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Approaches to Legal and Judicial Reform in Pakistan: Post Colonial Inertia and the Paucity of Imagination in Times of Turmoil and Change

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Contents

I.	Introduction	
	A. Condemnation And Comprehension.....	3
	B. ‘The Dictatorship Of No Alternatives’ — The Taliban Solution, A Self-Reforming Judiciary And More Usaid.....	5
ii.	Law, The Game Of Economic Struggle And The Limitations Of Legal Discourse.....	16
iii.	A Typology Of Legal And Judicial Reform Approaches In Pakistan.....	22
	A. The ‘Specific Issues Based Incremental Amendment Approaches’.....	23
	B. The ‘Institutional Malaise Approaches’.....	25
	C. The ‘Efficiency Plus Approaches’	27
	D. The ‘Human Capital Development Approaches’	33
	E. The ‘Islamization Of Law And Legal System Approaches’.....	35
	F. The ‘Judicial Activism Approaches’.....	39
	G. The ‘Access To Justice As A Function Of Access To Economic And Political Empowerment Approaches’	43
	H. A Uniform Ethos: Different Avatars?.....	46
iv.	Post-Colonial Inertia And The Poverty Of Imagination.....	49
	A. From The Colonial To The Post-Colonial Era — Elements Of Continuity And Its Custodians.....	49
	B. False Starts And Aborted Idealism — India’s Failed Romance With A New Ethos	55
	C. The Centrality Of ‘Law’ In Contemporary ‘Law And Development’ Discourse — A Poor Substitute For Questions Political And Economic.....	59
	D. Conclusion.....	63

A. Condemnation and Comprehension

There is no paucity of recent critical attention to the failures of the Pakistani legal and judicial system and the differential level of access to justice enjoyed by Pakistani citizens. In fact, more so than at any stage in Pakistan's recent history, legal and judicial system reform is currently a prominent, strident and divisive theme in its political, judicial and social discourse. The verdict on the prevalent Pakistani legal and judicial system is uncontroverted — it does not work very well, and to the extent that it does, its benefits are differentially distributed, with a clear tilt to those with better access due to class, capital and social networks. That is not to overlook bright periods, judgments and outcomes in its over sixty -year long history. However, overall, not many would disagree that it is slow, expensive, vulnerable to exploitation and misuse, coercive, unintelligible to the majority due to its complexity, made further inaccessible due to poor regulation of the legal profession, and resilient to reform. This denunciation is apparent across a wide array of internationally funded law reform project reports on Pakistan; internal assessments by various Pakistani Law Commissions as well as other local government and non-government agencies, and indeed, various judgments of the Pakistani appellate courts. The policy document for a major USAID funded justice sector reform project that was supposed to be launched in Pakistan in 2009-10 has the following summation on the state of the Pakistani judicial system. It says: "Legal experts and the public regard Pakistan's judicial system as weak, poorly administered, under-funded, insufficiently transparent, low in morale and burdened by exceedingly slow court proceedings."¹

Other recent reports on the current state of and challenges faced by the Pakistani legal and judicial system deliver a similar verdict. They highlight its historical structural weaknesses, ineffectualness and politicization; an inadequate oversight of the functioning of lower courts by the higher courts due to both capacity constraints and lack of inclination; and, the overburdening, under-resourcing, case backlog and prevalent corruption of its trial courts. They conclude that these limitations in turn make the harsh but relatively swift and transparent parallel justice on offer by the Taliban and other militant groups in some Pakistani regions attractive to sections of the general population.² Other international reports stress the need to shift from pure 'brick and mortar' reforms to training and human capacity building, in order to tackle the challenges of what they describe as overloaded courts, as well as meagerly compensated and often corrupt judges and poorly trained lawyers.³ Still other reports emphasize, apart from the usual stress on the underfunding and neglect of the judicial organ, greater focus to address various structural and political factors contributing to regular violation of judicial independence,

² See for instance, CAROLINE WADHAMS, BRIAN KATULIS, LAWRENCE KORB, and COLIN COOKMAN, *Partnership for Progress: Advancing a New Strategy for Prosperity and Stability in Pakistan and the Region*, (CENTER FOR AMERICAN PROGRESS November 2008) at <http://www.americanprogress.org/issues/2008/11/pdf/pakistan.pdf>

³ THE NEXT CHAPTER: UNITED STATES AND PAKISTAN, A REPORT OF THE PAKISTAN POLICY WORKING GROUP (September 2008) at http://nesa-center.org/uploads/PPWG_Report_2008_11.pdf

as well as inadequate judicial accountability. They also call for the repeal of various laws that they categorize as discriminatory on the basis of religion and gender.⁴

For those more empirically inclined, public perception surveys exploring what ordinary people think about the legal and judicial system invariably reveal lack of faith in the courts, especially from those belonging to less privileged and more vulnerable groups of society.⁵ Public surveys that document feedback from members of the public actually encountering the judicial system also report widespread experience of financial corruption.⁶ Backlog of cases and delayed legal proceedings are also highlighted as a

⁴ CRISIS GROUP ASIA REPORT N°160, REFORMING THE JUDICIARY IN PAKISTAN, 16 October 2008 at http://www.ssrnetwork.net/uploaded_files/4248.pdf. Other relevant reports from the Crisis Group contain CRISIS GROUP ASIA REPORT N° 86, BUILDING JUDICIAL INDEPENDENCE IN PAKISTAN, 10 November 2004; CRISIS GROUP ASIA REPORT N° 137, ELECTIONS, DEMOCRACY AND STABILITY IN PAKISTAN, 31 July 2007; and CRISIS GROUP ASIA BRIEFING N° 70, WINDING BACK MARTIAL LAW IN PAKISTAN, 12 November 2007.

⁵ See for example the GOVERNMENT OF PAKISTAN'S NATIONAL RECONSTRUCTION BUREAU: SOCIAL AUDIT OF GOVERNANCE AND DELIVERY OF PUBLIC SERVICES: BASELINE SURVEY 2002 — National Report. In terms of general perception about the purpose of courts, only 46% of the household respondents in this national household survey conveyed the view that the courts were there to help them, with a lesser percentage of the respondents communicating such hopeful perception in the smaller provinces, in the rural areas, amongst the women; and, the 'vulnerable households' — (though possibly also, in the opinion of the report writers because less people in this category were in a position to express a definite opinion due to their lack of exposure to courts). The most common reason given by those who did not agree with the observation that the courts are there to help people was that one needed money to go through a court. 8% of the respondents from all over the country reported a contact with the courts in the last five years, with less frequent contacts in the smaller provinces, as well as by female respondents, 'vulnerable households,' and households that were more remotely located from a court. 51% of the households that had actual court contact in the last five years expressed lack of satisfaction with the experience; with once again gender and vulnerability of the household acting as important contributing factors. GOVERNMENT OF PAKISTAN'S NATIONAL RECONSTRUCTION BUREAU: SOCIAL AUDIT OF GOVERNANCE AND DELIVERY OF PUBLIC SERVICES: BASELINE SURVEY 2004-05 shows some improvement in the percentage of households who have the perception that courts are there to help, as well as in the percentage of households that had a satisfactory court contact in the last two years.

⁶ TRANSPARENCY INTERNATIONAL PAKISTAN: SURVEY ON NATURE AND EXTENT OF CORRUPTION IN THE PUBLIC SECTOR, March 2002; and, TRANSPARENCY INTERNATIONAL PAKISTAN: NATIONAL CORRUPTION PERCEPTION SURVEY, 2006. According to the 2002 survey, 96% of the respondents who had contact with the lower courts had encountered corrupt practices. In terms of popular public perception, 55% of the respondents in the 2006 survey described the judicial system as corrupt. TRANSPARENCY INTERNATIONAL'S GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS places Pakistan amongst a list of countries where, according to its survey, more than one in three recent court users had to pay a bribe. There is a higher percentage of people who hold on to the perception of corruption in the judiciary, than those who actually reported having to pay a bribe. People put judges on a top of a list of functionaries they are dissatisfied with. The list also contains lawyers, police, court staff, prosecutors etc. Delay and backlog of cases is another recurrent theme in these reports. According to the 2007 report, in Punjab, more than 770,000 civil and criminal cases were pending. See

http://books.google.com/books?id=A8S6Yd047LcC&pg=PA12&lpg=PA12&dq=judicial+corruption+in+pakistan&source=bl&ots=LQbelle-5o&sig=arUEMvJOFseQMAYYiwnRgke0rFQ&hl=en&ei=WtXISqLE87JIAfp252SAw&sa=X&oi=book_result&ct=result&resnum=3#v=onepage&q=judicial%20corruption%20in%20pakistan&f=false

major issue.⁷ A perception of lack of judicial independence and neutrality is another prominent basis of critique. For instance, in 2003, the highest courts of the country came under scathing criticism by the Pakistan Bar Council — the national representative organization of Pakistani lawyers — which made public its first ever 'white paper', questioning judicial neutrality, since General Pervez Musharraf's military takeover in October 1999.⁸

The problem, therefore, does not lie in any absence of a critical discourse. The problem, as I shall argue, truly emerges due to certain common fallacies that introduce serious flaws in both the diagnosis of the problem and indeed in the prescription for its cure. Thus condemnation, as I shall attempt to show, does not necessarily always equate with a true comprehension of the nature and depth of the crises confronting the Pakistani legal and judicial system.

B. 'The Dictatorship of No Alternatives' — The Taliban Solution, a Self-Reforming Judiciary and more USAID

Who, or why, or which, or what, Is the Akond of Swat...

*Do his people like him extremely well?
Or do they, whenever they can, rebel,
or PLOT,
At the Akond of Swat?*

*If he catches them then, either old or young,
Does he have them chopped in pieces or hung,
or SHOT,
The Akond of Swat?*

*Do his people prig in the lanes or park?
Or even at times, when days are dark,
GAROTTE,
The Akond of Swat?*

*Does he study the wants of his own dominion?
Or doesn't he care for public opinion
a JOT,
The Akond of Swat?...*

⁷ TRANSPARENCY INTERNATIONAL: NATIONAL INTEGRITY SYSTEMS – COUNTRY STUDY REPORT PAKISTAN, 2003.

⁸ See HUMAN RIGHTS COMMISSION OF PAKISTAN'S REPORT at <http://www.hrcp-web.org/InternsDisplay.aspx?id=11>

(The Akond of Swat, Edward Lear 1812-1888)

...the Akhund of Swat had two sets of progeny. On the one side were his disciples and deputies who collectively assumed the mantle of Sufi leadership. On the other were his own sons and grandsons, known by the title of miangul (flower of the saints), who took over the Akhund's position of political leadership in Swat and also inherited a degree of spiritual authority from him as well.

(Heroes of the Age: Moral Fault Lines on the Afghan Frontier, Edward B. Edwards, University of California Press: 1996)

Recently, Roberto Unger has aptly described the lack of intellectual ingenuity of national and international politics to move beyond the self-imposed constraint of choosing amongst existing models of political governance and economic growth, as ‘the dictatorship of no alternatives.’⁹ The domestic discourse in Pakistan is no different as I shall shortly attempt to demonstrate, with the caveat that recently some radical new solutions have been forced onto the table, which do not quite fit anywhere on the usual spectrum of legal and judicial reform programs. I will start with the most prominent such outlier first.

The first half of 2009 brought to international attention the increasingly violent events in the valley of Swat in North-Western Pakistan. It also demonstrated the combustible potential of law reform as a felt issue, as well as a handy slogan for aspirants to political control and power who have no qualms about the use of brutal force and violence. Swat was historically governed by a local ruler (historically known as the Akhunzada or the Akhund of Swat; subsequently the title of the ruler became the Wali of Swat) who dispensed largely discretionary but affordable and quick justice by employing a much more tolerant amalgamation of Islamic as well as local customary law.¹⁰ Edward Lear’s enigmatic and misspelt ‘Akond of Swat’ in his nonsense verse with the same title is the same person, though perhaps equally enigmatic today to most Pakistanis except those living in Swat.¹¹ Nostalgia in the valley of Swat, however, for that bygone era when the

⁹ ROBERTO UNGER, *WHAT SHOULD THE LEFT PROPOSE?* (Verso 2005)

¹⁰ For an interesting nostalgic description of this form of local justice see an interview with the last Wali of Swat in CHRISTINA LAMB, *The Wali of Swat mourns his lost land*, *The Sunday Times*, May 24, 2009 at <http://www.timesonline.co.uk/tol/news/world/asia/article6350519.ece> See also the very interesting memoirs of the last ruler of Swat that shed light on important aspects of the political and social history of the valley, FREDRIK BARTH, *THE LAST WALI OF SWAT* (White Orchid Press 2008).

¹¹ This is not to rule out that Edward Lear was deliberately poking fun at a local Indian ruler whose governance system stood apart from the legal system introduced by India’s colonial rulers; making him sound like a comical and semi-mythical creature. See for instance:

*...Is he tall or short, or dark or fair?
Does he sit on a stool or a sofa or a chair,
or SQUAT,
The Akond of Swat?*

Is he wise or foolish, young or old?

Akhunzada dispensed justice, is arguably not just romantic but also symptomatic of growing weariness with his replacement — the mainstream Pakistani legal system with its colonial antecedents. To better understand recent events in Swat, one also needs to shift the scrutiny back to the nineteenth century and understand the reasons for its historical affinity to radical Islamic ideologies and movements.¹² However, focusing for the moment on recent events, the outbreak of violence in Swat is as likely a manifestation of the growing popular disgruntlement with the slowness and venality of the existing legal and judicial system, rather being merely a manifestation of the growing popularity of the Taliban brand of governance in Pakistan's North-West and of course in adjacent Afghanistan. In fact, it is well worth exploring whether there was any deeper local support in Swat for the substantive elements of the Taliban brand of Islam at all — substantive elements that remain largely unarticulated. One cannot ignore that since the effective Pakistani military operation in Swat earlier last year to wipe out Taliban networks and presence from the area, reports from the ground largely reveal a guardedly relieved local people. One cannot thus rule out that many of these may have been coerced into subservience to the Taliban's power consolidation and expansionist agenda.¹³ Taliban exploitation of local class resentments between wealthy landlords and their landless tenants also seems to have played a part.¹⁴ Importantly, however, the basic underlying disgruntlement with the existing legal system is still seething¹⁵ — and a delayed palliative may be an ineffectual one.

*Does he drink his soup and his coffee cold,
or HOT,
The Akond of Swat?*

*Does he sing or whistle, jabber or talk,
And when riding abroad does he gallop or walk
or TROT,
The Akond of Swat?*

*Does he wear a turban, a fez, or a hat?
Does he sleep on a mattress, a bed, or a mat,
or COT,*

The Akond of Swat?

¹² An insightful recent history that, *inter alia*, looks at Swat and surrounding areas and the fusion of jihad with a strand of anti-colonial nationalism is AYESHA JALAL, *PARTISANS OF ALLAH: JIHAD IN SOUTH ASIA* (Harvard University Press 2009). For an interesting review of the famous anthropologist Fredrik Barth's classical works on the political anthropology of Swat and its critiques see DAVID B. EDWARDS, *Learning from the Swat Pathans: Political Leadership in Afghanistan, 1978-97*, *American Ethnologist*, Vol. 25, No. 4 (Nov., 1998), pp. 712-72

¹³ See for instance the following Pakistani news reports: <http://ipsnews.net/news.asp?idnews=48856> ; and http://www.thenews.com.pk/editorial_detail.asp?id=190048 ; and also, <http://www.counterpunch.org/khan06042009.html> ;

¹⁴ See the New York Times story on this aspect at <http://www.nytimes.com/2009/04/17/world/asia/17pstan.html>

¹⁵ See <http://www.foreignpolicyjournal.com/2009/07/09/the-situation-in-swat-an-interview-with-shahid-r-siddiqi/>

The slogan of choice for the Taliban in Swat has of course been that their brand of Islamic *sharia* will provide quick and cheap justice, unlike the system it meant to replace. While remaining largely reticent about revealing the substantive ethos and facets of this *sharia*, their putting a premium on ‘speed’ of justice is quite interesting. What is remarkable about this choice of slogans is that the Taliban’s promise to bring about ‘delay reduction’ in the legal and judicial system places them in a position no different from other significant players in the current justice sector reform discourse in Pakistan. As a matter of fact, ‘delay reduction’ is also the main proclaimed reform slogan of the resurgent post-Musharraf Pakistani judiciary, as well as the prominent mantra of past and present massive international justice sector reform programs from the Asian Development Bank and most recently the USAID. These are strange bedfellows to say the least! This, however, raises the logical question: Can such ostensibly divergent philosophies to legal and judicial systems converge so closely in their prescription? Furthermore, it is logical to inquire whether their diagnosis of the primary ailment of the Pakistani justice sector is even accurate or are Pakistan’s current legal and judicial predicaments a direct function of more complex underlying social, political and economic tensions? However, before one embarks on further exploration of these questions, there is need for further analysis of the events leading up to the military operation in Swat earlier last year.

Swat is a ‘special territory’ under the Pakistani Constitution, historically governed under a special set of provisions provided for special territories in Pakistan’s Constitution.¹⁶ Before the Pakistani military started its operation in Swat, the battle lines were largely drawn around a governmental proposal for legal and judicial reform in Swat — the Nizam-e-Adl Regulation 2009 (literally ‘the system of justice regulation 2009;’ hereinafter the ‘*Nizam-e-Adl Regulation*’).¹⁷ The Pakistani government brought this controversial and hastily generated law to the table in order to appease the Swat public

¹⁶ Under the Pakistani Constitution Swat falls in the special territories that possess a distinct legal status as specially administered areas and former states at the time of independence in 1947. Part XII Chapter 3 of the Constitution deals with such ‘Tribal Areas’ which include areas which are directly administered by the Federal Government — Federally Administered Tribal Areas (FATA) as well as Provincially Administered Tribal Areas (PATA). Swat falls under PATA. Unless the Parliament especially provides for it through legislation, the country’s Supreme Court and the High Courts cannot exercise any jurisdiction in the ‘Tribal Areas.’ Further, no acts of Federal or Provincial legislation apply to these areas unless the President of Pakistan so directs. In other words, the extension of Pakistani laws and legal system to these areas vests with the President and is subject to exceptions and modifications by the same. The President, and through his approval the Governor of a Province, can also introduce regulations to these areas for purposes of bringing about ‘peace’ and ‘good government.’ The centralized mode of executive administration of these areas thus survives intact from its colonial antecedents.

¹⁷ See for the contents of THE NIZAM-E-ADL REGULATION, 2009 http://www.dailytimes.com.pk/default.asp?page=2009%5C04%5C15%5Cstory_15-4-2009_pg7_51 This is not a unique piece of legislation and in some ways draws upon earlier similar regulatory mechanisms for the region such as the Nifaz-i-Nizam-i-Sharia Regulation of 1994 and the Sharia Nizam-i-Adl Regulation of 1999. The legislative initiative was proclaimed by the Pakistani government as an endeavor to bring peace to the region, and to also address local demands for making justice delivery more expeditious. See the report from the Pakistani daily ‘The News International’ http://www.thenews.com.pk/top_story_detail.asp?Id=20372

and their largely self-appointed Taliban spokespersons at a time when the Swat Taliban were more or less holding the government in the valley under siege and blatantly running a parallel government. The possibility of armistice with the Taliban through such an accord was hailed by the Pakistani government as a step welcomed by the Swati locals, weary of Taliban presence and strong arm tactics, as well as wary of the cost of yet another military operation in the area in case a peace accord failed.¹⁸ However, the government came under severe criticism from international governments, media, as well as local political parties, media, civil society, and urban human rights groups etc., for what they considered its capitulation to Taliban blackmail. They feared that such an accord would be nothing short of an encouragement for the spillover of narrowly envisioned, harsh and repressive Taliban style Islam; and, that it would exacerbate militancy and coercion in other parts of the country, leading to the creation of additional states within the state.¹⁹ However, as it turned out, the government's attempt to implement the *Nizam-e-Adl Regulation* failed. Once the possibilities of an accord based on the *Nizam-e-Adl Regulation* failed and a military operation was launched to flush out the Taliban in Swat, the Pakistani media then went on to criticize the government in the wake of a growing crisis of internally displaced persons from Swat due to the military operation.²⁰ The Pakistani government as well as supportive sections of international media, however, maintained that an important shift in the political and popular mood had occurred in Pakistan in favor of the military operation due to blatant violation of the terms of the Swat peace accord by the Taliban.²¹

Stepping away momentarily from these events and moving to the design and details of the *Nizam-e-Adl Regulation* itself, there can be an argument that it addressed Taliban's Islamic aspirations in a rather facile manner. Alternatively, one can also argue that it cleverly mitigated Taliban attempts to enforce their hegemony under the guise of their brand of Islamic law, while genuinely attempting to address popular demands for a more expeditious legal and judicial system. In favor of the first argument, one could for instance point out that the *Nizam-e-Adl Regulation* essentially substituted the English titles of existing courts and law officers with more 'Islamic' sounding Arabic substitutes. So in terms of applicable nomenclature, the judges were transformed overnight into

¹⁸ See <http://www.newspakistan.net/swat-peace-accord-welcomed-by-all-and-sundry-minister-2009-26-02.php> ; and also, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=34576&tx_ttnews%5BbackPid%5D=7&cHash=081b812552

¹⁹ For an overview of both sides of the debate see the report from the Daily Dawn, Pakistan <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/nwfp/grey-areas-in-nizam-i-adl-regulation-hs>; see also an overview of the critique of *Nizam-e-Adl* in the New International, Pakistan story at http://www.thenews.com.pk/editorial_detail.asp?id=173260

²⁰ See the Daily Times, Pakistan story at http://www.dailytimes.com.pk/default.asp?page=2009%5C06%5C04%5Cstory_4-6-2009_pg7_26; See also the Daily Pakistan story at <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/provinces/13+swat+idps+skeptical+of+return+plan-za-12>

²¹ See The New York Times story <http://www.nytimes.com/2009/05/06/world/asia/06pstan.html>, as well as The Daily Dawn, Pakistan report <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/16-gilani-urges-national-consensus-as-apc-convenes-hs-16>

'*Qazis*' with no real change in their roles and responsibilities. Importantly, the actual brand of Islamic law to be applied by them in Swat and in the special status Provincially Administered Tribal Areas (PATA) was the one already defined, prescribed and anointed by the state. The *Qazis* were to be appointed by the government; their appointment qualifications were to be benchmarked by state standards and institutions; and, their methodology of application and their interpretations of *Sharia* law were to be consistent with the methodology and interpretations already used by Pakistani judges.²² One can thus argue that nothing had really changed and the existing understandings of and mechanisms for applying *Sharia* law in the rest of the country were staunchly preserved by the *Nizam-e-Adl Regulation*.

