASC. *Family Laws and Judicial Perceptions*, A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.

[1256] The situation was not different in India. See Varun Gauri (2009) Public Interest Litigation in India: Overreaching or Underachieving? Online: <http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-5109>, Last visited Feb 22, 2014; see also S. Muralidhar (1999) India: Public Interest Litigation Survey 1997-1998, published in 33-34 Annual Survey of Indian Law 525 (1997-98) online: <http://www.ielrc.org/india/litigation.php>. Last visited Feb 22, 2014.

other deserving persons as "weaker segments of the society.[1257]" My question is, is it possible to approach class issues through Public Interest Litigation?

Bonded Labour

Starting from the *Darshan Masih* case, the issue of bonded labour is unresolved, even in neighbouring India.[1258] Menski's poststructural defense of Public Interest Litigation is that while South Asian middle-class activists and their Western supporters had never seriously put themselves in the feet of a bonded labourer in "South Asian conditions of life," that should not be an excuse. At least the courts stood with the disadvantaged and argued that more resources should be directed to them.[1259] However, this does not explain the actual place of law in social change.

In Pakistan, activists and social movements adopted Public Interest Litigation from the very beginning in the *Darshan Masih case*.[1260] To end the issue of bonded

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[1257] Supreme Court Chief Justice Iftikhar Chaudhry, keynote address, the inaugural session of National Judicial Conference 2010, 16-18 April, 2010. Online: <http://ljcp.gov.pk/Menu%20Items/NJC-2010/PDFs/PRESS%20COPY%20OF%20INAUGURAL%20ADDRESS%20OF%20HCJ%2016.04.2010.pdf>, last visited Dec 02 at 9.

[1258] Bonded labour was abolished in India in 1973 by Article 11 of the Constitution, by the *Bonded Labour System Abolition Act*, 1992, and the *Bonded Labour System (Abolition) Rules* of 1995. See Werner Menski (1997), "Public Interest Litigation: A strategy for the future. The Fourth Cornelius Memorial Lecture" in Werner Menski, Ahmad Rafay Alam & Mehreen Kasoori Raza, ed.s, *Public Interest Litigation in Pakistan* (London: Platinum publishing limited and Karachi: Pakistan Law House, 2000) 106 at 121.

[1259] Werner Menski (2000), "Introductory Overview of Public Interest Litigation in Pakistan; Past Future" in Menski et al., *supra* note 248 1-21.

[1260] Indian courts followed the legislation in bonded labour, whereas in Pakistan, the judiciary followed the Indian judiciary. It gave the decision of *Darshan Masih*, after which the Pakistani

labour, they adopted extensive legal means, but they also joined hands with the Pakistan Mazdoor Kissan Party (or the Pakistan Workers and Peasants Party) to fight the issue from a political base.[1261] In the 1990s, these movements started relying on foreign funds to establish schools for the children of the bonded labourers and to fight legal battles. Slowly, the leadership of these NGOs left the class struggle political debate and class itself (the class position of the bonded labourer). The focus became for them to help the poor and their rights only. This departure political and apolitical NGOs was complete when the Pakistan Workers and Peasants Party decided to step back from the bonded labour NGO movement, which was fully indulged in accepting foreign fund assistance. After some time, foreign funds dried up for bonded labour activities, as the priorities of donor agencies changed to women rights, the environment and consumer protection for emerging markets by the end of the 1990s. Foreign funds moved directly to decentralization under good governance in 2000s. The lack of funds in bonded labour projects resulted in infighting between groups of NGOs, further reducing the interest of the middle class and petty bourgeois NGOs in the issue, as these classes were more interested in 'good governance' decentralization. Courts, as a part of state formation, responded accordingly.

According to Ghualm Fatima, General Secretary of the Bonded Labour Liberation Front, there was relief given in the *Darshan Masih* case. But this was just a decision.

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legislature responded. India passed *Bonded Labour System (Abolition) Act*, 1976 and prominent cases followed were *People's Union for Democratic Rights v Union of India*, AIR 1982 S. C. 147, *Bandhua Mukti Morcha v Union of India*, AIR 1984 S. C. 802, *Balsam v State of M. P.*, AIR 1990 Supreme Court 44.

