

Judicial Response to Human Rights Violations during Internal Disturbances in Pakistan



PhD Law Thesis

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Abstract

This research is about factors that seem to affect the core human rights values during civil unrest and internal armed disturbances in Pakistan. It mainly focuses on executive impunities and indemnities of administrative discretions regarding preventive and punitive measures to restore law and order during such situations. The study argues that legal antinomies between positivism and idealism as well as collectivism and individualism engender crisis of natural justice and provoke abuses of human rights norms. It indicates that criminal laws of Pakistan are indifferent to indigenous sociopolitical aspirations and are stringent in their operations.

It discusses in some details that governments, both democratic and non-democratic, are conscious to suppress civil disobedience and political resistance with unrestrained power and often violate fundamental rights of its citizens. This situation becomes bad to worse when state declares proclamation of emergency and sends its civil armed or armed forces in respective areas to deal with internal armed disturbance with an abeyance of certain constitutional guarantees. It produces such a vacuum under the notion of state sovereignty, where neither human rights nor humanitarian law can extend their due protections to civilians. As mostly due to State's denial of armed conflicts in their jurisdiction resultantly later being law of conflict become skeptical to dispense a humanely treatment.

It attempts to explore the role of Apex judiciary in Pakistan under constitutional guarantees and due process of law. It is mainly to resolve legal antinomies and to uphold natural justice through jural postulates of sociological jurisprudence under constructive interpretations of legal realism. This research further argues that judicial organ has jurisdiction and legitimacy to protect absolute and non-derogable rights in all kinds of conflicts. With such argument, this research focuses on practical measures to promote fundamental guarantees in Pakistan. It is either by re-legislations or by specific adoption and incorporation of international instruments in domestic jurisdiction. Mostly owing to rigor of general and special criminal laws of Pakistan which not only engender executive prerogatives with regards to use of indiscriminate lethal force but also permit undue administrative detentions. Besides their inherent presumption of guilt, strict liabilities, restrains on writ jurisdictions and protection of public officials from persecution in case of colourable exercise of their duties, not only enhance such rigors but also have negative impacts on the right to fair trial. Since this scenario of crime control model is hazardous to core rights such as right to life, protections against custodial torture and inhuman treatment, self-incrimination and arbitrary deprivation of liberty in peace as well as in conflict paradigms. Resultantly this research focuses on conventional as well as unconventional methods of conflict resolutions to uphold justice, fairness and tolerance at all times. And emphasizes on legal pluralism to draft just criminal laws in Pakistan by harmoniously jelling together Sharia, international human rights, sociocultural practices, constitutional guarantees and existing public law.

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List of Abbreviations

ADR	Alternative Dispute Resolution
ATA	The Anti-Terrorism Act, 1997
AFSPA	Armed Forces Special Powers (Assam and Manipur) Act, 1958
-----	Armed Forces Special Powers (Punjab and Chandigarh) Act, 1983
-----	Armed Forces Special Powers (Jammu and Kashmir) Act, 1990. India
AIR	All India Review
AP-I	Protocol Additional to the Geneva Conventions of 12 August 1949, And relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977
AP-II	Protocol Additional to the Geneva Conventions of 12 August 1949, And relating to the Protection of Victims of Non international Armed Conflicts (Protocol II), 8 June 1977
AJP	Access to Justice Program
Art.	Article of the Constitution of Pakistan, 1973
BLA	Balochistan Liberation Army
CJ	Chief Justice
Const.	Constitution of the Islamic Republic of Pakistan, 1973
Cr.P.C.	The Code of Criminal Procedure, 1898
CAT	Convention against Torture and other Cruel, inhuman or degrading Treatment or Punishment, 1984
CNSA	Control of Narcotic Substances Act, 1997
DOJ	Department of Justice
FATA	Federally Administrated Tribal Areas
FC	Frontier Constabulary
FIA	Federal Investigation Agency
FSC	Federal Shariat Court
GCs	Geneva Conventions, I, II, III and IV of 1949
HC	High Court
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
IHL	International Humanitarian Law
IHR	International Human Rights
ISI	The Directorate for Pakistan Inter-Services Intelligence, Pakistan
ISPR	The Inter-Services Public Relations, Pakistan
ICJ	International Court of Justice

ICC	International Criminal Court
INGO	International Non-Governmental Organization
ICTY	International Criminal Tribunal for the former Yugoslavia, 1993
ICTR	International Criminal Tribunal for Rwanda, 1994
J	Justice of High Courts/ Supreme Court
KPK	The Province of Khyber Pakhtunkhwa, Pakistan
LC	Lower Courts
MPO	West Pakistan Maintenance of Public Order Ordinance, 1960
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NJP	National Judicial Policy, Pakistan
PATA	Provincially Administrated Tribal Areas
PANAA	Prevention of Anti-National Activities Act, 1974
PLA	Permanent Lok Adalat
PTI	Pakistan Tehreek-e-Insaf
PAT	Pakistan Awami Tehreek
PAA	Pakistan Army Act, 1952
PPC	Pakistan Penal Code, 1860
POPA	Protection of Pakistan Act, 2014
POTA	Prevention of Terrorism Act, 2002, India
PNA	Pakistan National Alliance
PLD	Pakistan Law Digest
PIL	Public Interest Litigations
PUS	Public Utility Services
Reg.	Action in Aid of Civil Power Regulation, 2011
ROCCIPI	A qualitative method of accessing legislations covers Rules, Opportunity, Capacity, Communication, Interest/Objectives, Problematic/Institutional Psychology, Process and Impact of Laws
SC	Supreme Court
SRA	The Specific Relief Act, 1877
S	Section
Ss.	Sections
SAARC	South Asian Association for Regional Cooperation
TTP	Tahreek-e-Taliban Pakistan
UDHR	Universal Declaration of Human Rights, 1948
UNDP	United Nations Development Program
UNSC	United Nations Security Council
YLR	Yearly Law Review

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Introduction, Significance and Scope of the Research

INTRODUCTION

In response to contemporary wave of violent extremism and unrest in Pakistan¹ a large number of scholars under the auspices of the Council of Islamic Ideology attempt to dig out its causations in the following manner. They unanimously indicate that, “extremism is caused by the sense of hopelessness and pessimism in an individual whose rights are usurped and society is unable to provide justice to them.” Similarly observe that, “terrorism has its roots in the lack of governance and unstable political system not only in Pakistan but also in the rest of Muslim world.” Moreover, illustrate that, “sectarianism and religious intolerance emerge from dogmatic religious attitudes that justify violence for their own vested and political interests.”² This scenario infers that the threshold of civil and personal liberties as well as socioeconomic justice is susceptible in Pakistan that causes internal sociopolitical and religious disturbances. According to Shah Wali Allah it is owing to breakdown of the “*cycle of justice*” under which sociopolitical balance of society leans toward particular classes that makes the entire administrative system unjust and corrupt.³ Whereas for Iqbal it is an inability of legislature

¹ See into National Counter Terrorism Authority Pakistan, “Significant Incidents of Terror Attacks in Pakistan (2002-2016),” accessed January 23, 2017, [http://www.nacta.gov.pk/Downloads/10.significant%20Incidents%20\(25102016\).pdf](http://www.nacta.gov.pk/Downloads/10.significant%20Incidents%20(25102016).pdf).

² See Council of Islamic Ideology, *Islam awr Intiha Pasandi, ek Tahqiqati Ja'iza* (Islamabad: Council of Islamic Ideology, 2009), 169-172, quoted in Muhammad Khalid Masud, “Religious counter-narrative against violent extremism,” (Analysis Paper, Pakistan Peace Collective, Federal Ministry for Information, Broadcasting and National Heritage, Islamabad, January 14, 2017), 25-26.

³ See into Marcia K. Hermansen, trans., *The Conclusive Argument from God: Shah Wali Allah's Hujjat Allah al-Baligha* (Leiden: E.J. Brill, 1996), 140-155; Vasileios Syros, “An Early Modern South Asian Thinker on

to craft a unanimous “*collective ego*” of a nation that can enshrine cohesiveness, equality, social reciprocity and civil liberties.⁴ As Iqbal seems to be close to social contract doctrine of Kant to craft “*categorical imperative for egalitarians*,” resultantly this study initially focuses on the western connotation of statehood to comprehend above mentioned concerns.⁵ Since the modern state being a legal entity consists of defined territory, permanent population, government and sovereignty.⁶ Whereas government being a pragmatic component of state is accountable to take care of its governed territory and population. Consequently, it contains legitimacy by the mutual consent of its citizens to use appropriate force to maintain its existence and indigenous law and order.⁷ Hence, it is a rational choice of the ‘*post-Westphalian*’ sovereign state to save its exterior centric sovereignty and interior centric legitimacy in the anarchic international paradigm.⁸ Under

the Rise and Decline of Empires: Shah Wali Allah of Delhi, the Mughals, and the Byzantines,” *Journal of World History* 23, no. 4 (2012): 811-815; Ayesha Jalal, *Patissans of Allah: Jihad in South Asia* (Lahore: Sange-e-Meel Publications, 2008), 50-51: This *cycle of justice* indicates that under the division of labour the rights and obligation of one socio-economic class depends upon other classes, meaning thereby the working class produces market goods that are sold by owner of land or factory, this activity not only produces wealth but also generate tax. Such tax/revenue is collected by administrators to form a collective good which futher benefits the same working class if distributed equally and equitably under the just government of a just ruler. Shah Wali Allah believes that demise of such cycle of justice was one of the core reasons for fall of the Mughal Empire which employed the taxes for their own leisures.

⁴ See Mohammad Iqbal *The Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934), 147-158.

⁵ *Ibid.*, 95-117, 172-175; See also into Matthew Lippman, *Law and Society* (Chicago: Sage Publications, Inc., 2015), 49-50.

⁶ See Montevideo, *Montevideo Convention on Rights and Duties of State*, by The Governments represented in the Seventh International Conference of American States (Motevideo, December 26, 1933), 1: for Article1-3.

⁷ See Evan Fox-Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, (2010): 301-336.

⁸ See Jason Franks, *Rethinking the Roots of Terrorism* (Hampshire, England: Palgrave Macmillan, Macmillan Distribution Ltd, 2006), 2-4, 13-18, 22-24, 48-50; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New Delhi: First South Asian Edition, Foundation Books Pvt. Ltd., 2005), 189-202: argues that State as an entity has a prerogative to save its existence through force and power in the anarchic international system, where every other state acts and reacts in accordance with the realpolitik. He declares it a national security paradox because even an apparent universal outlook of human rights corpus is state centric and acknowledges the supremacy of the state over any other ideology.

the social contract doctrine fundamental unit of state is a free will individual.⁹ As a rational being, this *egalitarian* surrenders his will through consensus with other individuals not only to form a just society but also to avoid socio-political anarchy.¹⁰ This process has a core premise to dispense justice for all members of the society through its institutions to attain collective peace and pragmatic civil liberties.¹¹ For a sustainable harmony with this order, the state needs laws to regulate conduct of its beneficiaries through a legal trust of legislations.¹² It works as a rationale for public agencies to protect the individual's basic rights with the structural arrangement of 'man, community and state.'¹³ Moreover, this contractual scheme is also aligned with conventionalist and constitutionalist school of human rights.¹⁴

However, it is not compatible as such with a post-colonial environment of newly independent states like Pakistan, which are still facing the dilemma of social cohesion,

⁹ See John Finnis, *Natural Law & Natural Rights* (New York: Oxford University Press, 2011), 165; Ronald Grimsley, "Political Theory," in *The Philosophy of Rousseau* (London: Oxford University Press, 1973), 90-97.

¹⁰ See Immanuel Kant, *Groundwork of Metaphysics of Morals*, ed., Trans. Mary Gregor (Trumpington Street, Cambridge, United Kingdom: Cambridge University Press, 1998), 52-66.

¹¹ See John Rawls, *A Theory of Justice* (Third Indian Reprint. Delhi: Universal Law Publishing Co, 2008), 54-60; U.N. General Assembly Resolution 375(IV), *Draft Declaration on Rights and Duties of State*, by International Law Commission (Year Book of The International Law Commission, 1949), 2: Article.6: "Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion."

¹² See Evan Criddle, "Fiduciary Foundation of Administrative Law," *Notre Dame Law Review* 87, no.3 (2012): 1089-1097.

¹³ See Makau wa Mutua, "The Ideology of Human Rights," *Virginia Journal of International Law* 36 (1996): 650-660.

¹⁴ See into Ibid., 596; Michael Haas, *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), 36: Makau is a critic of Universalist approach of Human Rights and believes in cultural diversity along with full belly conception of socio-economic justice .

political sovereignty and popular legitimacy.¹⁵ Due to socio-political polarization, inadequate infrastructure and crisis of governance these states are unable to have a total compliance with international human rights practices of the contemporary era.¹⁶ With unpopular regimes, oligarchy in these States often resorts to use state power to impose and maintain its legitimacy. It is through coercive legal orders with certain restrictions on civil liberties.¹⁷ Though being adherents of command authority, positivists are least concerned with the moral validity of coercive legal order.¹⁸ Yet notions like “*minimum content of natural law*”, “*soft positivism*” and the ethical value of rule of law in the form of “*practical reasonableness*” lead to an inviolability of personal liberties.¹⁹ Resultantly many developing countries are endorsing basic human rights with transformation and specific adoption theory of international law in domestic jurisprudence for a pragmatic due process

¹⁵ See e.g. into Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership-Pakistan, 2008), 9-41; L.P. Sharma, *The Brown Ruler of India: A Historical-cum- Sociological Study of Indian Affairs after Independence* (Delhi: Konark Publishers Pvt LTD, 1988), 34-79; Khalid B. Sayeed, “Constitutional Autocracy,” in *The Political System of Pakistan* (Boston: Houghton Mifflin Company, 1967), 101-126; Creg Cariton, “Middleeast News.” Vers. html. www.aljazeera.com. November Thursday, 2013. [http://www.aljazeera.com/news/MiddleEast/2013/11/Egyptian women jailed over protest](http://www.aljazeera.com/news/MiddleEast/2013/11/Egyptian%20women%20jailed%20over%20protest) (accessed November Thursday, 2013) : “21 women and girls including minors Jailed and sentenced for 11 years for a peaceful protest without due permit for making a human chain against unjust laws, legislated and imposed by Egyptain Regime during post Morsi emergency”.

¹⁶ See Herrelson Stephens, *Exploring International Human Rights: Essential Readings: Critical Connections: Studies in Peace, Democracy, and Human Rights* (Colorado: Lynne Rienner Publishers, 2010), 109-140.

¹⁷ See Evan Criddle, “Fiduciary Foundation of Administrative Law,” *Notre Dame Law Review* 87, no.3 (2012): 1073-1074.

¹⁸ See Herrelson Stephens, *Exploring International Human Rights: Essential Readings: Critical Connections: Studies in Peace, Democracy, and Human Rights* (Colorado: Lynne Rienner Publishers, 2010), 20-100.

¹⁹ See H.L.A.Hart, *The Concept of law* (New Delhi: Oxford University Press, 2005), 192-202, 252-254; John Finnes, *Natural Law & Natural Rights* (Clarendon: Oxford University Press, 2011), 100-127; Lon Fuller, *The Morality of Law* (Fourth Indian Reprint. New Delhi: Universal Law Publishing Co, 2006), 33-91.

of law.²⁰ It is mainly through pluralism, judicial realism and expanding sociological jurisprudence,²¹ also acknowledged as such in an Indian judgment.²²

Recent judicial trends in Pakistan also follow the specific adoption theory of international law. It is especially with regard to practical application of international human right law in the domestic jurisdiction.²³ Subsequently the contemporary Apex judiciary in Pakistan seems to move from its positivist trends in a viable field of sociological jurisprudence through public interest litigations.²⁴ This approach also attains domestic and international legitimacy due to a Universalist blend of due process of law with the rule of law under constitutionalism.²⁵

²⁰ See in K.C. Joshi, *Relation between International Law and State Law* (Lucknow: Eastern Book Company, 2006), 39-54.

²¹ See Roscoe Pound, *An Introduction To The Philosophy Of Law* (Fourth Indian Reprint. New Delhi: Universal Law Publishing Co, 2006), 42-47, 56-57, 62-63; And in Julius Stone, *Human Law & Human Justice* (Second Indian Reprint, New Delhi: Universal Law Publishing Co, 2004), 251-255, 263-270; W. Friedman, *Legal Theory* (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co, 2008), 70-81, 86-92.

²² See *Peoples Union for Civil Liberties v. Union of India*, AIR 1982 SC 1473: Under an impact of this trend Indian Judiciary considers the specific adoption theory compatible with municipal law if basic hierarchal structure of state constitution is not contrary to it.

²³ See *Watan Party and Another v. Federation of Pakistan*, PLD 2011 SC 997, 1020: Apex court has focused on Universal Declaration of Human Rights (UDHR) and Quranic injunctions for inquisitorial proceedings for the enforcement of fundamental rights in Karachi; *Foundation for Fundamental Rights v. Federation of Pakistan and 4 others*, PLD 2013 Peshawar 94; *Haji Lal Muhammad v. Federation of Pakistan*, PLD 2014 Peshawar 199.

²⁴ See into *Mst. Rohaifa (dec) Through her Sons v. Federation of Pakistan through Secretary, Ministry of Defence etc, DG, ISI, Islamabad*, Const. P.No.1 of 2012 and CrI.O.Ps.No.8 & 12 of 2012.doc, 13.12.2013, <http://www.supremecourt.gov.pk/2013/Judgments/Orders/>: Apex court declares the Sec.2(1) (d) of the Army Act 1952 and Action in Aid of Civil Power Regulation, 2011, *ultra vires* of the constitution. It exceeds from its territorial jurisdiction up to FATA by delimiting Art.247 (7) of the Constitution of Pakistan. It held through a combination of Art.4,9,10A, 13, 184(3) of the Constitution of Pakistan, that scope of Fundamental Rights can be enhanced up to FATA if cause of lies in settled areas. The court declares preventive detention of detainees in the internment center of Pakistan Army located in FATA under Action in Aid of Civil Power Regulation, 2011 and West Pakistan Maintenance of Public Order 1960, as illegal and wrong full confinement.

²⁵ See S.P. Sathe, *Judicial Activism in India* (New Delhi: Oxford University Press, 2004), 195-311.

Accordingly, on many occasions higher judiciary has declared an ultimate inviolability of core human rights in domestic jurisdictions in all kinds of circumstances, during either peace or civil strife.²⁶It directs the respective government to take extraordinary measures for the protection of fundamental rights.²⁷ Since basic obligations of legal system are to minimize sense of injustice or deprivation through equality and equity.²⁸It becomes more crucial when state muddles through a transitional phase of political turmoil and our mass dissent.²⁹

Protests through freedom of expression and boycott from political obligations are popular responses of minority or any other alienated group to redress their just grievances.³⁰In a constitutional setup, extreme disagreements can be diluted through statesmanship or

²⁶ See for more details in *Niaz Ahmed Khan v. Province of Sindh*, PLD 1977 Karachi 604; *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307; *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111; *Afzoon Kausar v. Additional District Magistrate, ICT, Islamabad*, PLD 2011 Islamabad 1; *Watan Party and another v. Federation of Pakistan*, PLD 2011 SC 997; *President Balochistan High Court Bar Association v. Federation of Pakistan*, Constitutional petition no 77 of 2010 on 2012, <http://www.supremecourt.gov.pk/2012/Judgments/Orders/>: for a harmonious and constructive interpretation of Art.2A,4,9,10,10A,,13,14,16,17,19A and Art 25 with Art.184(3), Art.189 and Art.190 of the Constitution of Pakistan,1973 for the protection of fundamental rights and expansion of civil liberties.

²⁷ See *Watan Party and Another v. Federation of Pakistan*, PLD 2011 SC 997, 1019: “State is duty bound to protect the life and property of its citizens in accordance with law.”

²⁸ See in Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (London: The MIT Press, 1994), 567.

²⁹ See Anisseh Van Engeland and Rudolp M. Rachael, *From Terrorism to Politics* (Aldershot, Hampshire: Ashgate Publishing Limited, 2008), 1-13, 171-180.

³⁰ See *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206, 295: Political protest to protect civil liberties with a remedy of constitutional amendments and judicial review of legislation, on the touch stone of the basic structure of constitutionalism. “The urge for change is always there in the human nature. If change is not allowed to be brought about or the party in power being in brute majority introduces changes in the Constitution resulting in taking away of fundamental rights and curbing of civil liberties then the people may be compelled to employ extra Constitutional means to have the change effected in accordance with their wishes. The framers of the constitution have, therefore, provided for amendment. It is another matter that such provision may be abused and the Constitution may be arbitrarily amended so as to deprive the people of their lawful right.”; Arato and Cohen , *Civil Society and Political Theory*, 569-604.

judicial organ of the State.³¹ It requires equity, good conscious and natural justice under a fiduciary relationship of the State with its citizens.³² Nevertheless, contrary to it transforms into anarchy and civil strife that further elevates to internal disturbance with a vicious cycle of political violence.³³ Moreover, an ultimate end of this chaos is usually a meager efficacy of government to rule.³⁴ This legal antinomy of stability and change attracts legitimate use of state force to restore law and order and to create deterrence in the society.³⁵ Yet it creates another antinomy of collectivism and individualism with a relatively more preventive and punitive measures for maximum deterrence under utilitarian approach.³⁶ Such dynamics of internal security attracts an absolute administrative control³⁷ to avoid political fragmentations³⁸ to establish writ of the state.³⁹ This situation engenders the discretionary

³¹ See John Finnis, *Natural Law & Natural Rights* (New York: Oxford University Press, 2011), 273-275.

³² See Annabelle Lever, "Democracy and Judicial Review: Are They Really Incompatible?," *Perspective on Politics* 7, no.4 (2009): 805-822; Evan Fox. Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, no.4 (2010): 301-336.

³³ For in-depth analysis please see, Leo Kuper, *Genocide: Its political use in the Twentieth Century* (New Haven: Yale University Press, 1981), 1-10; Wolfgang Sofsky, *Violence: Terrorism, Genocide, War* (London: Granta Books, 2003), 70-76.

³⁴ See *President Balochistan High Court Bar Association v. Federation of Pakistan*, Constitutional Petition no 77 of 2010; <http://www.supremecourt.gov.pk/> 2012, [Short Order] Para 48: "Federal Government except deploying FC troops, has also failed to protect province of Balochistan from internal disturbances. Similarly, as far as Provincial Government of Blochistan is concerned it had lost its constitutional authority to govern the province because of violation of fundamental rights of the people of Pakistan".

³⁵ See *Watan Party and Another v. Federation of Pakistan*, PLD 2011 SC 997, 1113: "Successful State maintains a monopoly on the legitimate use of physical force within its border".

³⁶ See Stokes Eric, *The English Utilitarians and India* (Oxford: Clarendon University Press, 1963), 305-322; W. Friedman, *Legal Theory* (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co, 2008), 86-91.

³⁷ See for a utilitarian and consequential (ends justify the means) perspective of executive power [Civil and Military Bureaucracy] into *Sh. Liaqat Hussain v. Federation of Pakistan*, PLD1999 SC 504,581-590: "Armed Forces also fall within the definition of Executive.", also see in this case at 680: "in aid of civil power implies that deployment of the Armed Forces shall be for the purpose of enabling the civil power to deal with the situation affecting maintenance of public order which has necessitated the deployment of armed forces. The word "aid" postulates the continued existence of the authority to be aided."

³⁸ See Hassan Askar Rizvi, "The Paradox of Military Rule in Pakistan," *Asian Survey* 24, 5 (1984): 534-555.

³⁹ See *Sh. Liaqat Hussain v. Federation of Pakistan*, PLD1999 SC 504, at 678: "An Inherent attribute of sovereignty, the right of every government to take whatever steps are necessary for its own preservation"

use of administrative powers with blurred directives on the use of force.⁴⁰ Likewise, legislative indemnity of these actions under doctrine of necessity⁴¹ transgresses the required limits of objectivity, reasonableness and proportionality in administrative actions.⁴² After an absence of accountability, these executive impunities make personal liberties vulnerable.⁴³ It falls out into a potentially authoritarianism,⁴⁴ with an inverse relationship to civil liberties and due process of law.⁴⁵

This indirect administrative control for absolute law and order was relatively more perilous for civil liberties in colonial India. It gave legislative protections to preventive laws, even during peacetime to manage indigenous movements of independence. Prior to the writ jurisdiction of the high court, immense powers were conferred to law enforcement agencies.⁴⁶ This colonial legacy has sustained itself amid a fragile social political scenario

⁴⁰ See *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111, 15: “The force used must be in proportion to the injury to be averted and must not be employed for the gratification of vindication or malicious feeling”

⁴¹ See *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307, 327-328.

⁴² See *Mamoona Saeed v. Government of Punjab*, PLD 2007 Lahore 128, 134-139.

⁴³ See Nihal Jayawickrama, *The Judicial Application of Human Right Law: National, Regional and International Jurisprudence* (UK: Cambridge University Press, 2004), 17.

⁴⁴ See Hiroshi Sato, *Recent Trends in Constitutional Rights in India* (India: The Institute of Developing Economies, 1975):1-13: “This study describes that the executive coercion and state violence in the wrap of Public emergency has a direct negative impact on the constitutional and fundamental rights of Indian citizens.”

⁴⁵ See B.R. Sharma, *Constitutional Law and Judicial Activism* (New Delhi: Ashish Publishing House, 1990), 2-33: examines the contours of the Preventive/Administrative detentions through the spectrum of judicial activism and constitutional safeguards.

⁴⁶ See Anil Kalhan, “Colonial Continuities: Human Rights, Terrorism and Security law in India,” *Columbia Journal of Asian Law* 20, no.1 (2006): 93-234.

of India and Pakistan.⁴⁷ Seemingly an unrestrained bureaucracy has continued to manipulate the masses with its discretionary powers for a purported public peace.⁴⁸

Despite the fact that powers of writ jurisdiction of high court have been incorporated in the legal system of Pakistan since 1954.⁴⁹ The executive impunity over preventive and punitive actions has remained intact due to non-pluralistic military and civil regimes.⁵⁰ It proved to be counterproductive⁵¹ to bring social cohesion, egalitarianism and constitutionalism in Pakistan, mainly due to judicial immunities and legislative covers.⁵² Then whenever such an unaccountable establishment confronts political dissents and

⁴⁷ See L.P. Sharma, *The Brown Rulers of India* (Delhi: Konark Publishers Pvt Ltd, 1988), 1-13; for an attitudinal legacy of colonial authoritarianism and vested interests of administrators as vital determinants behind discretionary executive power.

⁴⁸ See into Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: Peshawar University Foundation Press, 1989), 135-183; *Keshav Talpade v. Emperor*, AIR 1943 FC 1.

⁴⁹ See Shabber Raza Rizvi, *Fundamental Rights and Judicial Review in Pakistan* (Lahore: Vanguard Books (Pvt) Ltd., 2000), 1-2, 58-66; M.A. Fazal, *Judicial Control of Administrative Action in India and Pakistan: A Comparative Study of Principles and Remedies* (Oxford: The Clarendon Press, 1969), 24-25.

⁵⁰ See Paula Newberg, "Pakistan's Troubled Landscape," *World Policy Journal* 4, no. 2 (1987): 314-330; K. J. Newman, "Pakistan's Preventive Autocracy and its Causes," *Pacific Affairs* 32, no.1 (1959): 18-33.

⁵¹ See for the counterproductive impact of an absolute totalitarianism into John Rawls, "Definition And Justification of Civil Disobedience," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall, Inc, 1991), 103: "--- mode of protest, along with militant action and resistance, as a tactic for transforming or even overturning an unjust and corrupt system. There is no difficulty about such action in this case."

⁵² See e.g. into Zulfiqar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Karachi: Oxford University Press, 1995), 18-43, 118-229; Farzana Shaikh, *Making Sense of Pakistan* (London: Foundation Books, C. Hurst & Co. Publishers, 2009), 1-13, 116-146; Ayesha Jalal, *The State of Martial Rule: The origins of Pakistan's Political economy of Defence* (Lahore: Sange-E-Meel Publications), 194-276; See also for judicial immunities and legislative covers in 1st Amendment, Act .XXXIII of 1974, 4th Amendment Act LXXI of 1974, 5th Amendment, Act LXII of 1974, 7th amendment Act XXIII of 1977, The Constitution Amendment Order 1980, P.O.no 1 of 1980 in the Constitution of Pakistan, 1973 ;Pakistan Armed Forces (Acting in Aid Of the Civil Power) Ordinance, 1998.OrdinanceXII of 1998: "Section 12";Actions in Aid of Civil Power -2011 Regulations Bill for FATA/PATA; Pakistan, Senate Of. "Debates ," 77th Session. Islamabad, 2012, 1-19; See also for legislative power to confer indemnity in Art.237 of the Constitution of Pakistan 1973; And in Hamza Khalid, "Actions in aid of Civil Power." *Aditorial. Research Society of International Law. The Nation*, July 17, (2011): 1-2: for "issue of executive impunity."

protests,⁵³ it usually resorts to maximum use of force to curb them, without a least concern to human rights norms.⁵⁴ This situation becomes bad to worse when a high threshold of internal disturbance and severity of violence attracts proclamation of emergency.⁵⁵ While federal government calls its armed forces in aid of civil power to protect its units from such perceived or real disaster.⁵⁶ It not only withers constitutional protection of certain fundamental rights,⁵⁷ but also places a bar on judicial review of administrative actions.⁵⁸ Under such circumstances neither rules of international human rights law, nor international humanitarian law can extend its protections to the victims of executive impunity.⁵⁹

⁵³ See H.A. Bedau, "Civil Disobedience and Personal Responsibility for Injustice," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 49-67: argues that in a liberal and democratic society right to protest through freedom of expression, association and movement is a safeguard against the probability of tyranny of ruling majority if the entire state apparatus including judiciary attempts to deviate from the core constitutional norms. Through these instruments popular movement can overrule the pledge to obedience to law for an impersonal, political and noble cause in accordance with constitutional conventions and egalitarian spirit. As it is an enshrined civil right of 'reasonable men' to ridicule the writ of sitting government if it ever transgress the rightful conditions and civil liberties, yet they shall not be permitted to subdue national security and state sovereignty. Such contentious and illegal refusal may be performed through sit-ins, illegal boycotts, strikes, illegal blocking of roads, chanting of anti-regimes slogans, motivational speeches [based on moral grounds of natural law, but must not be the hate speeches against creed, cast, ethnicity or religion] in an unlawful assembly. All of these illegal acts require a very careful response of the sitting governments to restore public order through negotiations or through mild use of force without compromising principles of proportionality and distinction.