Looking at the alternative way of gauging the *Nizam-e-Adl Regulation* that is laid out above, one is, however, persuaded that the real promise of the legislation, and a more concrete realization of the official commitment to the promised 'speed' of justice, lay elsewhere than in the Islamic-sounding titles of judges etc. It lay in its attempt to streamline and expedite the time taken for an average civil or criminal suit in the Pakistani legal system. The *Nizam-e-Adl Regulation* put upper limits of six and four months each for the adjudication of such cases and introduced confidence-inspiring measures for monitoring and penalizing judicial delays. This was indeed a tight straightjacket for introducing greater efficiency to legal proceedings in Pakistan that usually last for years rather than months. The provision of a consensual out of court settlement mechanism, as well as additional provisions to discipline and galvanize police performance in the registration and investigation of criminal cases further bolstered this intervention. Finally, a formal directive to have the option of conducting court proceedings in the local language Pashto and Urdu, as well as in English, was an additional step towards making courts accessible to laypersons (even though local languages and Urdu are even otherwise routinely employed in Pakistani lower courts but formalization of this practice was important). Delay reduction and better accessibility were thus the real hidden fruits in the promised basket, and not any substantively different laws. The revealed preferences in the official prescriptions for Swat's disgruntlement were emerging from the official understanding of the Swat crisis. This understanding was based on the notion that public dissatisfaction with the existing legal system actually lay at the access and operational levels, rather than in the Swatis looking upon the existing system as 'un-Islamic' in any way.

The Swat Taliban, however, made two fatal miscalculations that led to the *Nizam-e-Adl Regulation* failing to forge an armistice. Obviously unhappy that the key to controlling the legal and judicial system in Swat i.e. the power of appointment of *Qazis*, was not conceded to them, they publicly lambasted the government for bad faith and rejected the government legislation out of hand. However, simultaneously, they publicly exposed their own incapability for a commitment to negotiation and compromise to bring about a cessation of on-going violence in the valley. Unwilling to lay down arms (and also not keen to relinquish the rallying cry for a 'better' system of justice, that had galvanized

²² See for the contents of THE NIZAM-E-ADL REGULATION, 2009
http://www.dailytimes.com.pk/default.asp?page=2009%5C04%5C15%5Cstory_15-4-2009_pg7_51

their rebellion) as required by the armistice made contingent by the government's agreement to introduce the *Nizam-e-Adl Regulation*, they decided instead to test the waters by making aggressive forays into surrounding areas, while the government's guns were temporarily averted.²³ The Pakistani government effectively used these two episodes to build public and political party support for sending in the army.²⁴

Since the army operation in Swat there has been little or no update on whether the *Nizam-e-Adal Regulation* is being implemented or not, as the government had indeed indicated that it would after the army operation.²⁵ This is of course dangerous if the basic underlying disgruntlement with the existing legal system is still seething there — and a delayed palliative may be an ineffectual one. There, of course, still remains the question as to what is so radically 'Islamic' and different between what was proposed by the government as the solution in Swat and what is being proposed as the direction of law reform elsewhere in the country.

As mentioned earlier, the promise of 'speedy justice' and 'delay reduction' is also being bandied around by a restored and revitalized Pakistani judiciary. Pakistan has of course been quite prominent in world news lately. The Swat episode was preceded by the now internationally recognized and lauded 'Pakistani lawyers' movement' for its role in the successful restoration of the several appellate court judges illegally ousted by General Pervez Musharraf, after his suspension of the Constitution and declaration of an emergency on November 03, 2007. This movement triggered an unprecedented larger coalition of political parties, civil society and media, and generated open debate on the role of the army in Pakistan's politics, as well as the plight of the country's frequently violated constitutional ethos.²⁶ Once restored, Chief Justice Iftikhar Muhammad Chaudhry made several public statements promising a reformed and strengthened judiciary that would better serve the Constitution and meet public aspirations.²⁷ At the time of the writing of this article, the restored judiciary was temporarily debilitated in terms of numerical strength, due to the removal of all the judges appointed by Musharraf after the declaration of emergency; and due to on-going embroilments over fresh

²³ See The Christian Science Monitor report at <http://www.csmonitor.com/2009/0415/p06s13-wosc.html> ; the New York Times Report at <http://www.nytimes.com/2009/04/23/world/asia/23buner.html>;

²⁴ See the Daily Dawn Report at <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/16-gilani-urges-national-consensus-as-apc-convenes-hs-16>

²⁵ A detailed conversation with the Districts & Sessions Judge Swat in February 2010 revealed that implementation of the *Nizam-e-Adal* regulation is still pending even a year after the end of the military operation in Swat.

²⁶ See the following overviews and perspectives on the lawyers movement in the Columbia Journalism Review at http://www.cjr.org/behind_the_news/chaos_theory_1.php?page=all; in SCRIBD at <http://www.scribd.com/doc/16530405/The-Pakistan-Centrifuge>; in The News International Pakistan at http://www.thenews.com.pk/daily_detail.asp?id=167582. See also TRACY CARBASHO AND JENNIFER PULICE, *U.S. Lawyers urge Pakistani officials to restore country's Judicial Independence*, 9 *Lawyers J.* 4 (December 2007); JOEL A. MINTZ, *A Perspective On Pakistan's Chief Justice, Judicial Independence, and the Rule of Law*, 15 *ILSA J Int'l & Comp L* 1 (Fall 2008); and, SHOAIB A, GHAS, *Miscarriage of Chief Justice: Lawyers, Media, and the Struggle for Judicial Independence in Pakistan*, SSRN Accepted Paper Series (2008)

²⁷ See <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/conference-on-judicial-policy-ends-judges-asked-to-avoid-public-events-679>

appointments between different political factions. In this context, the Pakistani judicial leadership has recently put forward its game plan for judicial reform. The National Judicial Policy 2009 (hereinafter the ‘NJP’) is the latest articulation on part of the Pakistani judiciary to put its house in order.²⁸ Given its own admission of the enormous problems of delay and backlog that it is facing, it predictably highlights these as its most high-value targets for reform. The NJP lays out various short and medium term strategies towards more efficient utilization of existing resources; further capacity building of the judicial organ; fast-tracked adjudication of certain important categories of cases; and, greater judicial accountability (especially of the lower court judges) for tackling corruption.²⁹ While calling for the year 2009 to be commemorated as the ‘Year for Justice at the Grassroots Level,’ the NJP does indeed talk about the need for defending the more ‘vulnerable groups’ in society, rather than being exclusively preoccupied with ‘delay reduction.’ However, it can be argued that a close reading of the NJP reveals that it visualizes the protection of ‘vulnerable groups’ in society to be the logical outcome of a more independent, better resourced and internally accountable judiciary, rather than an independent objective requiring additional focus and special measures.

Why ‘delay-reduction’ and clearance of the ‘backlog of cases’ is such a judicial preoccupation in Pakistan is understandable at one level. Quite apart from strong public sentiment on the matter, at times taking explosive proportions as in Swat (which is the existing and as yet unexplored understanding of that particular crisis), the official numbers on pending cases in Pakistani courts speak for themselves. The acuteness of the situation comes through in the statistics provided by the NJP itself (though it is worthwhile to probe if the situation is actually even worse) (furthermore, these statistics do not include the case pendency statistics for Pakistani special courts and administrative tribunals, where we are told by the NJP that the pendency of cases is equally high).³⁰

Statistics on Backlog of Cases in Pakistani Courts - 2009

Superior Judiciary	Number of Pending Cases	Subordinate Judiciary	Number of Pending Cases
Supreme Court of Pakistan	19055	Punjab	1225879
Federal Shariat Court	2092	Sindh	144942
Lahore High Court	84704	NWFP	187441
High Court of Sindh	18571	Baluchistan	7664
Peshawar	10363		

²⁸ For the text of the National Judicial Policy 2009 *see* <http://www.supremecourt.gov.pk/njp2009/njp2009.pdf>

²⁹ *Id.*

³⁰ *Id.*

High Court			
High Court of Baluchistan	4160		
Total pending Cases	138945		1565926

The main explanation offered by the NJP for the accumulation of the above backlog is inadequate budgetary allocation to the judiciary. It would be interesting here to examine the existing number of judges in Pakistan's appellate courts. All combined, the websites of the Pakistani appellate courts reveal (as of November 5, 2009) a total strength of eighteen Supreme Court of Pakistan judges;³¹ five Federal Shariat Court judges;³² twenty-four Lahore High Court Judges;³³ nineteen High Court of Sindh judges;³⁴ and thirteen Peshawar High Court judges.³⁵ The High Court of Balochistan was at the time of the writing of this article in a complete state of overhaul, as all its incumbent judges had been declared unconstitutional for taking an oath under General Pervez Musharraf after his declaration of emergency in 2007. It had only one newly appointed judge who is also the Chief Justice, and additional appointments were underway. While conceding that these courts were under-strength at the time of the writing of this article and new appointments were in the offing, at the given strength, if we divide the number of pending cases in various appellate courts provided in the NJP with the available judges in those courts, we get the following number of cases per judge: 1058 cases for every judge of the Supreme Court; 418 cases for every judge of the Federal Shariat Court; 3529 cases for every judge of the Lahore High Court; 977 cases for every judge of the High Court of Sindh; 797 cases for every judge of the Peshawar High Court; and, of course 4160 cases for the sole judge of the High Court of Balochistan (numbers rounded to the nearest digit).

If one were to assume these courts operating at their full sanctioned capacity, which is: seventeen, eight, sixty, forty, twenty and eleven judges respectively for the aforementioned courts, the numbers obviously improve (though not in the case of the Supreme Court where the sanctioned strength is actually seventeen and hence the number of cases per judge actually go up). The number of cases per judge at the full operational capacity of these courts would still be: 1120 cases per every judge of the Supreme Court; 261 cases for every judge of the Federal Shariat Court; 1411 cases for every judge of the Lahore High Court; 464 cases for every judge of the High Court of Sindh; 518 cases for every judge of the Peshawar High Court; and, 378 cases for every judge of the High Court of Balochistan (numbers rounded to the nearest digit). This is of course just the pending cases and we are assuming no new cases for the moment. It is also important to

³¹ The Supreme Court of Pakistan website at <http://www.supremecourt.gov.pk/web/> (as of November 5, 2009).

³² The Federal Shariat Court of Pakistan website at <http://www.shariatcourt.gov.pk/index.html> (as of November 5, 2009).

³³ The Lahore High Court website at <http://www.lhc.gov.pk/> (as of November 5, 2009).

³⁴ The High Court of Sindh website at <http://www.sindhhighcourt.gov.pk/> (as of November 5, 2009).

³⁵ The Peshawar High Court website at <http://www.peshawarhighcourt.gov.pk/> (as of November 5, 2009).

bear in mind that historically the High Courts have seldom been able to appoint sufficient judges to fill in all available slots, due to the unavailability of a sufficiently high number of qualified and willing candidates, as well as controversies and tussles over the appointment process. Furthermore, many cases in the appellate courts are heard by two, three or even higher member benches of these courts and hence in those situations further judicial time is invested in adjudicating a single case.

It should be evident that ‘delay reduction’ is of course not just a function of enhanced court capacity through bolstering the number of judges and their support staff. There are several other factors that can create additional work load for the courts and/or cause delay, such as, *inter alia*, the complexity and inefficiency of court processes, mechanisms, and systems; higher levels of public litigiousness; unavailability of other viable modes of dispute resolution; abuse of process by both litigators and lawyers to create delays; the complexity of the legal disputes in the cases; the existence of certain laws that create greater propensity for dispute and litigation; the sub-optimal performance and lack of cooperation of the police; the level and stringency of application of the bars to litigation such as *locus standi*, jurisdiction, requirements for appeals etc; the competence and attitudes of judges; the quality of performance of the lower courts; legal and procedural flaws and lacunae; and judicial training and performance enhancement programs. Thus, delay can be the manifestation of several problems. While various law reform efforts in the past have attempted to examine and address these various aspects of the problem, it is hard not to question their eventual success, given the statistics for the backlog of cases provided by the Supreme Court. Especially, since the start of the twenty-first century saw the launch of the massive Asian Development Bank ‘Access to Justice Program’ (the U.S. \$ 350 million loan for this reform effort is to date the largest loan for a project of this nature) that exclusively focused on the ‘delays’ and ‘backlogs’ besieging Pakistani courts. U.S \$ 350 million dollars later (even acknowledging the political and judicial turmoil in Pakistan following Musharraf’s declaration of emergency at the end of 2007 — many fresh appointments were made during that time and hence one cannot say that the actual number of judges in the courts actually dipped drastically, regardless of their constitutional illegitimacy), it would not be unfair to question whether increasing the budget for the judiciary and boosting the number of judges is really the solution to the problem. This is quite apart from the fact that the NJC says comparatively little about the nature and quality of justice that it wishes to impart, other than in vague and rhetorical terms. One therefore, wonders whether an over-emphasis on ‘speed’ can both lead to a fatal ignorance of the need for, as well as an adverse affect on the actual ‘quality’ of judicial output (‘quality’ is arguably a vague term when one speaks of judicial output, but it is being used here to collectively refer to all that a legal dispute resolution system is looked upon to deliver, in addition to ‘speed’). It is conveniently ignored that ‘quality’ in itself could likely be the real reason for the popular resentment against the existing legal and judicial system in Swat, as well as elsewhere in Pakistan. Yet this theme seems strangely underexplored in the Pakistani justice sector discourse. While it is understandable to not ignore the obvious i.e. ‘delay,’ it is far less understandable why that should remain the preponderant reform preoccupation.

The most recent development in the Pakistani justice sector reform arena was the USAID U.S. \$ 90 million ‘Strengthening Justice with Pakistan’ Program (the ‘USIAD Program’) which was expected to become operational by early 2010.³⁶ Though it has currently been indefinitely shelved due to differences over its design and ambit between the Government of Pakistan and the USAID, past experience shows that it may make yet another appearance in the future. It is difficult to predict how the USAID Program would have departed, if at all, in its approach, from the ADB ‘Access to Justice Program’ — and whether it would have learnt from its failures or not. The only publicly available project design and policy document for the USAID Program so far is the Request for Proposals devised by USAID, or the ‘RFP.’ The RFP did state that the ‘Access to Justice Program’ primarily focused on “infrastructure upgrades” and “equipment purchases” where the bulk of the loan was spent (other than the approximately U.S. \$20 million that was used for technical assistance and an additional U.S. \$24 million that was used to establish an endowment for small grant funding).³⁷ It further acknowledged that while the ‘Access to Justice Program’ effected policy change owing to its loan conditions, the overall progress on the implementation of many of these policies remains unfulfilled.³⁸ However, the RFP stated the hope that the “Access to Justice Program’ had created openings to move forward with what it calls “the next stage of rule of law development.”³⁹ The RFP’s recognition of Pakistan’s political, legal and social complexities and its proclamation that, “... sustainable impact will require a measured, flexible and demonstration-based approach that includes sequencing interventions, conducting periodic evaluations, and making adjustments as needed,” extended a preliminary promise of a more nuanced approach on part of the USAID Program than the ‘Access to Justice Program.’

The RFP laid down the broadly stated objective of the USAID Program to “Strengthen the Judiciary to Achieve Progress in Judicial Efficiency, Transparency, Accessibility, Independence and Accountability.”⁴⁰ However, ‘efficiency’ of judicial operations, protection of ‘private businesses’ and ‘foreign investments’— and as a result, a flourishing free ‘market economy,’ — quickly emerge as the essential underlying goals of the USAID Program, as the RFP goes on to elaborate on its ethos and policy priorities by linking them to its overall purpose. The RFP states that:

“[A] project that supports the judiciary to achieve this objective will better protect the rights of individuals and private institutions. The judiciary’s ability to protect these rights and enforce the legal and regulatory environment in Pakistan will be key to enhancing a more open environment that attracts foreign investment and in so doing, increases the

³⁶ This program was at the stage of inviting proposals from potential consultants at the time of the writing of this article. Its basic ambit and structure is officially stated in the formal ‘Request for Proposals’ Document (usually referred to as the ‘RFP’). See at https://www.fbo.gov/download/f82/f825702026376a491b252180155ff40e/Pakistan_Justice_RFP_Final.pdf

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

efficiency of the market system, enhances sustainable economic growth and increases the standards of living for Pakistanis.”⁴¹

Added anxiety and impetus for its expressed goals was provided by the RFP through its highlighting the danger of further support for the Taliban model of justice, in case of a complete breakdown of the existing Pakistani judicial system. The RFP warned against growing popular mistrust in the formal justice system as an invitation to obscurantist alternatives. It cautioned: “Overall, the public lacks confidence in the justice system which undermines Pakistan’s rule of law and contributes to rising violence, including crime, terrorism and human rights abuses. When people mistrust the justice system, the more likely they will look toward alternatives ranging from strict versions of Islamic law or taking the law into their own hands.”

One has no cavil with the importance of the fine objectives for reform laid down by the USAID Program i.e., *Judicial Efficiency, Transparency, Accessibility, Independence and Accountability*. Furthermore, one can imagine reforms in these areas boosting citizen access and confidence in courts. ‘Justice,’ however is a much more complex and elusive goal and one is more guarded in readily accepting the USAID Program’s claim that the accomplishment of the aforementioned objectives would be sufficient to, “...help break the cycle of citizen mistrust and apathy toward the judiciary and assist the judiciary to better deliver justice.”⁴² It can be argued that “...measurable progress that the public can readily see in reducing case delay; making courts more transparent, accessible and user-friendly; and, enhancing the independence, accountability and professionalism of judges and court personnel, while also addressing structural challenges to ensure sustainable impact” sounds rather all-encompassing and sufficient.⁴³ However, whether this comprehensively and deeply addresses what divides a society; what exacerbates disputes; and, what actually induces conflict and litigation necessitates a fresh perspective on the role of law and legal systems in a society. Even looking very narrowly at just the pendency of cases problem in Pakistan, the aforementioned approach may provide some mechanisms for speedy disposal of cases but does not quite explain why there are so many legal cases in the first place and why are new ones being initiated all the time. It also does not tell us whether the people are actually happy with the quality of justice they get; unhappy as they are with the delays in the process. Finally, one is not really assured that even with a boost in the numbers and an improvement in the training and incentive structure of the judges, they will eventually stop playing catch-up. With this in mind, I now move to examine this vitally important perspective.

II. LAW, THE GAME OF ECONOMIC STRUGGLE AND THE LIMITATIONS OF LEGAL DISCOURSE

A primary concern for anyone interested in how law reform will actually affect the more ‘vulnerable groups’ in society would be as follows. In the context of the aforementioned major International Financial Institution (‘IFI’) funded justice sector reform projects

⁴¹ Id.

⁴² Id.

⁴³ Id.

underway in Pakistan, the seemingly promising IFI fascination with a ‘rights’ discourse (as the Law & Development literature that I shall discuss later in this article warns) could just turn out to be a damp squib, as far as the ‘vulnerable groups’ are concerned. This is because while employing the rhetoric of ‘rights protection’, ‘distribution,’ and ‘equity’ such projects may actually follow a much more parochial agenda of essentially promoting and protecting existing regimes of ‘property’ and ‘contract’ rights, towards achievement of pre-determined models of a preferred version of a market economy. This does not sound dissimilar to what the aforementioned USAID Project hoped to do, albeit, linking these goals to eventually larger and more widely dispersed public welfare and public good. Such an approach can of course have definite and far-reaching distributional consequences. For instance, enhancing the efficiency of a country’s legal and judicial system to further protect and promote the existing property rights regime would necessarily translate into the perpetuation of the politico-economic *status quo* that is enshrined in that property rights regime. Surely, this can only benefit certain already entrenched property interests and their support networks in the prevalent political system. One has to be willing to consider that to an extent (its exact level can of course be debated and could vary from context to context) the underlying discord in a society can be due to the hegemony and exploitation caused by a certain property regime. It is the underlying discords that may oftentimes spill over into law courts and at other times avoid, side step, impede or marginalize formal state dispute resolution, by adopting both non-violent and violent alternatives. If this can indeed be the case then any so-called ‘reforms’ that turn a complete blind eye to this important dimension are not really addressing what may be the real reasons for dispute, crime, social disharmony and weak contract enforcement in a given society.

The contemporary law reform debate in Pakistan, as we shall see in the next section, however, largely shies away from or simply ignores this possibility. Furthermore, it often conflates and thus creates a confusing jumble of different and complex concepts such as ‘judicial independence,’ ‘rule of law,’ ‘equity’ and ‘justice.’ ‘Rule of law’ may be a perfectly worthwhile goal to pursue in a state of lawlessness but achieving ‘rule of law’ may not at all mean achieving all that is enshrined in ‘justice,’ which of course is also a function of the definition of ‘justice’ that one adheres to. One can of course adopt a definition of ‘rule of law’ and indeed that of ‘justice’ that may equate the two but that would be rather pointless reductionism. It is important to better appreciate that the term ‘rights’ is capable of embracing very different and even at times competing goals. Furthermore, that the ‘legal rights discourse’ can be deceptive as it can hide other significant debates and contestations in society — debates and contestations that are equally relevant to both the achievement of a ‘rule of law’ and to bringing about of a widely acceptable notion of ‘justice.’

In this context, it merits to revisit Robert Hale’s seminal work in the area of law and economics. Hale’s work is significant as it provides the important insight that (as Duncan Kennedy summarizes it), “... the rules of property, contract, and tort law (along with the criminal law rules that reinforce them in some cases) are “rules of the game of economic

struggle.”⁴⁴ In addition, these rules, “... differentially and asymmetrically empower groups bargaining over the fruits of cooperation in production.”⁴⁵ Legal realists like Hale reveal how the state uses force to ensure obedience to the rules of the game of bargaining over a joint product. Thus the state is, in fact, the author of the distribution, even though distribution appears to be determined solely by ‘voluntary agreement’ of parties. Hale warns against our taking for granted the background legal rules for a given economic system — he deems it a “voluntaristic” fallacy to think that a *laissez-faire* system does not have coercive restrictions.⁴⁶

One could argue that the government’s protection of property rights is essentially a protection against any violent private party interference with such rights. However, Hale disagrees that government protection of property rights is non-interference. This is because the government also forbids the ‘non-owner’ from handling such property, even when it involves no violence or force whatsoever. Therefore, the government is not just keeping the peace, as ‘rule of law’ projects visualize and depict its role. It is also exerting ‘coercion’ wherever necessary, in order to protect owners, not merely from violence but also peaceful infringement of their sole and exclusive right of the thing owned.⁴⁷ Hale uses the term ‘coercion’ in a value-neutral sense. He employs it as an analytical tool and his focus is on the actual power plays in society that one can be blind to due to the ‘fallacy of liberty.’⁴⁸ Understanding ‘coercion,’ Hale thinks, is vital because, “[T]he distribution of income ... depends on the relative power of coercion which the different members of the community can exert against one another”, and “[T]he resulting distribution is very far from being equal...”⁴⁹

Hale’s method of analysis of particular legal rules to determine their affect on bargaining power, and thus on distribution of income between the concerned groups, asserts that it is difficult to measure different interests in the community.⁵⁰ There are also no simple rules to measure how conflicts between them should be settled.⁵¹ As a result, Hale thinks that the ‘principles of justice’ governing courts do not suffice and they scarcely envisage the problem.⁵² In his view, economics needed to develop a method to measure change in human satisfaction resulting from increase in production of one and decrease in production of another article.⁵³ At the same time, Hale is not convinced that a mere ‘balancing program’ can bring about a greater level of equality in the effectiveness of coercive weapons, of say the property-owners and the non-property owners.⁵⁴ In other

⁴⁴ DUNCAN KENNEDY, *The Stakes of Law, Or Hale and Foucault!* in *SEXY DRESSING ETC. ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (Harvard University Press 1993). At 83.