[1261] Interview with Abdullah Komoka, Secretary General, *Pakistan Mazdoor Kissan Party* (Pakistan Workers and Peasants Party-PMKP) dated Dec 2, 2013.

Later, the *Bonded Labour Act* was passed, but the Supreme Court still could not abolish bonded labour in spite of this legislation. According to her, the Supreme Court was busy in big political cases and couldn't bother with 4.5 million brick kiln workers.[1262] On September 12, 2012, the Bonded Labour Liberation Front asked the Supreme Court why they weren't looking at their own decisions and violations after these decisions. Her stance was that the activists could hardly compel the courts to give decisions, but then the courts overlooked their own decisions. That is why a slogan used by the group was *'tum fayslay bhi khaw gayay; tum qawaneen ura gayay,'* which means 'You have eaten away the decisions; you have thrown away the laws.[1263] Fatima stated that '*contempt of court'* was a common complaint in elite politics, but her issue was *contempt for workers* by the judiciary. For example, judges frequently claimed that bonded labourers were fraudulent. They argued bonded labourers who got advances of Rs 50000 ($500) were 'habitual' debtors rather than question why the brick owners indebted the labourers for life with these petty loans. Once, a judge said, "Oh, there are bonded labourers in the court. They ran away with my Rs. 45,000."[1264] What a judge, what a court! Fatima's view was clear – bonded labor cannot be abolished as long as the feudal system remains. All the feudal lords themselves are brick kiln owners and are sitting in the assemblies. District Nizams

[1262] These figures are according to BLLF. It does not include other small informal sector industry and agriculture labour where bonded labour is rampant. Fatima defined that every labourer who is 'bound' and gets less than Rs 5000 per month (approx. $50) is a bonded labourer. Contractors only took young men. The bonded labourer was given Rs 2500 ($25) and 40 kg.s of wheat per month. He and his family are expected to work round the clock for the landowner. They are used to settle enmities and are even used to commit thefts and other illegal activities for the landowner. Interview with Ghulam Fatima**,** General Secretary Bonded Labour Liberation Front, BLLF, dated 20/12/2012

[1263] *Ibid.*

[1264] *Ibid.*

(local governments heads) themselves were invigilating the implementation of law and were torturing the bonded labour. The 33% of women in the legislative bodies were not from movements but from the same elite political families, though they often had no political background. Until and unless there will be representation of the working class in the assembly, there will be no change.[1265]

Gender and Public Interest Litigation

The most highlighted contribution of the judiciary was its protection of the right to property for women.[1266] The constitution of Pakistan gives ample opportunities for women's rights,[1267] but they are not enforced.[1268] The judiciary, being part of the social formation, also carried these prejudices of a male-dominant society. Supreme Court Chief Justice Ajmal Mian admitted that the position of women in Pakistan is not good as in U.S. and Canada but added that it is not as bleak as is often presented in Western media as Pakistan has women with roles in various walks of life.[1269] Subordinate and superior

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[1265] *Ibid.*

[1266] In the *Ghulam Ali* case, PLD 1990 Supreme Court 1, the court clearly stood for female's (daughter's) rights in inheritance even if the legislature was lagging. Even in the *Kalsoom Bibi* case, 2005 SCMR 135, the court took notice of deprivation of females from property in the form of gift and relaxed the rule of the burden of proof on the respondent beneficiary. See also the *Muhammad Ashraf* case 1989 SCMR 1390.

[1267] The Constitution of Pakistan has three sets of provisions related to rights. First, background provisions (2A, 3, and 4) which are preamble of the Constitution. Second, the provisions relating to fundamental rights (Article 8, 9, 14, 23, 24, 25 etc) third set of provisions are principles of policy (Article 33, 35, 37 (a), 37e, etc)

[1268] Dr. Muhammad Farogh Naseem, "Constitutional Guarantees for the Rights of Women and their Implementation" (1998) PLJ 1998, Journal, 31 at 35. The writer is LLB (Hons.) (Wales), LLM (London), PhD (London) of Lincoln's Inn Barrister-at-Law.