⁵⁴ See *F.B Ali and another v. The State*, PLD 1975 SC 506; *Niaz Ahmed Khan v. Province of Sindh*, PLD 1977 Karachi 604 ; *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307; *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111: For the vulnerabilities of rights of right to life, liberty, dignity and fair trial during law and order crisis, civil commotion, internal disturbances and public emergencies.

⁵⁵ See Article 232 [1] of the Constitution of Pakistan, 1973.

⁵⁶ See Article 245 [1] of the constitution of Pakistan, 1973.

⁵⁷ See Article 233 [1] of the Constitution of Pakistan, 1973.

⁵⁸ See Article 245[2] of the Constitution Of Pakistan, 1973; *Sh. Liaqat Hussain v. Federation of Pakistan*, PLD 1999 SC 504; *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431.

⁵⁹ The references of the un-bridled executive impunity have been discussed in the following cases. For more details please see, *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 Lahore 112; *Miraj Muhammad Khan v. Government of West Pakistan*, PLD 1966 Karachi 282; *Nasim Fatima v. Government of West Pakistan*, PLD 1967 LHC 103, 144 ; *M.A. Aziz v. The Province of East Pakistan*, PLD 1969 Dacca 339; *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307, 345; *Mehram Ali v. Federation of Pakistan*, PLD 1998 SC 1445; *Mohtarma Benazir Bhutto v. President of*

Since the states claim their sovereignties and usually deny the status of internal armed conflict or insurgency within their jurisdiction.⁶⁰ Therefore lack of accountability and transparency either in police actions or in paramilitary and military engagements produce a problem of objective application of the relevant law. It becomes highly difficult to ascertain a threshold of necessity, proportionality, and distinction, especially when armed forces are acting in aid of civil power to restore public order.⁶¹ Moreover, their prolong

Pakistan, PLD 1998 SC 388; *Sh .Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504; *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111; *Inayatullah Khan Mushraqi v. The Crown*, PLD 1952 Lahore 331; *Muhammad Umar Khan v. The Crown*, PLD 1953 Lahore 528: “Locus Poenitentiae as an ultimate objective of preventive detentions”. And following authors have discussed it, see e.g. into Faqir Hussain, “Preventive Detention :Abuse of the law,” in *Personal Liberty and Preventive Detention* (Peshawar: Peshawar University Foundation Press, 1989), 62-74; Ali Nawaz Chohwan, “Sweep of Enforceable Rights of Man and Legal Implications of ICCPR and CAT Covenants,” *PLD Journal Section* (2011): 8-11: It contains excessive or subjective preventive detentions, physical and psychological torture, enforced disappearances and illegal confinements. Moreover, extrajudicial killings and other inhuman treatments for confession, deterrence and repentance or persecution during preventive or punitive custody, beyond objectivity, reasonableness and proportionality are *chief elements* of this unbridled executive impunity.

⁵⁹ See into *Naga People’s Movement of Human Rights v. Union of India*, AIR 1998 SC 431, 452, 453: “A situation of internal disturbance involving the local population requires a different approach -- Involvement of Armed Forces in handling such a situation brings them in confrontation with their countrymen. Prolonged or too frequent deployment of Armed Forces for handling such situations is likely to generate a feeling of alienation among the people against the Armed Forces.”

⁶⁰ See into Sandesh Sivakumaran, “*International Humanitarian Law*,” in *International Human Rights Law*, eds. Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (New York: Oxford University Press, 2010), 487-493.

⁶¹ See Francoise J. Hampson, “The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body,” *International Review of Red Cross* 90, no.871 (2008): 549-572. Dale Stephens, “Military Involvement in Law Enforcement,” *International Review of Red Cross* 92, no.878 (2010): 453-468; General Assembly (United Nation), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN:Patent A/Res/60/147, 2006), 1-9: for a blurred area of applicabilty of either International Human Rights law or International Humantarian Law during full scale military operations in low intensity conflict or surgical strikes associated with internal armed conflicts or internal disturbance or civil war. The application of IHR deals with the doctrine of necessity, it means that lawful killing and fatal arms are authorized only out of an extreme necessity and self defence. However with respect to IHL lawfull killing is allowed for hostile cobatant only. Now when states do not declare insurgency(internal armed conflict) which can attract Additional Protocol II,1977, IHL would not be able to extend its protection to non combatant civiliain as well as POWs. State on the other hand declare the rebellions as miscreants or terroists and ruthlessly deals with them under the doctrine of utalitarian deternece of criminal law. Thus neither International Human Rights (doctrine of nessesity and self

presence in disturbed areas in the pretext of low intensity conflicts escalate propaganda as well as collateral damage.⁶² Then both of these factors further aggravate a vicious cycle of violence.⁶³ Because both sides try to justify their cause, law enforcement agencies use maximum force to restore the writ of the state and dissenting armed groups maximize their efforts to enlarge their impacts.⁶⁴

Yet during such sociopolitical and legal crisis, constitutional framework provides plausibility of protection of core rights⁶⁵ mainly through due process clause in Pakistan.⁶⁶ It not only remains intact⁶⁷ even during public emergencies with judicial outreaches⁶⁸ but also establishes its writ over the entire executive arm including armed or civil armed

denfence) nor International Humantarin law (Doctrine of distinction and proportionality, means only a lawfull combatant ,out of military nescessity and with a least harm to civilian’s object and life can be targeted) is effective to protect jus cogens norms during internal disturbances.

⁶² See *Naga People’s Movement of Human Rights v. Union of India*, A I R 1998 SC 431, 452 and at 453: “A situation of internal disturbance involving the local population requires a different approach Involvement of Armed Forces in handling such a situation brings them in confrontation with their countrymen. Prolonged or too frequent deployment of Armed Forces for handling such situations is likely to generate a feeling of alienation among the people against the Armed Forces”.

⁶³ See Omar Asghar Khan Foundation, *A Cry from the Valley: Narrations by the people of Malakand* (Islamabad: Omar Agar khan foundation, 2009), 7-15; Anil Kalhan, “Colonial Continuities: Human Rights, Terrorism and Security law in India,” *Columbia Journal of Asian Law* 20, no. 93 (2006): 93-224, 172-175, 204-207.

⁶⁴ See Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge: Cambridge University Press, 2007), 207-210: for theory of contestation and control, it narrates that use of violence is a rational strategy to raise the price of a continued conflict and to gain a better position for political bargain especially through targeting civilians. Moreover, valence is also used to maintain control over a contested sovereignty zones.

⁶⁵ See *Sh. Liaqat Hussain v. Federation of Pakistan*, PLD1999 SC 504, at 536:“ It is true that the state has right to protect itself against terrorist activities including all those who would destroy it -- but in the exercise of such right and with a view to preserving the society and the State ,it must take all measures in conformity with the constitution and not in derogation thereof”

⁶⁶ See Article 4 (1) and (2) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁶⁷ See e.g. in *Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 426, 446-448: “Art.2A [Objective Resolution] as a substantive part of the constitution and driving force for Art.4,9,14,184(3) and 190 of the constitution of Pakistan for judicial activism through public interest litigations”.

⁶⁸ See *Tika Iqbal Muhammad Khan v .General Pervez Musharif* , PLD 2008 SC178, 202 -203;

forces especially when they act in aid of civil power.⁶⁹ Resultantly courts through writ prerogatives often contest the administrative discourse to right to self-defense, necessity or use of lethal force during internal strife.⁷⁰ Similarly declare arbitrary criminal laws being void on the touchstone of natural justice and due process of law.⁷¹ Such constitutional safeguards appears as benchmark to sustain core human guarantee during all kind of armed crises and exceptional situations,⁷² irrespective to their theoretical categorization or legal status of parties.⁷³ As Weill affirmatively indicates, “*national courts have developed their own important jurisprudence relating to human rights, and have become the guardians of*

⁶⁹ See *Suo Motu Case of 2012* PLD 2012 SC 553: “Contempt proceedings against Syed Yousaf Raza Galani, the Prime Minister of Pakistan Regarding non- compliance of court order”; Article 190 of The Constitution of the Islamic Republic of Pakistan, 1973; *Tirupati Balji Developers Pvt. Ltd. v. State of Bihar* AIR 2004 SC 2351: for a constructive interpretation of constitutional statutes with regards to substantial and tangible constitutionalism and rule of law. And in *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206, 274: “All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.”

⁷⁰ See *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206, 262-264, 274-276; *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111; *Watan Party and another v. Federation of Pakistan*, PLD 2011 SC 997, 149-154; *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307; *Niaz Ahmed Khan v. Province of Sindh*, PLD 1977 Karachi 604; *Sh .Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504; *President Balochistan High Court Bat Association v. Federation of Pakistan*, Constitutional Petition no. 77 of 2010 on 2012, <http://www.supremecourt.gov.pk/2012/Judgments/Orders/>: for the combination of Art. 2A, 4, 8, 9, 14, 25, 184(3), and 190 of the constitution of Pakistan, 1973, as a touch stone for the enforcement of fundamental right as well as inviolability of independence of judiciary to protect core human rights in all circumstances, even during Martial laws, Constitutional emergencies or Internal disturbances regardless of military or paramilitary operations in aid of civil power.

⁷¹ See *Mehram Ali and others v. Federation of Pakistan*, PLD 1998 SC 1445: “Arbitrary and vague meanings have been given to Civil Commotion, Internal Disturbance, lock-out, Strike, Go Slow, under the provisions of Anti-Terrorism Act (XXVII) 1997.”

⁷² See e.g. into Jean Pictet, et al., *Commentary: on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987), 1396-1402; Evan Criddle, “Proportionality in Counter-Insurgency: A Relational Theory,” *Notre Dame Law Review* 87, no.3 (2012): 1073-1112; *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Judgment, 178 (July 10, 2008) ; *Prosecutor v. Tadić*, Case No. IT-94-1-I, App. Chamber Decision of Oct. 2, 1995, 119-127; *Khatsiyeva and others v. Russia*, App. No.5108/02, 17Jan.2008.

⁷³ See e.g. in Eve La Haye, *War Crimes In Internal Armed Conflict* (New York: Cambridge University Press, 2008), 8-13: “Towards a workable definition of Internal Armed Conflict.”; Andrew Clapham, “Human Rights Obligations of Non-State Actors in Conflict Situations,” *International Review of the Red Cross* 88, no. 863 (2006): 491-508; Antonio Cassese, *International Law in a Divided World* (Oxford: Oxford University Press, 1986), 81-85: “For the humanitarian assistance and protection , the time length of conflict , the size of disturbed area , level of preparation and response , kind of weapon used in armed clashes , deployment of troops and their numbers , intensity of violence and gravity of loss are sufficient to determine the threshold and status of armed conflict without due recognition of State.”

*those rights. This allows for judicial intervention from a practical and policy perspective, and indeed, the majority of courts in democratic states today are in position to limit the state's exercise of powers when it leads to human rights violations. Such human rights jurisprudence has also become gradually applicable in situations of armed conflicts, in addition to or rather instead of humanitarian law; courts increasingly tend to apply international human rights law during internal armed conflicts. One advantage of this approach is that human rights are often embedded in constitutional law and that litigants may have better access to courts.*⁷⁴

Nevertheless, it seems appropriate now to categorize internal strives for judicial applicability of relevant right regimes and jurisprudence. Resultantly the ICRC explains their numerous thresholds depending upon the scale of ‘*violence*’ and overall catastrophic ‘*humanitarian consequences*’. Firstly, it defines the terminology of *violence* as physical or psychological acts and behaviors affecting the holistic physiological integrity of a person or group. Then it defines individual or collective ‘*humanitarian consequences*’ as chronic abuses of core rights such as life, dignity, liberty, conscious, food, health care, family, employment and property.⁷⁵ Upon these thresholds, it indicates ahead that other than a full scale *internal armed conflict* that deals with the acts of hostilities between two or more than two armed groups but not necessarily the armed forces of a state. The internal strife is a “*confrontation*” within the country having some level of duration, gravity and acts of violence in which one of the party must be law enforcement agency of the state including

⁷⁴ See Sharon Weill, “Building Respect for IHL through National Courts,” *International Review of the Red Cross* 96, no. 895/6 (2014): 874.

⁷⁵ See The International Committee of the Red Cross, “The International Committee of the Red Cross’s Role in Situations of Violence in Situations of Violence below the Threshold of Armed Conflict: Policy Document,” *International Review of the Red Cross: Scope of the Law in Armed Conflict* 96, no. 893 (2014): 281, 290-291.

its civil and armed forces. Although both of scenarios deal with existence of groups, yet former only covers the category which has some control over a territory and population along with hierarchy and potential to conduct sustained and open hostilities. While the later mainly deals with unorganized and unstructured groups or bands of likeminded or clusters with common objectives with or without having control over a territory and population.⁷⁶ Then for Balcells '*confrontation*' is a violent political expression and mobilization of a community⁷⁷ while Ellwood indicates that such mobilization has potential to alter the '*center of social control*'.⁷⁸ Subsequently the ICRC categorizes such confrontations in to '*internal disturbances*' '*internal tensions*' and '*acts of collective violence*'. Indicates ahead that internal disturbance denotes a significant level of sustained socio-political unrest with sequels of violent riots for which police is primarily resorted to detain and deter perpetrators with a selective use of force. However large number of preventive detentions, summary proceedings, incidents of custodial torture, extra judicial killings and restrains on the right to fair trial may lead to above mentioned '*humanitarian consequences*'. Mostly constitutional framework and human rights jurisprudence through judicial review of administrative actions seem applicable remedy to prevent human rights violations in this context. However a constant judicial or constitutional indifference at this juncture may lead to '*internal tensions*' which mostly deal with constant tensions of one or more communities or groups with governments over any political, socio-cultural, ethnic

⁷⁶ Ibid., 280-281.

⁷⁷ See Laia Balcells, "Rivalry and Revenge: Violence against Civilians in Conventional Civil Wars," *International Studies Quarterly* 54, no. 2 (2010): 291.

⁷⁸ See Charles A. Ellwood, "A Psychological Theory of Revolutions," *American Journal of Sociology* 11, no. 1 (1905): 49.

or religious issue.⁷⁹Such protracted struggle leads to sociopolitical isolation and ‘*stigmatization*’ of a particular community⁸⁰ who encounters detentions, forced disappearances, target killings and other inhuman treatments.⁸¹ The accumulative outcome of this scenario attracts the application of customary norms that combines the core guarantees of human rights as well as humanitarian law. It is mostly to curb summary proceedings of ad hoc tribunals, indefinite internments, collective punishments and indiscriminate use of lethal force during law enforcement operations. As military or paramilitary forces are engaged in aid of civil power actions that mostly indemnified from the ambit of writ jurisdictions and require an expanded judicial activism to address state violence and ‘*humanitarian consequence*’.⁸²The last category “*acts of collective violence*” is based upon violent ethno-religious conflicts or communal riots between two or more than two sizable communities, tribes or disorganized non-state groups in which state forces have no direct involvement.⁸³ Yet a sheer apathy of law enforcement agencies to disarm them or state’s tacit support to anyone of them out of its ideological ties may aggravate this situation up to genocide or internal armed conflict.⁸⁴ Accordingly the

⁷⁹ See into Red Cross, *Threshold of Armed Conflict*, 278-279, 288, 291.

⁸⁰ See Reetta Toivanen, “*Walking the line between the war on terror and the defense of Human Rights*,” in *Human Rights in Asia: A Reassessment of the Asian Values Debate*, eds. Leens Avonius and Damien Kingsbury (New York: Palgrave Macmillan Press, 2008), 203: “*the mechanism of othering*.”

⁸¹ See in Hannah Arendt, *The Origins of Totalitarianism* (Claveland: Meridian Books, The World Publishing Company, 1962), 466-467, 473-476.

⁸² See into Weill, *IHL through National Courts*, 875-879; Red Cross, *Threshold*, 279, 288.

⁸³ See Red Cross, *Threshold*, 281.

⁸⁴ See Arendt, *The Origins of Totalitarianism*, 364-390; Arundhati Roy, *Listening to Grass-hopper: Field Notes on Democracy* (Rawalpindi: Pakistan’s edition, Services Book Club, G.H.Q, 2011), 27-29: Discusses the matrix of anti-muslim Gujrat riots, 2002 in India.

remedial legal measures deal with rule of law through prompt and neutral police response, transparent investigation, accessibility to courts, fair trial and expeditious justice.⁸⁵

However, it seems that owing to systemic constitutional lacunas and legal voids the fundamental rights and due process discourse is not optimal as such in Pakistan.⁸⁶ Recent patterns of violence not only indicate this aspect but also reveal administrative and judicial indifferences to minimize the causative sociopolitical and religious polarizations.⁸⁷

⁸⁵ See Red Cross, Threshold, 288.

⁸⁶ See *M.M. Mansur Ali v. Arodhendu Shekhar Chatterjee*, PLD 1966 SC 37, 41; *Mir Abdul Baqi Baluch v. The Government of Pakistan*, PLD 1968 SC 313, at 324, 329: “Revoking of Proclamation of Emergency function of the President is a political question not within competence of courts”; *Imtiaz Ahmad v. Government of Pakistan*, 1994 SCMR 2142: “judicial restraint [under doctrine of separations of power] is essential “to the continuance of rule of law” and the public confidence in the political impartiality of the judiciary” and the voluntary respect for the law.”; See also in Art.8(3)(a), 10(3), (4), (5), (6), (7), (8), 199(3), 233(2), 236(2), 237, 245(2), (3), (4), 247(7) of the Constitution of Pakistan, 1973; And in Section 141 to 160 of The Pakistan Penal Code, Act No. XLV of 1860 “ of the Offences Against the Public Tranquility”; Section 127 to 132 of The Code of Criminal Procedure, Act V of 1898 “ Unlawful Assemblies and Maintenance of Public Peace and Security”; The Pakistan Army Act 1952, Act of XXXIX of 1952 The West Pakistan Maintenance of Public Order Ordinance, 1960; The Anti-Terrorism Act, 1997. Act XXVI I of 1997; Action in Aid Of Civil Power Regulation, 2011. States and Frontier Regions Division, 27th June 2011, F.No.11 (6) P/L/2011; Protection of Pakistan Ordinance, 2013. Ordinance No.IX of 2013, The Protection of Pakistan Act, 2014, The Pakistan Army (Amendment) Act, 2015, The Constitution (Twenty-first Amendment) Act, 2015.

⁸⁷ See e.g. into C. Cristine Fair and Seth G. Jones, “Pakistan’s War Within,” *Survival: Global Politics and Strategy* 51, no. 6 (2009): 161-188: For Military and Frontier Constabulary (Paramilitary) and Police operation in Khyber Pakhtun khuha (KPK) Province, and adjacent FATA & PATA. Post 9/11 U.S.Led Pak.Army ,Terrorist Hunt *Operation Enduring Freedom* 2001-2002 in South and North Waziristan. *Operation Almezan* 2002-2006 in Wana FATA and *Operation Zalzal*a 2008 in South Waziristan FATA. *Operation Sher Dil ,Rah-e- Haq &Rah-e Rast* 2007-2009 against Tehrike Nefaze Shariate Mohamadi (TNSM) later transformed in Tehrike Taliban Pakistan (TTP) in FATA/ PATA, Malakand Swat, Dir, etc.; Mateen Haider, “P.M. gave ‘go ahead’ for N.Waziristan, Khyber airstrikes,” *Dawn News*, February 2, 2014, <http://www.epaper.dawn.com/news/1088346/>: In a Post Swat operation paradigm, Prime Minister Nawaz Sharief, ordered Defence forces to get ready for a possible ground and air strike to eliminate TTP(Pakistan chapter of Taliban militia) from North Waziristan FATA. It is after when TTP claimed to murder 23 F.C. personals, abducted by TTP on 10 June 2010 from the Shonkre Post KPK; See also David D.Laitin, *Nations, States, and Violence* (Clarendon: Oxford University Press, 2007), 1-26; Gigi Gokeek, “Irredentism Versus Secessionism, the Potential for international Conflict,” *Social Science Research Network*, April 1, 2010, [http:// www.ssrn.com/abstract/1595095 /](http://www.ssrn.com/abstract/1595095/) : for Mohajirs’s political resistance against Sindhi feudalism in Karachi, it is in the form of “*Sons of Soil*” movement, resulting in to political terrorism in Urban Sindh. Moreover “*Irredentism*” (State based policy to redefine its boundary by instigating secession [*Revanchism*] movements in the peripheries of the other state) with regards to Kashmir dispute between India and Pakistan having a legacy of “*Levee En Masse.*”; See in Ajai Sahni, “*Responding to terrorism in Punjab, and Jammu &Kashmir,*” in *Responding to Terrorism in South Asia*, ed. S.D. Muni (New Delhi: Manohar Publishers &Distribution, 2006), 31-75; Kirpal Dhillon, *Police and Politics in India: Colonial Concept, Democratic*

Resultantly by declaring a catalyst to political violence, Fearon and Laitin identify such governmental behavior as ‘anocracy’.⁸⁸ It not only provokes ‘political instability’ but also aggravates transgressions to personal and civil liberties of susceptible class during both peace and crises.⁸⁹ Since actual or perceived grievances of a community or class are firstly

Compulsions: Indian Police 1947-2002 (New Delhi: Manohar Publishers & Distribution, 2005), 516-561; Ayesha Jalal, *Partisans of Allah: Jihad in South Asia* (Lahore: Sang-e-Meel Publications, 2008), 273-301: such militia in the name of Jihad was active in occupied Kashmir and during Russian invasion in Afghanistan 1979. However in the post 9/11 scenario it has a backlash impact on Pakistan in the form of religious intolerance and indigenous militancy; See in Muhammad Amir Rana, *A to Z of Jehadi Organizations in Pakistan*, trans. Saba Ansari (Lahore: Mashal Books, 2004), 83-101, 139-154: for religious extremism, sectarian violence in Azad Kashmir, Punjab, KPK, Sindh and Balochistan; also see in Human Rights Commission (Pakistan), *Human Right Violations: Conflict in Balochistan* (Lahore: Shireen Sheraz Printers, 2006), 1-68: for Baloch separatist movements and practices of collateral human rights abuses by Baloch insurgents (resistance from Murri and Bugti tribes for the control on natural resources and separatist movements by Baloch nationalist like Balochistan Liberation Army[BLA], Balochistan Republican Army[BRA], Balochistan Liberation Front[BLF], Baloch National Movement [BNM], Baloch Student Organization[BSO], and United Baloch Army[UBA]) and law enforcements agencies (with regards to counter terrorism operations and strategies). It seems that Baloch uprising is an outcome of a ‘vulnerable’ federalism in Pakistan, it is mainly due to a perceived dominance of Punjabis in military and civil bureaucracy. Hence survey of secondary source data indicates following categories of geographically oriented violent trends in Pakistan. In rural and urban KPK especially in FATA and PATA, there is an Ideological and religious terrorism. Urban Sindh (especially Karachi) experiences a criminal terrorism of ethnic and linguistic groups and land mafia to gain power. Political terrorism in Balochistan, is in the form of succession movements which are natural recourses and provincial autonomy centric. Southern Punjab not only demanding a linguistic based province in a reaction to relative deprivation but also observes sporadic incidents of sectarian violence; this sporadic trend of sectarianism is also present in the other parts of rural and urban Punjab along with Gilgit-Baltistan

⁸⁸ See James D. Fearon and David D. Laitin, “Ethnicity, Insurgency, and Civil War,” *The American Political Science Review* 97, no.1 (2003): 81.

⁸⁹ See for an overall law and order crisis in Pakistan, along with socio-political and religious disintegration and polarization as its impact into *Suo Motu Action upon an incident of indiscriminate firing and suicide attack in District Court, Islamabad*, S.M.C.No.3 of 2014 In The Supreme Court of Pakistan (Original Jurisdiction), <http://www.supremecourt.gov.pk/judgement/order/>; Human Right Cell (Pakistan), *Khuzdar mass grave*, No. 2914 (Islamabad: HRC, Supreme Court of Pakistan, 2014), http://www.supremecourt.gov.pk/human_rights_cell/: discovery of a mass grave of alleged missing persons in Khuzdar, a city of Balochistan. Since paramilitary forces and police are believed to be involve in this mass killings; *Suo Motu Action on the news clippings published on 04- 03-2013 in Daily “the News” Dawn and The Nation” Islamabad regarding Incident of Abbas Town at Karachi on 03.03.2013*, C.M.A.1145-K/2013 IN S.M.C.16/2011 In The Supreme Court of Pakistan(Original Jurisdiction), <http://www.supremecourt.gov.pk/judgement/order/>: A post Karachi law and order and killing case scenario of bomb blast aimed for target killing of a Muslim sect; “No-Go Areas only for a particular ethnicity in times of Ethnic Violence” And “Complete No-Go Areas Because of the Presence of Militants or Gangs”, C.M.A. No1652/2013 in SMC No16 of 2011 In The Supreme Court of Pakistan(Original Jurisdiction), <http://www.supremecourt.gov.pk/judgement/order/>: A post Karachi law and order, police and paramilitary operation launched on September 2013 in Karachi Scenario; *Against the Violence in Christian Colony in Badami Bagh area over alleged Blasphemy*, Const.P.No.10 of 2013 In The Supreme Court of Pakistan(Original Jurisdiction), <http://www.supremecourt.gov.pk/judgement/order/>; Jon Boone, “Family of

exploited and aroused up to violent unrest by its respective elites as power politics. Then remain unaddressed administratively as well as judicially besides even denounced by the ruling elites during retributive state measures. Subsequently both of these elite centric attributes firstly ignore the root cause of deprivations, aligned segregations, and then misperceive them during conflict paradigms that help to boost multifaceted patterns of violence.⁹⁰ Weill at this juncture helps to explain causation of judicial indifference to address chronic grievances and to promote core liberties during crisis and categorizes it as ‘*avoidance*’ and ‘*deferral*’ behaviors. Former covers an ‘*apologetic*’ attitude of judiciary when it does not intend to confront governments under pretexts of *necessity, political question, non-justiciability or locus standi* confines. Moreover, the latter deals with a strategy when court after taking cognizance of political issues refers them again to executive for corrective actions through its short orders.⁹¹ Though apparently slight and overdue yet seems an only viable way to engage governments over contesting issues and to enforce fundamental guarantees.⁹² Yet it again depends upon material and intellectual capacities of the respective legal system. Weill identifies the former as ‘*structural requirements*’ which cover independence and impartiality of courts from domestic and global impulses, right to access the court, public demands for social justice and overall threshold of rule of law in a society. While the latter is, identified as ‘*functional aspect*’

Balochistan’s missing and disappeared complete 2,000 km March,” *the guardian*, February 28, 2014: A protest long march from Queta to Islamabad by relatives of missing persons in Balochistan . They collectively formed an organization named as Voice of Baloch Missing People (VBMP).

⁹⁰ See James D. Fearon and David D. Laitin, “Ethnicity, Insurgency, and Civil War,” *The American Political Science Review* 97, no.1 (2003): 75-76, 79-80.

⁹¹ See Weill, IHL through National Courts, 865-868.

⁹² See *Ibid.*, 868; *Watan Party v. Federation of Pakistan*, PLD 2011 SC 997: for judicial cognizance over Karachi law and order situation.

which mainly deals with institutional and individual psyche to comprehend and promote human rights. Along with actual judicial impacts over legislative and executive measures, domestic compatibility and capacity to disseminate international customary norms as well as collective political will to realize conflict paradigm.⁹³

Then question is what legal cantors of conflict paradigms under the state sovereignty are? Although under crisis paradigm, Art.4 of the ICCPR exceptionally permits a state to limit certain liberties to save its territorial integrity and to restore order during public emergencies.⁹⁴ Even then, the core human rights are protected under international customary norms.⁹⁵ Since all of these rights complement each other to form a “*cluster of bare-minimum*” for humanity during all kinds of conflicts. It covers not only the citizens but also non-state actors or even enemy aliens during conducts of hostilities mainly through principles of necessity and distinction and proportionality.⁹⁶ However, multilateral abuses of these *non-derogable* rights during civil strife either by armed forces or by armed groups augment intolerance, ideological polarization and ‘*lethal political violence*’.⁹⁷ It

⁹³ See Weill, National Courts, 869-879.

⁹⁴ See Ralph Crawshaw et al., *Human Rights and Policing* (Boston: Martinus Nijhoff Publishers, 2007), 95-157: “Types of Conflict and Rules of Behavior.”

⁹⁵ See e.g. into Ibid., 111-125; Barrister Zafarullah Khan, *Human Rights: Theory and Practices* (Karachi, Pakistan Law House, 2007), 273-299: Article.4 of the International Covenant on Civil and Political Rights, 1966[ICCPR] ---If a state intends to invoke this Article then it is mandatory for it under international law to publically announce an *official proclamation of emergency*. Yet with a pledge not to violate of Art.6[*right to life*], Art.7[*protection from torture, inhuman treatment and degradation*], Art.8(1),(2)[*right to liberty, protection from slavery*], Art.11[*protection against arbitrary detention and arrest*], Art.15[*protection against retrospective punishment and self-incrimination*], Art.16[*equality before the law*], Art.18[*freedom of thought, conscience and religion*] of this Covenant.

⁹⁶ See Crawshaw, *Human Rights and Policing*, 105-110, 126-129.

⁹⁷ See Jason Franks, *Rethinking the Roots of Terrorism* (Basingstoke, Hampshire: Palgrave Macmillan, Macmillan Distribution Ltd, 2006), 17-20: The State’s forces and armed groups both resort to maximum use of force to achieve and maintains their control over a contested territory and population. For this purpose both the contested parties use the strategy of lethal violence to enhance their political agendas. Under state

depicts a scenario where even stringent laws and penalization would be ineffective to maintain social equilibrium in society.⁹⁸ Then escalations of state violence at this juncture provoke ‘pogroms’ and ‘subaltern genocide’⁹⁹ which may transcend to war crimes and crime against humanity.¹⁰⁰

While amid the above-mentioned crises armed groups or bands are equally responsible for human rights abuses through their conducts of hostilities and terror attacks directed to state forces, civilians and opponents.¹⁰¹ Yet state being member of international community and by possessing legitimate right to use lethal force is considered more responsible than organized or semi organized groups. Accordingly has an obligation not only to avoid indiscriminate use of lethal force with impunity,¹⁰² but also to resolve political deadlocks under its fiduciary characterization.¹⁰³ Under such *raison d’être*, this study intends to probe out the core and contemporary issue as seemingly governments in Pakistan continue to

centric perspective armed groups either use violence to instigate state apparatus to retaliate with maximum use of force which ultimately earn a bad name for state when it potentially violate core human rights norms. Or they demonstrate violence for some immediate as well as far reaching gains along with to prove their power to challenge the writ of the state. Under the root cause perspective alienated minority use violence strategically as a reaction against relative deprivation, structural inequalities and against an unjust regime or for self-determination in the form of succession movements.