⁴⁵ *Id.*

⁴⁶ ROBERT HALE, “*Coercion and Distribution in a Supposedly Non-Coercive State*,” 38 *Pol. Sci. Q.* 470 (1923). At 470-71, 481.

⁴⁷ *Id.* At 472-473.

⁴⁸ *Id.* At 471.

⁴⁹ *Id.* At 478.

⁵⁰ *Id.* At 493.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* At 493.

⁵⁴ *Id.* At 481

words, the need for supplementing any such ‘balancing program’ by “proposing to alter the legal arrangements themselves” cannot be ignored.⁵⁵ This alternation of underlying legal arrangements is a key theme that I want to focus on later in the context of its near absence in the contemporary law reform discourse in Pakistan.

A possible reading of Hale is that his concern is not really the inequality of bargaining power or the lack of a level playing field in society, but that he essentially questions the intellectual rigor of the received concept of ‘equal bargaining power.’ However, a closer reading of Hale does suggest that that may not be completely accurate. While Hale does assert that bargaining power in society is not equal and that the playing field is not level but indeed inclined; so that if you change the slope one way or the other, it will change outcomes, it seems unfairly limiting to restrict Hale to a keen but aloof observer. Hale does not just care about bargaining configurations; it is also the outcomes that he is concerned about. According to the first reading of Hale, ‘bargaining’ is a tool; it is a means to an end. Hence, Hale’s prescription is essentially that any analysis should include closely looking at the background rules in society, rather than just assuming them. However, implicit in this reading is a different reading of Hale — the closer, second reading that I refer to above. This is a Hale who advocates proactive interventions on part of the legislature to address uneven bargaining power. This is a Hale who critically examines existing inheritance and government grant rules that, according to him, lead to the law endowing some with rights more advantageous than others. This is also a Hale who says that we could; if we wanted to, still maintain ‘protection of property’ and ‘freedom of contract’ under different sets of rules, so that planned government intervention is not necessarily inimical to economic liberty.⁵⁶ Surely, a choice of a very different set of background legal rules can have very different distributive outcomes, and very different resulting ‘property’ and ‘contract’ rights. Yet, one could still achieve, if that is a goal, a strict property rights protection regime and limited governmental interference with freedom of contract, “but a very different pattern of economic relationships.”⁵⁷ One could say that Hale’s approach to the multiple possible combinations and outcomes implicit in the terms “property” and “contract” has much akin to the Hohfeldian manner of analysis of ‘property’ and indeed its deconstruction.⁵⁸

This is also a Hale who is skeptical about any policies that perpetuate unequal redistribution and hence the maintenance of inequality in society, and which attach their hopes for more equal distribution to a ‘trickle down’ from the rich to the poor. He also finds much reason to doubt that market values should purely drive production choices, as they are truly reflective of society’s actual needs. Finding the gauging of what a community wants from the market value of goods to be a fallacy, he takes issues with the precedence given to less pressing needs of the rich to more pressing needs of society.

⁵⁵ Id.

⁵⁶ ROBERT HALE, “*Bargaining, Duress, and Economic Liberty*,” 1943 Colum. L. Rev. 603, 627-628.

⁵⁷ ROBERT HALE, “*Bargaining, Duress, and Economic Liberty*,” 1943 Colum. L. Rev. 603, 628.

⁵⁸ WESLEY NEWCOMB HOHFELD, “*Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*,” 23 Yale Law Journal 16 (1913) 45

Hale calls it a fallacy because he says that the production choices of society are actually determined by coercive arrangements that affect important interests. Moreover, these arrangements are kept in place by the government, which can alter them greatly.⁵⁹ So far from being a benign onlooker and a disinterested protector of ‘rights,’ the government is the actual custodian and protector of the underlying legal arrangements of a society. To the extent that those arrangements are exploitative and unfair and they breed discontent, strife and violence, one cannot absolve their ultimate protector i.e. a government itself, which quite paradoxically may be simultaneously embarking on projects to promote social harmony and contentment.

Particularly significant in the context of the present discussion, Hale feels that the courts are less suited to revising the more basic unequal distribution of bargaining power among individuals. According to Hale, judicial notions of ‘economic justice’ (with different judges adhering to different economic philosophies) brought to bear on judicial attempts to revise economic relationships between different members of the community would create greater confusion.⁶⁰ Additional problems may arise when judges employ the “question-begging language concerning ‘rights.’”⁶¹ In this context, Hale points out the incapacity of traditional legal doctrine to tackle ‘market prices’ issues (with market prices merely perceived as showing the strength of bargaining power of a person who owns a property or a service) and the threats in most economic transactions to damage the other party, as well as actual infliction of damage. Courts, says Hale, are unable to make requisite inquiries and are incapable of furnishing remedies in these situations.⁶² Further illustrating this point, Hale says that the economic motive of inflicting harm is regarded by the courts as normal bargaining, unless inflicted by means otherwise regarded as unlawful. So the courts are receptive to recognizing the compulsion on factory owners of labor strikes. However, they do not display similar receptivity to the compulsion exercised by factory owners on their employees to not join a union. He further elaborates on differential judicial treatment of ‘combined actions’ by capital and labor, and points out that the courts don’t probe the ‘omission’ of declining to employ someone, even if the motive of the ‘omission’ is a bad one. The mere existence of choice on part of someone facing unfavorable employment terms and a weak bargaining position, according to Hale, does not mean that there is no duress involved in the situation; as one often chooses in order to avoid something worse.⁶³ Pointing out the limitations of courts in addressing issues of basic unequal distribution, Hale advocates planned government intervention in areas that can help the economically weak, and says that, “there is no *a priori* reason for regarding planned governmental intervention in the economic sphere as inimical to economic liberty.”⁶⁴ At the same time, he warns against courts thwarting, in the name of ‘liberty’ and equality,’ any attempts by other organs of government to “increase and equalize the economic liberty of the weak.”⁶⁵

⁵⁹ ROBERT HALE, “*Coercion and Distribution in a Supposedly Non-Coercive State*,” 38 Pol. Sci. Q. 470 (1923).

⁶⁰ ROBERT HALE, “*Prima Facie Torts, Combination, and Non-Feasance*,” 1946 Colum. L. Rev. 196

⁶¹ *Id.* At 197.

⁶² ROBERT HALE, “*Bargaining, Duress, and Economic Liberty*,” 1943 Colum. L. Rev. 603, 624-625.

⁶³ ROBERT HALE, “*Force and the State*,” 1935 Colum. L. Rev. 286.

⁶⁴ ROBERT HALE, “*Bargaining, Duress, and Economic Liberty*,” 1943 Colum. L. Rev. 603, 628.

⁶⁵ *Id.* AT 625.

One obvious argument that emerges from the preceding discussion is the one about the limitation of the courts in furnishing an adequate response to the basic unequal distribution of bargaining power among individuals in society. This argument then underlines the necessity of legislative intervention to address this inequality. This position will be a useful framework, when I look at the ‘public interest litigation’ phenomenon in Pakistan and India later in this article — a phenomenon that is justified by the judges in view of their descriptions of legislative failure in these countries to meaningfully address issues of unequal distribution and asymmetrical bargaining power in society. However, an even more important argument that emerges from the aforementioned discussion is Hale’s denunciation of the explicit faith in certain models of contract, property and market relations determining optimal production decisions for society and also eventually addressing its distributive disparities (in which process the ‘voluntaristic’ consent of all sections of society is an essential presumption). Hale finds this to be a fallacy. A further extension of this fallacy is the belief that in the afore-described process, the state plays a neutral, backseat role. There is thus no recognition of the state’s actual coercive, interventionist role to preserve and protect the aforementioned contract/property/free market regime and its role in upholding the fiction of the regime being the outcome of a voluntary process.

In important ways, an additional fallacy that I wish to posit and explore in this article draws inspiration and form from Hale’s aforementioned insights. This fallacy assumes that the conversion of judges into highly efficient legal adjudication and case disposal machines, will not just reduce impasse and delay in legal adjudication, but will also address the deeper, complex underlying reasons that create social discord and legal disputes in the first place. So speedy disposal of cases, it is hoped will also address the issue of excessive litigation that burdens the courts. There is little doubt in this approach that the courts are invariably the best place to resolve any disputes, and thus it largely excludes other alternatives, or at best pays them lip service. Furthermore, this fallacy ascribes primary significance to the role of judges and the legal discourse in resolving complex societal disputes disguised as recurring legal cases — disputes which actually reflect highly contentious and divisive underlying economic and political struggles in society. Much as there is little likelihood of these problems ever being meaningfully resolved without an exploration of and engagement with possible economic and political solutions that actually emerge from economic and political arenas, the primacy of focus on judges and the legal discourse, frequently rides rough shod over a more multi-disciplinary perspective. Thus, a utopia is constructed. In this utopia, there is a straight path from proficient and well-incentivized judges to a legal system that works like efficient, predictable clockwork. The linear progression thus takes us to robust protection of private property, contract enforcement, and market economy. That is not all. At the end of this road to Oz, there also await us the varied rewards of economic growth, social harmony, rule of law and justice — all bundled up in an unrecognizable, glittering mass of something we are told is worth striving for. All the inequalities, deprivations and disharmonies that may have beset society before it embarked on this eventually triumphant journey, are somehow addressed on the way. Implicit in this fallacy that I am

positing, is of course all the fallacies that Hale points out. There is for example, little appreciation in this fallacy of the limitations of what courts can realistically achieve in divided and contentious societies. There is no attention in this fallacy to the possibility (an actuality in the post-colonial context of Pakistan) of a system dominated by certain sets of entrenched and hierarchical property, contract and market arrangements that always mitigate against any move towards a greater equality of bargaining power in society. Finally, this fallacy is characterized by the incredulity that the aforementioned system of hierarchical and entrenched property, contract and market arrangements is actually bolstered, sustained and perpetuated by the courts and the legal system that provide legal cover and sanctity to its economic ethos. It is my contention that in various ways, throughout its history the law reform agenda and debate in Pakistan has been debilitated by one or all of all these fallacies. Furthermore, the extant justice sector reform in Pakistan continue to pursue a mythical legal and judicial system that will, through greater efficiency and better incentives, also achieve various additional goals of equity, fairness and justice.

The obliviousness of these legal and judicial reform approaches to Hale's contribution to the social theory of law — “a theory about the distribution of wealth, income, power, and knowledge in capitalist society”⁶⁶ — is to my mind a major shortcoming. This is a theory, as Duncan Kennedy well puts it, which highlights the large causal role that law, or rather the legal ground rules that structure bargains between competitive/cooperative groups, play in distribution in society.”⁶⁷ And though the resulting distribution is far from equal, the all important legal ground rules are ignored — “[T]he invisibility of legal ground rules comes from the fact that when lawmakers do nothing, they appear to have nothing to do with the outcome.”⁶⁸ However, seeming inaction also begets a deliberate policy. According to Hale, all competition is legalized injury — “[O]nce there is a legal system, the choice of any particular set of background rules is a choice of a set of distributive outcomes, whether achieved through many rules or only a few.”⁶⁹ Thus, the background rules that protect a system of inequitable distribution in society will further exacerbate the inequality of distribution, even if seemingly playing an inert, neutral and inactive role. It is only a change in these fundamentally important background rules that can eventually have any visible changes in distributive patterns and a possible shift towards a more equitable dispensation.

III. A Typology of Law Reform Approaches in Pakistan

It would be instructive at this stage to shift the gaze to the nature of the justice sector reform discourse in Pakistan and to evaluate if it has indeed been debilitated by the aforementioned fallacies. If one were to develop a typology, one would detect several apparently different approaches to law reform in Pakistan. These apparently different

⁶⁶ DUNCAN KENNEDY, *The Stakes of Law, Or Hale and Foucault!*, in *SEXY DRESSING ETC. ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (Harvard University Press 1993). At 89-90.

⁶⁷ *Id.* At 90.

⁶⁸ *Id.* At 91.

⁶⁹ *Id.* At 92.

approaches, at times, do reveal certain variations in their assumptions, priorities and methodologies toward law reform. It is, however, a fundamental similarity between these that I hope to draw out. My relatively short descriptions of the various kinds of law reform approaches in my proposed typology are by no means exhaustive. These approaches encompass complex debates, structures and implementation mechanisms and every single one of them merits further independent and exhaustive analysis. However, I have attempted to capture their essence, design and prominent characteristics, and I proceed with the confidence that the typology does capture the broad and diverse strains of law reform approaches in Pakistan. My purpose in developing this typology is essentially to provide a useful analytical framework in order to evaluate whether any of the justice sector reform approaches historically adopted or currently prevalent in Pakistan has attempted to engage with the important underlying structural and societal dimensions of legal disputes, while proposing reforms. Thus, I am curious to see whether they have been mindful of Hale's cautions, and if they display cognizance of the fallacies that he points out.

I would categorize the various law reform approaches in Pakistan as follows:

- A. The 'Specific Issues based Incremental Amendment Approaches'
- B The 'Institutional Malaise Approaches'
- C The 'Efficiency Plus Approaches'
- D The 'Human Capital Development Approaches'
- E The 'Islamization of Law and Legal System Approaches'
- F The 'Judicial Activism Approaches'
- G The 'Access to Justice as a Function of Access to Economic and Political Empowerment Approaches'

A The 'Specific Issues based Incremental Amendment Approaches'

There is no paucity of indigenous Pakistani Law Reform Commission and Committee reports that have historically attempted to diagnose the ills of the Pakistani legal and judicial system, and recommended various palliatives.⁷⁰ One can, however, find them characterized by the following commonalities: (1) Historically, the various *ad hoc* Pakistani Law Reform Commissions and Committees on legal reform, as well as Pakistan's permanent Law Commission, have approached legal and judicial reform in a

⁷⁰ The Law & Justice Commission of Pakistan website lists the following Commissions and Committees that have analyzed the legal and judicial system and prepared recommendatory reports in the past: (1) Commission on Marriage and Family Law 1956; (2) Quetta and Kalat Laws Commission 1958; (3) Law Reform Commission 1958; (4) Law Reform Commission 1967; (5) High Powered Law Reform Committee Report 1974; (6) Law Committee for Recommending Measures for Speedy Disposal of Civil Litigation 1978; (7) Secretaries' Committee Report 1979; (8) Salahuddin Ahmed Committee 1980; (9) Pakistan Women's Rights Committee 1976; (10) Commission on the Status of Women Report 1985; (11) Commission on Reform of Civil Law 1993; (12) Commission of Inquiry for Women Report 1997. *See* <http://www.ljcp.gov.pk/Menu%20Items/Publications/Summary%20of%20reports%20of%20Ad%20hoc%20Commissions/3-summary%20of%20reports%20adhoc%20commissions.htm>

piecemeal fashion. That is to say, they have zeroed in on certain recurring glitches and ‘problems’ emerging from what they have perceived to be the less than optimal functioning of the legal system. Identifying particular shortcomings in specific laws, they have then offered specific legal or procedural amendments as solutions. In this context, they have by and large embraced the existing legal and judicial system as the accepted and potentially workable framework; (2) In terms of their findings as to what causes the ‘problems’ in the legal system, the Commissions and Committees have found the ‘problems’ impeding the legal and judicial system to be essentially the manifestations of inadequate implementation of existing rules and regulations. That is to say, they do not identify any deeper and more complex design or structural constraints in the legal and judicial system; or for that matter, any gaps between popular aspirations and expectations from the law and the ethos and philosophy of the legal and judicial system. This explains why the reports generated by the various *ad hoc* Law Reform Commissions and Committees over the years have essentially advocated judicial capacity building; the boosting of infrastructural and administrative support for judges; stringent application of existing rules and regulations for delay reduction; and, tinkering with civil and criminal procedures, the law of evidence, and, other rules and procedures — as sufficient antidote to achieve the goals of operational efficiency and delay reduction. Significantly, the colonial genealogy and continuing relevance of various so-called Pakistani laws is neither discussed nor questioned in these reports; (3) At times, some of the Commissions/Committees have also focused specifically on equity issues and also the special predicament of ‘vulnerable groups,’ (such as the committees focusing on women’s rights) as a separate and specific area of concern. However, the problem has once gain been contextualized, analyzed and addressed within the design and framework of the existing system; (4) Some of the reports have reiterated the recommendations in previous reports, and quite a few have blamed the lack of implementation of the recommendations of their predecessors on governmental apathy, a lack of political will, and/or lack of political stability in the country; (5) At times, lack of implementation has also been explained as caused by unfavorable reception on part of the ‘litigating public,’ as well as ‘members of the ‘bench and the bar.’ On other occasions, the Commission has clearly stated that radical changes are far from necessary. In this context, it is interesting to note an important observation of one of these Commissions – the 1958 Commission – that concluded, “... that radical changes were not desirable in the existing judicial system because the people by and large had become accustomed to the technicalities of the existing procedure, followed by the courts.”⁷¹ Similarly, the Law Commission Report of 1993, more or less, reiterated the views expressed by the earlier Commissions/Committees and stated that the existing procedural laws/rules were generally sound and needed no major surgery.⁷² Quite infrequently, some Committees — such as the Salahuddin Committee of 1980 — have recommended some structural changes to the system of administration of justice, such as replacing the adversarial system of litigation with what it described as the ‘amicus curia system,’ as well as a greater move towards alternative means of disputes

⁷¹ Law & Justice Commission of Pakistan website at <http://www.ljcp.gov.pk/Menu%20Items/Publications/Summary%20of%20reports%20of%20Ad%20hoc%20Commissions/3-summary%20of%20reports%20adhoc%20commissions.htm>

⁷² *Id.*

resolution.⁷³ Apparently, this unconventional thinking did not get much mileage and the attempt is of archival interest today.

The fact that most of the recommendations of these Commissions and Committees remained either unimplemented or were withdrawn (and even when they were implemented they seem to have had little impact even in enhancing judicial efficiency), means that they left no lasting impact in terms of any meaningful difference in how the legal and judicial system currently functions. A permanent Law & Justice Commission was set up in 1979 and over the years, it has passed through phases of dormancy and relative alacrity. However, in its essence, its tone and tenor, its ambit and focus, and the substantive tilt of its recommendations, it is very similar to the *ad hoc* law Commission and Committee reports of the past.

B The ‘Institutional Malaise Approaches’

While judges and lawyers authoring the aforementioned reports have been, largely, content to look at law and the legal process in Pakistan largely in isolation of its wider social and political context, other Pakistani justice sector reform approaches have attempted to gauge the impact of the larger political context on the legal and judicial process. Emanating from multidisciplinary perspectives of law, political science and history, these macro ‘Institutional Malaise Approaches’ identify, highlight and analyze the disruptive impact of various political and state structural factors on the functioning of the Pakistani legal and judicial system. They highlight, *inter alia*, the constitutional undermining and erosion in Pakistan due to the democratic displacement caused by military coups. They further point out the escalating politicization of Pakistani judiciary caused by its repeated and unenviable predicament to rule over the legality of highly politically contentious disputes.⁷⁴ They ascribe the breakdown of the Pakistani legal education system to historically low levels of funding, and the governmental neglect of public law schools to its apprehension of and dislike for the historically active and vocal pro-democracy role played by lawyers.⁷⁵ Furthermore, they focus on the historical underdevelopment of certain key areas of law like the tort liability regime and its debilitating impact on the availability of several important legal remedies to Pakistani citizens.⁷⁶ They argue that the world’s seventh nuclear power is a geo-politically significant, but a highly unstable state with a weak democratic culture and growing inner fissures caused by political obscurantism, religious radicalism, economic stagnation,

⁷³ Id.

⁷⁴ OSAMA SIDDIQUE, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents*, 23 Ariz. J. Int’l L. & Comp. L. 615-715 (2006). This article is a more recent depiction of this broad position in the context of its own special foci of inquiry, but several other political and historical narratives on Pakistan, many of which are drawn upon and cited in this article, further this argument.

⁷⁵ OSAMA SIDDIQUE, *Martial Laws and Lawyers: The Crisis of Legal Education in Pakistan and Key Areas of Reform*, 5 Regent J. Int’l L. 95 (2007)

⁷⁶ MARYAM KHAN & OSAMA SIDDIQUE, *The 2005 South Asian Earthquake: Natural Calamity or Failure of State? Exploring State Liability and Remedies for Victims of Defective Construction in Pakistan*, 9 Asian Law (2007).

institutional decline, and, growing lawlessness.⁷⁷ These factors have, according to these narratives, led to increased private interest cooption and abuse of certain problematic laws, to religious vigilantism and the violation of minorities' rights.⁷⁸ The fundamental premise underlying these approaches emphasizes that since its creation in 1947, Pakistan's political and constitutional evolution has been arrested by military rule through several impositions of martial law — the most recent one after a military coup in 1999.

In this chaotic context, the Pakistani justice system, they opine, finds itself overburdened and incapacitated. This is not the least because of its regressing quality and professionalism due to the growing politicization of the appointments and functioning of its judges. Pakistan's justice system and legal community have thus remained or, as they argue, have been kept underdeveloped, primarily because the country has been under direct military rule for more than half of its existence.⁷⁹ A case in point is that despite the vital nexus between the quality of legal education and the quality of justice, compared to developments in other academic areas, the development of legal education in Pakistan has traditionally lagged.⁸⁰ The 'Institutional Malaise Approaches' highlight that a socially relevant, high standard of legal education produces elements of change and champions justice. Quality research inspires and fuels an environment of analysis, debate, critique, and as a result, a culture of tolerance and democracy. Additionally, such education boosts the caliber and professionalism of legal professionals, judicial institutions, and society in general. Lawyers and legally trained individuals thus form a vital component of a vibrant, informed, and proactive civil society that strives for political, social, and economic justice. Apart from their focus on legal education and training, the 'Institutional Malaise Approaches' call for a close review of the criteria and process of judicial appointments, judicial removal, judicial accountability, judicial performance evaluation, judicial security of tenure, and financial security for judges.⁸¹ Even after the recent restoration of Chief Justice Iftikhar Hussain Chaudhry and other ousted judges, there is controversy and criticism of the steps taken by the new incumbents to oust those who took the oath under Musharraf. Furthermore, the revitalized judiciary is being accused by certain quarters, of influencing new judicial appointments and packing the court this time around with those who were diehard members of the lawyers' movement.⁸² In the present context, where a parliamentary committee on constitutional reform has come up with a new constitutional

⁷⁷ OSAMA SIDDIQUE & ZAHRA HAYAT, *Unholy Laws & Holy Speech: Blasphemy Laws in Pakistan – Controversial Origins, Design Defects and Free Speech Implications*, 17 MINN. J. INT'L L. 303 (2008)

⁷⁸ Id.

⁷⁹ OSAMA SIDDIQUE, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents*, 23 ARIZ. J. INT'L. & COMP. L. 615-715 (2006).

⁸⁰ RALPH BRAIBANTI, CHIEF JUSTICE CORNELIUS OF PAKISTAN 111-13 (1999).