[1269] He gave the reference of Business Recorder, Jan 3, 1999 in his book. This judicial education program on gender issues was held by the Asia- Pacific Advisory Forum on Judicial Education on Equality Issues in Lahore on Jan 2, 1999. Madam Justice L' Heureux- Dube of Canada was present. See Justice Mian, *supra* note 76. He dedicated one page out of his 383 pages

judiciaries are also involved decisions with a gendered bias and they could not surpass their various prejudices.[1270] According to Retired Justice of the Lahore High Court, Nasira Javed Iqbal, "judges are ready to believe the worst about women" and are supporting male aggressors by sending the women back to their homes from where they ran away from forced marriages and also lowering the threshold of provocation (which is a defense in a murder case) in honour killings and in punishing the rapists.[1271] The criminal justice system has utterly failed in protecting women against honor killings, domestic violence, Karo Kari, forced marriages, rape, and family feuds.[1272] Even courts allowing marriage according to women's wishes reduce sentences if such women are killed by the contending parties or the family.[1273] Farzana Bibi had to protest that "it is highly unfortunate that the so-called custodians of the constitutional rights of the citizens are violating the constitution by upholding and reinforcing archaic tribal value systems,

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autobiography about this topic. Justice Sajjad Ali Shah's834 pages long repetitive auto-biography did not include the word gender (though it does mention the Ghouri missile), women or women's rights (though World Bank) or female/feminism. Same is the case with Anwarul Haq's collection of speeches.

[1270]Nasira Javed Iqbal JLHC (ret., as she then was), *Judiciary and Gender Bias*, A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1. The counter claim is that the superior judiciary is always vigilant but the subordinate judiciary has also played an effective role in the protection of human rights. See Muhammad Nawaz Abbasi, J. Supreme Court, "Human Rights in Pakistan: Concepts and History of Human Rights" (2004) PLD 90 at 105.

[251] The punishment for a rapist is the death sentence but it has not been granted till date. See Nasira Javed Iqbal JLHC (ret., as she then was), *Judiciary and Gender Bias*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.

[1272] Unfortunately, the pioneer of PIL, Afzal Zullah Supreme Court Chief Justice (January 1, 1990 to April 18, 1993) was in favour of the reduction of sentences on the question of family honour, *ibid.*

[1273] Mohammad Riaz and Mohammad Feroze were given life imprisonment for killing their sister marrying after her own heart. LHC found it worth 18 months only, and, released them. The court held, "in our society nobody forgives a person who marries his sister or daughter without the consent of parents or near relatives." *Ibid.*

chauvinism, fanaticism and political expediency."[1274] The liberation of women always comes with a proviso among the most enlightened jurists. While talking about how male-dominated thinking is suppressing women, in the very next sentence, a jurist can jump to a proviso, such as this "does not mean that there should be a license to obscenity or that women should be let completely loose and encouraged to become paranoid about their rights, independence and feminism."[1275]

The problem exists at every level of the judicial structure. Female judges are not given proper courtrooms, residential facilities, medical facilities or promotions by the male-dominated judiciary. Retired Justice of Lahore High Court, Fukhrunisa Khokhar claimed that there are only 6% women in the subordinate judiciary and there is no female judge in the Supreme Court.[1276] The judiciary often accused the legislature of not legislating. What about the fact that amendments in Section 3 of the *Family Court Act* of 1994 made mandatory the presence of at least two judges in family court in each district, which has not been implemented by the judiciary? In 1994 (while Benazir Bhutto was Prime Minister), five female judges were appointed but none of them was allowed to work as Chief Justices of High Courts, though two of them could easily be considered for Lahore High Court and Peshawar High Court of North Western Province-NWFP. Both were superseded and were allowed to retire without elevating to Supreme Court. Supreme Court Chief Justice Sajjad (as he then was in 1995 when Benazir appointed female

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[1274] *Ibid.*
[1275] Dr. Muhammad Farogh Naseem, "Constitutional Guarantees for the Rights of Women and their Implementation" (1998) PLJ 1998, Journal, 31 at 35.
[1276] Fukhrunisa Khokhar JLHC (Ret., as she then was), *Judiciary and Gender Bias*, A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1.

judges) was even respectful of the idea and insisted that they should fulfill the 'constitutional requirements.' He refused the appointment of a "lady judge" from judicial service to be appointed as a judge. Benazir Bhutto insisted, but according to Sajjad, she was not sufficiently senior.[1277]