⁹⁸ See Evelin G. Lindner, “*Genocide, Humiliation, and inferiority: An Interdisciplinary Perspective*,” in *Genocides by the Oppressed: Subaltern Genocide in Theory and Practice*, eds. Nicholas A. Robins and Adam Jones (Bloomington: Indiana University Press, 2009), 138-158.

⁹⁹ See Adam Jones, “*When the Rabbit’s Got the Gun: Subaltern Genocide and Genocidal Continuum*,” in *Genocides By the Oppressed: Subaltern Genocide in Theory and Practice*, eds. Nicholas A. Robins and Adam Jones (Bloomington: Indiana University Press, 2009), 185-207.

¹⁰⁰ See Franks, *Rethinking the Roots of Terrorism*, 89-91.

¹⁰¹ See Andrew Clapham , “Human Rights Obligation of Non-State Actors in Conflict Situations,” *International Review of Red Cross* 88, no.863 (2006): 491-523.

¹⁰² See M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability,” *Law and Contemporary Problems* 59, no.4 (1996): 9-28; Marco Sassoli, “State Responsibility for Violations of International Humanitarian Law,” *International Review of Red Cross* 84, no.846 (2002): 401-434.

¹⁰³ See Chandra Lekha Sriram, *Peace as Governance: Power-sharing, Armed Groups and Contemporary Peace Negotiations* (Hampshire, England: Palgrave Macmillan, Macmillan Distribution Ltd, 2008), 12-43; Evan Criddle, "Fiduciary Foundation of Administrative Law," *Notre Dame Law Review* 87, no.3 (2012): 1089-1097.

violate basic human rights during internal disturbances. Even constitutional guarantees and international commitments are inapt to protect them owing to indiscriminate use of force, administrative discretions and executive impunities mostly emerging from stringent criminal laws. This scenario seemingly conforms the critical legal studies' view that law is a kind of politics which serves the interests of dominant class. Besides it has nothing to do with justness mainly due to its inherent indeterminacy and inconclusiveness to comprehend social realities.¹⁰⁴ But if it is true then according to Shah Wali Allah such societies are bound to collapse due to internal strife caused and stirred by sheer social imbalance and injustice.¹⁰⁵ Hence to avoid this eventuality, study intends to concentrate on the institution of judiciary and its writ prerogative not only to endorse justice and equilibrium in society but also to bring conclusiveness in the legal corpus of Pakistan.

CONTEXT OF THE STUDY

Contemporary national and international trends of violence and counter violence have engendered a crisis of human rights abuses.¹⁰⁶ The vicious cycles of these abuses are stimulating socio-political fragmentations in domestic and global sphere, which are

¹⁰⁴ See Alan Hunt, "The Theory of Critical Legal Studies," *Oxford Journal of Legal Studies* 6, no.1 (1986): 37-43: "indicates that law constantly remains in 'constitutive process' to seek its pragmatic relevance in a given society"; Matthew Lippman, *Law and Society* (Chicago: Sage Publications, Inc., 2015), 61-62.

¹⁰⁵ See into Ayesha Jalal, *Patisans of Allah: Jihad in South Asia* (Lahore: Sange-e-Meel Publications, 2008), 51, 54-57.

¹⁰⁶ See e.g. Benjamin Perryman, "Eva La Haye, War Crimes in Internal Armed Conflict," *Queen's Law Journal* 36, (2011): 674- 685; Niaz A. Shah, "War Crimes in the Armed Conflict in Pakistan," *Studies in Conflict & Terrorism* 33, no.4 (2010): 283- 306; Laurie R. Blank and Geoffrey S. Corn, "Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition," *Vanderbilt Journal of Transnational Law* 46, no.3 (2013): 693-746.

hazardous for national and international peace.¹⁰⁷ Consequently, the focus of research revolves around an assimilation of two competing concepts, one is the universality of human rights and other is national security and public order under the doctrine of state sovereignty.¹⁰⁸ While the former is advocating for the primacy of *jus cogens* norms, their peremptory nature and a universal obligation to protect them under the notion of *Erga Omnes*.¹⁰⁹ The latter is mainly focusing on discretionary powers and absolute administrative control to sustain law and order.¹¹⁰ Hence the case law study along with relevant literature indicates that constitutional defense and other legislative indemnities given to preventive penology and detentions are core determinants for executive impunities in Pakistan.¹¹¹ Then such impunities may proceed to incidences of custodial torture and

¹⁰⁷ See Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge: Cambridge University Press, 2007), 5-39, 163-175, 198-219, 260-265; James C. Davies, "Toward A Theory of Revolution," *American Sociological Review* 27, no.1 (1962): 5-19 at 5-8.

¹⁰⁸ See David D. Laitin, *Nations, States, and Violence* (Clarendon: Oxford University Press, 2007), 1-26, 128-138; Ralph Crawshaw et al., *Human Rights and Policing* (Boston: Martinus Nijhoff Publishers, 2007), 3-120, 271-295; *Haji Lal Muhammad v. Federation of Pakistan*, PLD 2014 Peshawar 199: reliance has been made on the Universal Declaration of Human Rights, 1948 for the enforcement of fundamental rights in Pakistan.

¹⁰⁹ See M. Cherif Bassiouni, "International Crimes: Jus Cogens And Obligatio Erga Omnes," *Law and Contemporary Problems* 59 no. 4 (1996): 63-74: Either peace or war or during proclamation of public emergency, supermacy and non derogation of jus cogens norms sustain through obligatio erga ominus. Jus cogens and erga ominus have tautological relationship, it also function as a defence to disobey superior's orders with regards to grave violations of peremptory norms of IHR . Moreover Jus cogens bounds the state under obligatio erga ominus not to grant impunity to the violators of such norms ; Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens," *The Yale Journal of International Law* 34 no. 331(2009): 332-360: "State is bound to extend the protection of the law and assumes obligations concerning the treatment to be afforded individuals ---whether nationals or nonnationals ----at the minimum prohibition against genocide, slavery or slave trade, murder or disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, systematic racial discrimination."

¹¹⁰ See Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: Peshawar University Foundation Press, 1989), 83-97.

¹¹¹ See *Hameedullah Qureshi v. A.P.A. Bara, Khyber House Peshawar Cantt*, P Cr.L J 2006 Peshawar 156-157.

other grave violations like wrongful confinements, inhuman treatment, self-incrimination, retrospective punishment and even extrajudicial killings.¹¹²

It seems irrespective to personal liberties preventive detention as policing method is resorted to embed sense of powerlessness and fear among potential dissenters during politically volatile situations in Pakistan.¹¹³ Yet according to O'Byrne, such administrative pattern is based upon "*constructivist doctrine*" which denounces a moralist universality of rights and priorities statehood and order for sustainability of common good. For this school of thought unqualified individualization of personal rights can only lead to a superficial state of nature and theoretical anarchy. Accordingly, reasonable restraints on "*absolute personal freedom*" are required to establish legal order and rule of law.¹¹⁴ Meaning thereby positivist's perspective of *collective good* is itself a fundamental human right that leads to egalitarian socio economic justice.¹¹⁵ However, this approach generates jurisprudential anomalies between '*administrative compliance*', '*statutory intent*' and '*subjectivity of justness*' mainly amid crisis situation of grave political discrepancies. As when personal rights like freedom of expression, conscious, speech and association may come in to direct

¹¹² See *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307, 387: "Preventive detention is negation of the most cherished human right, the right to personal freedom. The law on the subject is said to be preventive in character but in effect harshly punitive for it permits detention without trial without adjudication of guilt at the instance of the executive. That this executive power is capable of abuse ---- It often becomes the vehicle for suppressing dissent and has come to be regarded as an occupational hazard for the politicians in opposition. This unjust law continues to remain on the statute book but not without protest from the remaining two organs of the State, the legislature and the Judiciary. The former has sought to reduce its rigors by what are called constitutional safeguards and later having found the way to question detention on the ground of reasonableness, tempered it with justice."

¹¹³ See Muzammal Afzal, "Amnesty terms Section 144 a draconian law, calls for release of all PTI workers," *Dawn News*, November 1, 2016, national edition.

¹¹⁴ See Darren J. O'Byrne, *Human Rights: An Introduction* (Delhi: Pearson Education (Singapore) Pte. Ltd., Indian Branch, 2005), 18-19, 34-41.

¹¹⁵ See Haas, *International Human Rights*, 36.

conflict with settled collective *Will* and attempt to challenge writ of the law.¹¹⁶ Then Dworkin concentrates on judicial organ of the state to find practical legal solutions¹¹⁷ to mitigate such crisis,¹¹⁸ mainly through human rights values¹¹⁹ and constitutional principles.¹²⁰ Since this remedial jurisprudence¹²¹ is anticipated to reconcile competing interests in respective societies with least harm to collective social cohesion and order.¹²²

Hence constructive interpretations of laws for ‘*toleration of intolerants*’¹²³ is crucial to find “*right answer for legal antinomies*” as it attempts to enforce due process of law to cure core human rights values during conflicts.¹²⁴ It also appears that human rights based public

¹¹⁶ See W. Friedmann, *Legal Theory* (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co, 2008), 82-92.

¹¹⁷ See Julius Stone, *Human Law & Human Justice* (Second Indian Reprint. New Delhi: Universal Law Publishing Co, 2004), 245-247, 265-270: He cites a German minister of justice and legal philosopher Gustav Radbruch, who describes legal antinomies (fundamental philosophical controversies) during the Nazi Regime and gave an ethical theory of relativism in the dispensation of justice with a special emphasis on certain minimum norms of natural justice.

¹¹⁸ See Ronald Dworkin, *Taking Rights Seriously* (Fourth Indian Reprint. Delhi: Universal Law Publishing Co. Pvt Ltd, 2008), 82-84, 105-118.

¹¹⁹ See Immanuel Kant, “Groundwork of Metaphysics of Morals,” in *Practical Philosophy*, ed., and trans. Mary Gregor (New York: Cambridge University Press, 2008), 455-460: Universal Principles of good will and humanity to form Jus Cogens norms of International Human Rights.

¹²⁰ See Christopher C. Mojekwu, “*Nigerian Constitutionalism*,” in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 164: “Adherence to or government according to constitutional principles---- [which] predetermine the limits of the powers and duties of various institutions and organs of government in a society.”

¹²¹ See Wilfrid E. Rumble, “*James Madison on the Value of Bills of Rights*,” in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 122-161; O’Byrne, *Human Rights: An Introduction*, 45-55: A significant role of judiciary to protect citizens who as a moral agent are capable to perform their duties and also aware to their rights and obligations. Moreover it is not only a duty of government but also a prerogative of judiciary to protect those persons who as moral patients are not able as such to perform their obligations such as prisoners, POWs and other vulnerable segment of society.

¹²² See for sociological jurisprudence in Roscoe Pound, *An Introduction to the Philosophy of Law* (Fourth Indian Reprint. New Delhi: Universal Law Publishing Co, 2006), 42-47, 56-57, 62-63: Law being a social institution has an ultimate end (objective), it is to achieve collective growth and development by minimizing the friction of competing interests in a respective society.

¹²³ See in John Rawls, *A Theory of Justice* (Third Indian Reprint. Delhi: Universal Law Publishing Co, 2008), 215-227, 243-249: Politics of dissent to enhance the scope of civil liberties through judicial review of legislation.

¹²⁴ See Dworkin, *Taking Rights Seriously*, 82- 92, 197-199, 210-219.

interest litigations are important to enhance the quantum of accountability during law enforcement actions.¹²⁵ Though often contested,¹²⁶ yet this “*right answer*” through judicial activism¹²⁷ is vital for the expansion of civil liberties¹²⁸ especially during popular movements.¹²⁹ Such conspicuous role of judiciary to form rules is also acknowledged by Hart, though not in a *moralist* domain, but when the rules are unable to counter a crisis. Accordingly, judiciary has prerogatives to legislate to protect the core fabric of society even beyond the doctrine of separation of powers.¹³⁰

This study indicates that where politics of interests dominates, law and logic dismantle automatically and a Darwinian real politics prevail in an overall scenario.¹³¹ This notion of survival of fittest knows no limits of legality or validity and promotes a coercive elite system of government.¹³² Hence, autocratic regimes use a merger of civil and military

¹²⁵ See *Watan Party and another v. Federation of Pakistan*, PLD 2011 SC 997, 1058: “The state or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights”; *Naga People’s Movement of Human Rights v. Union of India*, A I R 1998 SC 431, 458 - 459.

¹²⁶ See *Tika Iqbal Muhammad Khan v. General Pervez Musharif*, PLD 2008 SC178, 204-205: The role of Apex judiciary in political questions and public policy domains has been criticized by establishment and status quo powers in Pakistan as being antithesis of doctrine of separation of power

¹²⁷ See *Sh. Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504, 727: “Jurisdiction of Supreme Court can be enlarged but cannot be curtailed.”

¹²⁸ *Ibid.*, 589: “Armed forces cannot abrogate, abridge or displace civil power of which judiciary is an important and integral part.”

¹²⁹ See Evan J. Criddle and Evan Fox-Decent, “A Fiduciary Theory of Jus Cogens,” *The Yale Journal of International Law* 34 no. 331(2009): 332-360.

¹³⁰ See Hart, *The Concept of law*, 252-254, 273-275: Where legal norms are unable to prescribe actions then under soft positivism, the open texture of law attracts discretion of judges to interpret in hard cases.

¹³¹ See *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206, 288: for ‘inter armes leges silent’; Haas, *International Human Rights*, 34-35.

¹³² See *Human Rights Commission of Pakistan v. Federation of Pakistan*, Constitution petition No 5 of 2010 /CMA4410/07/CMA 4420/09, http://www.supremecourt.gov.pk/human_rights_cell/important_human_rights_cases/ : “Arrest, detention, abduction/ and or disappearance of the citizens without disclosing any lawful warrant or lawful authority ,reason ,charges, place of their detention and without producing the victims in any court of law is in gross violation of Human/ Fundamental rights ,dignity and in violation of all laws and provisions of Constitution particularly, inter alia, its Article4 and fundamental guarantees by its Article 8,9,10,11,13,14 &15. Under customary international law all Member States of the United States are obliged

bureaucracy to sustain the status quo in domestic politics.¹³³ Such kind of establishment being the core element of colonial legacy governs in a non-egalitarian mode. Permanency, centralization, formalization, vertical faceless hierarchy, patrician training, aristocratic attitude, alienation from the masses and proxy representation of political sovereign are basic characteristics of this legacy.¹³⁴ It has deplored constitutionalism and rule of law in Pakistan not only during authoritarian military regimes but also during democratic eras.¹³⁵ Subsequently, this research argues that excessive delegated legislations in the name of state necessity have directional relationship with human rights violations especially when armed forces are acting in aid of civil power.¹³⁶ The concern of this research is to place these arbitrary and subjective administrative discretions under the constitutional domain and objectivity of law through the judicial apparatus of Pakistan. Thus to avoid

to make effective laws, administrative procedures, judicial system and device other measures to terminate act of enforced disappearance.”

¹³³ See Frederic Grare, *Reforming the Intelligence Agencies in Pakistan's Transitional Democracy* (Washington D.C: Carnegie Endowment for Intl Peace, 2006), 4, 26-30, 32-35.

¹³⁴ See L.P Sharma, *The Brown Rulers of India* (Delhi: Konark Publishers Pvt Ltd, 1988), 57-61; Peters B. Guy, *The Politics of Bureaucracy* (New York: Longman, 1995), 146-203.

¹³⁵ See Sayeed B. Khalid, “Constitutional Aristocracy,” in *The Political System of Pakistan* (Boston: Houghton Mifflin Company, 1967), 101-107; Ivor Jennings, *Constitutional Problems in Pakistan* (Cambridge: Cambridge University Press, 1957), 10-350; Reinhard Mehring, “*The Decline of Theory*,” in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 313-333.

¹³⁶ See *Muhammad Umar Khan v. The Crown*, PLD 1953 Lahore 528, 538: “If riot, rebellion or insurrection outrun the ordinary sources of law and order and assume such proportions that civil authorities become powerless to deal with it, the state would naturally look to its armed forces for assistance. If the military takeover in any such contingency and the general commanding the army completely ousts or subordinates civil authorities in the area, the law applied by him during the period of his occupation is martial law in sensu strictiore. During such period, all constitutional guarantees are suspended and the officer in chief command of the forces operating in the troubled area acquires for the time being supreme legislative, judicial and executive authority. In other words, he himself fixes the limits and definition of his own authority. He makes his own law, set up his own Courts and no civil authority, while he is in command, and may call in to question what he does. In this sense, therefore, martial law is not law at all but the will of the officer commanding the army. A commander who steps in to quell a rebellion inaugurates a reign of lawlessness and a civil authority, legislative or executive, which hands over the civil populace of a locality to the military, places the life, liberty and property of the people at the feet of the general who commands the army.”

such executive impunities it deliberates for either on alternative jurisprudence¹³⁷ and legislations¹³⁸ or other remedial mechanisms under constitutionalism.¹³⁹

Moreover, for a substantial control on human rights abuses during contemporary counter insurgency operations in federal and provincially administrated areas of Pakistan.¹⁴⁰ This research is trying to find out a practical contingency point between international human rights and international humanitarian law for the application of the principle of proportionality and distinction. It is anticipated to gain a sustainable quantum of basic human rights protection during all kinds of conflicts to avoid unnecessary human suffering and to diminish the vicious circle of violence.¹⁴¹ It aims to avoid a probability of human rights abuses associated with the proclamation of public emergency in Pakistan, since its

¹³⁷ See e.g. into Strang Sherman and Newbury Dorothy, *Restorative Justice* (London: Youth Justice Board-United Kingdom, 2008); in Center for Justice and Reconciliation (U.S), *What is Restorative Justice?* (Washington D C., U.S., 2008), 1-4: “To manage conventional criminology and penology and its counterproductive impacts and to reduce social friction from civil society as well as to increase social tolerance. Judges ought to perform as a facilitator under the jurisprudence of restorative justice to monitor the whole process of voluntary Reconciliation through monitoring and evaluation techniques”

¹³⁸ See *Maneka Gandhi v. Union of India*, AIR 1978 SC597, 632-635: “the chapter of fundamental rights being a touchstone to test the validity and constitutionality of a statute.”

¹³⁹ See Vijay Gupta, “Judicial Activism and State Accountability in Human Rights Violations,” in *Perspectives on Human Rights* (Delhi: Vikas Publishing House Pvt Ltd., 1998), 139-147: “Relaying on vicarious liability of the state as enumerated into *Rudul shah v. The State of Bihar*, AIR 1983 SC 1086: Right to compensation and rehabilitation for injuries done or caused by state agencies, Government would be free to recover the amount from the offending officials”.

¹⁴⁰ See e.g. into Article 6(Penal Prosecution) of the Additional protocol II, 1977: “Judicial Guarantees [as a supplement and integral part of Common Article 3“affording all the judicial guarantees which are recognized as indispensable by civilized people”] play a particularly important role, since every human being is entitled to a fair and regular trial, whatever the circumstances; Naiz A. Shah, *Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan* (New York: Routledge, Taylor & Frances Group, 2011), 93-135.

¹⁴¹ See Martin Scheinin, “Terrorism,” in *International Human Rights Law*, eds. Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (New York: Oxford University Press, 2010), 551-561: Under HRL, the “right to life” and [prevention against torture] are widely described as *jus cogens* norms that do not admit derogation even in public emergencies, violent riot or insurrection. The right to life with dignity does not prohibit all use of lethal force by states; rather, it imposes a requirement of justification: states may not use lethal force unless they can show that this extraordinary measure is “absolutely necessary” to protect life or legal order.

judicial revoking is held to be a political question out of the ambit of the court of law.¹⁴² It is when derogable or even non-derogable rights become vulnerable under necessity to deal administratively with internal disturbances.¹⁴³ Moreover intends to focus in those areas that do not have a judicial cover as such. Although court recognizes the emergence of armed conflicts in Federally Administrated Tribal Areas [FATA] and Provincially Administrated Tribal Areas [PATA] adjacent to the Province of Khyber Pakhtunkhwa. Yet is unable to extend its writ jurisdiction to evaluate and comprehend subsequent administrative measures in this conflict paradigm.¹⁴⁴

¹⁴² See *Mir Abdul Baqi Baluch v. The Government of Pakistan*, PLD 1968 SC 313: “It is the President who has to be satisfied that the grounds on which he issued the Proclamation have ceased to exist. It is not for the Courts to substitute their satisfaction for the satisfaction of the President. In any event, it cannot be said that merely because hostilities have ceased, the emergency is also at an end. This is a purely political question which is outside the competence of the Courts to decide, for, -----These are not questions which are amenable to judicial determination. No court can give a declaration that a state of war has ceased to exist when Chief executive does not say so.”

¹⁴³ See *Farid Ahmad v. Province of East Pakistan*, PLD 1969 Dacca 961: under the purview of the imposition of curfew by the Magistrate “if there had at all been any shooting it is not known under what circumstances force to that extent had to be used. Either in the right of private defense and or to suppress riot or tumult or in the protection of life and property while enforcing the curfew order.”; *Gohar Nawaz Sindhu v. Province of Punjab and others*, 2014 CLC 1558 Lahore: In context of the long march, civil disobedience and political agitation movement of Pakistan Tehrik-e- Insaf (PTI) and Pakistan Awami Tehrike (PAT) in 2014. It has been observed that, “unreasonable restrictions had been imposed by the government. It included blocking of all roads, routs, highways, motorway by putting barriers and containers which have violated the constitutional guarantees such as freedom of movement and assembly. Since wholesale blockade of roads and highways are unwarranted, unlawful and unconstitutional. Thus large Scale arrest intended to prevent citizens from participating in processions were abhorrent to the spirit and mandate of the Constitution”; *Kamran Murtaza v. Federation of Pakistan*, 2014 SCMR 1667: In the same context of PAT/PTI’s political protests and agitation for electoral and constitutional reforms in 2014 in Pakistan. Court observes, “in handling of a large scale agitation violations of fundamental rights under Article of 9 (right to life and security of person), 14(inviolability of dignity of man), 15(freedom of movement), 16(freedom of assembly), 24(protection of property) are taking place.”; *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206: “Imposition of curfew for indefinite period without relaxing is in violation of fundamental rights.”

¹⁴⁴ See *Rizwan Ullah and 2 others v. Secretary Home and Tribal Affairs, Govt. of N.W.F.P. Peshawar*, 2009 MLD 1482: Advocate General is acknowledging that strife and insurgency is taking place in SWAT, which is a part of PATA (Provincially Administrated Tribal Area); *Sami Ullah v. The State*, 2009 MLD 242 Peshawar: Prosecuting under the offence of criminal conspiracy and waging war against Pakistan while preparing the minor girls as suicide bombers in connection of the ongoing conflict in FATA (Federally Administrated Tribal Areas of Pakistan); Shah, *Islamic Law and the Law of Armed Conflict*, 134-135.

A core objective of this research is to bridge the gap, which emerges due to the proclamation of emergency. It is when neither constitutional guarantees nor international humanitarian law of internal armed conflict extends its protection to absolute human rights. States usually deny the objective threshold of protracted conflicts and maintain their claim of sovereignty to tackle such situation by declaring it an internal armed disturbance and use extraordinary powers to suppress. This situation requires such a legitimate mechanism that can comprehend all categories of disturbances ranging from public riots to insurgencies without jeopardizing state and human integrity. Yet only possible through pragmatic assimilation of international human rights and humanitarian law, constitutional guarantees, indigenous socio-legal values and religious norms to avoid the vicious cycle of political violence. Since, Pakistan has already experienced some simmering events of civil strife and internal disturbances, when federation has failed to execute the social contract between its units and citizens.¹⁴⁵ Hence this study is attempting to dig out some plausible ways to

¹⁴⁵ See e.g. into Mian Afrasiab Mehdi, *1971: Fact and Fiction: Views and Perceptions in Pakistan, India and Bangladesh* (Lahore: Makhdoom Printing Press Pvt. Ltd., 2015), 33-93; Paula R. Nweberg, *Judging the state: Courts and constitutional Politics in Pakistan* (Trumpington Street, Cambridge: Cambridge University Press, 2002), 115-120; T.V. Paul, *The Warrior State: Pakistan in the Contemporary World* (Haryana: Random House India, 2014), 42-54, 61-68, 131-149; *Human Rights Case No. 29388-K of 2013: in the matter of (Application of Muhabat Shah for recovery of Yassen Shah -Missing Person)*, 2014 PLD SC 305; *Suo Motu Case No. 16 of 2011 along with CMA's (Implementation proceedings of Judgment of this Court reported as PLD 2011 SC 997)*, PLD 2013 SC 443; Henceforth starting from East Pakistan's internal disturbance and insurgency in 1970-71, Balochistan's internal disturbance 1958-59, 1963-69, 1973-77, and 2004 to Present time. Swat internal disturbance 2008-2009, and Contemporary FATA insurgencies along with localized civil commotions like Lal Masjid unrest of 2007 as well as contemporary chain of terrorist attacks in settled area of Pakistan. And Militant wings of religious organizations and its fallout as sectarian violence of Gilgit-Baltistan, alleged Hazara community genocide 2010-2013, along with the persecution of minorities like Lahore riots 1953, Gojra riots 2009, Badami Bagh Lahore ethnic violence March 9, 2013 and Rawalpindi Sectarian Riot November 15, 2013. Moreover the subjugation of Martial law regimes through police power and its counterproductive effects in the form of political violence by Alzulfiqar 1979, Balochistan Liberation Army, Migrant militancy of Paka Qila 1990 etc, are such events which create legal antinomies of civil liberties and national security with socio political fragmentations in Pakistan.

strengthen a correlation between collectivism and individualism through pluralism and constitutionalism for peace, tolerance and maximization of social cohesion in Pakistan.

This contextualization enhances the scope of study to analyze following domains such as. The extent of social engineering through *jural postulates* to accommodate the conflicting interests of politically fragmented society of Pakistan in the presence of strong status quo forces like civil-military bureaucracy. It aims to examine the legitimacy of sociological jurisprudence in the presence of the doctrine of separation of powers. It also inquires the limits of state power that deprive citizens from their personal liberties in the pretext of national security. Besides intends to comprehend legislative intents in Pakistan that had not only conditionalized personal liberties to certain limitations but have also given constitutional protection to preventive detentions. Yet under such constitutional limits, it also inquires about the remedies available for dissent if native community or minority has no efficacy and assent to a tyrannical legal order. Subsequently tends to analyze the contours of an actual *locus penitentiae* relating to preventive detention that may carve out in the defense of public order to manage prejudicial activities. However, this study indicates that protracted and absolute intolerance to passive resistance may transcends to civil unrest. And, if not cured politically and constitutionally then it can exceed to lower threshold of law and order crisis or a high threshold of internal armed conflict.

Moreover, it wants to evaluate the objective measures and scope of the proclamation of emergency and examines the arguments of the temporary suspension of certain civil

liberties under the doctrine of state necessity. It intends to determine the kinds of human rights abuses occur to political dissenters in Pakistan when public emergency is declared, as well as the impact of stringent laws and discretionary police powers when an emergency is not declared as such. Also examines the judicial immunity of military and paramilitary actions in aid of civil power, with or without an imposition of public emergency. It attempts to make military courts, summary trials, and imposition of curfew plus shot at sight orders accountable to law. Especially during internal armed disturbance or insurgency when constitutional guarantees are suspended through proclamation of public emergencies.

For such accountability, study appraises the transformation and specific adoption theory of international law. It is to achieve a contingency point between the doctrine of state sovereignty and universality of human rights for the protection of fundamental guarantees. For this purpose, it tends to analyze principles of proportionality and distinction as well as Common Article 3 of Additional Protocol II, 1977 of International Humanitarian Law. Now the whole paradigm leads this study to conduct a review of relevant literature from an existing body of knowledge. It is for a formulation of the central argument to tackle core problem and to understand the dynamics of the above-mentioned domains of research.

REVIEW OF THE RELEVANT LITERATURE

Since the study revolves around the occurrence of internal disturbances in Pakistan, hence it seems appropriate to understand its socio-political and legal dynamics and to dig out the gaps that have probabilities of human rights violations. As the supreme court observes in *President Balochistan High Court Bar Association v. Federation of Pakistan*,¹⁴⁶ that internal disturbance indicates a domestic law and order crisis that is perilous to right to life and property along with other fundamental guaranties. It further categorizes such anarchy in to three core paradigms. As the first deals with unlawful assemblies, isolated riots and subsequent sabotage, affray, public nuisance, strikes, protests and sit insns. This category attracts the law enforcement operations through police and district administration under maintenance of public order. While the second category covers idiosyncratic and collective predatory acts '*in terrorem populai*'. When out of a large scale of threat to use criminal force, violence and actual assault, a large number of reasonable men perceive or actually feel fear and sustain loss to their life and liberty. This anarchic context attracts special administrative, legal, and judicial measures, where paramilitary forces are supposed to be engaged with police powers, yet it is again a law enforcement paradigm. The last category deals with civil commotion, which has a potential to lead towards internal strife, insurgency and civil war. Court observes in this context, "*Internal disturbances in the context of civil commotion may include an outbreak of large scale violence due to disturbance in any part*

¹⁴⁶ See 2012 SCMR 1784.

of country.”¹⁴⁷ Since even the existence of federation comes in to jeopardy in this scenario so proclamation of public emergency and military operations in aid of civil powers prove to be last resorts to restore order in country.