⁸¹ THE INTERNATIONAL BAR ASSOCIATION HUMAN RIGHTS INSTITUTE (IBAHRI) REPORT: "A LONG MARCH TO JUSTICE: A REPORT ON JUDICIAL INDEPENDENCE AND INTEGRITY IN PAKISTAN" (September, 2009). See

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=F0F99EB4-C9AC-4543-BD8A-57817D3F05C2>

⁸² For this criticism of the latest appointments to the Supreme Court and the High Courts see http://www.dailytimes.com.pk/default.asp?page=2009%5C10%5C04%5Cstory_4-10-2009_pg3_3

mechanism for the appointment of judges, voices of criticism are also being raised against what is being increasingly perceived as an attempt by the revived judiciary and their supporting blocks of lawyers, to vest the control of this appointment process with the judiciary and make it incumbent on its discretion, rather than vesting it with the parliament, the executive and representatives of society (with meaningful representation for the judiciary and the bar).⁸³ This criticism is also directed against perceived attempts by a new judiciary/legal bar alliance against making the judicial appointment process much more transparent and open to the public gaze.⁸⁴ This on-going critique once again shows up the Pakistani judicial appointment system to be far from satisfactory.

While the ‘Institutional Malaise Approaches’ may or may not focus on law reform at a finer level of detail, what they essentially hold is that several features of the larger political and state structure, as well as important institutional processes, have to undergo change before any service delivery improvements can take place in the justice sector. However, while the underlying institutional edifice is questioned in these approaches, a structural and societal alternative is not necessarily offered in any great specificity. The point of departure for these approaches, like the other law reform approaches in Pakistan, more or less remains the received legal and judicial system in a post-colonial setting. However, given that the proponents of this approach take a larger and longer view of things, at least these approaches contain the potential to question the received system and structure of the legal and judicial system at its fundamental levels. Therefore, while an exponent of this approach who, let’s say is focusing on improvement in the quality of legal education, is likely to conclude that once the country achieves the targets of better law schools, better bar regulations, and hence a larger pool of better and more qualified candidates for judicial appointments, the real issues of the justice sector are very likely to be adequately addressed. At the same time, another exponent who adheres to the ‘Institutional Malaise Approaches’ is as likely to conclude that even after all the aforementioned reforms, social inequity and asymmetric access to justice may well persist unless the underlying legal framework, and not just the legal but also the political and economic system, is questioned and revisited at a fundamental level. The latter exponent could for instance argue that even better trained and equity-minded judges can achieve little in a society deeply constrained by poverty, disempowerment, land ownership based hierarchies and hegemonies, income disparity, illiteracy and the civil-military imbalance.

C The ‘Efficiency Plus Approaches’

The IFI funded ‘Efficiency Plus Approaches’ have been the most prominent and characteristic recent approaches to justice sector reform endeavors in Pakistan. I call them ‘Efficiency Plus Approaches’ for two reasons.⁸⁵ Firstly, because at a theoretical

⁸³ See ASAD JAMAL, *Consistently Inconsistent*, The Friday Times, March 12-18, 2010; KHALED AHMED, *‘Independent’ or ‘Powerful,’* The Friday Times, March 12-18, 2010; and NAJAM SETHI, *Anti-Status-quo reform needed*, The Friday Times, March 12-18, 2010.

⁸⁴ Id.

⁸⁵ The inspiration for this term has come from the use of the term ‘Economic Growth +’ by David Kennedy in order to describe the pursuit of an economic growth policy that just focuses on following the so-called ‘best practices’ of efficient economies; putting consideration of the more contested and complicated

level these approaches have equated the pursuit and achievement of performance ‘efficiency’ with the tackling of more complex ‘equity’ and ‘equal opportunity’ issues. Secondly, despite the use, at times, of very clear pro-poor rhetoric, the actual underlying focus of the ‘Efficiency Plus Approaches’ has essentially been the enhancement of the ‘efficiency’ of courts and the judicial process, in order to enhance and bring about greater functioning and growth of a market economy. The aforementioned Asian Development Bank ‘Access to Justice’ Program in Pakistan (the ‘AJP’) — a U.S. \$ 350 million soft loan which is to date the largest such loan for justice sector reform in the world — is the primary and most significant example of the ‘Efficiency Plus Approaches.’ Diagnosing ‘delay’ as the main bane of the Pakistani legal system, the AJP sought to address how inertia and rent-seeking motivations obfuscate and obstruct the legal process.⁸⁶ It is important to note here that AJP’s reform rhetoric was very pro-poor and pro-vulnerable. Its professed aim was to bring “justice to the doorstep” of the people.⁸⁷ While facets of this ostensibly pro-poor program did identify and highlight the inequities stemming from discrimination based on class, gender and religion, and also acknowledged the various links between poverty and vulnerability, the actual policy actions of the program, both in design and actual implementation, were much more diffused in terms of their intent and outreach. Furthermore, they proceeded with the underlying assumption that key amendments to the existing laws and the legal and judicial system were sufficient to potentially address the issues and constraints that constrain the more vulnerable in society from accessing the courts. Once access was indeed provided, AJP’s assumption stretched to further embrace the idea that actual access would translate into equal treatment under the law, as well as protection of entitlements provided under the law. At the same time, AJP’s pursuit of general efficiency, timeliness and effectiveness of the legal system and thus the reduction of delay and promotion of certainty of outcome was meant to promote commercial and investment activity.⁸⁸ The question immediately arises as to whether this was an inherently paradoxical approach.

A telling insight into AJP’s approach is provided by its official ‘rationale’, which was as follows:

“Vulnerability, justice, and entitlements are closely linked. Vulnerability is a function of insecurity of access to key sets of material, social, political, and environmental assets. Justice is a function of the relationship between institutions responsible for delivering entitlements (public goods and services) predictably, affordably, and accountably, and the ability of

distributive dimensions of any economic policy on the backburner. See DAVID W. KENNEDY, “*The Rule of Law, Political Choices, and Development Common Sense*,” in *The New Law and Economic Development*, (David M. Trubek & Alvaro Santos eds., Cambridge University Press 2008).

⁸⁶ ASIAN DEV. BANK, REPORT AND RECOMMENDATION OF THE PRESIDENT TO THE BOARD OF DIRECTORS ON PROPOSED LOANS AND TECHNICAL ASSISTANCE GRANT TO THE ISLAMIC REPUBLIC OF PAKISTAN FOR THE ACCESS TO JUSTICE PROGRAM (NOVEMBER 2001). See http://www.adb.org/Documents/RRPS/PAK/rpp_32023.pdf

⁸⁷ Id.

⁸⁸ PROGRESS REPORT ON TRANCHE RELEASE. PAKISTAN: ACCESS TO JUSTICE PROGRAM (July 2007) <http://www.adb.org/Documents/Tranche-Releases/PAK/32023/32023-PAK-PRTR.pdf>

citizens to secure and sustain their access to key sets of assets. The pro-poor rationale of this Program assumes that efforts to limit the vulnerability of the poor to the vagaries of systems of administrative, political, civil, and criminal justice are at least as important as macroeconomic performance in poverty reduction. *In addition, the present legal framework and the performance of judicial institutions significantly constrain market-based economic growth, and in particular hinder foreign direct investment as well as the growth of small and medium-sized enterprises.*⁸⁹

There are two striking features of this rationale. First, the idea of a rescue plan of sorts for the ‘poor’ from their ‘vulnerability’ to a less than sensitive justice system is juxtaposed against an acceptance of the reality of their continuing entrapment in poverty. This could either mean that the existing system of “administrative, political, civil, and criminal justice” inherently sustains and perpetuates an uneven playing field where the poor always lose out due to the inherent bias that they have to face. A ‘leveling’ of this playing field would thus be the real ‘pro-poor’ impetus of reform. The other possible interpretation, however, is that the slowness and inefficiency of the justice system has an adverse impact on all citizens. However, the poor are additionally open to harm, exploitation and abuse, as they further lack the economic resources and liberty to effectively vindicate their claims in courts of law. Courts that are more efficient would, therefore, benefit everyone, even the poor. That they are not the only beneficiaries of the intended reform, is, however, clarified with the clear highlighting of the interests of “market-based economic growth,” “foreign direct investment,” and “small and medium-sized enterprises.” Therefore, the poor are joint beneficiaries of reform endeavors along with the holders of all existing commercial and market interests. Whether they are claimants on an equal footing with the others is unclear. Even if they have an unequal claim with the rest, could they be pushed behind in the rather long queue of claimants to the largesse of a ‘reformed’ judicial system, given the greater resources at the disposal of the commercial and market interests, is left unmentioned. Whether, a further entrenchment of existing commercial and market interests is in any way linked to or contributory towards the perpetuation of the larger socio-political and economic milieu in which the poor find themselves increasingly ‘vulnerable,’ is also not discussed. Would more ‘efficient’ courts — courts that resolve legal disputes more quickly and more predictably (as in they follow *stare decisis* more loyally) — be able to necessarily change anything when it comes to issues of ‘equity’ and ‘distribution’ that may be the actual underlying reasons for the vulnerability of the poor? Or would the courts, in some ways, directly or indirectly worsen the situation for the poor by putting a premium on ‘efficiency’ and ‘predictability,’ that could in all probability lead to further structural strengthening of the *status quo* and to a lesser propensity on their part to rock the boat as

⁸⁹ ASIAN DEV. BANK, REPORT AND RECOMMENDATION OF THE PRESIDENT TO THE BOARD OF DIRECTORS ON PROPOSED LOANS AND TECHNICAL ASSISTANCE GRANT TO THE ISLAMIC REPUBLIC OF PAKISTAN FOR THE ACCESS TO JUSTICE PROGRAM (NOVEMBER 2001). See http://www.adb.org/Documents/RRPS/PAK/rrp_32023.pdf . (Text italicized by the author for emphasis).

that would create both inefficiency and unpredictability? Inefficiency and unpredictability may be the inevitable outcome, at least temporarily, of any judicial endeavors to question the basic underlying structural causes for the low access to justice for the vulnerable and the historically disempowered. But it would definitely not be attractive to any societal goals of “market-based economic growth,” greater “foreign direct investment,” and flourishing of “small and medium-sized enterprises.” After all, who would want to invest in a country if its fundamental property rights regime is under question! These are fundamentally important questions that give one a sense of how deep and how meaningful any reforms are going to be for the vulnerable and the historically disempowered, especially if the goal is ‘access to justice’ and not simply ‘access to courts.’

A close review of the AJP experience reveals that these paradoxes remain unaddressed at the theoretical and ideological level. This leaves AJP and similar reform endeavors open to the critique that the poor and the vulnerable and the historically disempowered were meant, if anything, to be nothing more than residual claimants to what were essentially legal reforms for the protection and promotion of free market economy based contract and property rights. That is if indeed, it was even possible for the ‘poor’ and the vulnerable and historically disempowered to remain residual claimants given the intense competition for limited resources, court time and judicial attention. After all, don’t the most prolonged, divisive and complex societal and legal disputes surround the access to key sets of material, social, political, and environmental assets — the very arenas where the poor, the vulnerable and the historically disempowered may be found occupying opposite sides of the battle lines to those occupied by interest groups in economic growth and foreign investment? How could ‘efficiency’ of the justice system then be the primary reform goal and how could it address deep conflicts in society that could be the main contributors to on-going disputes? The ‘Efficiency Plus Approaches’ to justice sector reform have mostly sidestepped these important questions.

Proceeding with an unflinching confidence in the ability of an enhanced and more ‘efficient’ legal and judicial system, the ‘Efficiency Plus Approaches’ have thus quite predictably focused on the more superficial aspects of the problems facing the justice sector. These include the poor physical infrastructure of courts and related facilities, as well as the inadequate salaries, incentive structures etc., for judges. These issues are categorized by these approaches as the primary contributory causes to a dysfunctional justice system. The larger professed reform agenda of AJP, for instance, was to “improve access to justice,” in order to: “(i) provide security and ensure equal protection under the law to citizens, in particular the poor; (ii) secure and sustain entitlements and thereby reduce the poor's vulnerability; (iii) strengthen the legitimacy of state institutions; and, (iv) create conditions conducive to proper growth, especially by fostering investor's confidence.”⁹⁰ However, implicit in this approach was the faith that the law as it existed contained all the solutions to the problems, as well as the protections against the vulnerabilities, faced by the poor. Hence, the real task at hand was to simply provide better “access” to the poor, through more ‘efficient’ judges, to their hitherto elusive ‘entitlements’ and an evasive ‘equal protection under the law.’ The emphasis of the “in

⁹⁰ Id.

particular to the poor” simply providing the “plus” in the “Efficiency plus.”

An additional obvious shortcoming of these approaches has been the comparatively limited and narrow emphasis on the human variable in the justice equation i.e. the judges themselves. It was assumed that a better paid judge in a better courtroom following a more efficient regime of speedy case disposal, would not only be a more ‘efficient’ judge but also a more intelligent as well as a more ‘equitable’ one — with hardly any elaboration of what such trickle-down equity might mean. This convenient presumption of the judge as a monolithic, homogenous and predictable machine-like instrumentality is of course highly problematic. Sanitized and aloof from the appreciation of any biases, inclinations, pressures and prejudices stemming from the judges’ social, economic, class and educational background — which may be pro *status-quo* and protective of existing social and political hierarchies — the ‘Efficiency Plus Approaches’ assumed the eventual occurrence of pro-poor reforms, rather than meaningfully engaging with the more difficult question of how they would actually take place. There is thus a glaring omission, by these approaches, in the lack of cognizance of the systemic and institutional ideologies, politics, impetus, constraints, and varied impacts of any judicial system.⁹¹ At the same time, the ‘Efficiency Plus Approaches’ are as oblivious to the significant contributory role of legal education towards creating foot soldiers in service of a given and entrenched political and economic system that may itself be the fundamental root cause of poverty as well the vulnerability of the poor. While underplaying the complexity of the ‘human factor’ in justice delivery, the ‘Efficiency Plus Approaches’ are thus neglectful of the nature and ideology of the education and training that leads to the eventual creation of lawyers and judges who actually operate the legal and judicial system — as well as the important insights highlighting the importance of the legal educational dimension in other legal jurisdictions.⁹²

Thus the actual achievements of the ‘Efficiency Plus Approaches,’ such as the AJP, can largely be seen in projects geared towards building new court rooms, judicial lockups, waiting rooms for litigants, bar room facilities etc; computerization of judicial record rooms, and, streamlining of court processes; and, advocacy for increased salaries for judges and staff etc. When they have focused on the ‘human agency,’ the ‘Efficiency plus

⁹¹ See for instance DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]* (Harvard University Press 1997) for its lucid explorations of the various sociological and psychological aspects and implications of adjudication; in particular, the question of how politics affects judicial activity and how, in turn, lawmaking by judges affects politics, in the American context. For a more philosophical exploration of the phenomenon of judicial decision-making see DUNCAN KENNEDY, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Leg. Ed. 518 (1986).

⁹² DUNCAN KENNEDY: *Legal Education and the Reproduction of Hierarchy*, 32 J. Leg. Ed. 591 (1982). Duncan Kennedy’s seminal article and recent book: *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM*, (NYU Press, Critical America 2004) have spearheaded an incisive on-going debate that focuses on the ideological and structural impetuses and biases in the U.S. legal educational system in the training of lawyers towards adopting roles of unquestioning service towards existing patterns of domination and hierarchy in American society, to the exclusion of other possibilities of legal and political practice. One important part of the American law school training, according to Duncan Kennedy, is to create willing service providers to the hierarchies of a corporate welfare state.

Approaches’ have highlighted the need for boosting the ‘demand’ for justice by addressing issues of impaired access to different disadvantaged groups in society. In this context, they have also at times dabbled with non-judicial modes of dispute resolution or flirted with notions of decentralization of some less important aspects of dispute resolution to indigenous or local mechanisms. However, their ultimate, overarching and clearly professed aim in terms of legal and judicial reform goals has remained greater speed, efficiency and predictability, rather than equity or targeting the vulnerable, even though, as described, the latter goals are mentioned as a logical outcome of the former. In the ultimate analysis, however, the poor, the vulnerable and the historically disempowered have essentially remained residual claimants to attention as well as potential beneficiaries of eventual, ‘trickle down’ boons of a more efficient judicial system.

The final outcome of AJP has been far less satisfactory than the professed aspirations, even according to the donor institution itself, which evaluates its impact to be below par and its sustainability largely suspect.⁹³ Particularly when one looks at AJP’s limited forays in areas other than efficiency of judges and building judicial policy-making capacity, the performance is poor. Asian Development Bank acknowledges the limited progress that was made under AJP to institutionalize alternative dispute resolution to help reduce the loads on the courts, especially citing resistance to the idea in the lower courts and the bar.⁹⁴ For instance, reforms to institutionalize a framework for mediation of petty local disputes through the mechanism of *Musalihat Anjuman* (MA) have been declared unsuccessful in the National Judicial Policy 2009.⁹⁵ Very few MAs were actually established and most remain non-functional to date. The reasons offered for this setback cite lack of incentives for local governments to establish MAs, lack of awareness and confusion regarding their actual mandate, unclarity as to their rules of business and procedure, limited capacity of and weak incentive structure for the local conciliators meant to run MAs, past negative experience and bias against traditional *jirgas*, and

⁹³ TECHNICAL ASSISTANCE COMPLETION REPORT. TA 3823- PAK: SUPPORTING AND MONITORING PROGRESS UNDER THE ACCESS TO JUSTICE PROGRAM. See <http://www.adb.org/Documents/TACRs/PAK/32023-PAK-TCR.pdf> (unpublished document).

⁹⁴ Id. The National Judicial Policy for 2009 confirms the judiciary's commitment to ADR to help address case backlog and delay. The National Judicial Policy for 2009.

⁹⁵ The National Judicial Policy for 2009. The *Musalihat Anjuman* (MA) mechanism was stated to be designed to provide ordinary citizens with access to justice through informal, quick and inexpensive means. The idea was for localizing disputes for expeditious resolution. Local MA members were meant to discuss a conflict with both parties and try to come up with a negotiated settlement so that a case did not have to go to court or to the police. A broad range of criminal and civil disputes was visualized to be brought before MAs, including property disputes, inheritance, and marriage disputes. MAs were to consist of a panel of ‘eminent persons’ (individuals who are publicly known as persons of integrity, good judgment and command respect in the community) Disputes could also be referred to MA by the district judiciary, in which case settlement could be converted into a consent decree by the court. See ACCESS TO JUSTICE: MUSALIHAT ANJUMAN & DISTRICT OMBUDSMAN OFFICE 2008. DECENTRALIZATION SUPPORT PROGRAM. NATIONAL PROGRAM SUPPORT OFFICE. POLICY DIALOGUE OUTCOME REPORT. See at <http://www.decentralization.org.pk/docs/Access%20to%20Justice%20Musalihat%20Anjuman%20and%20District%20Ombudsman%20Office.pdf>

importantly, lack of support from the formal justice sector institutions.⁹⁶ Similarly, the idea of introducing District level Ombudsmen has also not taken off due to inadequate political and institutional ownership, resource constraints and weak incentive structures.⁹⁷ The ‘Efficiency Plus Approaches’ have to date achieved limited success in enhancing judicial efficiency and as to the ‘plus’ part, negligible to start with, that has more or less withered away.

D The ‘Human Capital Development Approaches’

The ‘Human Capital Development Approaches’ are similar to the ‘Efficiency Plus Approaches’ in their point of departure. They too proceed with an essential acceptance of the design and structure of the existing legal and judicial system as a given, and as something that can be improved upon for enhanced output. They are, however, somewhat different in some of their points of emphasis as they also stress the need for greater reforms to improve the qualitative output of judges. Thus, they are not just content with evaluating performance in purely quantitative efficiency terms. Like the ‘Efficiency Plus Approaches.’ They emphasize the historically poor salaries, facilities, and incentive structures etc., especially for trial judges. Importantly, they also highlight their lack of training. Thus they are more nuanced than the purely ‘Efficiency Plus Approaches’ in that they do not solely ascribe poor judicial performance to less than adequate or broken down court rooms; shortage of support staff; and, lack of residential facilities for judges, but also focus on additional institutional and historical factors impacting the human agency behind impartation of justice. However, while they point out that the judges manning the Pakistani lower judiciary have been historically under-funded, under-trained, and over-burdened with work (so that as such careers in the lower judiciary are typically opted for by those who have few other alternatives — essentially the very bottom of the available talent pool) they don’t quite stretch this analysis to the state of the appellate judiciary.⁹⁸ This is a telling omission (though brought about by the design constraints of the project but that in turn reveals the omission at the design stage) especially given that as is, the Pakistani appellate judiciary has habitually displayed a haughty resilience to ideas of further training and education, often branding it as contemptuous of the judiciary as well as a violation of its independence. This hostility to any attempts to reform its eligibility, appointment, evaluation and removal mechanisms under the Constitution, under the misleading slogan of ‘independence of judiciary,’ is evident in the current imbroglio on the work of the constitutional reform committee’s

⁹⁶ Id. MAs were also intended to institutionalize traditional ADR mechanisms, like *Jirgas*. A *Jirga* is a tribal assembly of elders who make decisions by consensus. *Jirgas* are often called in to resolve disputes between two individuals. Disputants find a mediator, who is generally a local notable and/or a senior religious leader. The mediator hears from both sides then forms a *Jirga* of community elders and includes supports from both sides. The *Jirga* makes a decision, which needs to be accepted. *Jirgas* are used as courts in tribal areas of Pakistan. However, *Jirgas* have also been misused to settle political rivalries, and in some cases violated the fundamental rights enshrined in the Constitution.

⁹⁷ Id.

⁹⁸ BHANDARI & NAQVI, COUNTRY STUDY: PAKISTAN (The Asia Foundation & Asian Development Bank Judicial Independence Project 2002). See also ASIAN DEV. BANK & PAK. MINISTRY OF LAW, JUSTICE & HUMAN RIGHTS, STRENGTHENING THE SUBORDINATE JUDICIARY IN PAKISTAN (Asian Dev. Bank & Pak. Ministry of Law, Justice & Human Rights 1999).

recommendations. This is despite the fact that a low constitutional qualification bar for appointments to the appellate judiciary; the absence of a legislative role in such appointments; the growing conundrums on the precise role of the executive and the judiciary in this process; the mystique surrounding this process and its resulting opaqueness to public and academic scrutiny; and, historical evidence of blatant politics controlling judicial appointments to the appellate judiciary have consistently raised serious questions about the quality of the appellate judiciary.⁹⁹ The existing constitution mechanism for removal of appellate court judges on being found incapable or guilty of misconduct has also proven to be highly ineffectual since its introduction in 1973. Yet the ‘Human Capital Development Approaches’ side-step these issues as indeed they ignore the importance of understanding the sociology of the judicial and legal professions and whether class, caste, gender and community alliances play a role in this entire milieu.¹⁰⁰

The ‘Human Capital Development Approaches’ point out that the fact that all the provincial governments as well as the federal government in Pakistan have historically allocated less than one percent of their respective budgets to the judiciary underlines historical low-prioritization and neglect of the justice sector.¹⁰¹ They further highlight that despite the adverse impact of meager salaries; inadequate facilities; poor working environment; low social status; and, overwhelming workloads on both the morale and performance of the Pakistani lower judiciary, pleas for reform have been consistently ignored.¹⁰² The inherent assumption and obvious prescription of these approaches is that adequate infrastructure and human capacity building will lead to a much more satisfactory legal system and judicial performance. However, the term ‘training’ is open to being reduced to, and is often reduced to, something as limited as enhanced judicial policy making, performance monitoring of the lower judiciary at the appellate level, and better judicial management skills at the lower judiciary level — all these exercises geared towards reaching delay reduction.¹⁰³ Even though ‘training’ is also capable of encapsulating much more dynamism and value-added. Where the ‘Human Capital Development Approaches’ adopt this narrow meaning and focus for judicial training, they are not very dissimilar to the ‘Efficiency Plus Approaches.’ The difficult question of whether equity concerns and the specific socio-economic factors causing the plight of the ‘vulnerable’ groups in society will also get adequately addressed by more socially and economically content and better trained and efficient (and yet not necessarily more socially sensitive and equity-oriented) judges, is not explored and explicated in the ‘Human Capital Development Approaches’ that visualize ‘training’ in its most inert and

⁹⁹ See OSAMA SIDDIQUE, *Judicial Appointments and Accountability: A Flawed Debate*, The Friday Times, March 12, 2010.