At the same time, judges used plural legal frameworks to remove the rigours of the laws adopted in the name of Islam.[1278] The judiciary did not touch the Hudood Laws, but no one was executed and the courts did not convict anyone. Doctors refused to do amputations.[1279] According to Samar Minallah, the judiciary played a proactive role in abolishing the customs of Swana, Vanni or Sang Chatti,[1280] which are "culturally sanctioned forms of violence" and an abuse of fundamental rights by *Panchayts* or *jirgas*, who claim the customs are "an indigenous means of alternate dispute resolution mechanisms."[1281] The judiciary in Pakistan strongly stood against the Jirga presenting itself as a 'modernist' force. Through an amendment Section 310-A in the Pakistan Penal Code-PPC, the *Swana* custom was criminalized in 2004. On December 16, 2005, the

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[1277] Justice Sajjad Ali-Shah CJSC (ret. As he then was) *Law Courts in a Glass House: An autobiography* (Karachi: Oxford University Press, 2001) at 229.

[1278] Shaheen Sardar Ali, *Applying Islamic Criminal Justice in Plural Legal System: Exploring Gender- Sensitive Judicial Responses to Hudood Laws in Pakistan*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1 at 1, and 11. The writer was Professor of Law, University of Warwick and Professor at the University of Oslo, Norway. Formerly, Professor of Law, University of Peshawar, Pakistan; Provincial Minister for Health, Population and Women's Development, Government of the NWFP, Pakistan and Chair of the National Commission on the Status of Women, Pakistan.

[1279] Interview with senior lawyer, Abid Hassan Minto**,** Dated December 20, 2012.

[1280] *Swana*, *Vanni* or *Sang Chatti* are the customs women/girl are given in dispute settlement of usually murder cases to keep traditional peace. The proceedings are conducted by *jirga* or traditional *panchayats.*

[1281] Samar Minallah, (2006) *Judiciary as a Catalyst for Social Change.* A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1. The researcher is an anthropologist and Executive Director, Ethno Media and Development.

Chief Justice declared *Jirgas* to be a negation of the concept of 'civilization.' But this viewpoint does not go uncontested. Justice Javed Iqbal, while discussing delays in the judicial system, appreciated the fewer delays in the courts under the Baluchistan system, giving the informal *Sardari* system as the reason for the lower case load. He favoured the system's mediation to create a "win-win" situation in litigation as opposed to the zero-sum outcome of adjudication system.[1282] The feudal chiefs or *sardars* themselves sitting in legislation could not legislate against them.[1283] Even Benazir Bhutto appreciated *Jirga* and conducted it by herself.[1284]

Let us then turn to the potential for women's emancipation in Public Interest Litigation. Suffice it to say that, in Pakistan, 80% of rapes are never reported and only the most resilient and resourceful go for First Information Report-FIR.[1285] Secondly, the following factors reduces the relief further:

1) Gender bias in judiciary itself

2) What percentage reaches the higher judiciary

3) What percentage of cases the court takes notice of

4) What percentage it can implement the decisions

[1282] Justice Javed Iqbal, *The Role of Judiciary as a Catalyst of Social Change*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1, 1-18 at 15.

[1283] In 2006, a parliamentarian and a District Nazim (administrator) were involved in handing over five girls to the rival party. Supreme Court here took a *suo motu* notice. Sindh High Court Sukhar bench explicitly declared holding a Jirga as illegal and unconstitutional and banned them. In spite of this, feudal members of the Sindh government enacted the *Sindh Amicable Settlement of Disputes Ordinance (SASDO),* 2004. In 2002 in the *Aba Khel Vanni* case in Mianwali, the Nawab of Kalabagh himself handed over 8 girls to resolve a very old dispute.

[1284] See Benazir Bhutto, *Daughter of the East: An Autobiography,* 2nd ed. (London: Simon & Schuster, 1988, 2007)

[1285] Justice Khokar, *supra* note 266.

5) To what extent legal relief is relief when social, economic and political relief are not available,

6) Even in those cases which were reported and persuaded on behalf of weak and very poor,[1286] the actual motivators have been NGOs for the last two decades. The media also claims credit as in *Mukhtaran Mai case*.[1287] So one is compelled to conclude that activism and political struggle are the saviors, not the judiciary.