This case law indicates that the connotation of internal disturbance contains a wide range of conflicts that are directed to public order and national security. Accordingly the sections of the Pakistan Penal Code, 1860 and The Criminal Procedure Code, 1898 which deal with unlawful assemblies, public nuisance, maintenance of public peace and tranquility and offences against State and armed forces cover such wide scope. Yet it lacks the procedural clarity about the use of force and other precautions regarding proportionality and distinction if such force contains lethal firearm. Moreover such general criminal law is unable to discern political protests and agitations from criminal rioting and assaults, so constitutes all kind of resentment as criminal disobedience to law. Such muddling to distinguish and label interstate conflicts especially in case of the last two categories of disturbance as stated in the above mentioned judgment has also been discussed by Peter G. Thompson, *Armed Groups: The 21st Century Threat* (London: Rowman & Littlefield Publishing Groups, Inc., 2014). He indicates that a high threshold of violence might be identified as civil wars, low intensity conflict, armed conflict, internationalized interstate conflict, hybrid conflict, extra systematic conflict, insurgency, small war, gang war, and predatory crime. However, he associates such high scale of violence with an existence of non-state armed groups that emerge in polarized, weak, fragile and post conflict transitory

¹⁴⁷ Ibid.

states. These armed groups which he believes are an outcome of institutional injustice consist of autonomous and sub state actors who lack legitimacy, remain clandestine, consist of small membership involve in transnational activity to assert their ideology. By relaying upon the United Nations office for Coordination of Humanitarian Affairs, he gives a definition of an armed group. According to which, *“it is a group that has the potential to employ in the use of force to achieve political, ideological, or economic objectives: are not within the formal military structures of State, State-alliances or intergovernmental organizations: and are not under the control of State(s) in which they operate.”*

Accordingly, Thompson categorizes such groups in to insurgents, terrorists, transnational criminal organizations, gangs and militias who fight with state for to enforce their rhetoric over a contest territory and population. He further bifurcates insurgents from terrorists as former fight for territory and its population whereas later resort to violence to influence population in wake of their agenda. Such violence is either instrumental or expressive as the former is strategically use to achieve some objectives whereas later is employed for the sake violence and counter violence to express anguish. Thompson further refers Bard E. O’Neill, *Insurgency and Terrorism: Revolution to Apocalypse* (Washington: Potomac Books, 2005) to elaborate the kinds of insurgencies that are based upon different ideologies and objectives. Subsequently he gives nine different kinds such as anarchist, egalitarians, traditionalists, apocalyptic-utopian, pluralists, secessionists, reformists, preservationists and commercialists. Likewise he mentions four major trends of terrorism in the modern world as discussed by David C. Rapoport, *“The Four Waves of Modern*

Terrorism,” in *Attacking Terrorism: Elements of a Grand Strategy*, eds. Audrey Cronin and James Ludes (Washington: George-Town University Press, 2004). It contains the anarchist wave of 1880’s as inspired by Marxist’s ideology, the anticolonial wave 1920-1960, the new leftist wave of 1979 and contemporary Islamic radicalism, since all of them also contain the notion of nationalism in their propagation.

Thompson argues at this point that since such kind of systematic violence is based upon ideology thence counter insurgency and anti-terrorism measures prove counterproductive in the absence of a pragmatic counter ideology. Especially the indiscriminate state violence instigates the neutral population to align with armed groups to avoid persecution and state repression. He argues that during such contestation, zones of impunity emerge which are tolerated both by armed groups as well as by law enforcement agencies for their own perspectives. He narrates that human rights violations occur in these ideological and strategic zones of impunities that usually evolve during enemy-centric counterinsurgency and law enforcement operations. Resultantly he believes that the nature of relationship between state and its citizens is crucial to tackle dissenting politics and strife, if such relationship carries trust deficits then it is hard to avoid violence and counter violence. Yet he does not explain that how zones of executive impunity can evolve during law enforcement operations in spite of the presence of judicial organ that is supposed to protect citizen’s rights irrespective of their allegiance. Court observes in this regard in *Suleman and others v. Manager, Domestic Banking Habib Bank Ltd. and another*,¹⁴⁸ that to establish peace

¹⁴⁸ 2003 CLD 1797 Karachi.

and security for realm was a royal prerogative in Britain and its subsidiary colonies, which was subsequently delegated to executive to enforce with absolute indemnity. Arundhati Roy, *Listening to Grass-hopper: Field Notes on Democracy* (Rawalpindi: Pakistan's Edition, Services Book Club, G.H.Q, 2011) has identified this administrative approach in the post-independence context as 'hyper-nationalism' which concentrates on excessive police powers through repressive means like prolonged preventive detentions.

Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: Peshawar University Foundation Press, 1989) presents a comparative study of Indian and Pakistani case laws and legislations, which are dealing with preventive detentions during peace and emergency period. He also mentions few English cases¹⁴⁹ that are dealing with preventive detentions during the transitional emergency of World War 1 and II. He states that it is unfortunate to have preventive detentions clauses and their constitutional protections even during peace times in pre and post independent subcontinent due to indigenous political polarization and social fragmentation. He establishes a direct negative relationship between the laws of preventive detention and personal and civil liberties. Accordingly, a detention merely on subjective or objective apprehension of executives, even prior to an actual commission of offence engenders such administrative discretions that have tautological links with executive impunities

¹⁴⁹ See e.g. into Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: Peshawar University Foundation Press, 1989), 39-71: for *R. v. Commanding officer, Ex parte Ferguson*, (1911) I.K.B; *Rex v. Halliday*, (1917) A.C.260; *Reg v. Justices of Cork*, (1882) 15 Cox C.C; *Green v. Secretary of State*, (1942) A.C. 284; *Liversidge v. Anderson*, (1942) A.C. 206.

He concludes that either detention is preventive or punitive the negative impact on personal liberty would be same. However, he has a view to have some kind of deterrence through mild restrictions on derogable human rights as a prevention measure during public emergencies for internal security and state sovereignty. Thus, he passively accepts that protection of an overall society would ultimately end up in the protection of personal liberty with an inclination towards trickledown effect of positivist's utilitarianism during public emergency. However, the rigorousness of these preventive measures can be well assessed in the *Muhammad Umar Khan v. The Crown*,¹⁵⁰ where Munir.C.J. being a positivist espouses the doctrine of state necessity during civil unrest and gives validity to all kinds of preventive actions and delegated legislation and its retrospective legislative indemnity. In addition has justified martial law courts during public emergency in the name of the defense of realm without giving due considerations to civil and political rights of the citizens of Pakistan.

This judicial approach towards preventive measures and derogation of civil liberty had its traces in colonial India, For example in *Re Rajdhar Kalu Patil*,¹⁵¹ court admits its inability to deal with legislative indemnity given to executives under a statute¹⁵² to maintain public order irrespective how contrary it is to natural justice. And in the *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* court declares, "The court cannot itself transform a barbarous custom in to milder one".¹⁵³ As well as in the *Satyandra Nath Mazumdar*, "Ananda

¹⁵⁰ PLD 1953 Lahore 528, 531-532.

¹⁵¹ AIR (35) 1948 Bombay 334.

¹⁵² Ibid., 334: for "The Bombay Public Security Measures Act (VI of 1947)."

¹⁵³ AIR 1931 P C 248, 249.

Bazar Patrika” v. *Government of Calcutta*, court admits, “Jurisdiction of this court under S.34, Press (Emergency Powers) Act is of an extremely limited”¹⁵⁴. Though court declares the discretionary nature of delegated legislation invalid in the *Keshav Talpade v. Emperor*,¹⁵⁵ but simultaneously admits, “*Courts of law ought to abstain from harsh and ungenerous criticism of acts done in good faith by those who bear the burden and responsibility of government, especially in time of danger and crisis.*”¹⁵⁶ Moreover, the *Sibnath Banerji v. Emperor*,¹⁵⁷ declares the subjective satisfaction of police for detention invalid but it does not test the vires of Defence of India Act 1939. With slight deviation in *Vimlabai Deshpande v. Emperor*,¹⁵⁸ court courageously incorporates honesty and reasonableness in the satisfaction of detaining authority. Yet it again validates the existence of preventive detention laws in the legal system of colonial India for the defense of realm. An overview of these cases elaborates the positivist attitude of colonial judiciary that remains constant as an institutional psyche even after the independence

Under this passive judicial trend, Dorab Patel, *Testament of a Liberal* (Karachi: Oxford University Press, 2000) discusses the mala-fide intentions of totalitarian regimes when they rely upon criminal laws to suppress their political opponents. He specifically explains the tactical use of preventive detention laws for political victimization in Pakistan. Wolfgang Sofsky, *Violence: Terrorism, Genocide, War* (London: Granta Books, 2003)

¹⁵⁴ AIR 1932 Calcutta 745, 746.

¹⁵⁵ AIR 1943 FC 1.

¹⁵⁶ AIR 1943 FC 1, 5.

¹⁵⁷ AIR 1945 P C 156.

¹⁵⁸ AIR 1946 P C 123.

discusses the politics of criminal laws in the national security paradigms and identifies their two core categorizes. While the first category deals with the laws relating to public order and nuisance and is relied upon for social control. Whereas the second category deals with laws relating to national security and legitimizes absolute deterrence and state oppression for political control and maintenance of state sovereignty. He argues that power politics does not care about compromises rather it has a tendency to inflict pain for an absolute obedience. And once a social order has been established the same brutal force is used by sovereign to gain legitimacy and to control civil disobedience. At this stage, sustainable peace in community is linked with public order that ultimately depends upon state violence for its preservation. However, this vicious circle of violence has a tendency of polarization and fragmentation in society due to extreme alienation of victimized people.

The Indian judiciary in the *Naga People's Movement of Human Rights v. Union of India* has also mentioned this social alienation being a counterproductive outcome of counter insurgency operations under such conditions.¹⁵⁹ Similarly Leo Kuper, *Genocide: Its political use in the Twentieth Century* (New Haven: Yale University Press, 1981) and Antonio Cassese, *Inhuman States* (Cambridge: Polity Press, 1996) both analyze politically unrest societies and indicate that incidences of human rights violations are core determinant for socio-political polarization that potentially lead to occurrence of

¹⁵⁹ AIR 1998 SC 431, 434: "A situation of Internal Disturbance involving the local population requires a different approach. Involvement of Armed Forces in handling such situation brings them in confrontation with their countrymen. Prolonged or too frequent deployment of Armed forces for handling such situations is likely to generate a feeling of alienation among the people against the Armed Forces who by their sacrifices in the defense of their country have earned a place in the hearts of the people."

insurgency or civil war. Subsequently Kirpal Dhillon, *Police, and Politics in India* (New Delhi: Manohar Publisher, 2005) elaborates the role of Indian police amid counter insurgency and law enforcement operations. Firstly, he discusses indifferences of political governments to address socioeconomic injustices and their apathy to resolve petty political differences mainly due to their own stakes. Then unfolds administrative pressures on the police force when it is strategically instructed by the ruling elites to be involved in mass atrocities, stigmatization, and marginalization of targeted population. Then it is appropriate to mention B.Guy Peters, *The Politics of Bureaucracy* (New York: Longman, 1995) at this juncture, as he says that bureaucracy serves the interests of governing elites through proxy control. Ayesha Jalal, *Contemporary South Asia: Democracy and Authoritarianism in South Asia*. (Cambridge: Cambridge University Press, 1995) reveals the same in the context of India and Pakistan. Because S.D. Muni, ed., *Responding to Terrorism in South Asia* (Colombo: Lordson Publishers, 2006) correlates the segregation of Naga people with such an indirect and proxy administration, based on excessive delegated legislations. He also mentions the counterproductive impacts of anti-terrorism laws and preventive detention laws on law enforcement actions.

Julie Harrelson Stephens, *Exploring International Human Rights: Essential Readings: Critical Connections: Studies in Peace, Democracy, and Human Rights*, ed. Julie Harrelson Rhonda L. Callaway (Colorado: Lynne Rienner Publishers, 2010) believes that strategic use of human rights violations is a catalyst for emerging terrorist activity. Anil Kalhan, et al., "Colonial Continuities: Human Rights, Terrorism and Security Laws in

India," *Columbia Journal of Asian Law* 20, no.1 (2006): 93-234, argues in Indian perspective that political violence is a colonial continuity and has a potential of national security crisis. However, preventive laws and anti-terrorism legislations are even more perilous for nation building process because stringent nature of these laws defeats the moral value of governance and rule of law. With this milieu L.P. Sharma, *The Brown Rulers of India* (Delhi: Konark Publishers Pvt Ltd, 1988) describes that excessive delegated legislations, executive impunity, discretionary controls of bureaucracy as well as their arrogant attitude towards common masses is hazardous for civil and political liberties. Moreover, Gunnar Myrdal, *Asian Drama* (London: The Penguin Press, 1972) focuses on discretionary executive control and elaborates that ideological and attitudinal legacy of colonial authoritarianism is one of the strong force behind this structure.

Yet contrary to it under universalism Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Massachusetts: MIT Press, 1994) consider civil disobedience as a legitimate right of minorities, and dissident groups to protest against the violation of justice. These public protests for expansion of civil and personal liberties lead to an innovative and just social compromise¹⁶⁰ by neutralizing the monopoly of majority in liberal and democratic societies. Then Annabella Lever, "Democracy and Judicial Review: Are they Really Incompatible?," *Perspective on Politics* 7, no.4 (2009): 805-822, believes that among such kind of extreme conflicts courts have the legitimacy to act as final arbitrator to save civil liberties and democracy under constitutionalism. On the other hand,

¹⁶⁰ See Ronald Moore, "Rawls on Constitutional-Making," in *Constitutionalism*, eds., J. Roland Pennock and John W. Chapman (New York: New York Press, 1979), 238-265.

court in *Mumtaz Ali Bhattu v. The Deputy Martial Law Administrator Karachi*,¹⁶¹ has given the priority to defense of realm and public order over civil liberties. It was under the notion of '*Salus populi est suprema lex*'¹⁶² to save the legitimacy of the legal order of the state during waves of political agitations. However, it has kept the arena of writ prerogative of high court intact to save inalienable human rights on the touchstone of due process of law.¹⁶³ Such judicial position is akin to Philip Soper, "Natural Confusion about Natural Law," *Michigan Law Review* 90 (August 1992): 2393-2423, who believes that natural law as a higher law in the form of due process clause of the constitution provides a rationale for adjudication and reasoning beyond the enacted positive law.

In this case, court elaborates two kinds of tests to valid legislative enactment regarding preventive measures, one is the test of doctrine of state necessity, and other is a test of fundamental guarantees.¹⁶⁴ Along with it discuss the objective of preventive detention and other preventive laws and has an emphasis on '*locus Penitentiae*', which means that as a result of preventive action how much repentance and deterrence has emerged in the mind of detainees to refrain from acting pre judicially, detrimental to public order.¹⁶⁵ Court observes that this test of necessity would control arbitrary delegated legislations. Never the less such kind of views elaborates an apparent judicial deviation from strict positivism due

¹⁶¹ PLD 1979 Karachi 307.

¹⁶² See Ibid., 323-324: "Public Safety is the Highest law of all, must prevail in times of National Crisis and the people are to submit to temporary abdication of their constitutional liberties in order to enable the Government to combat the crisis situation which might otherwise destroy the very existence of the Nation."

¹⁶³ Ibid, 328-336; 357-360: "Article 4 is out of Chapter II of the fundamental guarantees and remains erected even the temporary suspension of derogable rights during public emergency, thus with harmonious combination of Art. 4, 9, 10, 14, 25, 184(3) and 199 of the Constitution of Pakistan, 1973. Judiciary can prevent human rights abuses."

¹⁶⁴ Ibid, 338-340.

¹⁶⁵ Ibid., 344-345: for "*Inayatullah Khan Mushraqi v. The Crown*, PLD 1952 Lahore 331"

to gradual impacts of judicial realism and natural justice. Resultantly Court in *Naiiz Ahmad v. Province of Sindh*,¹⁶⁶ and *Liaquat Hussain v. Federation of Pakistan*,¹⁶⁷ declares that when armed forces are acting in aid of civil power, with regard to public emergency based on internal disturbance. Even then, supremacy of constitutional government remains intact because it does not mean military government or court martial of civilian. And judiciary as an integral part of civil power has a prerogative to enforce due process of law for the protection of civil liberties.

Among these competing notions Frederic Grare, *Reforming the Intelligence Agencies in Pakistan's Transitional Democracy* (Washington DC: Carnegie Endowment for Intl Peace, 2009) discusses the role of intelligence agencies in the enforced disappearances of dissident groups in the context of national security paradigm of Pakistan. Writer mentions the inability of writ prerogative of high courts for the production of these detainees and expounds the impunity of these intelligence agencies in missing person cases. This exploratory research criticizes 'The Anti-Terrorism Act, 1997', which has strengthen this impunity. Moreover judgments given by the court in *Mehram Ali v. Federation of Pakistan*,¹⁶⁸ and *Jamat-i-Islami Pakistan v. Federation of Pakistan*,¹⁶⁹ share same views and declare some provisions of this statute ultra vires of the constitution because they give arbitrary powers to law enforcement agencies and are contrary to right of life, liberty and dignity.

¹⁶⁶ See PLD 1977 Karachi 604, 657, 661-662, 667.

¹⁶⁷ PLD 1999 SC 504, 581, 589-590, 595, 598.

¹⁶⁸ PLD 1998 SC 1445.

¹⁶⁹ PLD 2000 SC 111, 127-148.

Yet the question is that why law enforcement agencies have such an immense power in Pakistan. T.V. Paul, *The Warrior State: Pakistan in the Contemporary World* (Haryana: Random House India, 2014) explains it by declaring Pakistan a “*garrison state*,” according to him a state that is predominantly involves in state security and where “*men specialist on violence*” has actual and symbolic manipulation in governance, such state may categorized as “*garrison*” or “*praetorian*” state. He further explains both terms, as in “*praetorian state*” frequent military involvement in national socio-political and economic paradigm gives two kind of praetorian-ism. One is ‘*arbitrator type*’ and other is ‘*ruler type*’, since former deals with a frequent intervention yet without any ideological imprint or impact, whereas later deals with the patterns of involvement with an ideological impact on societal norms. The legitimacy and societal efficacy of the later engenders the notion of garrison state with an ideological legacy in society. Accordingly, the institutional psyche and administrative mindset of a “*garrison state*” is focused on national security and militarism.

Hassan Askari Rizvi, *The Military & Politics in Pakistan: 1947-1997* (Lahore: Sange-e-Meel Publications, 2011) perceives this institutional psyche as a way of life of armed forces in Pakistan, because military for him is not a profession, rather an attitude. Then owing to strict discipline and cohesion, such attitude becomes efficacious to align political polarization in fledgling democracy especially when strategic decisions are being taken by the government. For Paul, a state with this mindset mostly perceives itself vulnerable under “*Hobbesian*” international order. It acts and reacts through realpolitik doctrine by subduing moralities of international law for its self-defined survival, and mostly rests upon

its armed forces under this skeptical international environment. Even a vibrant civil society, electoral process and constitutional evolution are not able to alter such security centric approach of a “*garrison state*”. Here the question arises that why the electoral process and democratization remain inept to change such national approach? Paul’s answer in this regard is interesting to evaluate the impact of democracy in a security state, where entire electoral process proves to be a mere plebiscite under sham democracy. He identifies such paradigm as “*hybrid democracy*” with partial civil and personal liberties. Paul indicates that geographical vulnerabilities, historical administrative patterns, skeptical civil liberties, sociopolitical polarization and economic disparities are core variables to materialize “*hybrid democracy*” in Pakistan.

Paul indicates ahead that instead of international aggression, such “*garrison states*” adopt tyrannical methods to suppress indigenous political dissent to sustain an over whelming military influence on governance and administration. This national security paradigm legitimately empowers centralized and organized armed forces and other law enforcement agencies over fragmented polity and popular will in Pakistan. Seemingly, the policing based upon such threat perception have negative impact on civil liberties. As even court of law coincides with this administrative approach and observes, “*Loyalty to state and obedience to constitution and law is a first duty of the citizen of the country and if person commits any offence against the State, then he is not entitled to the protection of fundamental rights.*”¹⁷⁰ Therefore, under the notion of “*garrison state*” all kinds of dissents and subsequent efforts

¹⁷⁰ See *Asif Mahmood v. Federation of Pakistan*, PLD 2005 Lahore 721.

for their solidification are perceived as anti-state activities. Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968) as quoted by Paul perceives such governance patterns as “*community without politics*” because the military dominated ruling class prevents the political evolution of community by stigmatizing the politics of dissent as treason. Whereas jurisprudentially W. Friedmann, *Law in a changing Society* (London: Stevens & Sons Ltd., 1972) recognizes it as “*fundamentalist perspective of public order,*” in which retributive justice, being a core administrative value is prioritized to save the “*social equilibrium.*” N.V. Paranjape, *Criminology and Penology* (Allahabad: Central Law Publication, 2007) identifies this approach as administrative penology that is to save the national security and public tranquility. While the court of law has same connotation in Pakistan as it observes, “Fundamental rights have no real meaning if the State itself is in danger and disorganized. If the State is in danger, the liberties of the subjects are themselves in danger. Subsequently equilibrium ought to be maintained between the two competing interests that are as follows. One, personal and civil liberties that are declared by the constitution as fundamental and secondly the need to impose social control and reasonable limitations on the enjoyment of these rights in the interest of the collective good of the society.”¹⁷¹

According to Hannah Arendt, *The Origins of Totalitarianism* (Claveland: Meridian Books, The World Publishing Company, 1962) the above-mentioned scenario may construe as “*total terror*” of a totalitarian regime. It is when all the state institutions including judiciary complement each other to enforce absolute order and obedience in society, with a

¹⁷¹ See *Nawabzada Nasrullah Khan v. The District Magistrate, Lahore and the Government of West Pakistan*, PLD 1965 (W.P) Lahore 642.

meager probability of dissent. She personifies such society as a “*one Man whole*,” where all the segments of society are forced to follow a specific yet irrational state centric ideology through stringent administrative measures. Yet the question is that why a connotation of irrationality is donated for the formulation of such national ideology? Her answer indicates that instead of causation and empiricism like social contract doctrine, ethnic or religious ideologies are based upon self-conceived premises of dominated classes. Accordingly, the entire national struggle is focused to achieve such hypothetical premises for which distorted interpretations of history and conspiracy theories are employed to prepare “*political soldiers*” for a cause. While for Roy it is an enforcement of “*hyper-nationalism*,” whereas for Arendt it is an ‘external-internal’ psychological warfare of an ideological cum totalitarian state. As on external fronts it remains in perpetual hostility with neighboring countries to harness its ideological uniqueness and on its internal fronts it induces its population to follow specific doctrines. It is mainly through propaganda and terror for which armed forces, law enforcement agencies and criminal laws play pivotal roles. She believes that stigmatization, custodial torture, degrading treatment, and deprivation of life and liberty are employed to dehumanize a targeted group for its political isolation and social alienation. She further elaborates that collective and individual identities and self-esteem are manipulated through isolation and alienation strategies to control and curb political dissents. Resultantly to regain sociopolitical integration such targeted groups and individuals ought to rely upon state owned perspectives and connotations. She also maintains that totalitarian regimes instigate political isolations and polarizations to discourage mass mobilization, political associations and formulation of

harmonious popular will for their own stakes. However, she warns that chronic and organized isolation of a pacified segment of society is potently dangerous even for totalitarian order, as it may react in vengeance for its sociopolitical survival. Nevertheless, she firmly denounces legal systems of tyrannical regimes on the touchstone of natural justice and human rights. As they mostly induce administrative whims through coercion and extreme deterrence by refuting popular aspirations with indifferences to normal human behaviors.

B.R. Sharma, *Constitutional Law and Judicial Activism* (New Delhi: Ashish Publishing House, 1990) and Hiroshi Sato, "Recent Trends of Constitutional Rights in Indi," *The Developing Economies* 15, no.1 (1977): 14-26 have similar views in the context of post emergency Indian experience. They indicate that owing to Proclamation of Emergency in 1975, West Bengal Prevention of Violent Activity Act 1971 and Maintenance of Internal Security Act 1978(MISA), Indian citizens have faced the negative impacts of administrative discretions on their constitutional and fundamental rights. Sharma goes ahead and says that inception of preventive detentions in the chapter of fundamental rights of the constitution of India indicates that the Legislator wanted to have equilibrium between internal security and civil liberty during peace and internal disturbances. Yet in a suggestive manner he correlates judicial activism with civil liberties and narrates that pro-active judiciary can improve the level of personal liberty through constitutional protection.

Tariq Hassan, "Supreme Court of Pakistan: The Case of Missing Persons," *Criterion* 4, no.3 (2011): 1-11, has identical vision and forms an eventuality between preventive

detention law and missing person's issue. To deal with executive impunity he focuses on the national criminal prosecution against the state authorities who are involved in the subjective and arbitrary detentions. He urges Supreme Court to play its constitutional role on basis of due process of law for the protection of core human rights by relaying upon International human rights law and humanitarian law. Thus, he considers transformation theory of international law as a remedy for executive impunity while discussing the role of international criminal court in national jurisdiction when national authorities are unable or unwilling to implement international human rights. K.C. Joshi, *International Law & Human Rights* (Lucknow: Eastern Book Company, 2006) presets the idea of transformation and specific adoption theory for the merger of international human rights and international humanitarian law in domestic jurisdiction. It is intended for the primacy of inalienable principle of human rights by filling the gaps in domestic law during uncertain situations of doctrine of state sovereignty and universalism through contextual and critical legal approach of interpretive legislations. Indian judiciary gives its warrant in the *People's Union For Civil Liberties v. Union of India*,¹⁷² for a pragmatic implantation of this view provided that its harmoniums compatibility with domestic jurisprudence.

This alternative measure has also been taken in to consideration by Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and Dvid Harris, eds. *International Human Rights Law* (New York: Oxford University Press, 2010). Resultantly establish a plausible link between International Human Rights, International Humanitarian law, and international

¹⁷² AIR 1982 SC 1473.

criminal Law for the protection of core human rights. They narrate that being a genesis of international human rights law and international humanitarian law, International Covenant on Civil and Political Rights [1966] is directly applicable in domestic jurisdiction under a constitutional protection of fundamental rights. Thus irrespective of application of human rights or humanitarian law it contains the protection of core human rights under all kind of situations on the foundation of due process of law. If constitutional guarantees loss its efficacy in the pretext of state sovereignty during public emergency and internal disturbances then minimum protection through judicial guarantees as incorporated in Common Article 3 extends its auspices. And if IHL faces issue like vagueness of application of torture in internal armed conflicts then IHR gives the protection of jus cogens norms.¹⁷³

Likewise Evan Criddle, “Proportionality in Counter-Insurgency: A Relational Theory,” *Notre Dame Law Review* 87, no.3 (2012): 1073-1112, coincides with them while discussing the civil strife of Libya, Afghanistan, Chechnya, Iraq, Sri Lanka, and emphasizes on the application of IHL principles of proportionality and distinction in law enforcement actions during internal disturbances. The operational list of do’s and don’ts while acting under Armed Forces (Special Powers) Act, 1958 of India, mentioned in the *Naga People* case.¹⁷⁴ Then the six points agenda of Sardar Akhtar Jan Mengel for restoration of peace in

¹⁷³ See Andrew Clapham, “*Non-State Actors*,” in *International Human Rights Law*, eds. Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (New York: Oxford University Press, 2010), 534-535: Because definition of torture contains the existence of public official , and armed groups fighting with each other or with governmental agencies in classic internal armed conflict are not public officials in that sense in spite of the status of belligerent or insurgent and contains specific terror, organization, chain of command and control etc.

¹⁷⁴ See *Naga People’s Movement of Human Rights v. Union of India*, AIR 1998 SC 431, 458-459.

Balochistan with an authoritative judicial categorization of violent internal disturbance in this province. As well as judicial dicta under harmonious interpretation of Articles 4, 7, 9, 10A, 14, 15, 17, 18, 24(1), 25, 148(3) and 184(3) of the Pak constitution for protection of core human rights values contained in the *Blochistan law and order case*¹⁷⁵ represent the same views.

This judicial approach to establish objectivity on the level of violence to determine the threshold of disturbance has also been discussed by Eve La Haye, *War Crimes in Internal Armed Conflict* (New York: Cambridge University Press, 2008). Subsequently identifies key determinants like the increased involvement of governmental forces, the types of weapon, time length of sporadic act of violence, amount of territory, displacement of indigenous community, level of organization and intensity of hostilities. For the application of Common Article 3 of Additional Protocol II if state claims its sovereignty. And narrate in the light of numerous judgments of ICTR and ICTY as well as Rome Statute of ICC that national courts have complete jurisdiction to deal with protracted armed conflicts between governmental forces and organized armed group. This view coincides with arguments of the then Attorney General of Pakistan Yahya Bakhtiar, *In Re: Trial of Pakistani Prisoners of War: Pakistan v India* (Lahore: All Pakistan Legal Decisions, 1973). Since as chief counsel of the government of Pakistan in the ICJ, he had endorsed the jurisdiction of national courts to try 195 Pakistan's army and civil officers for

¹⁷⁵ See *President Balochistan High Court Bar Association v. Federation of Pakistan etc*, Constitutional Petition no 77 of 2010 reported on 2012, 3-20, 24-25, 32-41, 52-61, <http://www.supremecourt.gov.pk/2012/Judgments/Orders/>.

allegations of genocide, crimes against humanity and war crimes during counterinsurgency operations in the then East Pakistan.

Doswald Beck, et al., *International Humanitarian Law--An Anthology* (Delhi: LexisNexis Butterworths Wadhwa Nagpur, 2009) discuss the same issue of linkages and elaborate that Turku Declaration on Minimum Humanitarian Standards [1990], is a milestone for lowering of threshold limits of armed conflict to safeguard personal liberty, life and dignity. This work narrates that Post Turku Declaration scenario along with ad hoc tribunals in Rwanda and Yugoslavia, espacilly the *Dusko Tadic* case¹⁷⁶ has a particular stress on due process of law. It is predominantly to deal with armed groups and provides a terminology of *fundamental standards of humanity* with respect to principles of proportionality and distinction applicable during civil strife. Then Edwin Shorts and Claire D. Than, *International Criminal Law and Human Rights* (London: Thomson, Sweet & Maxwell, 2003) focus on the inviolability principle of human rights under all kind of the circumstances. They present an amalgamation of IHR, IHL and international criminal law in the light of European Convention for the Protection of Human Rights, Fundamental Freedom [1950] and *Furundzija* case.¹⁷⁷

¹⁷⁶ See Doswald Beck, “*International Humanitarian Law Relating to Non International Armed Conflict*,” in *International Humanitarian Law--An Anthology* (Delhi: LexisNexis Butterworths Wadhwa Nagpur, 2009), 234; *Prosecutor v. Tadic*, (IT-94-1-A), ICTY App. Ch., July 15 1999.

¹⁷⁷ See Edwin Shorts and Clair de Than, *International Criminal Law and Human Rights* (London: Thomson ,Sweet & Maxwell, 2003), 12; *Prosecutor v. Furundzija*, (IT -95-17/1-T), December 10 1998 (2002) 91 H.R.R. 1051, UN ICT(App.) (Yug.)

Under these trends of amalgamation and transformation, apex judiciary in Pakistan has relied on Universal Declaration of Human Rights for the protection of human rights in the *Karachi law and order* case.¹⁷⁸ It has a specific emphasis on due process of law¹⁷⁹ with tools of public interest litigations¹⁸⁰ and judicial activism,¹⁸¹ mainly through an inquisitorial system of adjudication.¹⁸² It stresses government to comply with constitutionalism even during public emergencies¹⁸³ to safeguard civil and personal liberties. This approach coincides with Vijay Gupta, *Perspectives on Human Rights* (Delhi: Vikas Publishing House, 1996) who describes the emerging trends of judicial activism in India with a pragmatic insight of state accountability in human rights violations through compensation strategy. According to him, the tactical use of vicarious liability of state in administrative actions is not only an effective way to reduce executive impunity but also a means to restorative justice. He further narrates that judiciary as an ultimate arbitrator in civil society is also accountable to the whims of masses thus judicial activism must be curative in nature to sustain legitimacy. He suggests that courts should directly fix and impose pecuniary fines on liable officers instead of giving directions to government to do so. He concludes that such remedial measures for an actus reus would heal the trauma of human rights abuses.