¹⁰⁰ BHANDARI & NAQVI, COUNTRY STUDY: PAKISTAN (The Asia Foundation & Asian Development Bank Judicial Independence Project 2002).

¹⁰¹ Id.

¹⁰² ASIAN DEV. BANK & PAK. MINISTRY OF LAW, JUSTICE & HUMAN RIGHTS, STRENGTHENING THE SUBORDINATE JUDICIARY IN PAKISTAN (Asian Dev. Bank & Pak. Ministry of Law, Justice & Human Rights 1999).

¹⁰³ LIVINGSTON ARMYTAGE, PAKISTAN’S LAW & JUSTICE SECTOR REFORM EXPERIENCE — SOME LESSONS, COMMONWEALTH LAW CONFERENCE (Melbourne 14 April 2003). See <http://www.educatingjudges.com/Hyperlinks/PakistanADBProjectLessonsLearned.pdf>

mechanical sense.

E The ‘Islamization of Law and Legal System Approaches’

The ‘Islamization of Law and Legal System Approaches,’ (predominantly visible and thriving during the Pakistani military ruler Zia-ul-Haq’s regime from 1979-88), cannot be decoupled from the larger political context of Zia’s martial law and his subsequent attempts to entrench his regime through the adoption of ‘Islamization’ as a political philosophy and a strategy of rule. Zia’s ‘Islamization’ program operated at both the level of introducing certain fundamental structural changes to the judicial system, as well as the so-called ‘Islamization’ of particular laws. To provide ideological oversight and justification, the Islamic Ideology Council was formed six weeks after Zia’s 1979 coup and was entrusted with the task of preparing an outline of an Islamic state. It also had a panel on Islamic Law.¹⁰⁴ One of the most decisive steps towards the ‘Islamization’ of the legal system was the creation of a parallel judicial apparatus, comprising the Federal Shariat Court (the “FSC”)¹⁰⁵ and the Shariat Appellate Bench of the Supreme Court (the “SAB”).¹⁰⁶ The FSC was authorized and mandated to ensure the conformity of all legislation to the Quran and Sunnah,¹⁰⁷ and strike down any law it considered repugnant to either.¹⁰⁸ Moreover, an appeal against a decision of the FSC was possible only to the SAB.¹⁰⁹ The composition of the FSC¹¹⁰ and the SAB¹¹¹ in itself cemented the formalization of the role of the ‘*Ulema*’ – Islamic religious scholars, in this new graft onto the existing judicial system.¹¹² The FSC was also used, at times, for pushing upstairs independent-minded judges of the high courts, and hence it served an important role for ‘taming’ independent-minded judges.¹¹³

Apart from the alterations to the structure of the judicial system, the enactment of the blasphemy laws and the controversial Hudood (Islamic Criminal) laws governing areas of

¹⁰⁴ OMAR NOMAN, *THE POLITICAL ECONOMY OF PAKISTAN 1947-85*, 117–56 (Kegan Paul Int’l. 1990), at 118.

¹⁰⁵ *See* CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, ZAIN SHAIKH, (1973) (Pakistan Law House 2004) [hereinafter PAK CONST.] art 203-C (1), at 112.

¹⁰⁶ *Id.* at 119. art 203 (F) (3).

¹⁰⁷ *Id.* at 115. art 203-D (1).

¹⁰⁸ *Id.* at 116. art 203-D (3).

¹⁰⁹ *Id.* at 119. art 203-F (1).

¹¹⁰ *Id.* at 113. art 203-C (3A).

¹¹¹ *Id.* at 119. art 203 F (a) and (b).

¹¹² Thus, the composition of the FSC and SAB in itself assured the adoption of a conservative rather than a modernistic and progressive interpretation of the Quran and Sunnah.

¹¹³ HAMID KHAN, *CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 579–708* (Oxford Univ. Press 2001, at 638, 641. In effect, the FSC indirectly performed legislative functions by: (a) reviewing existing laws to see if they were in conformance with the *Sharia* and declaring if not so, in which case such laws ceased to exist after a stipulated time period; and (b) laying down guidelines and formulations to direct what the laws should be, which guidelines and formulations were in turn required to be kept in consideration by the legislature. Thus, they played a significant role in the promulgation of various criminal laws under Zia.

personal morality, also formed a very important part of Zia's 'Islamization' program.¹¹⁴ Significant changes were made to the law, which were questioned by moderate elements in society, rights groups, and political and legal commentators. Critics of Zia's introduction of new 'Islamic' laws both questioned their Islamic legitimacy at a theological level, and highlighted their operational defects and vulnerability to abuse. They criticized the introduction of new punishments such as stoning to death, amputation etc., that could be meted out because of prosecutions, trials and convictions under laws that they argued suffered from several substantive and procedural issues, thus creating a huge possibility of injustice. The overarching lack of faith in the integrity and telos of Zia's 'Islamization' oriented legal and judicial reforms, however, stemmed from the realm of the larger political critique of Zia's rule and its various actions as inherently *mala fide*. Zia's legal reforms were thus deemed the fruit of a poisoned tree. To its detractors, Zia's reforms lacked the basic integrity and commitment to promote either Islam or good laws (instead doing an injustice to both). Furthermore, they left no room for deliberation and dialogue both because Zia did not allow it, and also because it was considered pointless to even acknowledge them as model for discussion, tainted as they were due to their underlying objective. Thus, Zia's legal and judicial reforms continue to be examined not as an alternative ethos or vision for any legal and judicial reform, but largely as a supportive edifice and framework for an illegal and oppressive regime that intended to and openly found justification for its illegality and oppression in 'Islam.' 'Islamization' also came to be used by Zia as a handy tool and was a leitmotif of that period, when he wanted to thwart any legitimate opposition — they could simply be condemned unheard as un-Islamic. Apart from these fundamental points of discord, on closer examination critics found several of Zia's laws to be discriminatory against the rights of women; and, in that sense inherently retrogressive and unrepresentative of what they considered the true spirit of Islam.¹¹⁵ Women's rights groups in Pakistan and abroad in particular have continued to regularly document, analyze and protest against what they point out are the various aspects of these laws, which are discriminatory against women. The critique has come both from a doctrinal and ideological perspective,¹¹⁶ as well as

¹¹⁴ The Hudood Laws were enacted through as many as four Presidential Ordinances and one Presidential Order, namely, Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), *reprinted* in 31 PLD 1979 Central Statutes 51 (1979); Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), *reprinted* in 31 PLD 1979 Central Statutes 56 (1979); Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979), *reprinted* in 31 PLD 1979 Central Statutes 44 (1979); Execution of the Punishment of Whipping Ordinance, 1979 (IX of 1979), *reprinted* in 31 PLD 1979 Central Statutes 60 (1979); and, Prohibition (Enforcement of Hadd) Order, 1979 (IV of 1979), *reprinted* in 31 PLD 1979 Central Statutes 33 (1979).

¹¹⁵ See for instance, CHARLES H. KENNEDY, *Islamization and Legal Reform in Pakistan, 1979–1989*, 63 PAC. AFF. 62, 72 (1990). See also, ASMA JAHANGIR & HINA JILANI, *THE HUDOOD ORDINANCES: A DIVINE SANCTION?* at 18, 21-22, 32-33 (Sang-e-Meel Publications 1990)(they castigate Zia's Islamization of laws as an attempt to consolidate his power; analyze the adverse impact of these laws and their implementation mechanisms in an equally adverse socio-political and legal environment; and comment on how extension of religious sanctity to these laws makes any criticism of them tantamount to heresy).

¹¹⁶ FAUZIA GARDEZI, 'Nationalism and State Formation: Women's Struggles and Islamization in Pakistan' in *ENGENDERING THE NATION-STATE*, at 79 (Neelam Hussain, Samiya Mumtaz, Rubina Saigol ed., Simorgh Women's Resource and Publication Centre 1997) who argues that Zia's Islamization of laws is unprecedented in Pakistan's history and discusses their impact on shaping gender relations and

through exhaustive empirical studies of the several problems of these laws. Their criticism targets discriminatory evidentiary rules, as well as the consequence of the equation of rape with adultery. The latter has led to the conversion of complaints of rape into prosecutions for adultery, when the accusers fail to bring sufficient evidence to prove rape, due to inadequate investigative and evidentiary mechanisms, quite apart from the incidence of malicious prosecutions.

Broadly, the verdict of the informed contemporary opinion on the Islamic laws introduced during Zia's regimes is that they formed part of a larger pattern in which the subjugation of legislation to political expediency subverted the processes of justice in Pakistan. Not the product of a pluralistic and participatory democratic discourse, Pakistani and foreign commentators continue to regard these laws as essentially the legislative interventions of a military dictator who adopted a theocratic rhetoric and agenda for clearly self-serving motivations. Therefore, quite apart from their flawed design, the very genesis and ethos of these laws continues to be regarded as highly tainted. It is, therefore, not surprising that while some of Zia's interventions continue a highly controversial life three decades later, it is only the fragility of subsequent political governments and not any great public support for them that extends them a lease of life. The Federal Shariat Court has recently come openly under fire by the Supreme Court as a problematic entity and its actual role has in any case been much curtailed since its inception. Repeatedly, there are movements of public pressure to repeal some the more problematic laws introduced under Zia. It would be interesting to mention here that, briefly, a revisionist judiciary in the 1980s questioned the continuing application, at times, by the Pakistani courts, of the colonial doctrine of 'justice, equity and good conscience.' It noted a growing judicial trend to apply Islamic laws and its principles as Islamic principles of equity, judicial norms and philosophy where extant statute law was silent or open to interpretation, and it actively prescribed this approach.¹¹⁷

Had this trend continued it would have been interesting to observe a revisiting by the judiciary of the colonial features of the Pakistani legal and judicial system while employing an alternative ethos and methodology. Subsequent years, however, demonstrated that this kind of thinking has mostly lost momentum. In fact, there has been

the nature of the State. *id.* at 79-80. See also, SABA GUL KHATTAK, *Gendered and Violent: Inscribing the Military of the Nation-State*, *id.* at 38, who focuses on the impact of the military upon civil society in terms of perpetuating gender ideologies; explores the specific issues of engendering the nation-state and how the processes of engendering are directly connected to violence and defence even when the language they use is one of 'caring'; and also the militarization of civil society and its unquestioned 'normal' status *vis-à-vis* democracy, *id.*; and SAADIA TOOR, *The State, Fundamentalism and Civil Society*, *id.* at 111, who argues that Zia's legal interventions continue to have an impact long after his demise because quite apart from their being an imposition from above by a repressive and authoritarian regime, which held power through domination, the effect of Islamization on Pakistani civil and political society has been far greater than usually acknowledged, *id.* at 112. Other commentators have squarely described the Islamization agenda as one meant to systematically reduce the power and participation of women in the public sphere, and such dilution of their role as not just a mere side effect as such. See ANITA M. WEISS, *Women's Position in Pakistan: Socio cultural Effects of Islamization*, 25 *ASIAN SURV.* 863, 876-77 (1985).

¹¹⁷ Haji Nizam Khan v. Additional District Judge, Lyallpur, PLD 1976 Lahore 930.

a rearguard action on part of judges who still favor a less religiously nuanced interpretation of laws and the Constitution. The most illustrative example of this is the Supreme Court jurisprudence surrounding the constitutional reading of one of Zia's elevated 'Islamic' provisions i.e. Article 2-A of the Constitution. The language of the eventual Article 2-A was originally enshrined in what is referred to as the 'Objectives Resolution' — which acted as the preamble to previous Pakistani constitutions.¹¹⁸ Zia, however, made it an operative part of the current Constitution as Article 2-A, in order to unequivocally redefine the ethos of the Constitution as non-secular.¹¹⁹ There is a series of Supreme Court cases during and soon after Zia that held interesting discussions on whether Article 2-A was at par with the other provisions of the Constitution or whether due to its broad and all-encompassing content, it ought to be looked upon as the *grundnorm* of the Constitution. An important implication of the latter reading was that Article 2-A could then trump any 'conflicting' provision of the Constitution on the litmus test of whether they were in violation of Islam and hence also give vast powers to judges willing to use it as such. Recent Pakistani judgments have, however, put to rest the argument that Article 2-A can trump other constitutional provisions, thus acting as a sort of *grundnorm*, and have declared instead that it stands on an equal footing with other provisions of the Constitution.¹²⁰ Indeed, they have firmly precluded and strongly warned against an interpretation of Article 2-A which would raise it to the pedestal of being a litmus test for gauging, evaluating and potentially becoming a justification for judicially striking down any other constitutional provisions. While acknowledging that various such provisions may be inconsistent with Article 2-A, the courts clearly warn that such an interpretive approach would undermine the entire Constitution.¹²¹ However, regardless of the above, Article 2-A has also been used frequently for underlining the courts'

¹¹⁸ I am referring here to the Constitutions of 1956 and 1962 and the un-amended version of the Constitution of 1973.

¹¹⁹ PAK CONST., art. 2-A makes the Objectives Resolution a part of the substantive provisions of the Constitution. The controversial Objectives Resolution, which was opposed by all the minority members of the Constituent Assembly at the time of its adoption in 1949, apart from having an overtly religious tone, starts with the words: "Whereas sovereignty over the entire universe belongs to Allah Almighty alone and authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust," and extends protection to the Fundamental Rights under the Constitution subject to "law and public morality."

¹²⁰ See *Sharaf Faridi v. The Federation of Pakistan*, PLD, 430, 452 (1989) (Pak.).

¹²¹ See *Hakim Khan v. Government of Pakistan*, PLD 595, 612, 617, 620, 634-5 (1992) (Pak.). The Supreme Court laid down that the role of the Objectives Resolution, notwithstanding the insertion of art. 2-A in the Constitution, had not been fundamentally transformed from the role envisaged for it at the outset; namely that it should serve as a beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect the ideals and objectives set forth therein. So any impugned provision of the Constitution could only be corrected by a suitable amendment through the process laid down in the Constitution itself. The provisions of art. 2-A, the Court said, were never intended at any stage to be self-executory or to be adopted as a test of repugnancy or of contrariety and it was beyond the power of a court to apply the test of repugnancy by invoking art. 2-A for striking down any other provision of the Constitution. Art. 2-A was thus not a supra-constitutional provision. If it were, the Court said, then it would require the framing of an entirely new constitution. And if it were to be treated as a gauge for evaluating other provisions of the Constitution, the Court further elaborated, then most of the articles of the existing Constitution would become questionable on the ground of their alleged inconsistency with its provisions. And that, the Court warned, would result in the undermining of the entire Constitution and pave the way for its eventual destruction, or at least its continuance in its present form. This view was subsequently upheld in *Zaheeruddin v. The State*, SCMR 1718 (1993) (Pak.).

commitment to a notion of justice that permeates the Constitution.¹²² At the same time Zia's 'Islamization' continues to at times influence judges in drawing principles from Islamic jurisprudence to fill gaps.¹²³ However, as an alternative model of judicial and legal reform in Pakistan, it currently has no prominent champions, or any considerable political or popular backing.

F The 'Judicial Activism Approaches'

The ethos of this approach can be traced in the "public interest litigation" phenomenon that emerged in Pakistan over the last almost three decades, in the wake of a similar phenomenon in neighboring India.¹²⁴ In what may seem unusual to observers in other jurisdictions, this phenomenon has been characterized by activist judges revisiting, relaxing and amending the existing trial systems and procedures, and their own conventional roles in trial adjudication. The intent is to actively intervene and adjudicate in areas where activist judges find injustice and persecution to be prevalent in society to an unacceptable level.¹²⁵ Justifying this innovative approach, they have argued that the

¹²² See Dr. Faqir Hussain, *Public Interest Litigation in Pakistan*, PLD 72, 77 (1993) (Pak.) [hereinafter Faqir Hussain, *Public Interest Litigation*] who emphasizes the role of art. 2-A in the emergence of public interest litigation in Pakistan, along with the role played by the Fundamental Rights, the Principles of Policy and arts. 3, 4 and 187 of the Constitution which respectively entrench the State imperative of eliminating exploitation, upholding the right of individuals to be dealt with in accordance with law, and empowering the Supreme Court to issue such directions, orders and decrees as may be necessary for doing complete justice in any case or matter before it.

¹²³ See MANSOOR HASSAN KHAN, *PUBLIC INTEREST LITIGATION: GROWTH OF THE CONCEPT AND ITS MEANING IN PAKISTAN*, 48-53 (Pakistan Law House, 1993). The author traces cases in which the Supreme Court has invoked Islamic principles and Islamic common law as well the Court's reliance on constitutional provisions such as art. 268 of the Constitution, that allows the judiciary to construe the law with all such adaptations that are necessary to bring it in accordance with the Constitution (*see supra* note 96), to make the argument that there is a general tendency of the courts to fill in the vacuums existing in the law with Islamic principles and Islamic common law.

¹²⁴ A seminal article evaluating the emergence of this phenomenon in India is UPENDRA BAXI, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, *THIRD WORLD LEGAL STUD* 107 (1985). Baxi argues that this phenomenon, which emerged in the late 1970's, is very much distinguishable from the public interest movement that occurred in the U.S. He is of the view that unlike the U.S. movement that focused on "civic participation in governmental decision making" and was geared towards "greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society," the Indian phenomenon was directed against "state repression or governmental lawlessness" focusing "pre-eminently on the rural poor." *Id.* at 109. Distinguishing the U.S. phenomenon, he describes it as one that represented "interests without groups." *Id.* Others are even more categorical in making this distinction. See, P.N. BHAGWATI, *Judicial Activism and Public Interest Litigation*, 23 *COLUM. J. TRANSNAT'L L.* 561, 569 (1984). Bhagwati asserts that "[t]he substance of public interest litigation in India is much wider than that of public interest litigation in the United States" as while embracing all the issues encompassed in the U.S. movement, the Indian movement went beyond and focused on "the disadvantaged and other vulnerable concerns." *Id.* at 569. He adds to Baxi's categories of state oppression and governmental lawlessness, the additional areas of judicial interventions in India, such as administrative deviance and exploitation of disadvantaged groups and denial to them of their rights and entitlements. *Id.* It is not surprising, therefore, to note that both these writers propounded "social action litigation" as a more appropriate term to describe this phenomenon.

¹²⁵ Commentators on the Indian public interest litigation phenomenon have identified several methods and techniques, which Indian courts have developed to bring about a relaxed and litigant friendly approach for facilitating such litigation. Specifically, they point out the enhancement of direct access to the courts and

socio economic and political inequities of these countries preclude the most vulnerable from accessing the courts for seeking justice, which problem is exacerbated by dependence on, at times, unapproachable lawyers, intricate and often forbiddingly complex procedural requirements, the expense of litigation, and traditional legal and judicial attitudes.¹²⁶ While a certain amount of restraint has characterized this movement in more recent years, it has definitely opened up an entirely new arena for recourse to justice for many who had been hitherto unable to pursue legal remedies in a similar fashion. The emergence of public interest litigation in South Asia and its current trends and challenges are fast developing and extensive areas of study.

The substantive edifice that bedrocks and permeates the pursuit of this new breed of litigation and its remedies are the provisions in South Asian constitutions that extend protection to a diversity of human rights under the category of “Fundamental Rights.” The Pakistani Constitution contains a comprehensive list of such Fundamental Rights, around which the judiciary has incrementally developed a body of jurisprudence – which it has attempted to extend and defend, in spite of periods of military intervention that have temporarily precluded it from doing so.¹²⁷ There are several important Pakistani judgments that underline the importance of interpreting the Constitution in a manner that the ambit of the Fundamental Rights is not curtailed, but indeed expanded.¹²⁸ The

relaxed rules of standing, procedural flexibility in terms of commencement of legal actions, creative adjudication and elaboration of rights, and remedial flexibility. See for example, JAMIE CASSELS, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?* The American Journal of International Law, 37, No. 3, 495 (Summer, 1989). See also, G. L. PEIRIS, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, The International and Comparative Law Quarterly, 40, No.1, 66 (Jan., 1991), who traces the emergence and discusses the dynamics and impact of the “epistolary jurisdiction,” the relegation of the doctrine of *locus standi*, the extenuation of adversarial postulates, direct judicial involvement in controversial policy issues, the emergence of detailed administrative adjudication, the innovation of mechanisms for fact-finding, the expanded scope of discovery, the instrument of issuance of Directions to Federal and State governments, and invocation of free legal aid – as remarkable and distinctive features of the Indian public interest litigation phenomenon.

¹²⁶ See CHIEF JUSTICE (RETD) NASIM HASAN SHAH, *Public Interest Litigation as a Means of Social Justice*, PLD 31 (1993) (Pak.) [hereinafter Shah, *Public Interest Litigation*]. See also, CHIEF JUSTICE (RETD) AJMAL MIAN, *Hardships to Litigants and Miscarriage of Justice caused by Delays in Courts*, PLD 103 (1991) (Pak.), and JUSTICE ASIF SAEED KHAN KHOSA, *High Courts and Expeditious Justice*, PLD 97 (1993) (Pak.).

¹²⁷ Chapter I of Part II of the Pakistani Constitution lays out a comprehensive list of the Fundamental Rights enjoyed by the citizens of Pakistan. Art. 3 says that the State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability, to each according to his work. Art. 4 protects the right of individuals to be dealt with in accordance with the law. Art. 8(1) protects these Fundamental Rights and declares any law inconsistent with them to be void to the extent of such inconsistency, and Art. 8(2) prohibits the State from passing any laws that take away or abridge the Fundamental Rights and says that any law made in contravention of this clause would be void to the extent of such contravention. See PAK CONST., arts. 3, 4, 8-28.

¹²⁸ For example, the Pakistani Supreme Court has held that constitutional interpretation should not just be ceremonious observance of the rules and usages of interpretation but instead inspired by, *inter alia*, Fundamental Rights, in order to achieve the goals of democracy, tolerance, equality and social justice (see *Benazir Bhutto v. Federation of Pakistan*, PLD 416, 489 (1988) (Pak.)); that the prescribed approach while interpreting Fundamental Rights is one that is dynamic, progressive and liberal, keeping in view the ideals of the people, and socio-economic and politico-cultural values, so as to extend the benefit of the same to the maximum possible people; that the role of the courts is to expand the scope of such a provision and not to extenuate the same (see *Muhammad Nawaz Sharif v Federation of Pakistan* PLD 473, 674 (1993))

development and protection of Fundamental Rights jurisprudence in Pakistan has largely taken place due to the existence of special constitutional provisions for accessing the appellate courts for the protection of such rights. Article 199(1) of the Constitution bestows jurisdiction on the provincial High Courts, on the application of “any aggrieved party” or “on the application of any person” and where “it is satisfied that no other adequate remedy is provided by law,” to not only issue the usual writs of *prohibition*, *mandamus*, *certiorari*, *quo warranto*, and *habeas corpus* but to additionally, “on the application of any aggrieved person, make an order giving such directions to any person or authority including any Government exercising any power or performing any function in, or in relation to any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights...”¹²⁹ Article 184(3) of the Constitution enshrines the original jurisdiction of the Supreme Court and also grants it *suo motu* powers to intervene in areas of “public importance” for the enforcement of the Fundamental Rights.¹³⁰ The Supreme Court can utilize the same powers as the High Courts to issue various writs as well as their power to issue any order to any person for the enforcement of any Fundamental Rights. This power is further bolstered by Article 187(1) of the Constitution which gives the Supreme Court the “power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.”¹³¹ Over the last almost three decades, these provisions of the Constitution have been extensively invoked for rights protection.