7) Even when these activist groups go for relief to these judges, it is a minor part of their own work.

Women's rights activists had to fight against the judges and their conservative approach. Today's NGOs are not only refused by the judiciary when they go for broader political aims, they also can suffer the reduction of their funding. Let us recall Alavi's analysis in the very early days of the women's movement in Pakistan.[1288] He condemned the Left view of the women's rights movement as bourgeois elitist,[1289] and he gave a class analysis of the movement and its different layers. The agricultural Green Revolution relieved peasant women from outdoor work but increased repression on them within the household. He commented on how women's income in middle class families presaged a

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[1286] Like the famous *Mukhtran Mai* case.

[1287] Najam Sethi, *Role of Media in Dispensation of Justice*. A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1. He was the Editor-in-Chief, *Daily Times* and the *Friday Times*, Pakistan.

[1288] He tried to analytically understand the roots of the women rights movement in Pakistan (as seen in the work of the Women's Action Forum, Democratic Women's Association, Sindhiani Tehrik, and Women's Front)

[1289] Babar Ali, "Elitist View of Women's Struggle in Pakistan" (May 14, 1988) *Economic and Political Weekly*, cited by Alavi as an example. See Hamza Aalvi, ("Pakistan: Women in a Changing Society" (June 25, 1988) *Economic and Political Weekly* 1328-1330.

restructuration of family life and redefinition of moral values. "The whole problem arises from the crisis of middle class and lower middle household economy," he argued. For him, respect and dignity are middle class concepts.[1290] Working class women were less involved in women's rights movement. He felt the need to find ways to go beyond the "confines of the salaried urban middle class and lower middle class women and to work for mobilizing women for the wider sections of society."[1291] To bring the story to the present, opting only for law-centred and legal struggles also says a lot about the women's movement in Pakistan. Excessive legal struggles does not show the strength of the movement but the weakness of class struggle of these and their thin mass base.

Public Interest Litigation and the Environment

The biggest claim for success by Public Interest Litigation is in the area of environment. Dr. Pervez Hasan, a pioneer in this area,[1292] evaluated the *Shehla Zia case.*[1293] For him, Pakistan has among the most advanced environmental laws[1294] but

[1290] Hamza Alavi, "Pakistan: Women in a Changing Society" (June 25, 1988) *Economic and Political Weekly* 1328 at 1329.
[1291] *Ibid* at 1330.
[1292] See, generally, Parvez Hasan and Azim Azfar, "Securing Environmental Rights through Public Interest Litigation in South Asia" (2004) 22:3 VELJ 216-217 See also, Parvez Hasan, "Judiciary Leads the Way" (1998) 15:1 The Environmental Forum 48. An earlier recognition of the evolving role of the Pakistan judiciary is noted in Parvez Hasan, "From Lyon the Otsu: Laws on Conservation and Wise Use of Wetlands" in *Towards Wise Use of Wetlands* (Asian Wetlands Symposium, 1992) at 22-25.
[1293]Dr. Pervez Hasan, "*Shehla Zia v. WAPDA*: Ten Years Later" (2005) PLD, Journal, 48-57, Presidential address at the First Annual Seminar of Pakistan Environmental Law Association held at the Dr. Pervez Hasan Environmental Law centre, University of the Punjab (New Campus) Lahore on 14th March 2004 for the Life time Achievement Award conferred by PELA on Mr. Justice (R) Saleem Akhtar.

nothing has happened on this front due to "a wide gap between legislative goals, declared national policies and their implementation."[1295] This gap between policy and implementation is highlighted in the good governance discourse, and the problem is reduced to a 'governance' issue. The *Shehla Zia* case exemplifies the policy and implementation gap.

Shehla Zia's life was endangered by electromagnetic effects of a high voltage transmission line designed to go through a posh area of Islamabad; thus, the court ordered an end to the construction. While Shehla was not interested to pursue the case, the NGOs spent money, as did the biggest corporate lawyer, Pervez Hasan, who represents local and international corporations that pollute the environment and was appointed as *amicus curie*.[1296] As opposed to this, the actual lives of millions are endangered when slum dwellers are moved from state land under the high voltage wires.