¹⁷⁸ See *Watan Party and another v. Federation of Pakistan*, PLD 2011 SC 997, 1020, 1074.

¹⁷⁹ *Ibid.*, 1099 .

¹⁸⁰ *Ibid.*, 1055.

¹⁸¹ *Ibid.*, 1112.

¹⁸² *Ibid.*, 1054-1060.

¹⁸³ *Ibid.*, 1126.

S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2004) relies upon Max Weber and indicates that legitimacy is a social term, and has three components, legal validity, a shared feeling among people to have a duty to obey and actual obedience of law. He says that judicial activism has legitimacy in India because except judiciary no other alternative is available for minorities and segregated people to readdress their grievances against the abuses of legislative and executive powers. Although judicial activism is an antithesis of absolute separation of powers, but it is a constitutional way to counter anarchy. He narrates that judicial activism is an advanced form of judicial realism and effective to bring egalitarianism by expanding the scope of due process of law and personal liberty in India. This pluralistic approach is based upon the sociological jurisprudence of Roscoe Pound, *An Introduction to the Philosophy of Law* (Delhi, Indian Reprint, Universal Law Publishing Co., 2006). It considers that for a pragmatic dispensation of justice it is compulsory to minimize the conflicting and competing interests of society to save a social cohesion. He calls this phenomenon as the ends of law and replaces analytical jurisprudence with social engineering. Julius Stone, *Human Law & Human Justice* (New Delhi: Indian Reprint, Universal Law Publishing Co., 2004) also discusses the vulnerability of legal rules and norms when a socio political catastrophe occurs in a respective society. With a reliance on ethical value of justice theory, he discusses Gustav Radbruch's legal relativism which emphasis on the moral validity of positive law through the certain minimum norms of natural justice.

H.L.A. Hart, *The Concept of Law* (New Delhi: Indian Reprint, Oxford University Press, 2005) in the form of open texture of law and judicial discretion during a situation of legal vacuum emphasizes on the minimum content of natural law. He says that without an internal obligation of obedience no legal system can sustain merely because of coercions. This internal morality of law as an ethics of legal formalism has also been discussed by Lon L. Fuller, *The Morality of Law* (New Delhi: Indian Reprint, Universal Law Publishing Co., 2006) in the form of core elements of rule of law. He says that to be qualified as a legitimate legal system, it must consist of the following elements. Firstly, there must be a set of rules instead of ad hoc injunctions and arbitrary orders. Secondly, every member of the respective legal system must know these rules. Thirdly, rules must not have retrospective effects to implicate past actions. Fourthly, rules must not be in vague language rather they must be in an understandable form. Fifthly, a legal system must have a consistent set of rules. Sixthly, rules must not demand some impossible actions from its subjects. Seventhly, rules must not be changed frequently and lastly, administrative actions must be in conformity with the announced set of rules.

Fuller says further that lack of any of the above mentioned elements disqualify a legal system to be called as a legitimate and valid legal system. He personifies an autocratic legal system through an imaginary ruler “*Rex*” and describes its failures on the threshold of above-mentioned criterions of rule of law. John Finnis, *Natural Law & Natural Rights* (Clarendon: Oxford University Press, 2011) in the form of *practical reasonableness* discuss the same minimum requirement to save the core fabric of common good. However,

in a deep contrast to Fuller, he says as a moralist that popular sovereignty should contain a feasible environment for the persuasion of individual legitimate goals. He describes this form of common good as public interest and establishes its directional relationship with pragmatic implantation of human rights values in a respective society.

John Rawls, *A Theory of Justice* (Delhi: Third Indian Edition, Universal Law Publishers Co., 2008) and Ronald Dworkin, *Taking Rights Seriously* (Delhi: Indian Reprint, Universal Law Publishing Co., 2008) focus on the liberal democratic norms and discuss the rights of minority under majority rule. They extend the scope of justice and acknowledge the minority's right of political dissent and civil disobedience for constitutional rearrangements and bargains within a legal system. Former discusses the procedural aspect of institutional justice through the mechanism of equality and equity. And later believes that judicial organ of state has always a right answer for hard cases through constructive interpretation of moral values and principles present yet undiscovered in the seamless web of legal system. Both of them look at the civil disobedience as a political obligation of citizen in a social contract doctrine.

Rawls along with others classifies civil disobedience in to two main categories, Direct and indirect. Direct civil disobedience is a violation of a particular law, which is either ultra vires or beyond the Fuller's standards of inner morality of law. Dworkin, Rawls, Hugo Adam Bedau, ed., *Civil Disobedience in Focus* (London: Routledge, 1991), Howard Zinn, *Disobedience and Democracy Nine Fallacies on Law and Order* (Cambridge: South End

Press, 2002) and Peter Singer, *Democracy and Disobedience* (Clarendon: Oxford University Press, 1973) discuss the dynamics of socio-political defiances. They indicate that in case of direct civil disobedience, conscientious objection and passive resistance is a legitimate response of minorities as well as concerned citizens. They also argue that in lieu of violation of a particular law, dissenters can challenge its legality, validity and legitimacy in the court of law, if the said law is less than the standards of justice such as equality, liberty, equity and other human rights values. They say that judicial review of legislation is a kind of direct civil disobedience. However on the issue of indirect civil disobedience, where dissenters violate other valid laws in lieu of the objectionable law divergence is present among these writers. Rawls and Dworkin believe in non-violence and on the other hand, Badau, Singer, and Zinn do not exclude violence as a strategy to get recognition of the protests and movements. Brian Smart, "Defining Civil Disobedience," *Inquiry* 21 (1978): 249-269, specifically focuses on the audience strategy of violent indirect civil disobedience through coercion of force (use of violent and non-violent force) and coercion of persuasion (boycotts, strikes, resignations).

However, none of them discusses the political obligation of dissent and resistance amid the repressive tactics of absolute control in the context of dictatorial regimes. As civil disobedience composes of the rights to association, movement, expression and speech but in non-liberal states these rights can easily be derogated in the name of law and order. Besides it, Rawlsian position is very uncertain in the case of dictatorship and colonial rule because he thinks both kind of civil disobedience can only be possible in a near just society

and excludes totalitarian regimes. Due to this uncertain position political, protect for constitutional rights can turn in to public riots and political terrorism due to excessive use of state force. However, Rawls, Dworkin Zinn, and Bedau emphasize on the toleration of intolerants but it is in the regard to liberal democratic states. However, they are silent in the context of South Asia, where according to Hussain constitutional and legal protection of preventive detention is resorted to counter the civil liberties.

Resultantly the review of relevant literature indicates a gray area in the legal system of Pakistan. It points out the non- existence of a pragmatic mechanism for transparency and accountability during law and order operations of low and high threshold conducted by police, civil armed forces or armed forces. Friedmann illustrates this aspect as legal antinomies between stability and change, between positivism and idealism as well as between collectivism and individualism with a prescription of social engineering through sociological jurisprudence. However, this sociological jurisprudence has no utility during civil commotions in an extremely fragmented and polarized society as indicated by K.S. Subramanian, *Political Violence and the Police in India* (New Delhi: Sage Publications India Pvt Ltd, 2007). Similarly in an elite system of government like Pakistan which has a colonial legacy of civil and military bureaucracy as indicated by Khalid B. Sayeed, *The Political System of Pakistan* (Boston: Houghton Mifflin Company, 1967) and Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership-Pakistan, 2008). Nevertheless Pound emphasizes on authoritative *jural postulates for law* with a combination of social utilitarianism and natural law in judicial and legislative

domains. Yet both of these domains are not authoritative as such in Pakistan as indicated above by Jalal, Patel, Grare, Paul alongwith Ivor Jennings, *Constitutional Problems in Pakistan* (Cambridge: Cambridge University Press, 1957) and Hassan Askari Rizvi, “The Paradox of Military Rule in Pakistan,” *Asian Survey* 24, 5 (1984): 534-555.

It becomes more drastic when armed forces are acting in aid of civil power to suppress political violence due to a strict adherence to doctrine of national security. However, some studies demonstrate a deviation from strict positivism with an inclination towards natural justice and legal realism but are silent on the workable procedures to deal with political violence and terrorism. Thus are unable to give sustainable equilibrium between civil liberties and national security in the presence of preventive measures to meet grave dangers of internal disturbances. No doubt, some scholars are discussing about combination of peremptory norms of human rights with principles of proportionality and distinction of international humanitarian law to neutralize doctrine of necessity under special circumstances of public emergency. However, they are unable to mention constitutional modus operandi for an appropriate dispensation of Common Article 3 of Additional protocol II in domestic jurisdictions.

At this juncture, Masaji Chiba, “Other Phases of Legal Pluralism in the Contemporary World,” *Ratio Juris: Legal Pluralism in the Contemporary World* 11, no. 3 (1998): 228-245, brilliantly devises a mechanism of legal pluralism. It is mainly to counter “*conflicts of laws*” and relies upon a synthesis of state owned positive laws and state’s permitted minor

laws such as tribal norms, sociocultural practices, religious doctrines and humanitarian values. Like Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955) religious thesis of “*nomocracy*” that provides core human rights guarantees to entire humanity during war and armed conflicts. Masaji Chiba, “Legal Pluralism in Sri Lankan Society: Towards a General Theory of Non-Western Law,” *Journal of Legal Pluralism*, no.33 (1993): 197-212, provides modus operandi for harmonious order in a highly polarized nonwestern society through *legal pluralism*. As it rests upon a workable legislative arrangement of core values as cherished by human civilization, religion, culture, science, traditions and contemporary administration to govern a multi ethnic society. Resultantly Upendra Baxi, “*The Conflicting Conceptions of Legal Cultures and the Conflict of Legal Cultures*,” in *Rechtstheorie: Monistic or Pluralistic Legal Culture? Anthropological and Ethnological Foundations of Traditional and Modern Legal Systems*, eds. Peter Sack, Carl P. Wellman, and Mitsukuni Yasaki (Berlin: Duncker & Humblot, 1991) identifies it as a “*neo-liberal people’s law*” paradigm. Mainly to promote “*culture of law*” especially in non-western societies, which are intrinsically more tilted towards traditional and charismatic authorities than secular alien laws. According to Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006) on the one hand it is a pragmatic way to find out an indigenous and independent identity postulate for Asian societies. On the other hand, it is a viable rationale to subdue constant and unavoidable frictions between secular state apparatus, religion, culture, ethnic norms, and local traditions. Such frictions in the way to establish political authority in a state have also

been highlighted by Scott Veitch, Emiliios Christodoulidis, and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (New York: Routledge, Taylor & Francis Group, 2012) who formulate four categories of political rationalities and authorities. These include “*informal irrational*” which covers traditional tribal and feudal norms, “*formal irrational*” deals with the charismatic authority of religion, “*informal rational*” deals with autocratic administrative measures and “*formal rational*” covers positive legislative process. Accordingly, Gad Barzilai, "Beyond Relativism: Where is Political Power?," *Theoretical Inquires in Law* 9, no.2 (2008): 395-416, discusses them in conflict criminology paradigm and believes that their identity politics engenders lawlessness in society. For Charles A. Ellwood, “A Psychological Theory of Revolutions,” *American Journal of Sociology* 11, no. 1 (1905): 49-59, it is because depreciations in habitual obedience to law lead to anarchy. Then such feeble social control prompts governments to adopt exceptional administrative measures as discussed by A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (New Delhi: Indian Reprint, Universal Law Publishing Co., 2014) under the notion of “*rule by law*” to enforce rule of law even by compromising natural justice.

Hence, to counter the above-mentioned scenario of socio-legal conflicts, Veit Bader, “Constitutionalizing secularism, alternative secularism or liberal-democratic constitutionalism? : A Critical reading of some Turkish, ECtHR and Indian Supreme Court cases on ‘secularism’,” *Utrecht Law Review* 6, no. 3 (2010): 8-35, upholds a liberal paradigm of toleration of diversity up to the threshold of public order. This constitutional

“*contextualization*” through judiciary attempts to maintain a ‘*bare minimum*’ for all citizens on touch stone of fundamental rights, yet not able to comprehend impacts of racial or religious ideology on rational thinking and neutrality of state apparatus. However, by considering impacts of religious, ethnic, and cultural identities on secular political authority and legal system Menski proposes a general legal theory to legislate “*people’s law*” especially for multi ethnic and religious societies. He attempts to construct pragmatic legal principles through harmonious inferences from four core sources, namely religious doctrines, socio-cultural norms, international human rights and prevailing substantive laws. In his scheme of “*kite model*” of jurisprudence, religious doctrines precede socio-cultural local traditions, human rights values, and the state’s positive law respectively. Though he indicates that inference of unanimous legal principles, political authority and national identity in ideological and polarized societies are like “*flying kites*” with absolute balance in rough air. Yet for him it is a viable method to avoid accumulations of dissent and to counter radical ideologies and violence by the ‘*tolerance of diversities*’. Then the question is that which institution has an authoritative position in this *neo-sociological* jurisprudence? Interestingly, he is silent on this aspect in spite of being focused on *Sharia* and *Vedic* edicts to craft “*living laws*” for South Asia. At this juncture, N. W. Barber, “Legal Realism, Pluralism and Their Challengers,” *Legal Research Papers Series: University of Oxford*, paper no. 76 (2012): 1-24, relies upon the institution of judiciary for pragmatic “*living laws*,” as he perceives socio-legal pluralism a subsidiary of realism. Like Hart and Dworkin, he indicates that judicial mind of trained judges is capable to “*hunch*” over a proper application of ‘*constructed*’ rules in a given society. Such perspective is also

compatible to *counter radicalization* and *de-radicalization* study of Hamed El-Said, *New Approaches to Countering Terrorism: Designing and Evaluating Counter Radicalization and De-Radicalization Programs* (London: Palgrave Macmillan, 2015) to cure violent extremism in Pakistan. While the former deals with community centric state measures to curb violent extremism and judiciary under its writ prerogative has jurisdictions to address chronic socio-legal concerns of society. Whereas the later deals with prison reforms to counter radical minds of inmates under therapeutic penology as discussed by Bruce J. Winick, "Therapeutic Jurisprudence and Problem Solving Courts," *Fordham Urban Law Journal* 30, no.3 (2003): 1055-1090. Accordingly Charlotte Garden, "Meta Rights," *Fordham Law Review* 83, no.2 (2014): 855-906 indicates that judiciary has potential not only to curb custodial torture but also to address human rights concerns of prisoners. Since *Meta right* is such an enabling milieu that materializes human dignity and protection of other fundamental rights by dealing with personal rights like right to remain silent, protection against self-incrimination, torture and degrading treatment. Meaning thereby respect for human dignity either during detention or liberty is an essential touchstone in society as espoused by Shah Wali Allah in Marcia K. Hermansen, trans., *The Conclusive Argument from God: Shah Wali Allah of Delhi's Hujjat Allah al-Baligha* (Leiden: E. J. Brill, 1996). He gives four interconnected and contingent stages to achieve a balanced and harmonized collective good in society for which human dignity, equality and personal liberty as "*bare minimum*" constitute the foremost prerequisite. Then such "*categorical imperative*" is proceeded by conducive family life and reciprocity of equitable social transactions, effective and just political order and lastly the peaceful universal coexistence.

Interestingly speaking Iqbal in his Mohammad Iqbal, *The Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934) espouses the same under the notion of collective national ego. And alike Shah Wali Allah as well as Kant existence of ‘bare minimum’ is a prerequisite for him to form collective ego [*Will of the people*] through parliamentary dialectics. Accordingly, his rational interpretation of “*Tauhid*” covers equality, personal and civil liberties as well as national solidarity to accomplish public interest through just legal order. And for this purpose he relies upon the formation of individual’s ego and integrity to craft a right centered collective Will. The normative approach of Shah Wali Allah, Iqbal and Kant is also espoused by Katerina Dalacoura, *Islam, Liberalism and Human Rights: Impacts for International Relations* (New York: I. B. Tauris, 2007) as indicates that only liberal Muslim society can uphold liberal and rational interpretation of *Koran* that makes a state morally just. It further indicates that only equitable social process leads to fair political process that furthers liberalism and popular sovereignty. Argues ahead that though Islam profess collectivism and social reciprocity as compare to absolute individualism, yet the constitutional apparatus of enforcement of fundamental rights even in Muslim states is a viable method for “*toleration of intolerants*” to accommodate political dissents, religious diversity and subaltern deprivations. It seems more practical as compare to idealistic connotation of Iqbal and Kant because most of the newly independent Muslim states including Pakistan lack the precondition of social homogeneity to craft a just political and legal order.

CENTRAL ARGUMENT

To deal with human rights violations during internal disturbances this study argues that; the constitutional provision of due process of law remains intact even during public emergencies and endorses other fundamental guarantees in Pakistan. Its pragmatic enforcement through public interest litigations along with a strict adherence to non-derogable rights in domestic legislations curbs executive impunities and increases accountability in low or high threshold of law enforcement operations.

METHODS OF RESEARCH

This exploratory research explains the phenomena of human rights violations during internal disturbances with snow ball effect of qualitative methods. The snow ball method is resorted not only to induct case laws but also the relevant interdisciplinary study relating to constitution, International, human rights, humanitarian and criminal law, domestic special and general criminal law, jurisprudence, sociology, criminology, psychology, political science and international relations. It helps to formulate building blocks for logical arguments and formation of central arguments of the study. Starting from an inductive assimilation of primary sources like International Human Rights and Humanitarian Law Conventions, Rome Statutes of International Criminal Law. Along with domestic legislations this study conducts an exploratory research on the impact of preventive and anti-terrorism laws on human rights in Pakistan with a generalized to specific approach.

This research analyzes the academic debate on all the key issues raised through secondary documents-books and journals articles. The relevant literature has extensively reviewed and analyzed with inductive-deductive method to understand the core problem. By thoroughly reviewing the work of other authors, the research establishes the connection of the present study to the past and present literature. Inductive study blends the review of relevant literature with critical and in-depth analysis of case laws to deduce judicial theory and practices to these human rights violation. In this regard, the evidence has been collected from various sources and from ongoing practice, citing a variety of cases. The case study explores the difference in the scale and nature of the problem and clear pictures of theory and practice have been presented. Whereas for assessing domestic criminal laws the qualitative method of the ROCCPI analysis is priorities to evaluate impacts of special and general criminal laws on human rights in Pakistan. Resultantly rules of the existing substantive law, opportunity for drafting special criminal laws, capacity of the intended subjects and implementing agencies. Along with the communication, dissemination and public appraisal of the legislative intent, sociopolitical and legal ideology behind the criminal laws and policies, process of the law enforcement actions and impacts of intended sanctions has been evaluated thoroughly on the touch stone of constitutional guarantees. Situational analysis of qualitative research is employed to analyze law enforcement actions and counter insurgency operations in Pakistan to observe the trends of executive impunity and administrative discretions. A comparative study of Indian and Pakistani judicial and

administrative practices has also been conducted for validity and reliability of the central argument.

Keeping in mind that law is an evolving subject internet sources, databases, newspapers and magazine has been extensively used to update the material. This methodology enables this study to fully comprehend the problem and provides pragmatic recommendations.

SCHEME OF THE STUDY

It gives a complete detail about chapters, which are as following. ***Introduction, Significance and Scope of the Research*** deals with the research topic, its background and contemporary implications along with the statement of research problem and central argument of study. It also includes the review of relevant literature and related case laws for the construction of argumentation in an inductive-deductive method.

Theoretical Framework of this study is divided in to two comprehensive portions, ***Part: I*** and ***Part: II*** respectively. Since the former discusses philosophical and jurisprudential perspective of state's relationships with its citizens to evaluate administrative patterns. It is intended to analysis different perspectives of state sovereignty to understand it's correlation with civil and personal liberties. Mainly the social contract scheme, evolutionary nation state framework, and authoritarian administrative model are prioritized with an interdisciplinary approach. It aims to understand State's authority, legitimacy, and

efficacy to enlarge or to reduce the quantum of liberties in accordance with Universalist perspective of human right.

Then *Part: II* discuss *The Politics of Dissents and its Subsequent Administrative Response* in the above mentioned perspectives of state sovereignty. Accordingly, socio-political, reformative, and revolutionary movements are theoretically examined to understand the characteristics of a lower threshold of internal disturbances and likelihood of violence. It mainly attempts to locate the causes of human rights violations amid all kind of disturbances ranging from unlawful assemblies to protest movements in Pakistan.

Then the chapter of *Human Rights Concerns in the Laws and Practices Relating to Public Order in Pakistan* covers the general and special criminal laws in context to maintenance of public order. Its vast canvas covers the legal responses to a lower threshold of internal disturbances ranging from unlawful assemblies, public riots, sporadic acts of sabotage, protracted law and order crisis and its probable transition in to civil commotion. For such purpose it focuses on the relevant chapters of the Pakistan Penal Code, 1860 and the Criminal Procedure Code, 1898, mainly through case laws and qualitative method of assessing legislation. Then to examine special administrative and police powers to counter prejudicial activities of suspected persons, study relies upon the special law of the W.P. Maintenance of Public order, 1960 and the Prevention of Anti-National Activities Act, 1974. It mainly examines the impacts of such laws on personal and civil liberties, due process of law and right to fair trial in Pakistan. Also evaluates the phenomena of

executive impunities, seemingly associated with administrative powers to maintain law and order.

The chapter of *Human Rights Concerns in the Laws and Practices Relating to National Security in Pakistan* covers special laws relating to anti-terrorism, internal armed disturbances, public emergencies and defence of Pakistan. The Anti-Terrorism Act, 1997, The Pakistan Army Act, 1952, The Protection of Pakistan Act, 2014 and relevant constitutional provision are prioritized to be analyzed in the preceding manner. Mostly sporadic and protracted incidents of political and criminal terrorism, localized low intensity conflicts, internal armed conflicts and a full scale insurgency are the subject matter of this part. This chapter is divided in to two core parts, firstly it discusses a theoretical perspective of a high threshold of internal disturbance that deals with insurrectional movements, waging of war and raising arms against the state. Then it analyzes the relevant laws and practices to comprehend the human rights concerns during conflicts paradigm in Pakistan. It mainly focuses on the impact of such laws on non-derogable norms of human rights in a pre and post emergency scenario. It also evaluates an apparent vulnerability of these norms mostly in the background of proclamation of public emergency, when constitutional guarantees are not operative as such.

The chapter of *Judicial Protection of Core Human Rights Values during Conflicts* deals with the international human rights and humanitarian law simultaneously. It is to find out a pragmatic legal framework of fundamental guarantees not only for the stakeholders of

conflicts but also for civilians residing in conflict zones. Also covers the fundamental rights as enshrined in the constitution of Pakistan to protect non-derogable rights along with other core human rights and humanitarian values. Such probability is stemming from a combination of due process of law and rule of law under constitutionalism in all types of conflicts irrespective of their nature and intensity.

Conclusion covers the research findings of study and policy implications for peaceful settlement of protracted socio-political conflicts. It not only aims to minimize ideological fragmentations but also focuses on a likely inclusion of marginalized minorities and dissenting groups in to mainstream national politics. It is primarily to achieve a pragmatic constitutionalism, federalism and egalitarianism in Pakistan.

Theoretical Framework of the Study

Part: I: State and Its Civil Society

Thompson associates the phenomena of interstate conflicts and strife with armed groups which are socio-politically marginalized and deviant sub-state or non-state actors, willing to enforce their respective ideology through the employment of violence.¹⁸⁴ He further argues that armed groups connected with insurgency, terrorism, militia warfare, transnational criminal organizations and gang wars nurture in fragile, weak, post conflict and autocratic states.¹⁸⁵ Rapoport connects the occurrence of international terrorism with revolutionary zeal of subjugated, polarized and oppressed citizens of undemocratic regimes.¹⁸⁶ Consequently the focus of study revolves around the state's relationship with its citizens, to understand the causation of such marginalization and polarization as well as to identify state's fragility which in Thompson's views originates from institutional injustice.¹⁸⁷

On the other hand, Feinberg argues that conflicts of norms and institutions occur when states are facing threats to their existence through terrorism, internal strife and insurgencies. In this context, civil and personal liberties are partially or wholly restrained

¹⁸⁴ See Peter Thompson, *Armed Groups: 21ST Century Threat* (London: Rowman & Littlefield Publishing Group, Inc., 2014), 5-17, 33-40, 55-59.

¹⁸⁵ *Ibid.*, 66-67, 80-96.

¹⁸⁶ See David C. Rapoport, "The Four Waves of Modern Terrorism," in *Attacking Terrorism: Elements of a Grand Strategy*, eds. Audrey Cronin and James Ludes (Washington,DC: George-Town University Press, 2004), 46-73.

¹⁸⁷ See Thompson, *Armed Group*, 44-45.

during proclamation of public emergency or law enforcement operations prior to such proclamations. She portrays this situation as “*conflicts of norms*” where doctrine of national security prevails over fundamental rights and argues that such ‘*conflict*’ can be neutralized in the favor of “*human security*” through judicial interpretations.¹⁸⁸ Subsequently constitutional philosophies and jurisprudence are relied upon by this study not only to analyze state and its civil society but also its ideological perspective of statehood, institutional mechanism, conflict management and resolution. It is primarily to evaluate thresholds of personal and civil liberties under a vibrancy of civil society and statistic notion of statehood amid the politics of dissent and resistance in Pakistan.¹⁸⁹ She also inquires the significance of exploring practical interconnectivity between civil and political society under constitutional paradigm to achieve “*balancing of interests for human security*”?¹⁹⁰ Are both of these entities related to each other with reciprocity of rights and obligation? If yes, then what is a plausible barometer to access such reciprocity? Does it mean to attain liberal democracy for which state is only an authoritative regulator to provide institutional justice and fair play for citizens? Or, does it mean an authoritarian

¹⁸⁸ See Myriam Feinberg, “International counterterrorism-National Security and Human Rights: conflicts of norms or checks and balances?,” *The International Journal of Human Rights* 19, no. 4 (2015): 389-392.

¹⁸⁹ See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movement and Third World Resistance* (New Delhi: First South Asian edition, Foundation Books Pvt., Ltd, 2005), 189-194, 195-202.

¹⁹⁰ See Feinberg, *International Counterterrorism*, 390; D. Litowitz, “Gramsci, Hegemony and the Law,” *Brighton Young University Law Review*, no.2 (2000):518, quoted in, Kalim Imam, “Police and Rule of law in Pakistan: A Historical Analysis,” *Berkeley Journal of Social Sciences* 1, no. 8 (2011): 4: bifurcates a society in to civil and political domains for social control and cohesion. While civil society connotes informal institutions such as educational and religious institutions, political parties, community organizations which usually perform their functions through steeled norms and values. Whereas political society connotes the formal institutions such as legislature, executive and judiciary which act under prescribed rules and legal rational authority. Gramsci argues that compatibility between civil and political society is mandatory for contractual society, yet he illustrates ahead that former works on the bases of mutual consent, trust and interest whereas later works on the bases of established rules. Therefore for a pragmatic rule of law in a constitutional state civil society must give its consent to such established laws, which ultimately means that political society has an absolute hegemony over civil society.

entity not only to establish its writ through a legitimate use of force but also have hegemony over means of production and administration to maintain a socio-economic equilibrium between its citizens? Whether these two scenarios complement each other or conflict with each other? Can both paradigms be contextualized simultaneously through institutional justice under a due process of law? What is an essential element for such contextualization? Whether in this context peace and public order serve as core determinants, if yes, then how to establish such public peace? Is there any variance between state and community's perspective of "peace" while former is based on hegemony whereas latter is based upon mutual consent? Can linkages between both of them be established through a pragmatic enforcement of human rights?

Accordingly, out of the four core elements of statehood,¹⁹¹ this theoretical part of study deals with correlations between population and government. It formulates a direct relationship between these two elements by considering state as a legal entity, meaning thereby as a legal person having rights as well as duties.¹⁹² To understand such duties, this study initially focuses on social contract model and evolutionary model of statehood. Since an independent government is responsible to form sovereignty along with legitimacy over

¹⁹¹ See Montevideo, *Montevideo Convention on Rights and Duties of State*, by The Governments represented in the Seventh International Conference of American States (Montevideo, December 26, 1933), 1: for Article 1, 2 and 3; U.N. General Assembly Resolution 375(IV), *Draft Declaration on Rights and Duties of State*, by International Law Commission (Year Book of The International Law Commission, 1949), 2: for Article 1, 2, 3, 4 and 5.

¹⁹² See Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontent," *Columbia Journal of Transnational Law* 37 (1999): 403-457, at 409: "The State is an association of a considerable number of men living within a definite territory, constituted in fact as a political society and subject to the supreme authority of a sovereign, who has the power, ability and means to maintain the political organization of the association, with the assistance of the law, and to regulate and protect the rights of the members, to conduct relations with other states and to assume responsibility for its acts."

its defined territory and permanent population under these classical prototypes.¹⁹³ Here sovereignty is a territorial and ideological integrity of a state in the post Westphalian scenario of international law. And legitimacy is an indigenous capacity of the respective government to establish its writ over population.¹⁹⁴ Free will individuals of contractual paradigm honor such authority in a capacity of the citizenship.¹⁹⁵ It is due to the reason that being rational actors, they not only want to avoid anarchy but also believe on the procedural legality of such valid authority.¹⁹⁶ Validity as a legal concept focuses on the procedures and legally acknowledged parameters to measure this legal rational authority.¹⁹⁷ It also supplements political obligations among citizens of a respective state to observe an obedience to law. This actual and commonly shared obedience to law forms legitimacy not only for a particular legal system but also for the respective government.¹⁹⁸ This study argues that government has a pledge with its population¹⁹⁹ to give supremacy to

¹⁹³ See Jason Franks, *Rethinking the Roots of Terrorism* (Hampshire, England: Palgrave Macmillan, Macmillan Distribution Ltd, 2006), 56-57.

¹⁹⁴ *Ibid.*, 13-14, 22.

¹⁹⁵ See Bryan A. Garner, et al., ed. *Black's Law Dictionary*, eds., Bryan A. Garner, et al., 8th ed. (Boston: West Publishing Company, 2004), 261: "Citizen,---- is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges." And at 1424: "social contract—the express or implied agreement between citizens and their government by which individual agree to surrender certain freedom in exchange for mutual protection; an agreement forming the foundation of a political society."