It should, however, be noted that this judicial activism has been far from controversial. Over the years, and especially more recently, it has been open to strong criticism from various political and legal commentators in Pakistan. This criticism embraces the full spectrum of arguments that are usually made in support of judicial minimalism.¹³² In summary, it has been described, at times, as a transgression of the appropriate role of unelected judges in a democratic polity. It has been deemed in some cases to be in violation of the ‘doctrine of political question’ and indeed the assumption of a deeply political role on part of the judiciary. It has also been put to question in some situations as inappropriate judicial interference in areas politically contentious and technically complex — hence liable to end up in burnt fingers for the activist judges and additional hurdles for the elected democratic system impeded by bungling activist judges. An

(Pak.)); and, that a provision restricting Fundamental Rights or provincial autonomy ought not to be interpreted liberally so as to widen its scope. In the context of imposition of State Emergencies, Fundamental Rights cannot be suspended in routine and the citizens cannot be deprived of their liberties unless deprivation is reasonably related to the object of the Proclamation of Emergency and in doing so, the Executive must apply its mind having regard to the object of the Proclamation of Emergency, while suspending the Fundamental Rights (*see Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 57, 307 (1999) (Pak.)).

¹²⁹ *See* PAK CONST., art. 199(a) (b) and (c).

¹³⁰ *Id.* Art.184 (3) essentially says that the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights is involved, have the power to make an order of the nature mentioned in art. 199.

¹³¹ *See* PAK CONST., art. 187(1).

¹³² CASS R. SUNSTEN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT. (Cambridge: Harvard University Press 1999)

additional criticism is that less than salutary motivations of publicity and popularity can at times motivate judges to interfere in issues better left to resolution in the political and public debate arena. Furthermore, that appellate court judges ignore their own capacity constraints while undertaking *suo moto* cases that can not only result in lesser attention to their normal work in their original and appellate jurisdictions but also grandiose notions about the Supreme Court and High Court even interfering in matters that ought to be addressed by improved and empowered lower courts.¹³³ Additionally, this approach, like the other aforementioned approaches essentially focuses on delay reduction and greater access to the courts, through relaxed formal procedures; a broader interpretation of constitutional rights; and, an activist judiciary. However, quite predictably it almost never questions the fundamental post-colonial edifice of a justice system or the limits of its outreach, both in terms of the boundaries of its own jurisdiction *vis-à-vis* other organs of government as well as the desirability of alternative non-court dispute resolution possibilities in society. The activism is after all coming from a justice system and judges whose existence is dependant on the growth and further expansion of the formal justice system.

Conservative commentators sometimes employ the political epithet of ‘judicial tyranny’ to criticize certain non-originalist constitutional interpretations of United States Supreme Court.¹³⁴ Apprehensions of a certain ‘judicial tyranny’ in the sense of regular and debilitating invasion by the judiciary of democratic decision-making space, and also the lack of its own institutional accountability, are very much present in contemporary discourse on the role of the judiciary in Pakistan.¹³⁵ The possibility and hence

¹³³ The recent tussle between the Supreme Court of Pakistan and the Federal Government on appropriate sugar prices in the country, as well as disagreement on whether the court could fix these prices, is a very good example of these growing tensions. At one point in the hearing of this matter, a judge of the Supreme Court took offence when a Government Expert Commission was explaining to the Court the process of determination of commodity prices and criticized an earlier High Court decision to fix sugar prices. The judge scolded the Commission for lecturing the Court on economics. Though the Court conceded that the matter was in the domain of policy-making and political, it said that it was under the compulsion to intervene due to the adverse impact of high prices on the public and lack of appropriate remedial steps by the government. This is a classic embodiment of the dilemma. Government inaction or mis-governance along with real economic constraints create a crisis that captures public and then judicial attention. The Courts intervene, often to popular acclaim but soon realize that the problem is more complex than it seemed in the first place. At times, they start regarding the government’s perspective or alternative technical explanations and justifications as attempts to violate their writ and stature. The issue becomes personalized. Oftentimes nothing really comes out of it except sensational press. See <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/19-sc-judge-takes-offence-at-commission-report-on-sugar-hh-90>. For a good account of the Supreme Court of Pakistan’s recent controversial jurisprudence in high profile matters involving complex and conflicting economic perspectives, advocating greater judicial reticence in such matters see FEISAL NAQVI, *The Economics of Judicial Interventionism*, The Friday Times, March 19-25, 2010.

¹³⁴ For an interesting analysis of ‘Interpretivism’ and ‘neutral principles,’ which he describes as the two leading dogmas of modern constitutional theory that are designed to remedy a central problem of liberal theory by constraining the judiciary sufficiently to prevent judicial tyranny, see MARK V. TUSHNET, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983).

¹³⁵ See for example see ASAD JAMAL, *Consistently Inconsistent*, The Friday Times, March 12-18, 2010; KHALED AHMED, *‘Independent’ or ‘Powerful,’* The Friday Times, March 12-18, 2010; NAJAM SETHI,

apprehension of unlawful validation or invalidation of statutes as well as executive policy is always implicit in the higher judicial function. With a vocally activist judiciary, regardless of the various credible aforementioned justifications for such activism, the judges walk an even tighter line. In Pakistan, this is additionally true in view of the increasing public role and politicized perception of the judiciary. This is due to both the Pakistani judiciary's highly controversial historical role of military regime legitimization; as well as, its more praiseworthy recent defiance of Pervez Musharraf's military regime. Judges are much more politically visible in Pakistan than elsewhere – Chief Justice Iftikhar Muhammad Chaudhry was the uncontroverted and much flaunted symbol; the pinnacle of attention; and the focal point of the recent Pakistani lawyers' and civil society movement. He may have personally said relatively little in the public arena in order to not be accused of judicial impropriety, but the circumstances, the needs and the nature of the movement necessitated that he play the crucial highly visible and politically articulate role of the figurehead of the entire movement – it was he who acted as the Movement's rallying cry. Though largely communicating through his lawyers and spokespersons he did give speeches at various bar council meetings and was physically the momentum providing presence in the midst of lawyer protests and long marches that involved many thousands of lawyers, political workers, NGO representatives, students and other citizens. So when Pakistani judges engage in activism, their actions do not go unnoticed by the public but are the stuff of frontline news.

G The 'Access to Justice as a Function of Access to Economic and Political Empowerment Approaches'

Though not exclusively projects focusing on justice sector reform in Pakistan, various on-going development capacity building as well as poverty alleviation programs link low access of vulnerable groups to employment, education and health to their weak political participation and low access to justice. For instance, the on-going European Commission (EC) 'Democratization and Human Rights' projects in Pakistan have adopted a special focus on supporting initiatives that facilitate access to justice for vulnerable groups in society. In this regard, they particularly highlight the special vulnerable status of women, children and religious and/or ethnic/tribal minorities, particularly through strengthening viable systems to provide legal assistance to deprived and vulnerable individuals. In this context, they support awareness-raising campaigns, for instance for women's rights and core labor standards. An additional area of their emphasis is combating child labor in order to address child protection issues in a broader sense, including violence, abuse, trafficking, exploitation and discrimination, as well as juvenile justice. Another area of concern for the EC work is minorities' rights. The EC projects claim to be set out to cooperate with national institutions with a specific mandate for the protection and promotion of human rights and human and social development in order to help the government of Pakistan to implement its policies and international commitment towards 'human rights,' 'fair globalization' and 'decent work.' This ties in with EC assistance to help further strengthen the democratic process in Pakistan with a particular focus on

Anti-Status-quo reform needed, The Friday Times, March 12-18, 2010; and OSAMA SIDDIQUE, *A Flawed Debate*, The Friday Times, March 12-18, 2010.

political parties, public accountability and the electoral process. One distinctive feature of the EC projects is, that moving away from an exclusive reliance on the government institutions; they recognize the special contribution made by NGOs/Non-State Actors, including social partners, to overall socio-economic development. Consequently, engaging civil society is an increasingly important focal area in the EC-Pakistan cooperation portfolio. EC projects financially support NGOs/ non-state capacity in Pakistan, and also assist fostering public-private and private -private partnerships at grassroots level, in order to help create a sound and positive environment for vulnerable groups to assert their rights; to bring about revision of the national legislation, and support formulation of a national strategy to mainstream women's rights in all policies; and, to support mechanisms providing easier access to justice for vulnerable groups. Awareness generation programs on women's rights; building up demand for revision of controversial laws; creation of public pressure for the rights of vulnerable groups as a high priority on the government's agenda; exploring and helping establish options for alternative ways of resolving disputes; building up the capacities of elected representatives; facilitating a more confident use by vulnerable groups of the mechanisms available to assert their rights; and, reduction in the number of family law cases pending before the courts, are some of the key components of the EC approach to promoting access to justice for vulnerable groups.¹³⁶

Various UK Department for International Development (DFID) projects in Pakistan also proceed with the philosophy that access to justice is ultimately linked to greater economic and political empowerment of vulnerable groups. The essential focus of these projects has been in the areas of poverty reduction, education, health, inclusive growth, governance reforms, gender, humanitarian work and making aid more effective. In November 2006, UK and Pakistan signed a ten-year Development Partnership Arrangement and the UK announced an increase in aid to Pakistan for the period 2009 – 13 to £665 million. In July 2008, DFID published its new country plan for Pakistan that focuses on, *inter alia*: improving access to better health and education; growth and jobs for poor people; making government more effective; and ensuring that the international community works better together.¹³⁷

Unlike the aforementioned approaches that more or less treat justice reform in a vacuum and alternative dispute resolution as a side theme, and that regard the special predicament of the more vulnerable in society as ultimately solvable through enhanced judicial capacity and efficiency, the above-mentioned EC sponsored approaches highlight the larger political, economic and social challenges confronting Pakistan. Though their essential focus is not on reforming the legal and justice system *per se*, they are important both for their special attention to vulnerable groups, as well as for the fact that they link access to justice to access to economic and political empowerment. In contrast, of this,

¹³⁶ See PAKISTAN-EUROPEAN COMMUNITY, COUNTRY STRATEGY PAPER (2007-2013). See at http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141549.pdf

¹³⁷ For details of DFID projects in Pakistan see <http://projects.dfid.gov.uk/SearchResults.asp?countrySelect=PK-Pakistan> . For DFID overall plans for 2009-2013 see DFID COUNTRY PLAN: DEVELOPMENT IN PAKISTAN 2008-2013 - THE UK GOVERNMENTS PROGRAM OF WORK TO FIGHT POVERTY IN PAKISTAN at <http://www.dfid.gov.uk/Documents/publications/pakistan-CAP-08.pdf>

the aforementioned justice sector reform approaches do at times show cognition of the larger socio-political context, but their analytical and prescriptive framework is much more limited.¹³⁸

However, even these approaches have shown at times a tendency to falter and succumb to the temptation of providing simplistic solution to complex problems. For instance, a recent DFID funded proposal for assisting legal empowerment in Southern Punjab proposed an extensive legal aid program to assist poor litigants overcome economic constraints to accessing courts.¹³⁹ It proposed “a pilot intervention to support the poor in exercising their legal rights” as it considered that “the challenge is to propose mechanisms that allow the poor to have a level playing field while interfacing with the legal system.”¹⁴⁰ The highly debatable premise of the project is that the poorer sections of population in Southern Punjab possess certain justiciable claims for which they actually want to access courts. This premise is being put forward in the absence of any current data or recent empirical work that can clearly demonstrate the actual nature of disputes and contestations in rural and urban Southern Punjab and whether they are amenable to a judicial resolution (Southern Punjab is regarded as the poorest part of the province with a dominant large land-owning political elite). Additionally, the proposed project proceeds without any appreciation of whether the poorer sections of the pre-dominantly rural population have any intact legal or customary rights in land (I emphasize land due to its overwhelming significance in the political economy of rural Punjab and as the invariable source of litigation), given the canal colonization based social transformation in that area under the British. Moreover, it overlooks the risk that extending legal aid to the poorer sections of society wanting to agitate certain rights may not necessarily empower them to fight traditionally long and exhausting court battles against much more resourceful adversaries, in a litigation system highly vulnerable to delaying tactics and political pressure. There is rather perfunctory probing into whether the poorer sections of society in Southern Punjab prefer other local, cheaper and easily accessible dispute resolution mechanisms. Finally, even assuming that the proposed legal aid mechanism effectively evades corruption, inertia, seepages and elite capture, and it actually manages to fund the potential legal agitation of some poor would-be litigants, the likely outcome may merely be their joining a long queue of existing litigants awaiting court verdicts for many long years. The above example captures the tendency of even the law reform approaches in this category, cognizant as they are of the socio-political realities of the Pakistani context, for offering facile antidotes to complex issues of economic and political and hence legal disempowerment, without any empirical and sociological understanding of the context in which they operate.¹⁴¹

¹³⁸ PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT – USAID Pakistan (November 2008) see http://pdf.usaid.gov/pdf_docs/PNADO130.pdf

¹³⁹ LEGAL EMPOWERMENT OF THE POOR – SCOPING & DESIGN, PUNJAB ECONOMIC OPPORTUNITIES PROGRAMME (PEOP), SUMMARY PROJECT DOCUMENT -2009

¹⁴⁰ Id.

¹⁴¹ In another recent engagement on a potential project to assess the post-conflict legal needs of FATA and other tribal areas, an international expert working for a U.N agency expressed the hope that the project would be able to extend special focus on engendering the legal bars in these areas. Even a cursory examination of Pakistani newspapers would divulge that these are some of the most backward areas in the region in terms of female literacy and that the Taliban have been regularly blowing up schools for girls.

The extant limited and untested work on the significance of alternative dispute resolutions mechanisms in Pakistan reports that in a study of rural disputants, almost one third of those surveyed, chose informal justice alternatives like *panchayats*, not because they perceived these to be fairer than formal courts (indeed local status and power does influence their decisions) but because of the ease of access and lower cost that they offer. Furthermore, the study reports that the formal and informal dispute resolutions systems complement each other rather than being mutually exclusive. At times, the choice of the more expensive formal dispute resolution mechanisms i.e. the courts, is purely motivated by the fact that litigation is adopted as a tool for vindication or as a mode for defending, reclaiming or demonstrating of prestige.¹⁴² Quicker access and need for speedy decisions, on the other hand, may motivate the adoption of informal dispute resolution mechanisms. Even mainstream justice sector reform approaches concede that:

“the courts are used to delay decisions, to perpetuate a hierarchical social order, to protect vested or asserted interests, or to reinforce claims of prestige and ‘face’ - motivations and interests better served by lengthy, drawn out processes rather than the efficient and fair resolution of disputes. It has often been said that laws in Pakistan are relevant mostly as the context within which negotiations between the state and individuals, or mostly between private citizens, take place. Other factors that come to play in these negotiations are the class, ethnicity, wealth, gender, religion/sect, social hierarchy and social networks of the parties.”¹⁴³

These are important insights into some of the motivations that may influence forum shopping amongst Pakistani litigants and they warn against the convenient assumption that a more efficient formal judicial system is the overwhelming and uniform demand of the disputing public, as well as the optimal solution to their grievances.¹⁴⁴

H A Uniform Ethos: Different Avatars?

A fundamental premise and expectation of most of the justice sector reform approaches that I have discussed is of course that a full-fledged formal legal system actually meets and successfully translates peoples’ expectations and aspirations from the legal system. Legal pluralists of course point out that such fetishization of a formal legal system, as a monopoly over all coercion is misconceived. Furthermore, such fetishization can turn the formal legal system into a leviathan, which precludes the desirability of the pursuit of such an exclusivist model in the first place. They point out that there can remain a huge gulf between what has been described as popular legal consciousness and peoples’ actual

The possibility of finding a legal bar in these areas, let alone one with female lawyers awaiting assistance for empowerment are thus rather remote.

¹⁴² FOQIA SADIQ KHAN, QUEST FOR JUSTICE: JUDICIAL SYSTEM IN PAKISTAN, (Network Publications 2004)

¹⁴³ PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT – USAID Pakistan (November 2008). At 10-11. See http://pdf.usaid.gov/pdf_docs/PNADO130.pdf

¹⁴⁴ Id.

experience with the formal legal process.¹⁴⁵ While pursuing the utopia of an efficient, all-encompassing full-fledged legal system that is expected to fully correspond with the normative structure of society, most of the aforementioned legal and judicial reform approaches have little patience for alternative informal dispute resolution possibilities. Indeed, they regard a popular support for the same to be tantamount to the failure of the larger project of an efficient formal legal system. Some of the aforementioned approaches have also attempted and continue to attempt to impact the basic normative structure of society, such as Zia's 'Islamization' attempts and also the on-going trends in judicial activism, while lacking the requisite democratic credentials for undertaking such a project. This makes these endeavors controversial and open to criticism. On the other hand, the approaches that are willing to allow alternative mechanisms to coexist along with the formal legal system, largely, extend this allowance in a limited and carefully circumscribed terrain.

Additionally, the over-emphasis on 'delay' is quite problematic. This is quite apart from the fact that a certain delay may even be desirable in contexts where people have little faith in the formal legal system and they adopt recourse to it merely in order to generate additional pressure on the contesting parties to reach a more mutually satisfactory solution or reconciliation through informal means of dispute resolution. Furthermore, as has been discussed, an overemphasis on 'delay' causes the reformers to lose sight of other equally important dimensions of a well-functioning formal dispute resolution system. The quality of legal judgments is also a function of availability of sufficient time, resources and technical assistance in order for the judges to get to the crux of complex matters with multiple facets and ramifications. It pre-supposes ability and capacity on part of the courts to ensure that they give fair hearings to all parties. It mandates that extra support and facilitation is extended to the weaker parties in litigation. Society also expects legal judgments to provide sustainable, longer-term solutions to recurring issues and discord. All these are equally important considerations that can be lost sight of, and indeed have been lost sight of, in the single-minded pursuit of speedy justice. Ultimately, one of the most important dimensions of the adjudication of legal disputes is one that also explores and identifies the people, classes and groups in society who continue to win and the ones who continue to lose. Or in other words, the dimension that looks at how a legal dispute resolution mechanism entrench or revisit the underlying legal rules of the game that impact and determine the distribution of economic resources and political power in society. As we have seen, the justice sector reform approaches that we have examined above largely do not really broach that level. Even at the more superficial level of fixing the system so that it can work more 'efficiently,' the aforementioned approaches and the collective Pakistani legal reform experience is flawed and a failure at various levels. At this stage, a quick comparative examination of the Indian legal and judicial reform experience may be beneficial.

Upendra Baxi describes post-colonial law reform endeavors in India to be deeply flawed for the following reasons: (a) their impulse has come "almost wholly, from the governing

¹⁴⁵ SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 1, 14-15 (The University of Chicago Press, 1990).

elites” rather than the public, thus making them “technocratic and non-participative;”¹⁴⁶ (2) such law reform has not fundamentally re-examined the legal system and its real crisis but has been “*ad hoc*” and “patchwork” rather than being “contemplative,” “sustained” and “systematic;”¹⁴⁷ (3) and, as a result these law reform efforts have lacked comprehensive grasp of social reality and have further lacked a “coherent philosophical, ideological base,” thus leading to a situation where there is “no adequate institutionalization of law reform, no systematic agenda for it” and hence no integration of effort or optimal use of “available talent, skills and personnel.”¹⁴⁸ Therefore, according to Baxi, “[S]uch a situation is one where one may legitimately speak of the crisis of law reform.”¹⁴⁹

This description is uncannily reflective of the law reform phenomenon in Pakistan as well. There has been insufficient effort on part of the Pakistani ‘legal community’ (I shall be using this term to describe judges, lawyers, government policymakers and law officials, as well as, local and international consultants engaged in justice sector reform policy-making and advisory work) to engage with local issues and ground realities, while reviewing the legal and judicial system and recommending reform. Inherently technocratic in their approach, the law reform endeavors in Pakistan are further conflated by the pressures, and, the institutional and ideological biases and constraints introduced by internationally financed law reform packages. One of the main critiques of the AJP, for instance, has been the curtailment of vital open dialogue and debate on the nature and process of reform, as well as the irrelevance and impracticality of some of its prescriptions, brought about by its design rigidity. Matters were not helped by the fact that AJP’s implementation plan was complex and unwieldy. It rested on expectations of a buy-in, coordination and support from as many as twenty-nine (29) local implementing agencies and departments at the federal and provincial level. Such a massive operation obviously required the commission of sufficient skilled operational manpower, both at the AJP nerve center as well as its counterpart governmental departments. Furthermore, implementation was always going to be largely a function of actual political support from the Government at various levels; as well as, real public ownership and stake in the reform process. Insufficient preparatory groundwork meant that all these areas turned out to be acutely deficient. Any attempts to remedy the situation were belated and ineffectual. In hindsight, one of the core issues with the AJP reform approach, typical of similar IFI funded reform programs, was that all the ‘policy actions,’ that required governmental compliance for the successful impact of AJP, were pre-configured in Manila. This made it look like an attempt at transplantation of existing ADB notions of successful legal and judicial reform at best, and a largely meaningless list of tasks for coordinating various phases of loan extension by a financing institution, at worse. Vital pre-program launch groundwork, interaction and osmosis, which could have made AJP substantively richer and more incisive, as well as operationally workable, was unfortunately lacking. This, of course, raises a whole set of standard criticisms of international ‘transplantations’ of

¹⁴⁶ UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM 245 (Vikas Publishing House 1982). At 245.

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Id.

justice sector reform and ‘rule of law’ projects that have been the subject of recent international law and development literature that I shall shortly discuss. A massive program like AJP was bound to flounder without local support and active interfaces for discussion and suitable adjustment. What it earned instead was hostility and mistrust — and consequently a rather belated and hence corrosive self-doubt.