[1294] The *Pakistan Environmental Protection Ordinance*, 1983, establishment of Pakistan Environmental Protection Council chaired by the President of Pakistan. The 1983 Ordinance followed the experience of developed countries and set up a Federal Pakistan Environmental Protection Agency as well as Provincial Environmental Protection Agencies (EPAs) in the four provinces. The National Conservation Strategy was adopted in 1992 followed by Provincial Conservation Strategies. Later the Pakistan Environmental Protection Act, 1997 was promulgated. National Environmental Quality Standards (NEQS) were developed to guide industrial and other. The National Environmental Action Plan (NEAP) announced by the Government of Pakistan in 2001.

[1295] Dr. Parvez Hasan, "The Role of Judiciary and Judicial Commissions on Sustainable Development in Pakistan." A paper read at the International Jurists conference, Islamabad, 2006, *supra* note 1 at 48. The writer was an Advocate of the Supreme Court of Pakistan and High Courts of Pakistan, Senior Partner, Hasan & Hasan (Advocates), Lahore President, Pakistan Environmental Law Association. B.A (Punjab), L.L.B (Punjab), L.L.M (Yale), S.J.D. (Harvard).

[1296] Interview with Imran Akram, Barrister and Solicitor, Law Society of Upper Canada, Punjab Bar Council, and adjunct professor at the University Law College, Punjab University, Nov 10, 2013.

From the Environment Commission in the *Shehla Zia case*[1297] to the *salt mines* case[1298] to the *Mahmood Booti* case,[1299] the elite interest of environment cases is repetitive. But the problematic part in the analyses of these elite environment commissions is the "public-private" model, which results in 'built to operate and transfer' investment of the private sector. This is not more that the market endeavouring to control its own excesses.

Conclusion

I argue on the basis of the previous analysis that the notion of rights as a relief for the subordinate classes has a very limited emancipatory value when the subordinate classes have no power. Subordinate classes can invoke the legal political institutions of the state but this route is usually not productive. It results in huge costs to the two parties, including lengthy delays. Lawyers engaged are parasitic middlemen (and women) and workers have found formal legal codes cumbersome and illegible.[1300] The 'addiction to litigation' cannot be a substitute for mass mobilization. *Roti, Kapra aur Makaan* (meaning Food, Clothing and Shelter) – a quote from the Pakistan People's Party

[1297] In the *Shehla Zia* case, NESPAK (a semi government construction enterprise) was made the commission to look at the plan of the grid station of WAPDA (a state sector power producing and distributing agency).
[1298] *General Secretary, West Pakistan Salt Mines Labour Union (CBA) Khewra, Jhelum v. Director, Industries and Mineral Development, Punjab Lahore,* 1997 SCMR 2061.
[1299] *City District Government v. Muhammad Yousaf*, I.C.A No. 798/2002 filed before the Lahore High Court. Here in this case, the petitioner challenged the use of a site for dumping solid wastes.
[1300] During the work in Okara and Charsada around peasant struggles, lawyers admit playing such a role. See Akhtar, *supra* note 13 at 208.

founding manifesto – was the old program (1970s), geared towards substantive needs. The current rhetoric is one of legalism and rights and, it remains hollow.[1301] In the 'good governance' framework, the rule of law is posited as fundamental to a wide range of societal and developmental goals, including expanding and deepening the reach of democratic institutions, empowering the working classes and granting rights. Locally, the judiciary's claim about its role of political development and governance rests on two connected claims. The judiciary could not defend democracy in the face of military coups but could by protecting fundamental rights. Throughout my dissertation, I engaged with both claims in an interconnected manner in relation to political development (or governance). My analysis suggests that the judiciary has been crucial in the reproduction of state and political inequality in Pakistan. The rights discourse of the judiciary has been a poor substitute for this democratic deficit.

[1301] Dr. Mubashar Hasan, cited by Akhtar, *supra* note13 at 219.

Chapter Seven

Conclusion

In this dissertation, I have sought to empirically substantiate my theoretical claim that firstly, the judiciary is limited for its emancipatory value, and secondly, the judiciary is a crucial link in the reproduction of state and political inequality. My claim obviously has serious bearing on the central role that is given to the judiciary by the World Bank and other think tanks. It also has a bearing on how Pakistani society views the judiciary, which currently tends to be as a potential saviour from military dictatorship. I hope to have laid this perspective to rest.