¹⁹⁶ See Alpheus Thomas Mason and Richard H. Leach , "Struggle for Freedom in the Bible Commonwealth," in *In Quest Of Freedom* (Lanham: University Press of America, 1981), 35: "[D]ue to Fiduciary nature of government, doctrines of natural rights, social contract, advocacy of the people's right of resistance and fundamental principle of constitutional law, government, like its citizens, is bound by law and that when it transcends these limits, it cannot claim validity"; Franks, *Rethinking the Roots of Terrorism*, 55-57.

¹⁹⁷ See Anthony M.Orum, "The Vision of Max Weber," in *Introduction to Political Sociology* (New Jersey: Prentice-Hall, INC, 1983), 53-56: for "Weber's image of why men obey."

¹⁹⁸ See S.P. Sathe, *Judicial Activism in India* (New Delhi: Oxford University Press, 2004), 253-254: Referring to Max Weber's concept of legitimacy as a sociological aspect for obedience(a surrender of free will by rational being) to authority, here legitimacy consist of three core components first the procedural legality of an action or order to qualify for legal validity. Secondly a widely shared conception of justice engenders a duty to obey law, and lastly an actual obedience and observance of law through a large number of people.

¹⁹⁹ *To establish and maintain sovereignty and legitimacy*

individual's integrity, conscious and liberty and consider them antecedent variables in a contractual scheme of popular sovereignty.²⁰⁰ Therefore presence of civil liberties and due process of law stimulates obedience to a particular legal order;²⁰¹ however their absence brings contrary impacts.²⁰² Moreover in an evolutionary, nation state and constructivist's scenario this study discusses the significance of rule of law under utilitarianism to protect vulnerable segments of society.²⁰³ Inverse in this context brings an irrational charisma of oppressive majority, failure of constitutional guaranties and an obsession for a specific ideology with an undue emphasis on law and order.²⁰⁴

²⁰⁰ See Ronald Dworkin, *Taking Rights Seriously* (Delhi: Fourth Indian Reprint, Universal Law Publishers, 2008), 197-198, 205: "the course of government is to steer to the middle, to balance the general good and personal rights, giving to each it's due-----the institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected."

²⁰¹ See H.L.A. Hart, *The Concept of law* (New Delhi: Oxford University Press, 2005), 80-90: "with an internal aspect (voluntarily free will and consent) one feels under obligation to obey authority."; Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Massachusetts: MIT Press, 1994), 578-583: Threshold of citizenship along with a scale of legitimacy and validity determines the scope of political obligations for citizens. Resultantly Hart says that citizen's internal (free will obedience) and external (based upon coercive nature of law) obligation to authority is conditional with the elements and characteristics of law.

²⁰² See John Rawls, *A Theory of Justice* (Third Indian Reprint. Delhi: Universal Law Publishing Co., 2008), 363-391; Dworkin, *Taking Rights Seriously*, 210-212, 221-222.

²⁰³ See Darren J O'Byrne, *Human Rights: An Introduction* (Delhi: Pearson Education (Singapore) Pte. Ltd., Indian Branch, 2005), 1-105: In contrast to social contract doctrine, social constructivist approach (historical evolution of rights through sociopolitical and religious movements along with Marx's class conflict, Weber's social antagonism, Feminism's gender conflict, cultural relativism and state centric civil and political liberties) suggests that men learn about their rights and duties from a respective society and prevailing conditions. Constructivists believe that rights are not universal rather protection of civil liberties is conditional to the existence of the state and public order.

²⁰⁴ See Franks, *Rethinking the Roots of Terrorism*, 2-3, 13-18, 22-27, 57; Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge: Cambridge University Press, 2007), 16-38; Wolfgang Sofsky, *Violence: Terrorism, Genocide, War* (London: Granta Books, 2003), 68-69, 71, 75-76: A governmental attempt to bring ideological homogeneity in the state by imposing the will of majority through state's apparatus create socio-political polarization in society.

Roy identifies such trend as “*hyper-nationalism*”, when in a parliamentary democratic set up majoritarian ideology is institutionalized through administrative apparatus.²⁰⁵ It not only engenders relative deprivation²⁰⁶ and crisis of identity²⁰⁷ among marginalized minorities but also ignites nationalist movements along with armed secessionism.²⁰⁸ Such paradigm crafts, diminished citizenship²⁰⁹ and ideological polarization, which transcends into ethnic conflicts and then political violence to defend or assert certain ideologies.²¹⁰ Varshney says that it is the outcome of a feeble federalism and an unpopular governmental legitimacy under a strong yet autocratic center.²¹¹

²⁰⁵ See Arundhati Roy, *Listening to Grass-Hoppers: Field Notes on Democracy* (First Pakistani Reprint. Rawalpindi: Services Book Club, GHQ, 2011), xxxiv-xxxvi, 26-27, 33: She also identifies this situation as ‘*neo-fascism*’ in the context of abuse of anti-terrorism laws and rise of Hindu radicalism in the form of Bharatiya Janta Party(BJP) in the Indian parliamentary democracy. It is in a deep contrast to constitutional secularism of India.

²⁰⁶ See James C. Davies, "Towards A Theory of Revolution," *American Sociological Review* 27, no. 1 (1962): 5-19, 6-7: Under a J-curve theory, masses feel deprived when sustainable socio-economic growth encounters some interval of economic recession along with political fragmentation. In this scenario actual socio-economic and political gains remain less than expected outcome. And if actual gains are far less than expected gains then dissatisfied masses feel deprived out of their perceived grievances; See also in Franks, *Rethinking the Roots of Terrorism*, 29-32; Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (London: Duke University Press, 1999), 333-337: for minority’s relative deprivation caused by structural inequalities and class difference, as well as an individual’s physiological deprivation.

²⁰⁷ See Noam Chomsky, *Necessary Illusions: Thought Control in Democratic Societies* (First Indian Reprint. New Delhi: Viva Books Private Limited, 2008), 280-282; Noam Chomsky, *For Reasons of State* (New York: The New Press, 2003), 350.

²⁰⁸ See David D. Laitin, *Nations, States, and Violence* (Clarendon: Oxford University Press, 2007), 1-26,

²⁰⁹ See John Finnis, *Natural Law & Natural Rights* (New York: Oxford University Press, 2011), 359-360.

²¹⁰ See Evelin G. Lindner, “*Genocide, Humiliation, and inferiority: An Interdisciplinary Perspective*,” in *Genocides by the Oppressed: Subaltern Genocide in Theory and Practice*, eds. Nicholas A. Robins and Adam Jones (Bloomington: Indiana University Press, 2009), 148-151; Leo Kuper, *Genocide: Its political use in the Twentieth Century* (New Haven: Yale University Press, 1981), 1-30.

²¹¹ See Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (First Pakistani Reprint. Karachi: Oxford University Press, 2003), 24-25, 30-31, 38: argues that ethnic construction is a shared conception of identity for a formation of nation and nation state. Such construction ignores micro level communal differences to establish homogeneity, however in the prolong absences of integration, inclusion and cohesion these minutes differences evolve in to an ethnic conflict. This conflict further transforms in to ethnic violence, pogroms and succession movements due to political manipulations of the elites of respective ethnic groups.

To restore legitimacy and writ over population and territory in the above mentioned scenario, respective governments usually resort to disproportionate and indiscriminate use of force along with other coercive measures through law enforcement agencies.²¹² Such instrumentality becomes valid and legalise after getting a legislative indemnity to counter dissent in an ideological nation state.²¹³ These practices in the name of nationalism engender executive impunities with regards to human rights violation and infringement of civil liberties.²¹⁴

As these transgressions are not only core causes but also outcomes of political violence,²¹⁵ resultanty the canvas of study in subsequent portions of this part revolves around formation of popular sovereignty, liberal democracy and dispensation of right based procedural justice. It also examines potentials for dialectical process for inclusion of dissenting minorities to formulate a conflict management mechanism during political protests. The core objective of such deliberation is to understand conceptual dynamics of state sovereignty, governmental legitimacy and citizenship. As on the one hand it endeavors to identify generalized root causes of executive impunities and socio-political fragmentations. Since both of them are considered as antecedent variables for protracted political violence and resulting human rights abuses.²¹⁶ On the other hand it intends for

²¹² See Franks, *Rethinking the Roots of Terrorism*, 14-15, 18-20; Roy, *Listening to Grass-Hoppers*, 29-31, 36-37, 147-152, 155-156.

²¹³ See Roy, *Listening to Grass-Hoppers*, 175-177.

²¹⁴ *Ibid.*, 28-29; Franks, *Rethinking the Roots of Terrorism*, 16, 55, 59; Anil Kalhan, "Colonial Continuities: Human Rights, Terrorism and Security law in India," *Columbia Journal of Asian Law* 20, no. 93 (2006): 93-234, 172-198.

²¹⁵ See Franks, *Rethinking the Roots of Terrorism*, 15, 57, 60-63.

²¹⁶ *Ibid.*, 13-18, 22-30.

remedial measures to deal with these issues especially in the context of Pakistan. It is mainly through an effective constitutionalism, federalism and political sovereignty of citizenship with a liberty to dissent, as enshrined in the social contract model.²¹⁷ As Rawls along with Soper formulates a combination of rule of law with due process of law to deal with this scenario. While former focuses on institutional justice under constitutionalism,²¹⁸ whereas latter emphasizes on the due process clauses by declaring them a higher law as compared to constitutional or procedural law.²¹⁹

Rights in the Context of Pre to Post Statehood Communities

Hobbes (1588-1679) and Locke (1632-1704) being “*essentialists*,”²²⁰ urge on pre social individual rights. Former requires a peaceful community and an assertive state to avoid anarchical wrangling of survival of the fittest with a centrality to right to life and security.²²¹ And latter suggests a contractual society with a premise of individual liberty to expand the horizon of inborn natural freedom through a least assertive state.²²² However a query arises about the relationships of community and state, that which element has

²¹⁷ See Mason and Leach, *In Quest Of Freedom*, 21-35, 55-70, 368-383.

²¹⁸ See Rawls, *A Theory of Justice*, 239.

²¹⁹ See Philip Soper, “Some Natural Confusions about Natural Law,” *Michigan Law Review* 90, no. 8 (1992): 2393-2423, 2408-2411.

²²⁰ See O’Byrne, *Human Rights: An Introduction*, 17-35: Hobbes’s and Locke’s absolute liberty is in abstraction without any evolutionary or statutory context, this liberalism focuses on individualistic autonomy, self-determination, and independent thinking even before entering in to any social relation. It argues for innate human rights and freedom prior to any community or statehood.

²²¹ *Ibid.*, 29-30.

²²² See Alpheus Thomas Mason and Richard H. Leach, “Taproots of Freedom,” in *In Quest Of Freedom* (Lanham: University Press of America, 1981), 10-11: according to John Lock, “Perfect Freedom and Equality” under natural law; Ronald Grimsley, “Political Theory,” in *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), 116.

preeminence with regards to a desired mutual peace in the contractual paradigm? Hobbes in this context elaborates that self-preservation in the form of basic physiological, psychological and material requirements is a supreme object of every human being.²²³ To attain this core objective, men of rationality and reasoning form a community through mutual consensus.²²⁴ For them it has an ethical supremacy,²²⁵ yet no sovereign exists among them, Hobbes and latter Hart ²²⁶[though in a different perspective]²²⁷ identify this transitional phase as “*pre-legal period.*”²²⁸ Meanwhile Austin (1790-1859) at this point is also on the same line and identifies this ethical position as “*positive morality.*” which only has a persuasive impact on sovereign but not binding as such.²²⁹ Consequently, the fictional contract exists among egalitarians but not between sovereign and egalitarians. However sovereign is under a moral obligation to protect and preserve the core human rights.²³⁰ Stumpf identifies this position as a confluence between morality and natural law, being an authoritative guideline for positive law.²³¹ Pound indicates accordingly that

²²³ See Samuel Enoch Stumpf, *Morality and the Law* (Tennessee: Vanderbilt university Press, 1966), 189-196: For Hobbes morality of self-preservation based on “the minimum argument for natural law”, these bare minimum standards for existence consist of right to life, equality, right to fair trail, socioeconomic justice, and pursuit to happiness and freedom of conscious. In other words the contemporary fundamental rights as enshrined in constitution of USA, India and Pakistan are the core objectives to form a social contract.

²²⁴ *Ibid.*, 198-199, 202.

²²⁵ *Ibid.*, 204-205.

²²⁶ See Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: Lexis Nexis Butterworths Tolly, U.K. Ltd., 2003), 87-107: Hart’s ‘*pre- legal period*’ of a tribal society has some basic rule of mutual forbearance; he identifies them as “primary rules.” According to Hart such primary rules have uncertainty and to attain certainty of law secondary rules such as rule of recognition, rule of change and rule of adjudication are attained through the creation of a legal system. However these primary rules, which Cotterrell argues come from reasoning and produce core legal Principles give validity to all other secondary rules , under the analytical mechanism of a legal system.

²²⁷ See H.L.A. Hart, *The Concept of law* (New Delhi: Oxford University Press, 2005), 91-99.

²²⁸ See Stumpf, *Morality and the Law*, 166-167, 181-188.

²²⁹ See Cotterrell, *The Politics of Jurisprudence*, 54-56, 65-70.

²³⁰ See Stumpf, *Morality and the Law*, 204-205.

²³¹ *Ibid.*, 208-211: “ The fiction of a social contract is not the decisive point here, what is important about the contract theory, however, is its insistence that, either chronologically or logically, there is, prior to sovereign , a moral order and that the function of the sovereign is to implement it.-----In this view, the origin of sovereignty lies in morality----- in

instead of validation, which is beyond its scope the natural law should be resorted to assess positive law.²³²

Similarly, another essentialist cum universalist,²³³ Kant (1724-1804) narrates under the expression of ‘*provisionally rightful possession*’²³⁴ that even prior to the statehood; individuals have internal freedom and inborn natural rights to protect their life, liberty, and property. Yet these rights are susceptible in the absence of an authoritative force to protect them; resultantly he uses the term ‘provisionally’ to explain their vulnerability. Nevertheless, with such a perfect freedom an individual becomes a man of integrity and is capable to decide rationally for him and others.²³⁵ Then for a rational decision Kant combines intuition with intention to bring conclusiveness to individual and collective rights and contextualizes them to a free society.²³⁶

the natural moral law which logically leads men, in the interests of peace, survival and the enjoyment of human contentment, to create a civil society. From its inception then, the sovereign has a moral cause and a moral end. ----- [Thus] the safety of the people is the supreme law.”

²³² See Roscoe Pound, *The Ideal Element in Law* (Calcutta: Calcutta University Press, 1958), 50.

²³³ See O’Byrne, *Human Rights: An Introduction*, 38-59: Kant gives a generalized normative principle of rights and duties; here rights are conditional with corresponding duties to be rationalized in a respective society. Thus absolute freedom of man is associated with its corresponding absolute freedom of others in a social setup. This generalized principle is universal for all human societies where participant of contractual societies are moral agents not for themselves but for all others around them. This moral agency of human beings for each other is not only a rationale for international human rights ,but also gives a conception of civil liberties and fundamental rights ,where The State, its institution and its citizens act like a moral agent for each other.

²³⁴ See Immanuel Kant, “Groundwork of Metaphysics of Morals,” in *Practical Philosophy* , ed., trans. Mary Gregor (New York: Cambridge University Press, 2008), 410.

²³⁵ *Ibid.*, 409-410.

²³⁶ See Evan Fox-Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, (2010): 301-336, at 325; Darren J O’Byrne, *Human Rights: An Introduction* (Delhi: Pearson Education (Singapore) Pte. Ltd., Indian Branch, 2005), 55-59: Intuition as a *Prior* (prior to experience) is a personal judgment of a freewill individual, as a man of integrity (poses inborn liberty, freedom and possession of property in Kant’s vision) wants a respectful existence of his life in an external condition . According to Kant this desire of respectful coexistence reflects an intention (motive) to do right things to save the integrities of others because everyone has at least these minima of natural rights. An intuition infers from natural law gives such an ethical generalization which prohibits to doing wrong to others

It is quite similar to the Locke's "reasonable man", who forms a community on the basis of expansion of liberty. This view of material benefit is also close to Hobbes's conception of social contract, where rights, obligations and rules of conducts stem from it.²³⁷ However to avoid any suppression in an organized society; Locke's reasonable man does not surrender all of his will. He only surrenders as much as necessary to form a civil and political society on a touchstone of shared conception of justice.²³⁸

In fact this autonomous portion of individual's will provides a rationale for resistance if any subjugation occurs in a civil society.²³⁹ Akin to Hobbesian paradigm, the Lockean model of civil and political society is characterized into horizontal and vertical domains. In his horizontal sphere, men of integrity form a contractual social bond for mutual coexistence through moral agency of each other.²⁴⁰ Kantian relational perspective produces

because inverse of it is itself harmful for one's own integrity and produces a vicious cycle of subjugation. Thus a right full intuition with good intention logically leads to an ethical behavior of good will with regards to social action. This perspective of good will also works as a dialectical synthesis, when heterogeneous reasons, emotions and sentiments act as a causation of exclusion from contractual scheme.

²³⁷ See Ronald Grimsley, "Political Theory," in *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), 117; Michael Haas, "The Philosophical Basis for Human Rights" in *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), 23.

²³⁸ See Alpheus Thomas Mason and Richard H. Leach, "Taproots of Freedom," in *In Quest Of Freedom* (Lanham: University Press of America, 1981), 13; W. Friedmann, *Legal Theory* (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co.Pvt Ltd, 2008), 123-125.

²³⁹ *Ibid.*, 14-15: for Locke, Natural law is ought to fill the gap left by positive law, and provide a logical ground for resistance and revolt when tyranny of majority rule or crises of governance occur in a contractual society; This position has also been recognized by Dworkin, who says that there is always a right answer to a legal problem, and this right answer is based upon principles (Extracted from natural law) present yet undiscovered in a seamless web of a legal system. See in Ronald Dworkin, *Taking Rights Seriously* (Fourth Indian Reprint. Delhi: Universal Law Publishers, 2008), 82-117, and at 210-211: "If the law is doubtful, he may follow his own judgment, even after a contrary decision by the highest competent court," and at 221-222: "Conviction under a vague criminal law offends the moral and political ideals of due process in two ways. First, it places a citizen in the unfair position of either acting at his peril or accepting a more stringent restriction on his life than the legislature may have authorized."

²⁴⁰ See Jean L. Cohen and Andrew Arato, "Civil Disobedience and Civil Society," in *Civil Society and Political Theory* (London: The MIT Press, 1994), 589-603.

a system of reciprocity and qualifies as civil society.²⁴¹It makes a subsequent political contract to form a public body to protect its mutually surrendered rights. It consists of public institutions and forms an individual-centric vertical political society (interdependent set of institutions like legislatures, executive and judiciary).²⁴²The centrality of individual's rights in a civil and political society gives a rationale for contractual liberal theory, which ultimately leads to a concept of participatory and limited government.²⁴³

Locke and Rousseau (1712-1778) commonly believe that a society does not evolve through an evolutionary process or by a continuity of some dynasties or states, with ruler and subject relation. Rather it emerges through a voluntarily agreement of free individuals having a presumed equality.²⁴⁴This equality is a practical standard of ethics and morality for Kant, it is the only pragmatic ground for Kant's "*man of integrity*", Locke's "*Reasonable man*" and Rousseau's "*master of himself with independent will*" where an individual interacts with equals to gain rightful conditions. Kant calls it "*categorical imperative*", a universal parameter of interaction between equals with equipoise of goodwill for all.²⁴⁵Rousseau identifies this phenomenon as a "*virtue*" of contractual

²⁴¹ Ibid., 596-597; O'Byrne, *Human Rights: An Introduction*, 30-35: An essentialist and universalist perspective of class less society of equals under a notion of egalitarianism.

²⁴² Ibid., 602-603.

²⁴³ See Wilfrid E. Rumble, "*James Madison on the Value of Bills of Rights*," in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 125.

²⁴⁴ See Grimsley, *Rousseau*, 115.

²⁴⁵ See Immanuel Kant, "Groundwork of Metaphysics of Morals," in *Practical Philosophy*, ed., and trans. Mary Gregor (New York: Cambridge University Press, 2008), 407; Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens," *The Yale Journal of International Law* 34, no. 331 (2009): 331-387, at 353: The categorical imperative is a practical reason and moral standard to form a community, where individual's freedom is compatible with others.

society²⁴⁶ and a contemporary political philosopher John Rawls describes it as an “*ethic of mutual respect and self esteem.*”²⁴⁷

After attaining this “*ethical common wealth*”,²⁴⁸ Kant argues in “*mine or yours*” debate that owing to inbuilt mutual relationships²⁴⁹ and altruism, man gets an ‘*outer freedom*’ to claim the ownership of things and actions which do not fall in the category of his ‘*internal freedom*’.²⁵⁰ Through these acquired rights under categorical imperative, man claims the ownership of entities which are external (like public institutions, legislations, public property, governance and civil liberties etc) up to an extent of the same claim of others.²⁵¹ Thus participants of social contract form a “*commonwealth*” for communal interests and reciprocally entitle themselves to achieve collective civil liberties under “*rightful conditions*”.²⁵² These conditions signify a non-instrumentalization, where they have a right to self determination [personal liberty] for outer freedom [civil liberties] without any wrongful interference to their inborn natural rights.²⁵³

²⁴⁶ See Grimsley, *Rousseau*, 96.

²⁴⁷ See Rawls, *A Theory of Justice*, 256.

²⁴⁸ *Ibid.*, 257.

²⁴⁹ See Evan Fox-Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, (2010): 301-336, at 326: Fiduciary relationship of man with community and state based upon integrity, formal moral equality and solicitude.

²⁵⁰ An absolute liberty to utilize personal belongings like life, body, thought, property and actions etc without any permission or interception.

²⁵¹ See Immanuel Kant, “Groundwork of Metaphysics of Morals,” in *Practical Philosophy*, ed., and trans. Mary Gregor (New York: Cambridge University Press, 2008), 402-413.

²⁵² *Ibid.*, 455-460.

²⁵³ See W. Friedman, *Legal Theory* (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co. Pvt Ltd, 2008), 157-161.

Moreover individuals are not simply means to do or achieve some ends through institutions or through other individuals. Rather under rightful conditions, they are themselves ‘ends’ to get collective well being without any constraint and domination.²⁵⁴Such a coexistence of community has also been discussed by a contemporary postivist Hart(1961). He says that a generalised esteem for right to life, liberty, dignity, equality and property creates a “*mutual forbearance*”.²⁵⁵ By concluding the Hobbsian “*ethical notion of one’s self-preservation*,”²⁵⁶he calls it a “*minimum content of natural law*”, and declares it mandatory to maintain an equilibrium in a community. Hart argues that laws and morals have no utility in an uneven, vulnerable and indifferent society with inadequate resources until its members satisfy their specific level of physiological needs.²⁵⁷

On the same ground with Lockean Spirit, Julius Stone advocates for an evaluation of positive law through natural law scale for the protection of non-derogable rights.²⁵⁸He refers to two core principles of Stammler (1856-1938) for a just community, through “*principles of respect*” and “*principle of participation*”²⁵⁹ an individual can protect his dignity and basic human rights and can remain a man of free will within a community of

²⁵⁴ See Michael Haas, “The Philosophical Basis for Human Rights,” in *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), 24 and at 28; Evan Fox. Decent and Evan Criddle, “The Fiduciary Constitution of Human Rights,” *Cambridge University Press* 15, (2010): 301-336, 321-322.

²⁵⁵ See H.L.A. Hart, *The Concept of law* (New Delhi: Oxford University Press, 2005), 193-200.

²⁵⁶ See Stumpf, *Morality and the Law*, 189-217.

²⁵⁷ See Hart, *The Concept of Law*, 193-194: “unless certain physical, psychological, or economic conditions are satisfied-----no system of laws or code of morals can be established.”

²⁵⁸ See Julius Stone, *Human Law & Human Justice* (Second Indian Reprint. New Delhi: Universal Law Publishing Co.Pvt Ltd, 2004), 75-78.

²⁵⁹ *Ibid.*, 174-175: Stammler a Neo Kantian German jurist and a social idealist, his Principles of Respect consist of two core elements, “(1) The Content of a person’s violation must not depend upon the arbitrary will of another,(2) Every legal demand can only be maintained in such a way that the person obligated may remain a fellow-creature.” Stammler’s Principles of Participation also consist of two elements, “(1) A person legally obligated must not be arbitrarily excluded from the community,(2) Every lawful power of decision may exclude the person affected by it from the community only to the extent that person may remain a fellow-creature.”

free will equals. He further relies upon Radbruch (1878-1949)²⁶⁰ for a workable fusion of positive law with natural law to bring justice in a community. Radbruch has also been quoted by Stumpf in such way, “*the Idea of law can be none other than justice*”,²⁶¹ and justice is defined by Pound as “...*the ideal relation between men*”.²⁶² Therefore justice is objectively considered as an accomplishment of the core principles of “*catagorical imperatives*” through Hobbesian and Hartian perspective of legal order.²⁶³ Such a practical standard is crucial to evaluate an authoritative command in individual as well as in institutional capacity.²⁶⁴ For such purpose, legitimacy of a legal precept is conditional with its conformity to “*certain minimum standards of justice*”, stemming from a conception of individual equality.²⁶⁵

This portion of study argues by concentrating on contractual philosophers that freewill individuals, conscious about their rights make a bond with each other on the consideration of rightful conditions. They rationally form a civil society for their own collective benefits and agree to surrender some of their privileges (absolute freedom in a tribal or nomadic formation) in the name of civil society. Their allegiances to a respective society are conditional to rightful conditions under the contours of self preservation, liberty and equality related to an universal principle of catagorical imperative. The logic of the statehood is based on the premise and potential of the sovereign to protect fundamental

²⁶⁰ Gustav Radbruch, a German politician and professor of law, his philosophical foundation about justice based upon equality is also known as “*Radbruch Formula*”.

²⁶¹ See Stumpf, *Morality and the Law*, 184.

²⁶² See Pound, *The Ideal Element in Law*, 84.

²⁶³ See Stumpf, *Morality and the Law*, 184-188.

²⁶⁴ See Stone, *Human Law & Human Justice*, 251-255.

²⁶⁵ *Ibid.*, 247-255.

human rights of the entire participants of community. Therefore, under morality of natural law, neither community nor state has any plausibility in the absence of bare minimum requirements of self preservation. These absolute rights remain constant irrespective of the nomenclature of society, either “*pre-legal*” [pre-state] traditional or “*legal*” [post statehood].²⁶⁶ Such deontological ethics not only provide rationale for civil liberties but also function as antithesis to a potential majoritarian domination, while giving a concept of egalitarianism.²⁶⁷ This pluralistic model of contractual society gives an idea of right based liberal theory with a pragmatism of dissent from majority, if anything less than rightful conditions occurs.²⁶⁸ Now the subsequent portion of this chapter, discusses a transition from civil to political society and its implications for liberal democracy. Moreover, it thrashes out patterns of state sovereignty, citizenship and civil liberties in a contractual as well as in an evolutionary (nation-state) sphere.

Citizenship and Civil Liberties under different Paradigms of Sovereignty

In a post contractual scenario of political society, Kant and Rousseau demonstrate that men need a common objective code to achieve equilibrium between subjective interests and to

²⁶⁶ See Stumpf, *Morality and the Law*, 181-217: interprets Kelsen’s grund-norm in moralist perspectives and argues that it is based on reasoning and moral values as enshrined in the Kant’s categorical imperative. He explains that validity of Kelsen’s norm is based upon another norm and the interdependence of all legal norms as a legal system is based upon a fictional *grund-norm*, which comes from reasoning, and such reasoning is based on the natural law perspective of self-preservation, liberty, justice and mutual existence. Therefore during formative phase of community the fictional basic norm is derived from the natural law principles, which also function as a constant determinant amid transformation of such pre-state community in to a post state community. Here the sole purpose to attain the state is to implement such morality through an authoritative sovereign.

²⁶⁷ See Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (London: The MIT Press, 1994), 15-26.

²⁶⁸ *Ibid.*, 492-604.

avoid subjugation. Former emphasizes on a set of laws based upon “*common will*” along with a consensual constitution and a patriarchal authority of state in the form of institutions.²⁶⁹ And the later believes in an objective “*common force*” as an entity and an integrated whole for the preservation and well-being of community.²⁷⁰

Durkheim’s (1858-1917) “*collective conscious*” in this context acknowledges the quest for objectivity of law and morality to recognize the shared goals of society.²⁷¹ Finnis defines it as ‘*common good*’ for an effective collaboration of persons and co-ordination of resources to enhance collective well-being.²⁷² He gives three perspectives of rights based common good, first is a cohesive body of laws through political arrangements and second deals with an accumulative whole of collective human virtues and rights. A third perspective consists of an overall conducive environment for individual gains and objectives under Kantian notion of rightful conditions. He refers this last category as equality based non-utilitarian “*general welfare*” as well as “*the public interest.*”²⁷³

For a creation of political society and public body, Jefferson (1743-1826) and Fichte (1762-1814) follow the Lockean vertical model of political contract instead of social contract. Both consider the formation of government through consensus as groundwork of

²⁶⁹ See Immanuel Kant, “Groundwork of Metaphysics of Morals,” in *Practical Philosophy*, ed. , trans. Mary Gregor (New York: Cambridge University Press, 2008), 455-460: ‘State as a multitude of people under rightful condition as a whole makes a common wealth’; Evan J. Criddle, “Proportionality in Counterinsurgency: A Relational Theory,” *Notre Dame Law Review* 87, no.3 (2012): 1089-1095: “Fiduciary Character of Sovereignty”; Friedman, *Legal Theory*, 157-161.

²⁷⁰ See Grimsley, *Rousseau*, 96-98.

²⁷¹ See Phil Harris, *An Introduction to Law* (Cambridge, United Kingdom: Cambridge University Press, 2007), 9-10.

²⁷² See John Finnis, *Natural Law & Natural Rights*, 165.

²⁷³ *Ibid.*, 154-156.

legal order to protect acquired and inborn rights.²⁷⁴ Particularly Jefferson gives priority to collective welfare of community over blind and enforced observance of law. His conception of government akin to Finnis's is community centric rather than state centric.²⁷⁵ It means that even constitution and legal framework can be deviated momentarily, and be altered accordingly through amendments if there is a dire deontological need to save the postulates of categorical imperatives.²⁷⁶ However a rebuttal of such Universalist perspective can be found in classic Hobbesian domains of Montesquieu (1689-1775). He believes in a certainty of legal order and supremacy of law for a sustainable security of civil and political rights.²⁷⁷ Yet being cynical about a possible domination of government and its wrongful interference, he introduces an instrument of separation of power.²⁷⁸ Moreover, James Madison (1751-1849) in this regard, argues for limited government and federalism under contractual scheme.²⁷⁹ Being an advocate of constitutionalism, he acknowledges the existence of factions and difference of opinions in

²⁷⁴ See Michael Haas, "The Philosophical Basis for Human Rights," in *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), 22, 25.