The lack of ‘contemplative,’ ‘sustained’ and ‘systematic thinking,’ as well as a ‘coherent philosophical, ideological base,’ that Upendra Baxi points out in the Indian context, have also characterized Pakistani law reform initiatives. As has been discussed, there is something of the knee-jerk about the recommendations made by various Commissions and Committees that have engaged in law reform deliberations throughout Pakistan’s history, as they have superficially responded to real or perceived problems with the legal and judicial system. Inadequate attempts have been made to evaluate the larger social context as well as more particular potential sociological impact of reform in different regions and on different groups. While the adopted stance on reform has been presented as grand and all-encompassing, its methodology, if anything, has been “...action-oriented, instrumental, patchwork...”¹⁵⁰ It can even be said that at times ‘reform’ has been more of a mere “ritual” to meet immediate and urgent political demands to dissipate outward manifestations of deeper crises. At other times ‘reform’ has just been the slogan adopted by governmental attempts at displaying an outward commitment to positive change, rather than a well thought-through process for legal and hence social change. It is therefore, not surprising that most of the aforementioned Committee and Commission reports are neither publicly accessible nor the lynchpins of on-going and informed policy dialogue. They thus remain relatively opaque to public scrutiny. Ironically, while not being readily visible themselves, they have invariably advocated reforms leading to transparency in governance. Yet their own existence remains more a matter of official documentary bean counting to convey a false semblance of sustained governmental commitment to law reform. Particularistic and parochial law reform endeavors, such as those during the Zia-ul-Haq era, suffer from the same flaws that have been discussed in the context of other reform efforts in Pakistan. They, however, carry the added burden and taint of being motivated by political self-preservation and narrow sectarian motivations. I have discussed how theirs are more the crimes of actual commission as compared to the several crimes of omission of the other law reform endeavors in Pakistan.

IV POST-COLONIAL INERTIA AND THE POVERTY OF IMAGINATION

A From the Colonial to the Post-Colonial Era – Elements of Continuity and its Custodians

As is evident from the previous section, the most prominent post-colonial legal and judicial reform debates in Pakistan claim to be addressing its legal and judicial crises while looking at international best practices, but with insufficient attention to local context, realities and aspirations. Their essential focus is on whittling and tweaking the

¹⁵⁰ Id.

edifice of the existing system, institutions and processes for better service delivery. Furthermore, much as this system, these institutions and their processes are largely inherited from Pakistan's colonial past, the Pakistani reform debate is being undertaken without a backward glance, a peep at the past, or any sense of history. Pakistan's colonial past and its post-colonial present are contiguous eras that seamlessly flow into each other in the historical continuum, and yet there are no traces in the present of any engagement with the past. The blue prints and building blocks employed by post-colonial reformers and policy-makers, as they attempt to develop and refine the Pakistani legal and judicial system, are essentially and inherently the ones left behind by the colonists. After independence in 1947, major pieces of colonial legislation continued to provide Pakistan its constitutional framework. Repeated failures by Pakistan to formulate and entrench a new constitutional ethos further ensured that a new polity could not emerge through a consultative, deliberative, popular democratic process — a process that was looking to the future while being mindful of the past. Several military interventions and periods of dictatorial rule; the dominance of a strong centralized executive; an all-encompassing colonial model of bureaucracy; and, the fragility and inexperience of political structures and processes perpetuated the earlier domination of similar structures, imperatives and modes of governance in the colonial era.¹⁵¹ Even a cursory examination of the colonial discourse on law and legal engineering in India reveals the various complex and shifting imperatives and characteristics of colonial use of law and the resulting contradictions and tensions within the legal and judicial system. Thus, though logically germane to contemporary discourse, the past is conspicuous for its absence in Pakistani justice sector reform discussions of the present.

In the present context, it is important to further evaluate the role of the Pakistani 'legal community', and especially its judges and lawyers, in perpetuating the legal and judicial system inherited from Pakistan's colonial past. The less than salutary role historically played by the Pakistani judges in legitimizing military rule; or, the traditionally proactive pro-democracy role played by Pakistani lawyers are highly relevant and important independent themes of study. They, however, are not within the ambit of this article. Instead, the focus here is on the role played by the Pakistani 'legal community' (a paradoxical one in the case of the lawyers who have otherwise played a very significant pro-independence and pro-democracy role in the colonial and post-colonial eras. What causes the paradox is an important question worth further exploration in ensuring the entrenchment and continuation of the monopoly of the existing system of dispute resolution — a system revolving around, run by, and providing sustenance to career judges and professional legal bars. What requires exploration is the notion of the vested interests of the existing stakeholders in the Pakistani justice system as an important contributory factor to the lack of any meaningful and historicized debate on the fundamentals of the Pakistani legal system. It is telling after all as to how the evaluations, critiques and proposed reforms of the Pakistani legal and judicial system, emanating from this 'legal community', have consistently fallen far well short of any historical, sociological and structural critique of the *status quo* in terms of its differential impact on

¹⁵¹ OSAMA SIDDIQUE, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents*, 23 *Ariz. J. Int'l. & Comp. L.* 624-636 (2006).

and its benefits to different sections of society.

Maintenance of a legal and judicial *status quo* can be understood, I propose, in three different ways. (1) First, it can mean that judges and lawyers all over the world are, by and large, instinctively conservative by the very nature of what they do. They are thus institutionally protective of the existing legal and judicial system and hostile to any ideas of drastic law reform or the transfer of certain kinds of disputes to alternative modes and mechanisms of dispute resolution. The motivation of course may both be ideological — they have great faith and pride in what they do and hence feel justified in having a monopoly over dispute resolution and dispensation of justice. They may thus entertain considerable skepticism (at times well grounded) about the efficiency, quality, independence and impartiality of any alternatives to the formal legal system. The motivation could also be economic — alternatives to the formal legal system or any great simplification of the legal system may mean lost client fees. Thus for certain members of the ‘legal community’, especially the lawyers practicing in overpopulated lower courts (where competition is fierce, revenues lean and survival tenuous) any reforms that lead to an erosion of existing lacunae, complexities and contradictions in the laws and the legal system may also be perceived as potentially detrimental to continuing public reliance on legal advice, and thus lost earnings. (2) Second, the resistance to legal and judicial reform can also stem from an ubiquitous institutional inertia and resistance to any change — as change could mean financial, political, and emotional cost of having to adjust and modify existing practices. (3) Third, for a certain section of lawyers and indeed court staff and even judges, especially in the lower rungs of the legal and judicial hierarchy, reforms that address lacunae, complexities and contradictions in the legal and judicial system, as well as the perennial delays in the legal process, can also mean dilution of ‘rent-seeking’ opportunities. The *pro-status-quo* stance can and does indeed manifest in at times resistance and hostility to not just reforms that make the legal system simpler, transparent and more intelligible to the layperson, but also to any reforms that promote ideas of and mechanisms for professional accountability of judges and lawyers.

One way or another, all the aforementioned motivations are as true for the Pakistani ‘legal community’ as they are for legal communities elsewhere. Furthermore, since legal bars are historically much more politicized in places like Pakistan, this has in many ways caused the criteria for entry to the legal profession to be quite low (in addition to the fact that getting a legal educational qualification from a law school has been equally undemanding for a whole host of reasons). The aforementioned factors also cause the legal profession to be overpopulated. While professional pride in raising the quality of legal bars, as well economic motives to share the legal services revenue pie with as few lawyers as possible, are concepts well understood in and adhered to by the legal bars of most developed countries — they have historically given way in Pakistan to the more immediate motivations of bolstering political constituencies through a very high annual inflow of lawyers into the profession.¹⁵² The Pakistani lawyers have historically also been

¹⁵² During 2005-06 the author interviewed several prominent officeholders of the Punjab Bar Council as well as the Lahore high Court Bar Association who said that a one year term for the officeholders of these bars meant that successful candidate were heavily reliant on the votes of young law graduates seeking admission to the bar. Furthermore, they also blamed the short stint in office as inadequate for developing any

resistant to all interventionist attempts to reform the functioning of legal bars and the accountability of incompetent and/or unethical lawyers. There is no meaningful or credible bar examination mechanism,¹⁵³ continuing legal education programs,¹⁵⁴ or internal disciplinary mechanisms worth speaking of.¹⁵⁵ The Pakistani bar associations (at the Supreme Court, High Courts, provincial, district and tehsil court levels) are deeply divided along national and local political lines (and at certain lower levels also along ethnic and caste lines) and have been historically lax in regulating the profession.¹⁵⁶ They are only partially legitimate in their condemnation of all external attempts at their reform as politically motivated interventions to fragment their political pro-democracy clout. This is because they have been as resistant to any reform attempts that have been purely aimed at protecting the litigating public from exploitation at the hands of incompetent and unethical lawyers.¹⁵⁷

However, it must be noted that the Pakistani ‘legal community’s’ support for the *status-quo* has not extended against expansion of the size and reach of the formal legal system. I have already mentioned that factors that elsewhere motivate a tighter regulation of the size and quality of legal bars are, largely, absent in the Pakistani context. Various Law Reform Commissions and Committees and indeed the recent National Judicial Policy 2009 have actually recommended that the panacea for the ills of the legal and judicial system lie in increasing the number of judges and court staff; in enhancing their incentive structure and boosting their budgetary allocation. So maintenance of the *status-quo* in the Pakistani context can be better understood as the maintenance and indeed expansion of the formal legal system (with certain sections of the ‘legal community’ strongly resistant

longer term vision of and stake in meaningful bar reform. Many also categorized declining entry to the bar to all young law graduates as unjust in a country where many found seeking higher education an elusive and expensive prospect. Stringent bars on entry to the bar, they said, were tantamount to forcing unemployment on these young people. Furthermore, due to the historically low bar on taking up law as a profession, several civil servants also start practicing law after retirement. A demonstrated aptitude for the law is also not a necessary prerequisite for entry to the profession, as students who find the going tough in other fields of education and professions often take up law as a convenient alternative vocation with the hope that with enough years spent in making the rounds of the courts, experience will make up for any inadequacies in training at the law schools.

¹⁵³ Recently introduced bar examinations in Punjab for instance fall well short of testing the candidates’ proficiency of legal philosophy, doctrine, concepts, and methodology and almost exclusively focus on testing mechanical memory knowledge of procedure. Furthermore, the pass rate of these exams is almost a 100%, which is an indictment of their rigor.

¹⁵⁴ Several endeavors in conjunction with the Canadian Bar Association during 2005-06 to start such programs failed due to lack of interest in and support by local legal bars.

¹⁵⁵ The lameness of these internal disciplinary mechanisms is a source of consistent public criticism. More recently, their laxness was exposed in several incidents where certain lawyers were involved in roughing up some journalists, policemen and even lower court judges and yet, despite intense media scrutiny and public outrage, they were more or less let off by the bar disciplinary committees that investigated these episodes with very light punishments. See for example the story in The Daily Nation at

<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/07-Aug-2009/Lawyers-again-rough-up-journalists>

¹⁵⁶ Election canvassing during periodic bar elections at various levels underlines the importance of political and even ethnic and caste associations in such elections to the candidates’ prospects of success.

¹⁵⁷ This description is based on the author’s own extensive experience of working on legal education and legal bar reforms in Pakistan as a consultant since 2005.

to any major changes in the laws and the legal system for the aforementioned reasons) to the exclusion of any alternatives. ‘More of the same’ is thus the solution of choice for the legal community.

In this context, the role of the Pakistani lawyers’ *vis-à-vis* the Pakistani legal education system is well worth noting for the following reason. Historically underfunded and ignored, state law schools in Pakistan have never presented a conducive environment for the development of an indigenous legal academia and quality local research. Successor private law schools on the other hand have largely entered this area in pursuit of profit and have done little to raise the quality of legal education. While this absence of the legal academy has obviously meant the absence of an important institution that can raise standards of legal education, it has also caused the larger national discourse on law, rights and justice to be poorer. In the absence of a legal academy, teaching at Pakistani law schools has been and continues to be primarily conducted by practicing lawyers. Furthermore, lawyers also play a prominent role in the regulation of legal education and the Pakistan Bar Council thus plays a regulatory and oversight role (that would in other jurisdictions be left to autonomous law schools), as well as a role in accreditation of law schools, curricular design and standard setting. The regulatory function of law schools is actually in a confused state. This is because separate legal statutes, introduced at different points in time, empower both the Pakistan Bar Council and the Higher Education Commission of Pakistan — the ultimate regulatory body for university education in the country — leading to an as yet unresolved issue of conflicting jurisdiction.¹⁵⁸ However, the Pakistan Bar Council has always had the ascendant role in actually shaping and regulating the direction of legal education in the country.

This is quite problematic. I have already identified the various problems and constraints that the legal profession is facing in Pakistan. The fact that they also have controlling influence on the legal education in the country has meant that the particular bent and emphasis of legal education has been to impart a craft-like specialization. It may be useful here to briefly look at Max Weber’s -typology of the types of professional legal training and through it of specifically legal modes of thinking. In my view, the currently prevalent type of legal training in Pakistan can be seen as similar to, in Weber’s terms, an “...empirical training in the law as a craft; the apprentices learn from the practitioners more or less in the course of actual legal practice.” Weber’s alternative typology of legal training describes it as being taught “...in special schools, where the emphasis is placed on legal theory and ‘science,’ that is, where legal phenomena are given rational and systemic treatment.”¹⁵⁹ Now the immediate objection that can be raised against my analogy is that Weber’s first type really spoke about the guild-like English method of having law taught by lawyers. My response is that in the Pakistani legal academy, which is more or less devoid of full-time academics engaged in research and writing, practicing

¹⁵⁸ Osama Siddique, *Martial Laws and Lawyers: The Crisis of Legal Education in Pakistan and Key Areas of Reform*, 5 Regent J. Int’l L. 95 (2007). See also PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT – USAID Pakistan (November 2008) at 27-29. see http://pdf.usaid.gov/pdf_docs/PNADO130.pdf

¹⁵⁹ MAX WEBER ON LAW IN ECONOMY AND SOCIETY, IN LAW IN MODERN HISTORY, Max Rheinstein, ed., (Harvard University Press 1954). At 198.

lawyers setting up curricula, setting standards and teaching law courses are not really very different in effect from Weber's typology where law is taught as a 'craft' rather than as a 'science.' In fact, if one explores Weber's typology further, various other similarities of ethos and methodology emerge owing to the fact that in both situations, the lawyer has displaced the law professor. For instance, Weber characterizes his first type as denoting a philosophy of legal training that was purely "empirical" and "practical," and that led to "specialization."¹⁶⁰ According to Weber:

“[T]his kind of legal training naturally produced a formalistic treatment of the law, bound by precedent and analogies drawn from precedent. Not only was systematic and comprehensive treatment of the whole body of the law prevented by the craft like specialization of the lawyers, but legal practice did not aim at all at a rational system but rather a practically useful scheme of contracts and actions, oriented towards the interests of clients in typically recurrent situations.”¹⁶¹

The vocational orientation of lawyers teaching law; their emphasis on the practical at the cost of the theoretical and the abstract; the absence of interdisciplinary, comparative or critical thinking as opposed to taking given doctrine as gospel, are indeed many of the critiques of current law teaching in Pakistan.¹⁶² It is hard to resist not quoting once again from Weber who goes on to observe:

“[W]herever legal education has been in the hands of practitioners, especially attorneys, who have made admission to practice a guild monopoly, an economic factor, namely, their pecuniary interest, brings to bear a strong influence upon the process not only of stabilizing the official law and of adapting it to changing needs in an exclusively empirical way but also of preventing its rationalization through legislation or legal science.”¹⁶³

The Pakistani lawyers' stranglehold on the country's legal education system can thus be looked upon as an invasion of law schools by a guild-like approach to training in law. One could argue that the same ethos is also embedded in the various approaches to justice sector reform in Pakistan in which the 'legal community' has played a prominent part. The existing structure, framework and salient features of the legal and judicial system are seldom questioned at a fundamental level by the lawyer/judge turned consultants due to the aforementioned reasons. This is, of course, not to advocate an overtly abstract and theoretical approach to law teaching that may lose sight of the practical needs in the formation of the law.

¹⁶⁰ Id. At 201.

¹⁶¹ Id.

¹⁶² Osama Siddique, *Martial Laws and Lawyers: The Crisis of Legal Education in Pakistan and Key Areas of Reform*, 5 Regent J. Int'l L. 95 (2007)

¹⁶³ MAX WEBER ON LAW IN ECONOMY AND SOCIETY, IN *LAW IN MODERN HISTORY*, Max Rheinstein, ed., (Harvard University Press 1954). At 202-203.

B False Starts and Aborted Idealism – India’s Failed Romance with a New Ethos

Has the other child of the South Asian post-colonial birthing fared better? It is instructive to take a brief look at India where its post-colonial legal system has come under criticism in recent scholarship. Some close observers of the progress, or rather ‘regress’ as they describe it, of India’s post-colonial legal system find it plagued with such a multiplicity of failings that they describe it as a ‘pathology’ of a legal system.¹⁶⁴ They point out rampant and deep-seated issues of extraordinary delays; expensive legal proceedings; and, multiplicity of court actions arising out of a single issue. They further identify haphazard execution decrees; competence and ethical issues with the legal bar; honesty and probity issues with witnesses and judges; and, the frequent inability of the Indian courts to bring about a resolution to the disputes being litigated.¹⁶⁵ Against this stern indictment of the Indian legal and judicial system, some commentators like Marc Galanter have methodically traced historical attempts in India to revert, at least partially, to indigenous solutions and dispute resolution mechanisms. However, like in Pakistan, these attempts towards any basic change to the Indian legal system or in the organization of its professional legal services seemed to have found little or no support amongst the Indian lawyer community.¹⁶⁶ Galanter documents a robust debate on the suitability of the colonial legal heritage and the need for its large-scale reform in the early years after India’s independence. A radical reformative spirit, it seems, did stay in the air for a short while but it eventually withered away with the traditional system either “displaced” or “powerfully influenced,” or in many cases “entirely supplanted” by the official system. Galanter finds any contemporary attempts to revive this debate to be “contained” by an official system comprising of “laws, techniques, institutions and roles” that were, as he says, “with few exceptions, modifications of British or other western models.”¹⁶⁷

A brief review of the early post-independence legal reform debate in India reveals arguments propounding the unsuitability of the colonial legal system for the Indian people. They highlight its foreignness, its complexity, and, its propensity for delay. Others point out the wastefulness of its divisive litigation process and its conduciveness to generating perjury and corruption. They lament the exacerbation of disputes due to the erosion of traditional Indian consensual dispute resolution mechanisms. Such a condemnation was “familiar,” according to Galanter, by the mid-nineteenth century and it was lent further fuel in the first quarter of the twentieth century by the Indian nationalist movement.¹⁶⁸ However, the Constitution of independent India endorsed the existing legal system and the only concession extended to the Gandhians at the forefront of the demand for resorting to traditional village based *panchayat* style justice was a Directive Principle in the new Constitution in favor of the *panchayats* as units of local self-government.¹⁶⁹

¹⁶⁴ OLIVER MENDELSON, *The Pathology of the Indian Legal System*, Modern Asian Studies, Vol. 15, No. 4. (1981), at.823-863

¹⁶⁵ Id.

¹⁶⁶ MARC GALANTER, *Introduction: The Study of the Indian Legal Profession* (1969)

¹⁶⁷ MARC GALANTER, *The Aborted Restoration of ‘Indigenous’ Law in India*, Comparative Studies in Society and History (1972). At 54.

¹⁶⁸ Id.

¹⁶⁹ Id. At 55.

Voices of dissent continued to persist, though they could not muster any support in the Indian lawyer community for any nostalgic hearkening back to tradition. The lawyers, largely, looked at Anglo-Indian law as a most beneficial and acceptable outcome. A 1958 Indian Law Commission actually found the Indian legal system to have the essential features of any system of judicial administration, and to be the logical and reasonable culmination of how the indigenous legal system would itself have evolved, if allowed to grow ‘normally.’ Furthermore, the Law Commission was of the view that the traditional system would have been unable to cope with the complex demands of a modern welfare state.¹⁷⁰ As a result, only a limited, experimental policy of revival of elected administrative *panchayats* as instruments of village self-government was pursued. This eventually brought about the phenomenon of judicial *panchayats* for specified categories of petty cases for “resolving the alienation of the villager from the legal system.”¹⁷¹ However, lawyers were almost uniformly barred from appearing before them.¹⁷² These judicial *panchayats* were also in many ways different from traditional *panchayats* in terms of how they were constituted; how they functioned; their conformity with statutory law; and, their dependence on official courts for the execution of their decrees (which could also be challenged there). It is significant to note the disdain and hostility extended to these *panchayats* by the Indian bench and the bar; the curbs put on their powers; and, the popular impression that they were largely merely downward channels for dissemination of official policy.¹⁷³

Galanter ascribes this marginalization of the *panchayat* reform to the entrenched vested interests of the powerful class of Indian lawyers and their ancillary workers. Their clout was significant, especially compared to the absence of an equivalent group of stakeholders, interested parties and spokespersons for the *panchayat* initiative. Galanter further ascribes the dwindling fortunes of any revival of a traditional system to the absence of a “vivid alternative,” in either religious or customary law, to the inherited formal legal system — an alternative that could lay a claim to taking on complex modern challenges and yet also uphold the proclaimed national ideals of “secularism,” “equality,” “unity,” “intelligibility,” and, “free movement and interchange.”¹⁷⁴ Finally, Galanter highlights the lack of a “concrete grievance that could mobilize popular support” for the revivalist cause.¹⁷⁵ However, Galanter also concedes that an additional factor was also the domestication of the Anglo-Indian law at the operative/programmatic level. Hence, he is persuaded by the view that a two-way adaptation of law and society had taken place during the century and a half-long pruning to make the law adaptable to local conditions. As a result, Indian lawyers were now the bearers of an All-India culture of working in and with this system — a system that was now intelligible at a national level.¹⁷⁶ As a result, according to Galanter, even villagers were not as isolated from this system and found ways to selectively use both the formal legal system and the traditional system (itself modified by the colonial encounter; not due to any normative superiority but due to

¹⁷⁰ Id. At 57.

¹⁷¹ Id. At 58.

¹⁷² Id.

¹⁷³ Id. At 60

¹⁷⁴ Id. At 61.

¹⁷⁵ Id. At 61-62.

¹⁷⁶ Id. At 63-64.

its technical, organizational and ideological characteristics) to their advantage.¹⁷⁷ To Galanter, therefore, the criticism that the current Indian law is not “normal” as it is not historically rooted in society; that it is incongruent with its social and cultural setting; and, that it lacks an “integrated purposive character,” is in part the “working myth of modern legal systems.”¹⁷⁸

The debate on whether the extant legal systems of post-colonial societies are ‘normal’ is a complex one and Galanter’s views on the matter aside, what is of immediate interest are his several important observations about the reasons why the debate on the revival of a traditional legal system actually floundered in India. Why there is no debate anymore on this important question is to me the real question. In many ways, the reasons offered by Galanter are equally relevant to Pakistan. One could further argue that on this side of the border such a debate was near absent even in the early, heady post-independence years (newspapers from the time reveal that there was popular debate but importantly there is little evidence of serious debate at the legislative or policy levels). While romantic nostalgia was never going to be a workable substitute for a domesticated local substitute with strong advocates and nation-wide familiarity, that still does not quite explain why more nuanced and locally contextualized alternatives and adaptations were not offered once it became apparent that the Anglo-Indian system was fast turning into a highly problematic and uncontrollable behemoth. While unsubstantiated and vague representations of the past may have sounded like unworkable myths, how satisfactory was the incumbent system? Fundamental questions thus remained unanswered about the capacity of the existing system to reform itself, even if one were to discard any revivalist notions of the past as Quixotic.