I have read the judiciary's role in the political development of Pakistan through its appointments, its decisions and reasoning, as well as its views and philosophies as expressed by its members, especially the successive Chief Justices. I define each era of the judiciary by its Chief Justice. I have used primary and secondary sources, such as biographies, as well as all the relevant case law to substantiate and explore my claim. By locating each case within a political context, I hope to have properly exposed the overall problematic role of the judiciary as a key state institution in the two ways as outlined above in Pakistan's political development. I have hoped to show the limits of the capacity of the judiciary to correct the ills of society, tame the corrupt ruling elite, correct the stagnant and stubborn structure in order to implement beneficial policies, satisfy the vocal

middle class with the rule of law, as well as pacify people with the hopes of rights entitlements.

My main point is that these limits have nothing to do with individuals, or good or bad judiciary and judges in the postcolonial societies. Rather, as the problems I listed are structural, the solutions also need to be structural. I have thus criticized the theory and practice of institutionalism and the "good governance" paradigm as promoted by international actors as sorely lacking. At a general level, the 'institutionalists' hold that the problems of postcolonial societies arise from the deviations from a number of 'ideal' institutions,' (liberal democracy) 'laws,' (market economy), and 'values' (rule of law). World Bank has a 'standard' and 'ideal type'; and 'measures' the 'deviations' through World Bank Good Governance Indicators (WGIs). The idea is that the developing world should be 'tuned' (synchronize) to these 'numbers' and correct the 'functioning' of the governance. I call it Hegelian Weberian institutionalist-functionalism even as it parallels the current phase of the "law and development" school of research and theory.

I have argued in contrast that institutional and constitutional arrangements in Pakistan in the post-colonial era have been reflections of class formations and deep structures organized through property relations and imperialist dependency relations. To correct and change institutional arrangements requires an extra-institutional orientation and to change the deep rules. This is particularly true when these organizing principles (structures), like dependency imperialist relations of the post-colonies, as well as unequal

distribution of land and wealth, are themselves the *main* hindrances on the path of political development.

In the good governance paradigm, legal institutions are considered as enabling as well as restraining. My dissertation showed that are enabling largely for the more equal (the powerful) partners in the legal, constitutional and institutional arrangement, and have been a restraining factor for the majority. Legal and constitutional arrangements and their respect for 'stability,' 'predictability,' and 'certainty' can be an enabling factor for the dominant classes but are restraining for the majority once they are entered into and then subordinated in an institutional arrangement. Therefore, the judiciary is not just limited in its abilities, but also plays a role in reproducing inequality.

This leads us to two other problematic assumptions in this paradigm -1. that every strategic actor is present in a legal, constitutional and institutional arrangement, and 2. that there is a consensus behind institutions. In this regard, I have attempted to show that in all institutional arrangements in Pakistan - from democracy to dictatorship - working class formations were missing. There was a deliberate focus on stopping the participation of the popular masses during modernization. Neo-colonialist or imperialsti design also cannot seen as present in all state formations and constitutional arrangements and is never noticed or mentioned in legal decisions and discourse. But, this is very much internal to the state and society of postcolonial Pakistan. While the continuous cry is for the wholesale transformation of the legal system the actual beneficiaries are left nameless.

There is also no consensus behind legal and constitutional arrangements. From elections, property laws to current wholesale legal amendments and enactments under globalization amounting to state sell-off and large-scale privatization of key economic sectors, marginalized sections do not know by whom and when are signed these agreements and how 'political' or 'civil' society has represented them in these 'talks.' Secrecy, control and profit-raking, as well as coercion and not consensus, lies behind the new legal arrangements.

Finally, I have also attempted to find space beyond legalism and constitutionalism, which I suggest can range from non-legal class and political struggles to self–governance for tribal and indigenous communities. These struggles which stress substantive rights over land and resources, beyond formal entitlements in the 'constitutional' arrangements, could remove key hindrances on the path of political development in postcolonial societies. What role the judiciary would play here, or what form it would need to take to play a role on this front, is, beyond the scope of this dissertation. I hope, through this dissertation, to have laid the ground for that next discussion.

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