²⁷⁵ See Wilfrid E. Rumble, "James Madison on the Value of Bills of Rights," in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 126: "Jefferson supports the thesis and maxim of *salus populi suprema lex esto*"

²⁷⁶ See Finnis, *Natural Law & Natural Rights*, 273-275: Being an essentialist as well as moralist he identifies it as 'Limits of the Rule of Law' under which core human values are supreme even than legal order and general will of a state. He emphasizes on the welfare of community, a common welfare based on the postulates and principles of categorical imperatives. Thus by a contrast to sum ranking concept of utilitarianism to have maximum good for maximum people through legal formalism he focuses on the universal principles of natural law to save core human values. Such *salus populi suprema lex esto* in Kelsen's domains is in deep contrast to Finnis's *Limits of the rule of law* because Kelsen's perspective is state centric rather than community centric; Arthur J. Jacobson and Bernhard Schlink, *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 328-330: Kelsen and Huber being positivists want to save the corpus of the state in the name of state necessity when a constitutional regime moves away drastically from the *grundnorm*.

²⁷⁷ See Richard S. Kay, "American Constitutionalism," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (Trumpington Street Cambridge: Cambridge University Press, 2001), 22-23.

²⁷⁸ See Haas, *International Human Rights*, 23-24.

²⁷⁹ See Wilfrid E. Rumble, "James Madison on the Value of Bills of Rights," in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 122-140.

a pluralistic society. He calls power struggle of these factions as “*violence of faction*” and perceives it a major cause for abuse of power, especially for minorities under a democratic principle of majority rule.²⁸⁰ Madison establishes a logical relationship between “*reasoning*” of free will individual, charismatic authority of popular ‘*passion*’ and rational ‘*legislation*’ in Federalist Papers.²⁸¹ He says that charisma and irrational pressure of popular passion on legislation may infringe minority’s interests. And to avoid such kind of abuse of popular passion he formulates a concept of strict constitutionalism²⁸² to ménage subjective political whims.²⁸³ In fact, due process clauses for equal protection of the laws [rights] in the bill of rights qualify as constitutionalism for him with a conspicuous role of judiciary. Under deontological principles of categorical imperatives that form constitution, judiciary not only manages legislative tyranny [inflicted by popular passion] but also protects civil liberties to establish a just society.²⁸⁴

But then what does mean by just society? How it should be conceived in a contractual paradigm? Is it dependent upon the formation of popular sovereignty first? How does such

²⁸⁰ Ibid., 141-142.

²⁸¹ Ibid., 143-144.

²⁸² See J.W. Peltason, *Corwin & Peltason's Understanding the Constitution* (Austin, Texas: Holt Mc Dougal, 1988), 181-203, 224-250: “5th and 14th Amendments of The Constitution of The United States of America”. It consists of norms and values, derived from the principle of categorical imperative. These deontological precepts are abstract accumulation of natural law principles under contractual scheme and in the form of Bill of Rights become an integral part of the American Constitution.

²⁸³ See Haas, *International Human Rights*, 34-35: It is derived from Political Realism and Social Darwinism, where influential individuals and factions manipulate society and even democratic process to gain maximum power and control. It creates such an irrational public will or demand (Madison’s popular passion) which though transitional but ends up in to stringent legislations and may hamper a minority’s interests.

²⁸⁴ See Wilfrid E. Rumble, “*James Madison on the Value of Bills of Rights*,” in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 144-153: Bill of Right is counter-majoritarian for Madison and under the notion of constitutionalism he perceives the institution of judiciary as a remedy against possible legislative tyrannies. Moreover with this approach the factional friction can be minimized through alteration or abolition of institutions which case such factionalism in a pluralistic society.

popular sovereignty come in to existence? Does any relationship exist between popular sovereignty, notion of citizenship and protection of personal as well civil liberties? If yes, then is the plausible outcome of such relationship an attainment of just society? Hence to satisfy such quires, this study illustrates a formulation of popular sovereignty with its plausible link with citizenship and personal as well as civil liberties in a subsequent flow diagram[*Figure: 1*]. According to this illustration of contractual paradigm, a free man has three core element of his being as '*a, b and c*'. Here "*c*" stands for his reasoning to form civil society with a due consideration of categorical imperative. This element is based upon an assumed notion of equality and helps to form a society of equals. Such egalitarian society as common good is further classified in to "*e*" and "*d*", the former as laissez-faire, and dynamic socio cultural norms emerge by the possible interactions of equals. It is free from any coercive monopoly yet compatible with the moral codes, extracted from the categorical imperative because, "morality is accepted standard of society."²⁸⁵The latter represents civil and political rights, guided by the same categorical imperative and requires to be protected under the notion of public order through the attainment of political society. As a government, it consists of legislature, executive and judiciary, not only comes in to existence but also functions under the binding doctrines of categorical imperative. At this point such doctrines also act as a principal constitutional convention, and empower legislature to craft a constitution and general will accordingly, which subsequently qualifies as popular sovereignty of an independent contractual state.

²⁸⁵ See H.L.A. Hart, *Law Liberty and Morality* (California: Stanford University Press, 1963), 5.

As an entity, State is linked not only with rest of its civil society through a premise of civil liberties as enshrined in the *d* component, but also directly attach with individual to protect his personal liberties as incorporated the element “*a*”. Besides, it is not permitted for state to intrude in to the “*b*” element of freeman that deals with his personal set of belief, conscious and freedom of thought. In the contractual paradigm, a ‘just’ state governs its citizens and protects common good in accordance with the categorical imperative. It does not interfere in to civil and personal liberties, individual as well as collective right to dissent and community’s right to laissez-faire with liberal sociocultural norms.



{*Figure:1*}

A vulnerable position of minority in the face of majority's passion is also taken in to consideration by Hans Kelsen(1881-1973) though in a deep contrast to contractual philosophers.²⁸⁶Under state law theory, when state emerges out of historical or evolutionary process, pre-established community and institutions proceed towards a constitution through democratic process.²⁸⁷However in this process of getting a supreme general will and social order minority may loses its voice by affirming or negating the majority's opinion.²⁸⁸But instead of right based liberal theory of possible dissent he looks

²⁸⁶ See Hans Kelsen, "On The Essence And Value of Democracy," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 84-109: He criticizes the contractual scheme and focuses on the utilitarian philosophy, his conception of majority is numerical majority through the sum ranking procedure of electoral process. In this process individual wills are represented through the formation of political parties and under democratic process majority makes a general will to maintain public order. He looks at Rousseau's general will from another perspective. He says that basic contract and unanimity is hypothetically possible only up to the extent of getting a State by a community on the basis of ideology. But after getting an independent territory social order can only be possible by making democratically an objective legal system on the basis of majority's will. The notion of "we the People" is in fact a utilitarian approach of majority's view regarding a specific social order. In this process of getting a public order he focuses on the maxim of equality to establish rule of law. Thus without any hypothetical voluntarism a general will of a State is established with the sum raking of majority wills of equals. However he is skeptical too about the possibility of majority's subjugation through the notion of majority is authority. And to avoid such kind of abuse of power he advocates for the rule of law (regularity of procedure), furthermore the corpus of law is crafted within a parliament through a dialectical process of thesis, anti-thesis and synthesis. He warns that if compromise does not take place on the touch stone of procedural validity then dictatorship of majority over minority can lead to bloody revolution. It means procedural equality is a real freedom of not in individual's sphere but also in collective sphere. Therefore individual and civil liberty is in-fact Rule of Law for Kelsen.

²⁸⁷ See Arthur J. Jacobson and Bernhard Schlink, "Constitutional Crisis: The German and the American Experience," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 1-39: "state,--precedes the constitution. It does so historically- the state as object of monarch's will and power was there before any constitution could frame or found it—the constitution was understood not as founding and framing the state, but rather as shaping and limiting the inherently unlimited powers of an already existing political organization. The constitution derived its legitimacy from the state, not the state from the constitution"

²⁸⁸ See e.g. into Erich Kaufmann, "On The Problem of the People's Will," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 196-206 ; Ernst Forsthoff, "The Total State," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 320-323; Ernst Rudolf Huber, "Form and Structure of the Reich," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 330-331: Mandate is charisma, sometimes with no rational causation and if it is taken to form an ideology of a community then an ill perceived homogeneity gives such a nationalism, which hampers the interest of minorities. In Forsthoff and Huber's Total State (It is

towards dialectical synthesis, procedural validity and equality based rule of law²⁸⁹ for the protection of minorities.²⁹⁰

Moreover to avoid sociological and historical heterogeneity Kelsen defines statehood in terms of a homogenous legal system. State being a specific unit of individuals forms a political community through an indigenous single legal order; he calls it monism due to its entirety.²⁹¹In an evolutionary perspective of political society, Rousseau's public order is dependent on a supreme "general will". It engenders through legislative postulates and consists of indispensable element of equality. This unaltered and constant general will, being a sovereign works as an imperative to protect relationship between elected rulers, state institutions, community, and individual in a compact whole of a legal order.²⁹²All common and individual wills must be in conformity with this supreme general will to establish sovereignty. However, on a subject of hierarchical formation of accumulative

based on an ethnic or religious homogenous nationalism with a ranked society, where majority is dedicated to a specific ideology. And try to impose this ideology on minority to bring cohesiveness and unanimity in the name of nationalism) the instrument of administration is used to establish absolute public order [ideological and territorial sovereignty based on majority's general will] without a due care to civil and individual liberties.

²⁸⁹ See Bryan A. Garner, et al, ed. *Black's Law Dictionary*, eds., Bryan A. Garner, et al., 8th ed. (Boston: West Publishing Company, 2004), 1359: "Rule of Law---the supremacy of regular as opposed to arbitrary power, the doctrine that every person is subject to the ordinary law within the jurisdiction".

²⁹⁰ See Hans Kelsen, "On The Essence And Value of Democracy," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 100-104.

²⁹¹ See Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," *Harvard Law Review* 55, no.44 (1942), 64-70; Hans Kelsen, "Sovereignty," in *Principles of International Law* (New York: Holt, Rinehart and Winston Inc., 1967), 581-585; Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontent," *Columbia Journal of Transnational Law* 37, (1999):403-457, 410-411.

²⁹² See e.g. into Grimsley, *Rousseau*, 97-99; Hans Kelsen, "Legal Formalism And Pure Theory of Law," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 76-83: Political association based on collective will and makes a common force, also called as social or public order by Kelsen. This public order is meant for smooth functioning of a respective legal system. It consists of legislature, executive and judiciary as interdependent components of political society (Government) for the formalism of abstract legal precepts.

general will and then common will, Rousseau looks at the supremacy of parliament and majority rule.²⁹³ It may lead to the “*total state theory*” with an absolute charismatic authority of majority’s passion,²⁹⁴ but its remedy has been discussed in the above paragraph.

In a contractual perspective, Rousseau’s general will as “*amour de soi*”, is an ultimate source of authority, and forms a collective trust. It is derived from a voluntary and rational bond of free men under the contours of categorical imperative to form liberal democracy. As the core promise of political society to civil society and its participants, it stands for

²⁹³ See in Erich Kaufmann, “*On The Problem of the People’s Will*,” in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 204: “Every Conflicting ideological, political, social, and economic interest may serve as the basis for building a party and putting forward an electoral list”

²⁹⁴ See Ernst Rudolf Huber, “*Constitution*,” in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 328-330: Similar to Kelsen’s Grund norm, Huber argues that fabric of a constitution is based on some fundamental principles, which serve as a ‘*spirit of constitution*’. If constitutional practices of a state divert from these fundamental principles then constitution as a general will lose its authority and legitimacy. In this case revolution occurs and a new faction becomes in power to form a novel general will in the interest of the corpus of state. Such state necessity gives a charismatic authority to this new faction, who forms a new constitution through the principle of ‘people’s unity’, ‘wholeness of society’ and ‘supremacy of faction’s ideology and its leadership’. Such revolutionary mode of general will is highly dependent on the apparatus of administration for its absolute implementation in a respective society. This model of governance is called as Total State to implement a specific ideology in the name of nationalism. It stems from State Law Theory to save the existence of the state if general will loses its popular legitimacy; Roy, *Listening to Grass-Hoppers*, 136-160, 163-166, 175-177: In the context of secular Indian democracy, she discusses the political rise of Bharatiya Janata Party (BJP) and its subsidiary Rashtriya Swayamsevak Sangh (RSS). She argues that increasing legitimacy of Hindutva ideology leading to such scenario, where administrative tool is used with absolute impunity to impose the majority’s perception on marginalized minorities in the name of nationalism. In this context of ‘*Hyper-Nationalism*’ [total state theory] she discusses the criminal negligence and an alleged manipulation of BJP government led by the then Indian chief minister Narendra Modi in the Gujarat anti-Muslim Riots 2002. “Modi’s government planned and executed the Gujarat genocide. In the elections that took place a few months after genocide, he was returned to power with an overwhelming majority. He ensured complete impunity for those who had participated in the killing---- impunity is an essential prerequisite for genocidal killing. India has a great tradition of granting impunity to mass killers---- In a democracy, for impunity after genocide, you have to ‘apply through proper channels’. Procedure is everything----The fascist democrat has physically mutated into a million little fascists. These are the joys of democracy----- The Muslims of India have been systematically marginalized and have now joined the Adivasis and Dalits, who have not just been marginalized but dehumanized by cast----- the ‘secular’ national press, having got over their outrage at the Gujarat genocide, now assesses Modi’s administrative skills, which most of them are uniformly impressed by ---[in] Hindu-Fundamentalist Indian state”

state's obligations to protect civil liberties.²⁹⁵ Being an authoritative principle it forms and protects a relationship between state, community and individual with bottom up approach.²⁹⁶ This basic resolution is a harmonious configuration between deontology and utilitarianism to gain a welfare state. In fact owing to its individual and community centric, rights based conception of government it qualifies as popular sovereignty.²⁹⁷ Rawls places this general will even prior to constitution making and institutional remolding process. He illustrates it as self-preserving "*principles of justice*", "*appropriate conception of justice*" and "*public principles of the ethical commonwealth*" with a specific emphasis on equality, liberty and self-respect.²⁹⁸ Moreover, to rationalize postulates of general will in a respective society, Rawls gives a practical model of ethical jurisprudence.²⁹⁹ For this purpose, he mingles the philosophies of Kant, Hobbs, Locke and Rousseau with two utilitarian philosophers, Bentham (1748-1832) and John Stuart Mill (1806-1873). Accordingly, he says that existence of a contractual society is based upon an accumulative satisfaction of all

²⁹⁵ See Grimsley, *Rousseau*, 102-103, 114-116.

²⁹⁶ See Makau wa Mutua "The Ideology of Human Rights," *Virginia Journal of International Law* 36 (1996): 650-660.

²⁹⁷ See Evan Fox-Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, (2010): 301-336: at 324: under state-subject fiducery relationship of contractual society, public policies and laws are formulated with a specific focus on the legitimate interests of citizens through Kant's *solicitude* and Hart's *five truisms of minimum content of natural law*. Thus with an instrument of *categorical imperative* general and common will ought to be aligned with each other to gain popular sovereignty.

²⁹⁸ See Rawls, *A Theory of Justice*, 138, 196-197, 257.

²⁹⁹ See e.g. into Richard B. Parker, "*The Jurisprudential Uses of John Rawls*," in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 280-283: "A rational approach of justice and just society by combining rights with utilitarianism"; Michael Haas, "The philosophical basis for human rights" in *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), 25-26; Darren J O'Byrne, *Human Rights: An Introduction* (Delhi: Pearson Education (Singapore) Pte. Ltd., Indian Branch, 2005), 18-71: Bentham being a positivist looks toward parliament to devise laws and policies enshrined with maximum good for maximum people. Though as a positivist he does not believe as such on the universality of human rights. But implicitly it can be said that he as a constructivist consider the importance of rights when he says that rights are only granted or taken back by the state. In spite of a descendent of Bentham, Mill believes in freedom of expression with laissez-faire market concept. Never the less Rawls believes in institutional justice, thus he concentrates on institutions for dispensation of rights with an orientation of maximum goods for maximum number.

of its members. Moreover, obedience to authority is conditional to this shared conception of society.³⁰⁰ Thus, legitimacy of state's institutions rests upon pragmatic civil liberties stemming from a confluence of utilitarian, liberal, and democratic approaches to society.³⁰¹

For a deduction of general will in contractual society, Rawls as a neo-Kantian formulates principle of "*original position*" with a "*veil of ignorance*." It is similar to categorical *imperative* to gain outer freedom of substantive and procedural justice without any domination or competition.³⁰² In this pre constitution context, participants of a community form a shared conception of justice. For this purpose they place the consensual values in a vertical order on the basis of assumed equality with full liberty. In this vertical order priority is given to equal citizenship and equality of opportunity with a centrality of human dignity.³⁰³ This Rawlsian position seems to align with Kelsen's presupposed "*basic norm*", which in its hierarchical ascendancy ought to give validity to all other norms.³⁰⁴

It appears that Rawls and Kelsen both look at this core conception of justice as Rousseau's '*amour de soi*' for institutional efficacy and procedural validity. Similarly Hart's views of internal aspect of obedience to law with a minimum content of natural law also follow such

³⁰⁰ See Rawls, *A Theory of Justice*, 24: "a society is properly arranged when its institutions maximize the net balance of satisfaction."

³⁰¹ *Ibid.*, 56-59: Obedience to system is based on the shared conception of justice stemming from common good, thus obedience is conditional to the substantive justice dispensed by the institution of a respective society.

³⁰² *Ibid.*, 136-137, 196-197, 252.

³⁰³ *Ibid.*, 61-63, 250-251.

³⁰⁴ See Hans Kelsen, "What is The Pure Theory of Law?" *Tulane Law Review* 34 (1960): 275-276.

conception.³⁰⁵ This study argues that for a contingency from civil to political society,³⁰⁶ charismatic or traditional authority to legal rational authority.³⁰⁷ And from pre constitutional to post constitutional stage,³⁰⁸ Hart's approach is more practical as compare to Rawls and Kelsen. Since Rawlsian "*original position with veil of ignorance*" seems more logical in the post statehood context of legislative domain to gain "*ethical common wealth*".³⁰⁹ While in a pre-intuitional stage it is too speculative without any authoritative forum.³¹⁰ Because Kant's "*man of integrity*" has pre statehood rights and knows his own "*internal freedom.*" He rationally enters in to a "*categorical imperative*" to protect his innate as well as acquired rights on the basis of non-domination without wearing such "*veil of ignorance.*"

³⁰⁵ See H.L.A. Hart, *The Concept of law* (New Delhi: Oxford University Press, 2005), 201 :“Without their voluntary co-operation ,thus creating authority ,the coercive power of law and government cannot be established.”, at 203: “Those who accept the authority of a legal system look upon it from the internal point of view.”, and at 210: “however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.”; Phil Harris, *An Introduction to Law* (Cambridge, United Kingdom: Cambridge University Press, 2007), 7:“Hart’s obedience to law lies in the idea of some inner psychological inclination.”; Delbert D. Smith, “The Legitimacy of Civil Disobedience as a Legal Concept ,” *Fordham Law Review* 36, no. 4 (1960): 707-730.

³⁰⁶ See Jean L. Cohen and Andrew Arato, “Civil Disobedience and Civil Society,” in *Civil Society and Political Theory* (London: The MIT Press, 1994), 601-603: Civil society is a contractual and horizontal community of equals on a foundation of right based liberal philosophy. And vertical political society denotes a hierarchical democratic approach of institutional justice stemming from democratic approach. A combination of these two notions under a consistent political process of rights based bargains and communications forms a liberal democracy.

³⁰⁷ See Anthony M.Orum, “The Vision of Max Weber,” in *Introduction to Political Sociology* (New Jersey: Prentice-Hall, INC, 1983), 42-61: Weber gives three forms of legitimate authority, firstly charismatic (based on personal ties to individual charisma), secondly traditional (tribal and feudal society) and lastly legal rational (contemporary post-industrial society based upon a valid legal system with a hierarchal order of permanent bureaucracy). Weberian legal rational authority is an evolutionary outcome of a charismatic and traditional authority after a consistent routinization.

³⁰⁸ See Rawls, *A Theory of Justice*, 196: “After the parties have adopted the principles of justice in the original position, they to a constitutional convention”

³⁰⁹ *Ibid.*, 27:“the correct decision [for ideal legislator] is essentially a question of efficient administration.” and at 361:“just legislation is the primary social end” .Thus ethical common wealth is inferred as cohesive and rights based public policies and laws.

³¹⁰ See Richard B. Parker, “*The Jurisprudential Uses of John Rawls,*” in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 277.

This kind of ignorance in original position may suits confederating units as independent legal entities to form federation and sovereignty in contractual scheme.³¹¹ However, a free will rational being with Hobbesian skepticism for others may not incline as such for it.³¹² Likewise, Kelsen's vision in the context of legal order about a non-positive and non-celestial "*presupposed basic norm*" in abstraction is too subjective to construct and interpret.³¹³ Hence, Hart's vision of systematic "*mutual forbearances*"³¹⁴ in the confluence with Kant's "*categorical imperative*," Hegel's (1770-1831) "*dialect*"³¹⁵ and Locke's "*reasonable man*" seems more pragmatic. It is not only to achieve Rousseau's "*general will*" in contractual society but also to deduce Kelsen's "*basic norm*" under state law theory.

Yet it too has a dilemma; Hart's "*mutual forbearances*" in their distinctive form are attributed only to '*some*' member of society³¹⁶ and this '*some*' may lead to an elite system

³¹¹ See Cecelia M. Kenyon, "*Constitutionalism in Revolutionary America*," in *Constitutionalism*, eds. John W. Chapman and J. Ronald Pennock (New York: New York Press, 1979), 84-120: Federalist's view for getting supreme general will with an amalgamation of common will of constituents units.

³¹² See Wilfrid E. Rumble, "*James Madison on the Value of Bills of Rights*," in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 126-135: Anti-Federalist view of radical liberal theory.

³¹³ See Hans Kelsen, "What is The Pure Theory of Law?," *Tulane Law Review* 34 (1960): 269-276: Because neither it is derived from natural law nor any constitutional convention or legislation enacts it, in fact it is presupposed in juristic thinking. Moreover every legal system may have its own indigenous basic norm; Hart, *The Concept of law*, 108-110: for the hypothetical nature of Kelsen's basic norm.

³¹⁴ See Hart, *The Concept of law*, 201: "a society to be viable must offer *some* of its members a system of mutual forbearances --- the existence of a legal system is a social phenomenon which always present two aspect,--- voluntary acceptance --- mere obedience" and at 202: "If the system is fair and caters genuinely for the vital interests of all those from whom it demand obedience, it may gain and retain the allegiance of most for most of the time, and will accordingly be stable."

³¹⁵ See Anthony M. Orum, *Introduction to Political Sociology* (New Jersey: Prentice-Hall, INC, 1983), 30-38, 89-94: Marks and Parson both perceive the *Hegelian dialect*, a catalyst for socio-political change and formulation of new commune in society, as it mainly consist of a contingency of *Thesis, Antithesis and Synthesis*.

³¹⁶ See Hart, *The Concept of law*, 201.

of government.³¹⁷ Hart himself acknowledges this menace and indicates it as a narrow and aristocratic system with a vulnerability of individual's core rights.³¹⁸ Here like Madison, he along with Dworkin looks towards judiciary for remedial measures. But it is when a legal order encounters a novel situation,³¹⁹ such as "*extreme fragmentation with a possible domination of one faction*".³²⁰

Moreover, Hart's "*minimum content of natural law*" not only works as focal point between Lockean and political society,³²¹ but is also decisive to achieve "*social integration*" of minorities in parliamentary democracies.³²² However, situation is different in context of colonial rule or newly independent states with colonial continuities.³²³ In this case, partly

³¹⁷ See C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956), 269-287: "The iron law of oligarchy by aristocracy."; Wilfrid E. Rumble, "James Madison on the Value of Bills of Rights," in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 141-142: Subjugation of majority through violence of factions.

³¹⁸ See Hart, *The Concept of law*, 202: "a narrow and exclusive system run in the interests of the dominant group, and it may be made continually more repressive and unstable with the latent threat of upheaval." "the step from the simple form of society,--- into the legal world ---sanctions brings its solid gains at a certain cost. --- the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense."

³¹⁹ See Dworkin, *Taking Rights Seriously*, 94-10: focuses on the constructive interpretation for protection of rights; Hart, *The Concept of law*, 135-145: "The open texture of law (when law fails to give a solution) leaves to court a law-creating power far wider."

³²⁰ *Italic is analogized in the context of study.*

³²¹ See Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Massachusetts: MIT Press, 1994), 594-599; Haas, *International Human Rights*, 31-32: under the 'stages of growth theory' of human rights jurisprudence this 'minimum content of natural law' is important to achieve and maintain basic human rights values amid a cyclical transformation from individual-centric liberal democratic movement to community-centric social democratic movement.

³²² See Hans Kelsen, "On The Essence And Value of Democracy," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al (California: University of California Press, 2000), 102.

³²³ See e.g. into Anil Kalhan, "Colonial Continuities: Human Rights, Terrorism and Security law in India," *Columbia Journal of Asian Law* 20, no.1 (2006): 93-234, 126-150: For strategic use of administration in pre and post-colonial era to maintain law and order and deterrence through coercive means of punitive and preventive actions.; Arato and Cohen, *Civil Society and Political Theory*, 598.

representative public bodies are raised to manage indirect control and status quo.³²⁴ Since “veil of ignorance” is most suitable in this context for likely reforms and constitutional package. It is for a possible socio-political, legal and administrative “re-engineering” inside the pre-existing parliamentary domains to bring liberal democracy.³²⁵ Julius Stone illustrates this readjustment as “pragmatism”³²⁶ and Roscoe Pound describes it as “social engineering”³²⁷ to expand the scope of justice and civil liberties.

An assimilation of above-mentioned views indicates that through innate rights of expression, association and freedom of speech egalitarians form a political society for their

³²⁴ See Khalid B. Sayeed, “Constitutional Autocracy,” in *The Political System of Pakistan* (Boston: Houghton Mifflin Company, 1967), 101-126; Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership-Pakistan, 2008), 9-41: For a coercive legal system with meager civil liberties consists of colonial legacy of civil and military bureaucracy aiming at indirect rule, an aristocratic parliament along with a technocratic, positivist and submissive judiciary; Arthur J. Jacobson and Bernhard Schlink, “*Constitutional Crisis: The German and the American Experience*,” in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 5-7: “the unity of the German Reich was derived not from the unity of the people, but from the league of monarchs ---- In the Empire, state law theory was a bourgeois theory, a theory bourgeois jurists mirroring the situation of bourgeoisie and its transformation--liberal ideas and arrangements even threatened to become a weapon against the bourgeoisie---a weapon in the hands of the proletariat, which could protect itself against abuse of power with the help of liberal precautions and achieve participation in ruling with the help of the parliamentary system.” Such kind of legal system is indifferent to socio-political changes and being statistic adheres to status quo.

³²⁵ See in Arato and Cohen, *Civil Society and Political Theory*, 598-599; Richard B. Parker, “*The Jurisprudential Uses of John Rawls*,” in *Constitutionalism*, eds. John W. Chapman and J. Ronald Pennock (New York: New York Press, 1979), 269-283; Reinhard Mehring, “*The Decline of Theory*,” in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 313-333: The study argues after analyzing these writers that evolutionary and historical context of Pakistan does not fall in to a contractual scheme. It had a community even before its emancipation, and this community had a religious identity, which formed nationalism after the independence due to its democratic assertion. This Pre and Post 1947 transitional paradigm attracted state law theory (Kelsen’s view of doctrine of state necessity) or total state (absolute law and order) theory with a specific concentration on institutions and administration to save the corpus of state. But the post 1947 scenario with pre-established Federal and Provincial legislative Assemblies had a mandate to form an independent general will. This formative phase of constitution making process was ideal to conceive Rawlsian position to get a pragmatic federalism, contractual constitution and remolding of institutions to implement constitutionalism.

³²⁶ See Julius Stone, *Human Law & Human Justice* (Second Indian Reprint. New Delhi: Universal Law Publishing Co.Pvt Ltd, 2004), 263-265.

³²⁷ See Roscoe Pound, *An Introduction to the Philosophy of Law* (Fourth Indian Reprint, Delhi: Universal Law Publishing Co.Pvt. Ltd, 2006), 47.

own self-rule. After a democratic discourse of dialectical synthesis and principle of majority a political society establishes its writ over civil society. Following the mandate given by civil society, legislature as a core component of political society carves out a general will through deontological postulates of categorical imperative. This general will as an ultimate will of ‘*egalitarians*’, forms constitution. Moreover, adherence to its norms establishes sovereignty in a respective contractual society. Such adherence to constitutional norms in liberal democracy qualifies as constitutionalism that gives rights based public order and administration. Hence, under social contract doctrine popular sovereignty is identical to due process of law for equal protection of the rights.³²⁸It aims to protect civil liberties and fundamental rights with deontological ethics of universal natural law.³²⁹

But then an antithesis of supra arguments appears in the form of cohesive obedience to national ideology under Roy’s perspective of “*hyper-nationalism*”³³⁰and Arendt’s dictum of “*totalitarian state*.”³³¹ Since an absolute administrative control for a self-induced public order and status quo qualifies as sovereignty and legitimacy in such a “*total state*

³²⁸ See Peltason, *Corwin & Peltason’s Understanding the Constitution*, 181-203, 224-250:Equal protection of laws indicates the state’s obligation to protect civil liberties through due process of law ; Bryan A. Garner, et al., ed. *Black’s Law Dictionary*, eds., Bryan A. Garner, et al., 8th ed. (Boston: West Publishing Company, 2004), 538-539:“Due Process—the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights”, “Procedural Due Process-- the minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments[USA Constitution]’ if the deprivation of a significant life, liberty, or property interest occur”, “Substantive Due Process--- legislation to be fair and reasonable in content and to further a legitimate governmental objective”, “Due-process rights—The rights (as to life ,liberty, and property) so fundamentally important as to require compliance with due process standards of fairness and justice”

³²⁹ See O’Byrne, *Human Rights: An Introduction*, 21-22, 47-59: Kant’s ethics of moral agent (reciprocal rights and duties) and moral patient (unilateral rights against society in case of any disability to perform duty) in a universal and generalized perspective leads to International Human Rights norms. And in a territorial specific scenario leads to civil liberties and enforcement of fundamental rights through the state apparatus.