Going back to India, where there was greater debate in the early years after independence, the news on the eventual outcome of the legal reform process, as mentioned above, is not very heartening. Upendra Baxi, for instance, says that law reform in India has followed the ‘colonial model of reactive mobilization of the law,’ rather than proactive mobilization on part of state agencies to protect those who cannot protect themselves. He finds this unacceptable in a context where the ‘vulnerable’ groups are in no position to activate any redistributive legislation on their own — through agrarian reforms or social protection legislation, in order to protect rural and urban unorganized labor and socially and economically vulnerable populations. Refusing to accept resource constraints as a valid excuse, Baxi is of the view that the real underlying issue is that law making and law implementation in India is still not looked upon as a social value and a vital component of human and social development.¹⁷⁹

Despite India’s cooling infatuation with any radical revival of tradition and the lukewarm commitment and defective design of its reform approach, some models of innovation, drawn from tradition, were and are still being pursued. Scholars who have kept an eye over the decades on the unfolding of Indian experimentation with the new style

¹⁷⁷ Id. At 64.

¹⁷⁸ Id. At 66.

¹⁷⁹ UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM (Vikas Publishing House 1982). At 47.

panchayat system for providing greater public access, participation and democratic decentralization, report a complex set of mixed blessings and outcomes. These range from, *inter alia*, further strengthening of patronage and coercive politics to growing political sensibility and rights awareness among villagers. They also give an account of resulting changes in patterns of domination. The diversity, incompatibility and ambiguity characterizing the rationale behind this experimentation are some of the reasons that are posited for their falling short of any great success. Structural issues and institutional weaknesses are also ascribed part of the blame for the less than happy outcome.¹⁸⁰ According to Baxi, the lack of clarity as to whether these institutions were to act as the lowest rung of the state; or, as local sub-governmental systems, adversely impaired their progress, and also encroached upon and displaced community based dispute resolution institutions.¹⁸¹ We also learn how the diverse community based dispute resolution mechanisms in India have even otherwise suffered at the hands of elite derision, trivialization and abandonment — popular justice was and is still deemed below the professionalized technocratic model of a “modern, secular, and rational” legal system.¹⁸² Paradoxically, this happened even though, at other levels of Indian discourse, the themes of multiplicity and plurality of legal systems were rediscovered and under a more favorable light.¹⁸³ Yet the need to “harness the creative judicial energies of the people towards tasks of dispute handling and conflict processing” remains an outstanding opportunity, which if ignored, commentators warn, would ensure “a permanent crisis of the Indian legal system.”¹⁸⁴

The evidence on the ground suggests that the aforementioned innovation in India of introducing *panchayats* is increasingly becoming moribund and largely redundant with villagers opting for the extremes of informal village forums or formal external tribunals. This is as much due to the procedural rigidity of the *panchayats* as it is due to the opportunities or devices for bargaining and mediation provided by litigation.¹⁸⁵ Thus, the persisting dissatisfaction of the Indian public with the cost and slowness of India’s lower courts under its proclaimed indigenized colonial legal system now also extends to state forays into other dispute resolution mechanism, such as local mediation alternatives like the *lok adalats*.¹⁸⁶ The emergence of rival courts and dispute resolution mechanisms in various parts of the country (such as those run by political groups, both revolutionary and part of the state establishment); local strongmen; and, caste *panchayats*, is cited as additional testimony to growing popular dissatisfaction with the ability of state experimentations with informalism, in order to provide any effective access to justice to

¹⁸⁰ UPENDRA BAXI & MARC GALANTER, *Panchayat Justice: An Indian Experiment in Legal Access* (1979).

¹⁸¹ UPENDRA BAXI, *THE CRISIS OF THE INDIAN LEGAL SYSTEM* (Vikas Publishing House, 1982). At 325.

¹⁸² *Id.* at 328.

¹⁸³ *Id.* at 330.

¹⁸⁴ *Id.* at 347.

¹⁸⁵ CATHERINE S. MESCHIEVITZ AND MARC GALANTER, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution* (1982)

¹⁸⁶ MARC GALANTER AND JAYANTH K. KRISHNAN, *Debased Informalism: Lok Adalats and Legal Rights in Modern India* (2003); *Bread for the Poor*: See also, MARC GALANTER AND JAYANTH K. KRISHNAN, *Access to Justice and the Rights of the Needy in India*, 55 *Hastings L.J.* 789 (2004)

the disadvantaged.¹⁸⁷ This is quite apart from a growing apartheid like impression in the popular mind that the “higher courts with the full panoply of legal process” are to serve the powerful whereas the *lok adalats* are the only flawed recourse offered to the less advantaged — a lackluster and ineffectual poor man’s version of the justice system.¹⁸⁸ These narratives on the Indian law reform endeavors provide important insights into the perpetuation of an inherited legal system, which though flawed and unsatisfactory, survives both due to the absence of meaningful alternatives, and also because of the existence of strong stakeholders in its existence. The indigenous legal community, as it emerges, is a major player in this scheme of things and any reform endeavor in post-colonial polities like India and Pakistan has to be cognizant of this challenge.

C The Centrality of ‘Law’ in Contemporary ‘Law and Development’ Discourse – A Poor Substitute for Questions Political and Economic

The ‘legal community’ in India and Pakistan thus seems to be part of the actual problem (loath as they would be to be described in this manner) while ironically it is also the ‘legal community’ that controls the discourse and debate on legal and judicial reform in these countries. This primacy and ascendancy of lawyers and judges in the municipal law reform context in post-colonial societies is not unique. Quite interestingly, a parallel development in the international Law & Development sphere has been the growing importance of ‘law’ as not just the mode and medium of discourse but also a possible panacea for the myriad political and economic issues debilitating developing countries. This has two obvious corollaries *vis-à-vis* our present discussion. Firstly, the growing prominence of law in this new exalted status in the International Law & Development discourse is bound to further entrench and enhance the role of lawyers and legal practitioners in the monotonous municipal debates and deliberations over the best paths for legal and judicial reform nirvanas, further stifling any dissenting voices and alternative visions.

Additionally, any possibility of excavating and rejuvenating the essential underlying economic and political debates on questions of justice, equity and distribution risk further marginalization. This would be inevitable as lawyers discover that they and the law that they practice, mold, and promote, are sufficient repositories of potential solutions to all of society’s problems and of cures to all its ills. Everything can now be potentially reduced to being just another avatar of an essentially legal problem. The inter-disciplinarity of approach necessary for better appraisal and more meaningful resolution of crumbling legal and judicial systems thus very much face the prospect of legal euthanasia. Instead of economics, history, sociology, anthropology and political economy joining forces with law to look at issues, which after all fall in the Venn diagram of all these disciplines, we may be moving towards the dogma of a disciplinary monotheism. The second consequence of this development is the further empowerment and potentially all-encompassing grasp of International Financial Institutions (IFIs) which are playing a prominent than ever role in ‘assisting’ developing countries with the reform of their legal

¹⁸⁷ Id.

¹⁸⁸ Id.

and judicial systems. I have briefly reviewed earlier the various design constraints, ideological biases and market economy centric perspectives of major IFI funded programs. To what extent will alternative visions and voices for reform, as well as the priorities and stakes of the ‘vulnerable’ and the disadvantaged, fall further by the way side, is the disturbing question.

The most poignant exposition of some of these apprehensions has come recently from David Kennedy. He has described this new canonization of law — and the multiple expectations from it to define development; as the route to development; and, as the framework and vocabulary for debating development, thus converting the legal regime into the site for “contestation and experimentation” — as fraught with serious issues.¹⁸⁹ The choice of law at the expense of political deliberation and dialogue, as well as rigorous economic analysis, ignores the distributional choices brought about by different legal regimes and rules. According to David Kennedy, it is the choices in terms of distribution that really ought to determine the choice of the developmental path, and its social, political and economic aspects. Thus using ‘Rule of Law’ not just as an arena for contestation, but as a substitute for sharply debating difficult political and economic questions through ideological and theoretical contestation, and thereby turning them into questions of professional expertise, is to David Kennedy purely a fallacy. The less than satisfactory outcome is the growing focus now, according to him, on development as simply ‘economic growth plus.’ This in other words simply means that it is best to just follow the ‘best practices’ of efficient economies and worry about the more contested and complicated distribution issues later. The problem of course is that this obscures the real issues, which are really the distributional issues.¹⁹⁰ In addition, procrastination on these issues not only further aggravates them but it can mean that their day may never really come. In many significant ways David Kennedy’s observations and apprehensions about the growing monopoly of the legal discipline in the international law and development discourse holds great relevance for the domestic context of law reform in Pakistan. We can see a parallel domination of the law and justice reform discourse in post-colonial polities like Pakistan by their legal fraternities. These mono-disciplinary trends portend deep eventual crises in both contexts.

As discussed before, the common thread in the aforementioned approaches to law reform in Pakistan remains an unquestioning faith in the received and inherited design and structure of the legal and judicial system. My assertion that these approaches are de-contextualized, ahistorical and unimaginative receives further credence when one looks at the policy goals being articulated in the examples of the three seemingly discordant avenues for reform (Taliban, Pakistan Supreme Court and USAID) that I discuss earlier in the article. The ambit of debate in my various types of law reform discourse seems to be now increasingly dictated by internationally received ‘best practices’ of the World

¹⁸⁹ DAVID W. KENNEDY, “*Laws and Developments*,” in CONTEMPLATING COMPLEXITY: LAW AND DEVELOPMENT IN THE 21ST CENTURY (Amanda Perry & John Hatchard eds., Cavendish Publishing, 2003).

¹⁹⁰ DAVID W. KENNEDY, “*The Rule of Law, Political Choices, and Development Common Sense*,” in THE NEW LAW AND ECONOMIC DEVELOPMENT, (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2008).

Bank and other IFIs that have come under nuanced critique in recent Law & Development scholarship. An astonishing proliferation of judicial reform projects seems to characterize contemporary international reform debate. Some of the new generation critiques of the latest IFI mandated international justice sector reform programs ring very true for the latest USAID program for Pakistan as well as the earlier ADB ‘Access to Justice Program’ that I have discussed before. To put it succinctly, these programs, *inter alia*, have a tendency to further constrain state autonomy and political choice and are strident in their prescription of delegation of a range of functions typically associated with the state to independent agencies, external or internal institutions and myriad non-state, non-market and civil society organizations. Furthermore, justice sector reform is on top of the agenda; ‘market actors’ are promoted as an important source of demand for ‘good law;’ there is at times a comparatively superficial recognition of non-legal sources of normativity; and the IFIs increasingly use human rights jargon as a reformulated vision of development.¹⁹¹ The World Bank’s has been recently criticized for its resistance to both empirical evidence and academic critique in its continuation of policies that focus on promotion of a legal order consisting of predictable, enforceable and efficient rules required for a market economy to flourish.¹⁹²

Yet a facile flirtation (so that there is active endorsement but little or no real promotion and consolidation) or a ‘selective engagement’ with the human rights jargon remains an apprehension. Such ‘selective engagement’ can ultimately translate into existing ‘contract’ and ‘property’ rights receiving a much greater fillip at the expense of a meaningful rights discourse bringing about any structural changes to address societal inequities. Most tellingly, critics point out that the actual content of the international legal reform agenda has changed very little over the years and its main concerns remain the efficiency of and competition within the system — while the main themes *vis-à-vis* the reformation of the state remain corruption, transparency and accountability.¹⁹³ The core of the international reform agenda still pursues ‘efficiency.’ It seems much less amenable to a larger scrutiny of human rights imperatives and ethos and resulting law reforms that focus on the distributive or other social effects of the legal reform agenda. The related issue of course is the ‘one size fits all’ nature of IFI reform prescriptions and an as yet absent pluralistic approach in IFI mandated international justice sector reform programs. In what has been described as the “postdevelopmentalist,” “poststructuralist,” and “postfundamentalist” current moment of the Law and Development dialectics, scholars still recognize several unvanquished perils. These include ethnocentricity, neglect of context, and discounting of difference in an era characterized by an over-emphasis on

¹⁹¹ KERRY RITTICH, “*The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*,” in THE NEW LAW AND ECONOMIC DEVELOPMENT (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2008).

¹⁹² ALVARRO SANTOS, “*The World Bank’s uses of the “Rule of Law” Promise in Economic Development*,” in THE NEW LAW AND ECONOMIC DEVELOPMENT (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2008).

¹⁹³ KERRY RITTICH, “*The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*,” in THE NEW LAW AND ECONOMIC DEVELOPMENT (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2008).

judicialism in the “Rule of Law” literature and practice.¹⁹⁴

Much as the increasingly important discipline of ‘Law & Development’ has been recognized as the meeting point of three different disciplinary fields, namely, dominant economic theories; prevailing legal theories; and institutional practices and policies of development agencies, the dominant economic theory in the current phase of ‘Law & Development’ has been described as the need for state intervention to address market failures.¹⁹⁵ On the other hand, the dominant current ‘legal theory’ has been described as, “the unsynthesized coexistence of transformed elements of CLT” (classical legal thought) and “transformed elements of the social” (with CLT and Social being the two earlier modes of global legal consciousness in Duncan Kennedy’s seminal scholarly categorization and description of the different stages and characteristics of the globalization of law.¹⁹⁶ According to Duncan Kennedy, this “contemporary legal consciousness” harbors a plethora of normative reconstruction projects, designed to transcend the opposition of the CLT and the Social and thereby restore Reason to rulership in law,” and also a “plethora of methodologies through which legal theorists attempt to achieve a distanced understanding of the relation of law to other domains.”¹⁹⁷ Finally, the dominant contemporary institutional practice has been portrayed as that of IFIs increasing their investment in law reform instead of focusing on creating market institutions.¹⁹⁸

Rule of Law’ is the latest mantra and it has been described as the result of the confluence of two different projects: (a) the project of democracy (domestic human rights protection); and, (b) the project of markets (discovery of institutions). Yet both projects look to and require from ‘Rule of Law,’ constitutional guarantees of some rights even if they disagree on which rights. Similarly, both projects want an independent judiciary, even if they disagree on its role. Both projects further want cost-effective access to justice but disagree on what it means. Finally, both projects have faith in modernized neo-formalism. This is thus an uneasy amalgam of potentially contradictory strands with many tensions, and also some overlap. According to David Trubek, the inherent earlier tensions between, for instance, Formalism (a neutral framework for growth; judicial autonomy; adherence to rule of law) and Pragmatism (the need for an instrumental approach to law; pragmatic problem solving; and policy science); between Economic Constitutionalism and Democratic Empowerment; between market-oriented growth and direct poverty alleviation; between efficiency and distribution; and between globalization and endogenous growth, continue to characterize the modern international ‘Law and

¹⁹⁴ SCOTT NEWTON, “*The Dialectics of Law and Development*,” in THE NEW LAW AND ECONOMIC DEVELOPMENT, (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2008).

¹⁹⁵ JOSEPH STIGLITZ, THE POST WASHINGTON CONSENSUS CONSENSUS (2004).

¹⁹⁶ DUNCAN KENNEDY, “*Three Globalizations of Law and Legal Thought: 1850-2000*” in THE NEW LAW AND ECONOMIC DEVELOPMENT (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2008). At 63.

¹⁹⁷ Id. At 71.

¹⁹⁸ DAVID TRUBEK & ALVARO SANTOS, “*The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*” in THE NEW LAW AND ECONOMIC DEVELOPMENT (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2008).

Development’ debates.¹⁹⁹

The various recurring issues, contradictions and blind spots pointed out by David Trubek in his overview of the international ‘Rule of Law’ regime continue to characterize the ADB, USAID and other ‘Efficiency Plus Approaches’ to justice sector reform projects being implemented in Pakistan. The list of cautions and warnings that academics are using to wave down the relentless juggernaut of the new “Rule of Law’ regime, are thus highly relevant for oblivious post-colonial domestic law reformers engaging with international ‘Rule of Law’ projects. That warning list requires a quick overview. It cautions that ‘no one size fits all.’ It points out the failures of earlier attempts at transplants and top down reforms. It reiterates the hitherto ignored need for context specific development. It reemphasizes the importance of long-term horizons; and, the need for much greater focus on labor, women and environmental rights, and not just contract, property, and economic regulation. It necessitates special efforts to ensure real access to justice; and recognition of the many different legitimate paths to growth. It asks pertinent questions about formalism and rigid constitutional constraints on state action. It warns against the constant risk of elite capture of reforms. Very importantly, it draws attention to the existence of a gap between law in books and law in practice.²⁰⁰

D. Conclusion

Two self-constraining and debilitating features have in my view, characterized the justice sector reform discourse in Pakistan. Firstly, debate, analysis and critique of the underlying political and economic arrangements in society (especially in a post-colonial context) that directly impact resource distribution, rights generation and protection, empowerment, and access to economic, political and social opportunities, has been largely missing from its political and legislative discourse. Thus, the vital linkages and inter-dependencies between formal legal rights and actual economic and political conditions necessary for their actualization have been consistently ignored in the Pakistani justice sector discourse (for a whole host of reasons that have been alluded to above) since its independence in 1947. This crisis of Pakistani politics and its democratic development has in fact caused its politicians and legislators to relinquish the justice sector discourse to its lawyers and judges —enabling the latter to dominate and control it. In other words, the discourse has been left to be formulated and structured by the narrower and technocratic perspectives, agendas and aspirations of the Pakistani ‘legal community,’ which is, by and large, for reasons discussed in this article, incapable of, unsuitable for, and disinterested in any substantive reforms in the legal and judicial system. As a result, this discourse is largely superficial; process focused rather than engaging with substantive issues of justice; about foreground institutions rather than background norms; and, therefore, socially and politically de-contextualized. I have also discussed in this article that the domination and control of the justice sector discourse by the ‘legal community’ is more pronounced in the Pakistani context, as compared to

¹⁹⁹ Id.

²⁰⁰ Id.

neighboring India.

Secondly, even within the narrower and technocratic domain of the Pakistani justice sector reform discourse, dominated by its ‘legal community,’ the pre-dominant theme for reform has been the enhancement of judicial efficiency’ and the ‘speed of justice.’ This obsession for ‘speed,’ I argue, has caused neglect of various other important performance aspects of a formal legal system. For instance, it has precluded possibilities, even within the limits and constraints of the judicial function, of rigorous analysis or the revisiting and reform of the structural and societal constraints that hamper access to courts. Instead the focus has been almost exclusively on reforms within the legal and judicial institutional framework in order to assist and promote access. And, even that has not been much of a success. The passion for ‘speed’ has also diverted attention from other important aspects of the judicial process, as well as the quality of judicial pronouncements. It has thus limited the possibility horizon for the formal justice system to tackle recurring discord and disputes in society; and the pursuit of greater distributional justice, fairness and equity through judicial interpretations of extant laws.

In view of the above, I have argued that it is vitally important to shift the focus of the justice sector reform discourse in Pakistan from a purely technocratic/legalistic one to a legal-sociological one. In other words, it is important to transfer the gaze from the courtrooms to the disputants themselves. This is essential in order to clearly assess the real nature of disputes in Pakistan and to determine how exactly do these disputes emerge in society, get resolved, or are perpetuated. Whether and how some of these disputes become legal contestations are only second order questions, which can be meaningfully looked into after a better understanding of the socio-politico-economic background and imperatives for societal disputes that may eventually become legal contestations. It is thus important to determine whether in these typical disputes there are regular winners and losers and whether consistently ending up on the losing side is a function of certain existing disempowerments and socio-economic conditions and structures? It is also important to determine whether the cultural hegemony, the cost and inapproachability, and the continuing alienness of the formal legal system (for a whole host of factors that are discussed above) persuade many Pakistani disputants to take recourse to informal dispute resolution mechanisms and notions of popular justice. This further necessitates on-going exploration of whether the history, structure, sociology, ideology and capacity of the existing legal system inhibits and constrains it in terms of addressing the phenomenon of disempowerment and resulting injustice.

An additional problem in this context is the growing popularity of legal rhetoric in the international law and development discourse that is bringing about a new reductionism wherein complex development issues are increasingly formulated, evaluated and debated through the framework of legal concepts and remedies. This increasing dominance of law and legal rights as the mode and medium of discourse in international Law & Development literature, and, also its deification as a possible panacea for the myriad political and economic issues debilitating developing countries, is also contributing, I argue, to the crowding out of the necessary space for evaluating the problems of disempowerment and discord in post-colonial societies. In this context, the massive IFI

funded justice sector reform projects introduced in Pakistan over the last decade or so have further reduced what ought to be a deeper, multi-disciplinary and essentially political and economic debate, into a narrowly circumscribed legalistic discourse that assumes the existing underpinnings and ethos of the economic and political system as a given. While ‘property rights protection,’ ‘contract enforcement,’ and the pursuit of a model of free market economy remain the predominant highlights of such IFI funded projects, the deeper and more divisive issues of political and economic disempowerment in post-colonial Pakistan remains neglected by indigenous political and social forces and institutions as well as the IFI funded projects.

Thus, a robust political engagement is missing and the extant discourse, I argue, is purely mechanical and technocratic, as it is defined by a ‘legal community’ that is ideologically, institutionally, methodologically and at times, parochially, unwilling to revisit the fundamentals of the legal and judicial system — thus ultimately consolidating it as a formal, justificatory and legitimizing façade for the underlying economic and political arrangements in Pakistani society. It is these underlying economic and political arrangements, I argue, that may be the real causes of discord, exploitation and disempowerment for various sections of Pakistani society and it is these arrangements that should thus necessarily be the foci of attention for the Pakistani political parties, social organizations, legislators, policy-makers and academics. Their mode of discussion and resolution is in the realm of the political and not the legal. The legal solutions will have to follow political solutions. The current reform discourse, on the other hand, creates an artificial divide between the legal system and society.

I have suggested in this article that even the existing narrow justice reform discourse in Pakistan can play a more effective role in the pursuit of qualitatively better decisions that promote distributional fairness and equity, rather than remaining in blind and elusive pursuit of independently meaningless goals of ‘speed’ and ‘efficiency.’ It, however, needs to be emphasized once more that even if the extant ‘legal community’ dominated justice sector reform discourse were made more nuanced and socially conscious, it would be largely unable to make a real impact on reducing disempowerment and inequities. Disempowerment and inequity are, I argue, perpetuated by the persistence of fundamental underlying political and economic realities, whose correction is beyond the capacity of the courts. The Pakistani courts have after all not been successful in achieving far easier targets. Even in the more limited paradigm of legal case disposal by the courts (an area that has received concentrated attention by IFI funded reform projects characterized by the fetish for ‘speed’), the gap between the increasing case burden on the courts and their speed of disposal is an ever-widening one. And while ‘access’ has been the other main mantra for reform, the gap between access to courts and disputants who cannot afford the time, funds and energy to seek such access is an ever-widening one. These failures further underline the necessity of understanding the phenomenon of dispute, as well as alternative modes of informal dispute resolution in Pakistan that may reveal potential solutions even for the relatively superficial (not superficial in the sense of insignificant but in the sense that they look at the process side of law rather than its substantive dimension) goals of ‘speed’ and ‘access.’ Such an altered approach may provide useful lessons at the process level — potentially more accessible and meaningful

local informal dispute resolution mechanisms. However, much more importantly, it may generate valuable insights at a substantive/fundamental structural level — studying the phenomenon of dispute may help explain the basic underlying economic and political framework of society; the possibly legitimizing and enabling role of the legal framework for the politico-economic *status-quo*; and the real root causes for the perpetuation and exacerbation of dispute, discord and violence in Pakistani society.

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