³³⁰ See Roy, *Listening to Grass-Hoppers*, 27.

³³¹ See Hannah Arendt, *The Origins of Totalitarianism* (Claveland: Meridian Books, The World Publishing Company, 1962), 392-395.

theory”.³³² Accordingly, specific emphasis on ends rather than means under ‘consequential’ values leads to hedonism and perfectionism to enforce state’s owned and induced *isms*.³³³ Such a national perspective proceeds to socially alienated legal formalism and a coercive legal order along with increasing trends of executive impunities.³³⁴ As Arendt indicates, “applies the law directly to mankind without bothering with the behavior of men.”³³⁵ Subsequently Friedmann and Arendt indicate that stringent criminal laws, law enforcement agencies and their discretionary powers, excessive use of force, custodial violence and maximization of punishments and coercive surveillance are employed under “fundamentalist doctrine” of public order.³³⁶ A following follow diagram [**Figure: 2**] illustrates the enforcement of majoritarian ideology through an administrative tool, yet with probability of reactionary dissent from minority.³³⁷ Similarly, Hart indicates for this milieu, “if a society were mainly devoted to the cruel persecution of a racial or religious minority, or if the steps to be taken include hideous torture then “disintegration” of such a society would be morally better than its continued existence and steps ought not to be taken to preserve it.”³³⁸

³³² See Reinhard Mehring, “The Decline of Theory,” in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 313-333.

³³³ See O’Byrne, *Human Rights: An Introduction*, 21, 52-53: According to Nietzsche and Huber it is an absolute charismatic authority of an individual or group or an ideology on the basis of its perceived excellence and supremacy in the eyes of its followers; Arendt, *The Origins of Totalitarianism*, 389-459.

³³⁴ See W. Friedmann, *Law in a Changing Society* (London: Stevens & Sons Ltd., 1972), 37-44: “In a totalitarian society, concepts of morality that differ from the official philosophy, as expressed in the law, are not tolerated.”; Roy, *Listening to Grass-Hoppers*, 15-42; Bryan A. Garner, et al., ed. *Black’s Law Dictionary*, eds., Bryan A. Garner, et al. 8th ed. (Boston: West Publishing Company, 2004), 913-914: “Legal Formalism [formation of law in an isolation to political and social inputs] carried almost to the point of meaninglessness”, “Legalistic--- one who believes in strict adherence to the letter of the law rather than its spirit”.

³³⁵ See Arendt, *Totalitarianism*, 462.

³³⁶ See Friedmann, *Law in a Changing Society*, 191: “[For] Fundamentalists –the function of the criminal law is essentially that of the defender and protector of moral values--”; Arendt, *Totalitarianism*, 430-431, 437-441, 467.

³³⁷ See Arendt, *Totalitarianism*, 478; Charles A. Ellwood, “A Psychological Theory of Revolutions,” *American Journal of Sociology* 11, no. 1 (1905): 58.

³³⁸ See H.L.A. Hart, *Law Liberty and Morality* (California: Stanford University Press, 1963), 14-15, 19.

Seemingly a culture of violence; either through reactionary political violence or imposed executive impunity in the name of restoration of public order engenders an environment of human rights violations.³³⁹ It not only diminishes the accepted moral standard of tolerance with amicable solution of conflicts but also has a negative impact on the notion of citizenship and civil liberties. As it has been indicated, “*tyrannical public sentiment or class interest may induce even in a democracy such an inflexibility or stagnation in institutions that only a revolution can sweep away the obstructing social structure.*”³⁴⁰

However, it is pertinent to understand the differences between ‘*totalitarianism*’ and ‘*total state*’ as both of these terms have been employed by Arendt to illustrate state’s punitive measures against its own citizens. Accordingly, she indicates that former deals with an “*irrational*” premise of a community which attempts to establish its religious or ethnic superiority over other communities or settled norms.³⁴¹ Subsequently to propagate and justify its ‘*ism*’ such community unilaterally involves in “*psychological warfare*” and constructs “*artificial civil war conditions*” to induce its philosophy and interpretations.³⁴² And if, able to take control over territory and population amid segregation then establishes such an ideological state where state machinery is employed to coerce subgroups as well as

³³⁹ See Sandeep Avinash Prasanna, “Red Belt, Green Hunt, Gray Law: India’s Naxalite- Maoist Insurgency and the Law of Non-International Armed Conflict,” *UCLA Law Review* 63, no.2 (2016): 490-492.

³⁴⁰ See Ellwood, *A Psychological Theory of Revolutions*, 58.

³⁴¹ See Arendt, *Totalitarianism*, 470-472: indicates that to prepare ideologically motivated “*political soldiers of self-defined cause*” tactics of propaganda and conspiracy theory are systematically employed to distort reality. Similarly causation and empiricism is negated to distort history and to craft heroism as well as self-styled revival of the past glorification which distorts the collective ability to judge reality and perceive fiction as a reality.

³⁴² *Ibid.*, 344, 373-374.

neighboring states.³⁴³ Therefore, “*totalitarianism*” is a political process to augment radical ideology even in a secular state. While the “*total state*” is an administrative process to impose radical national ideology over entire population through statutory scheme of “*total terror*.”³⁴⁴ It includes socio political alienations, stigmatization, propaganda through conspiracy theories and persecution to dehumanize and control non-conformists. However, amid these administrative measures to form an “*ideological whole*,” socio-economic polarizations are installed to avoid an articulation of political mobilization and mass moments against regimes. It seems accordingly that Arendt’s holistic nationhood under “*total state*” paradigm contradicts with theoretical perspectives of popular sovereignty under contractarian ethics. As the later tolerates and accommodates diversities in the course of ‘*we the people*’ whereas the former curbs them in the course of nationalism.³⁴⁵

Then, a question arises here that how reactionary movements can emerge in totalitarian societies despite of stringent administrative measures and their dehumanizing impacts on nonconformists? Accordingly, Baxi indicates that socio-cultural values that formulate identities of respective communities are categorised in to “*residual, dominant, emergent*” and “*adaptive*” cultures.³⁴⁶ While the “*dominant*” represents prevailing whims of ruling class whereas “*residual*” embodies cherished values of oppressed classes. However, amid

³⁴³ Ibid., 391: Identifies this double edge impact as *paradox of totalitarian regime*, as on the one hand it remains in constant conflict with other states to impose its global agenda and on other hand remains in constant conflict with its minorities to sustain internal propaganda and terror.

³⁴⁴ Ibid., 341-346, 419-422, 437-440.

³⁴⁵ Ibid., 465, 467, 473-477.

³⁴⁶ See Upendr Baxi, “*The Conflicting Conceptions of Legal Cultures and the Conflict of Legal Cultures*,” in *Rechtstheorie: Monistic or Pluralistic Legal Culture? Anthropological and Ethnological Foundations of Traditional and Modern Legal Systems*, eds. Peter Sack, Carl P. Wellman and Mitsukuni Yasaki (Berlin: Duncker & Humblot, 1991), 277-278.

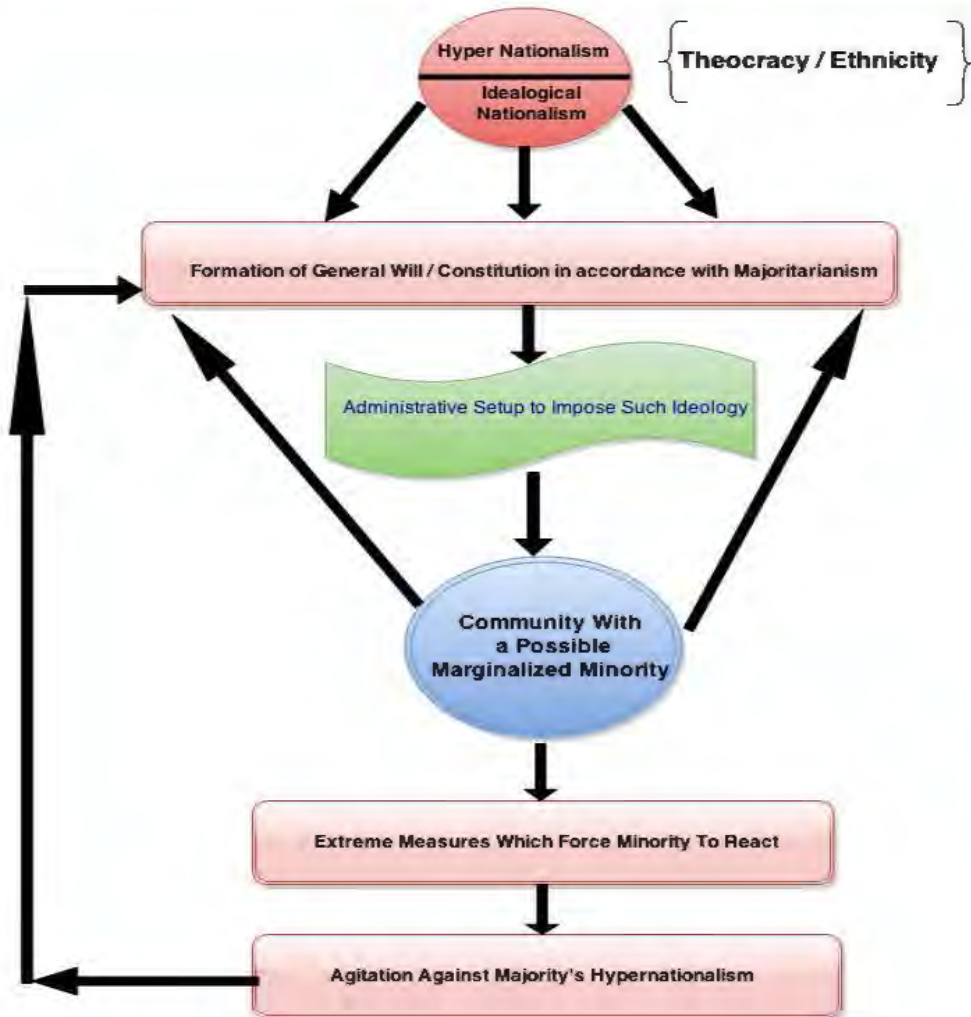
“total terror” oppressed communities are alienated to an extent where they prefer the dominant centric adaptive values for their survival. However, when owing to regional or global sociopolitical transformations an “emergent” culture penetrates in geographical and ideological peripheries the ‘residual’ develop ideological ties with it. Then both of these complement each other to resist ‘dominant’ values in a particular ‘total state’ and form agitation movements against regimes. Hence, the ‘dominant’ has two alternatives at this point; it either adjusts the eminent values of ‘emergent cum residual’ values under ‘legal pluralism’ or resists them punitively.³⁴⁷ Ellwood and Arendt both indicate that owing to irrationality and self-assumed superiority the dominant class often prefers the later recourse and instigates a culture of violence.³⁴⁸ Subsequently to explain the dynamics of state violence Arendt splits a citizen in to “moral” and “judicial” person. While under the moral paradigm his integrity, self-respect, and self-esteem are victimized through physiological torture and propaganda. And under judicial paradigm stringent punitive laws are employed not only to enhance their scope and discretions but also to infringe personal liberties by restraining right to fair trial. Hence by violating moral and judicial rights a targeted individual or person is intimidated to extent where his entire thought process and will can be manipulated to imbed shame, guilt and sense of powerlessness in it.³⁴⁹

³⁴⁷ Ibid., 276, 279-281; Arendt, *Totalitarianism*, 478.

³⁴⁸ See Ellwood, *A Psychological Theory of Revolutions*, 54-55; Arendt, *Totalitarianism*, 466: “By pressing men against each other, total terror destroys the space between them---It destroys the one essential prerequisite of all freedom which is simply the capacity of motion which cannot exist without space [civil liberties].”

³⁴⁹ See Arendt, *Totalitarianism*, 454-456.

TOTAL STATE THEORY / REACTIONARY MOVEMENTS



{Figure: 2}

In a stereo type Post Westphalian nation state, the western parliamentary democratic process is introduced not only to form government but also to form constitution according to the will of majority.³⁵⁰ This evolving political process with majority-rule principle establishes an indigenous legal system under an authoritative constitution and corpus of

³⁵⁰ See Arato and Cohen, *Civil Society and Political Theory*, 201-254.

precepts. The governmental legitimacy in such model rests upon procedural validity, dialectal synthesis with minority and efficacious popular consent. Rule of law in this context means governance according to prescribed rules, either legislatively codified in the form of statutes or incorporated through judicial precedents. The positive law and analytical jurisprudence is mainly used here to ascertain the validity of law.³⁵¹

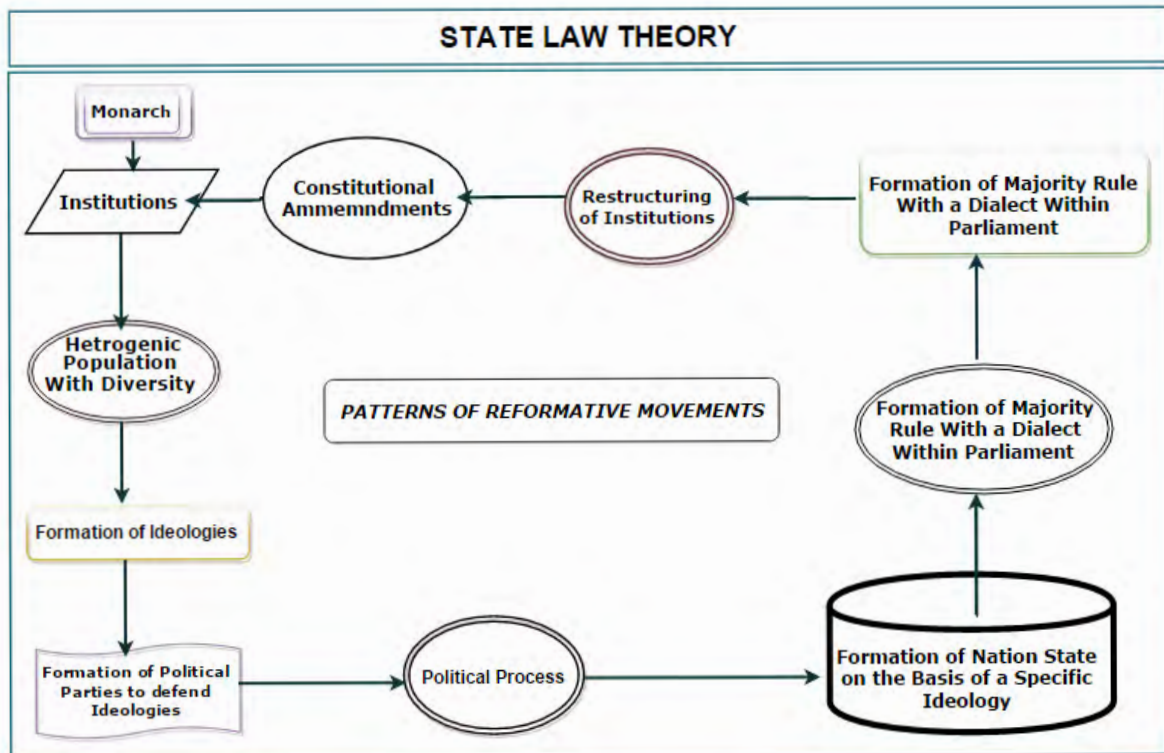
A continuous assertion of rule of law with utilitarian ethics not only forms public order but also qualifies as state sovereignty under this “*state law theory*.”³⁵² Though state and community has primacy in this model but as John Stuart Mills says “*the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to preserve harm to others.*”³⁵³ It seems that such limited and qualified scope of restoration of public order is compatible with personal and civil liberties,³⁵⁴ along with a high probability of reforms and reconstruction of institutions as illustrated in the subsequent follow diagram[**Figure: 3**].

³⁵¹ Ibid., 336-341.

³⁵² See Kelsen, *On The Essence And Value of Democracy*, 84-109.

³⁵³ See Friedmann, *Law in a Changing Society*, 191-192.

³⁵⁴ Ibid., 192-193: “ --utilitarian takes public order as the limiting factor--- Public order itself is not a static concept--- -- The much more limited concept of public order --is acceptable only in the context of a liberal society, which allows the individual a maximum of physical, intellectual and spiritual freedom, and correspondingly limits the function of criminal law.”



{ Figure: 3 }

Henceforth in a rebuttal to Franks’s apparent “*conflict*” between natural law’s “*idealism*” [like right to resist along with right to self-determination] and “*Westphalian realism*” [A justified use of maximum force for the survival of State].³⁵⁵ And to counter a Weberian (1864-

³⁵⁵ See Franks, *Rethinking the Roots of Terrorism*, 29-32, 60-63, 160: Dealing with the characteristics of non-state groups, he elaborates the paradox of international human rights norms and idealist perspective of Kant’s categorical imperative along with Locke’s reasonable man’s rational and calculated decision to dissent in case of injustice. He says that the conception of right full conditions and right to self-determination empower the dissenting individuals and groups to fight for their independence in the form of separatist movements. And when state as a legal entity exercise its right to maintain and protect its sovereignty and legitimacy through the use of force and other coercive measures. The civil and political rights like freedom of expression, conscious and thought, speech, association, movement, assembly and protection of life, liberty, equality before law, protection against torture, arbitrary detention, self-incrimination, apartheid as well as constitutional provisions of due process of law empower the non-state actors and other dissenting groups to seek the human rights protection. At this instance he inquire that whether international human rights norms are assertive and authoritative in the presence of a legitimate right of the state to protect and maintain its existence and ideological and territorial integrity as well as legitimacy of its Dejure government. Thus for him the phenomena of the Non –State actors emerge out of the vacuum which exists due to conflicts and competition between the idealist perspective of international human rights and realist perspective of nationalism , state necessity and state sovereignty. For such vacuum, which also produce ‘*anomie violence*’ he

1920) perception of “revolutionary” and “reactionary” tilts of natural law and its subsequent inconsistency with positive law.³⁵⁶ As well as to deal with Soper’s “*natural law dilemma*”, that natural rights have no credibility and reliability prior to the statehood and its relevant legal system, therefore are dependent on positive law for their practicality.³⁵⁷ Moreover, to ascertain the impacts of Universalist and essentialist perspective of human rights on the state sovereignty.³⁵⁸ It is appropriate to find a contingency point between due process of law,³⁵⁹ rule of law,³⁶⁰ and public order³⁶¹ and to place it under constitutionalism for qualification and protection of civil liberties. While former is primarily a natural law domain, establishes rights and liberties the latter two are positivist’s perspective of state authority to determine governmental legitimacy and reciprocal popular obedience.³⁶² In a rebuttal to Weber’s conception of natural rights, Rawls³⁶³ and Soper believe that due

refers to French revolution, which according to him is a milestone to engender a belief among dissenting individuals that they can bring a change through peaceful or armed resistance.

³⁵⁶ See W. Friedmann, *Legal Theory* (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co.Pvt Ltd, 2008), 82-92, 86: “As the Principle legal antinomies between Stability and Change, Positivism and Idealism --- Nationalism and Internationalism,--- Max Weber[with regards to stability and change]--- has stressed the revolutionary aspect of certain natural law ideologies. In fact natural law theories have served reaction as well as revolution.”

³⁵⁷ See in Philip Soper, “Some Natural Confusions about Natural Law,” *Michigan Law Review* 90, no. 8 (1992): 2393-2423, 2410-2412.

³⁵⁸ *Ibid.*, 2417-2418; Franks, *Rethinking*, 60.

³⁵⁹ See *The Stanford Encyclopedia of Philosophy*, Leslie Green, “Legal Obligation and Authority,” ed. Edward N. Zalta, accessed March 22, 2014,

<http://plato.stanford.edu/archives/win2012/entries/legal-obligation/>: Application of the state sovereignty and obedience to law on the basis of consent, equal membership of citizens and procedural fairness in contractual perspective.

³⁶⁰ *Ibid.*,: Application of the state sovereignty and obedience to law on the basis of political obligation of citizens (extracted from allegiance of the state to its citizens and vice versa), bureaucratization and institutionalization, necessity, moral fallibility, generalization and wide range as well as an equality before the law with regards to its application. It is a post formalism scenario, under analytical jurisprudence of evolutionary scheme.

³⁶¹ See O’Byrne, *Human Rights: An Introduction*, 159: “The object of law is the maintenance of social order.”

³⁶² See Friedman, *Legal Theory*, 91-92, 112, 123-125, 133-136, 145, 157-161; Soper, “Some Natural Confusions,”: 2421- 2423.

³⁶³ See Rawls, *A Theory of Justice*, 239.

process and rule of law supplement each other for tangible civil liberties.³⁶⁴ Consequently the due process clauses are extracted from natural law and function as ‘*higher law*’ over and above the constitution and procedural law.³⁶⁵

Akin to Dworkin, such hierarchical arrangement not only leads to judicial reasoning and adjudication of rights and liberties but also compliment natural and positive law for carving legal principles.³⁶⁶ Friedmann describes this compatibility as “*pragmatic positivism*” to satisfy vibrant social needs and wants, yet in a relatively free society.³⁶⁷ Likewise being a constructivist and rationalist Hannah Arendt (1906-1975) believes that human rights are associated with an existence of the state and citizenship.³⁶⁸ She identifies these rights as civil liberties and contextualizes them in a respective legal order.³⁶⁹ Although under this Neo-Hobbesian and Benthamian approach civil liberties are directly proportional to body politic, so can be curtailed or expanded accordingly.³⁷⁰ However like Soper, Rawls and Dworkin she too combines natural law with

³⁶⁴ See Soper, *Confusions*, 2417- 2423.

³⁶⁵ *Ibid.*, 2408-2410.

³⁶⁶ *Ibid.*, 2411-2416; Dworkin, *Taking Rights Seriously*, 216.

³⁶⁷ See in Friedmann, *Legal Theory*, 292-304: “In the realm of American realist movement---[which] has arisen and can operate only where there is sufficient freedom [civil liberties]-----it therefore demands a society which admits objectivity, that is a fundamentally tolerant [liberal] society. A totalitarian system has no room for realist jurisprudence.”

³⁶⁸ See in O’Byrne, *Human Rights*, 35: Susceptibility of human rights for refugees, non-state actors and illegal immigrants.

³⁶⁹ *Ibid.*, 36-37; Arato and Cohen, “The Discontents of Civil Society,” in *Civil Society and Political Theory*, 195: “out of the paradox of human rights for Arendt---Outside the body politic, the most fundamental right, namely, *the right to have rights* based on the ability to assert and defend rights publicly, cannot be secure. Thus, modern rights should be understood as *citizen* rights guaranteed by constitution. “State as a moral agent of its citizen ought to enforce fundamental rights and civil liberties. However these civil liberties can be curtailed during public emergencies or war time for the existence of political existence of state. Moreover such curtailment does not amount to human rights violations for her. It is just a rational decision of state as a political community to manage its existence.

³⁷⁰ See Franks, *Rethinking*, 55.

positive law for an equal protection of rights in a liberal democracy.³⁷¹ It is not only to accommodate a probability of dissenting will and reasoning but also to rationalize civil liberties.³⁷² Such combination is also endorsed in the preamble of the Universal Declaration of Human Rights, 1948. A blend of its third and fifth paragraph explicitly narrates that “*human rights should be protected by the rule of law---in larger freedom.*”³⁷³ Such larger freedom is an expression of the state based civil liberties protected through positive law and qualifies as constitutional guarantees.³⁷⁴ A succeeding portion of study is discussing this blend in the context of authority and procedural justice mainly through sociological and ethical jurisprudence.

Legitimacy and Obedience in a Post Constitutional Scenario

Sociological jurisprudence combines social utilitarianism with natural law³⁷⁵ for an equitable social order.³⁷⁶ Pound believes that law is neither a static nor a distant universal phenomenon. It is rather a dynamic variable depending upon time and space with a specific utility for the respective society.³⁷⁷

³⁷¹ See Arato and Cohen, *Civil Society*, 195-199: Under a domain of constitution and constitutionalism.

³⁷² *Ibid.*, 598-599: “what keeps limited government limited is the willingness of citizens to associate, form public opinions, act collectively on their own within civil society and thereby influence government.”

³⁷³ See in Barrister Zafarullah Khan, “Annex on Documents: Universal Declaration of Human Rights (1948),” in *Human Rights: Theory and Practices* (Karachi, Pakistan Law House, 2007), 265.

³⁷⁴ See Crawshaw, *Human Rights and Policing*, 47-49.

³⁷⁵ See Pound, *An Introduction to the Philosophy of Law*, 42-45.

³⁷⁶ See in E.M. Morgan, “Justice According to Law, by Roscoe Pound,” *Louisiana Law Review* 12, no.3 (1952): 328-325.

³⁷⁷ See Stone, *Human Law & Human Justice*, 269-270.

Pound's social engineering is based upon authoritative "*jural postulates*" in legislative and judicial arenas. In former's realm these "*working hypothesis*", deal with formulation of policies and legislative reforms to cater indigenous socio-economic and political demands. And in latter's case these "*postulates for law*" form a whole fabric of legal principles through reasoning with intent to enlarge the scope of procedural justice.³⁷⁸ These dialectical postulates maximize collective well-being and minimize frictions of conflicting interests in a respective society.³⁷⁹ With this strategy, law as a social institution achieves its purpose of socio-economic growth and substantial justice without a least probability of "*frictions*" by the settled general will.³⁸⁰ Pound believes that constitution and constitutionalism would be better off by such expanding role of judicial organ.³⁸¹ Hence to meet "*ends of law*", he focuses on an "*instrumental*" perspective of adjudication in which socioeconomic and political inputs are taken in to consideration for social reforms.³⁸² As differing from a "*mechanically literal*" approach of law, such vibrant judicial role is devised to bring socioeconomic justice in society.³⁸³

Sen for this purpose uses the phraseology of "*social relevancy of rights*" along with a Kantian perspective of "*perfect and imperfect obligations.*" To avoid subjectivity with regards to priority of natural rights in the field of governance and development, he focuses

³⁷⁸ Ibid., 266-269; Pound, *An Introduction to the Philosophy of Law*, 56-57: Thoroughly deliberated pre-supposed socio political and legal principles constructed through legislative and judicial reasoning for social integration and cohesion. In this regard, Pound perceives law as a social institution to minimize conflicts. Hence the end [objective] of law is to decrease an inevitable friction among competing interests.

³⁷⁹ See Friedmann, *Legal Theory*, 336-342.

³⁸⁰ Ibid., 336-337; Stone, *Human Law & Human Justice*, 263-265.

³⁸¹ See Friedmann, *Legal Theory*, 513-514.

³⁸² See Cotterrell, *The Politics of Jurisprudence*, 155-156, 160: F.N.7.

³⁸³ Ibid., 157-162.

on the social relevancy of rights. Accordingly the right which is objectively more demanding in a respective society requires an immediate adoption through appropriate institutional efforts to be qualified as legal right.³⁸⁴ Afterward it requires a pragmatic enforcement and protection to satisfy the urgency of society through “*fiduciary*” or contractual obligations of institution under the Kantian rightful conditions. He recognizes this responsibility as “*perfect obligation*,” however if the concern institution or person is unable or fails to perform this perfect obligation, then the succeeding or the remote institution is under “*imperfect obligation*” to protect it.³⁸⁵ Hence the “*instrumental*” role of judiciary under sociological jurisprudence comes in the same ambit of imperfect obligation if legislature or executive are unable to perform perfect obligations.³⁸⁶

At this point it is appropriate to understand the phenomena of institutional justice, because Rawls’s post constitutional focus is on dispensation of justice through an institutional setup whereas his constitution is a “*political justice through political society*.”³⁸⁷ Under this “*definite constitution for social action*”,³⁸⁸ every institution as a moral agent has a pledge to cure mal-administration along with other socio-political and economic injustices.³⁸⁹ For such a welfare state, he further splits the notion of justice in to two main categories,

³⁸⁴ See Amartya Sen, *The Idea of Justice* (Rawalpindi: Reprint in Pakistan, Services Book Club, GHQ, 2009), 362-371.

³⁸⁵ *Ibid.*, 372-376.

³⁸⁶ *Ibid.*, 364-366: he uses the term ‘Beyond the legislative Route’ to discuss such remote institutional responsibility.

³⁸⁷ See Rawls, *A Theory of Justice*, 221.

³⁸⁸ *Ibid.*, 566.

³⁸⁹ *Ibid.*, 57, 197, 221, 227.

“fairness”³⁹⁰ and “regularity.”³⁹¹ The former category is simply a workable confluence of Kantian perspective of categorical imperative with Stammler’s principles of respect and participation.³⁹² Its sole purpose is a preservation of individual’s self-esteem, dignity, reasonableness and moral agency through the contingency of four cyclic stages. These sequential stages consist of original position, constitutional conventions for constitution making process, formulation of constitution and the formation of institutional setup.³⁹³

With this horizon Rawls further splits liberty and equality in to two different domains.³⁹⁴ His liberty is a contractual and deontological concept of egalitarianism to establish due process of law for a bilateral protection of individual and collective rights. It is also meant for formulation and evaluation of political agendas, policy inputs and national objectives.³⁹⁵ Parker identifies such liberty as a fifth stage of Rawls constitution making process, with a possibility of Lockean perception of dissenting individual will.³⁹⁶ Rawls call it a “*precondition of the rational pursuit of value,*”³⁹⁷ which ultimately lead to political justice and a presumed equality. Equality for Rawls deals with rule of law, non-coercive formulation of institutions and an overall conducive environment to accomplish individual goals. He illustrates it as “*equality essentially as regularity*” to treat everyone

³⁹⁰ Ibid., 565.

³⁹¹ Ibid., 235.

³⁹² See Stone, *Human Law & Human Justice*, 174-175.

³⁹³ See Rawls, *A Theory of Justice*, 440, 196-198.

³⁹⁴ Ibid., 204.

³⁹⁵ Ibid., 62, 202-205, 210-219.

³⁹⁶ See Richard B. Parker, “*The Jurisprudential Uses of John Rawls,*” in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 279.

³⁹⁷ See Rawls, *A Theory of Justice*, 210.

similarly and to deal like cases alike through institutional mechanism.³⁹⁸ Hence due process as a normative morality is a prerequisite to achieve rule of law,³⁹⁹ and to ascertain political justice in a pluralistic society.⁴⁰⁰ Consequently, he focuses on a utilitarian procedural fairness, stemming from his latter category of justice,⁴⁰¹ with a sole drive to establish rule of law. It means that morality of natural law is not only essential to gain respect to law but also a pre-qualification to establish a legal order. Nevertheless, the question is that how can a specific legal order be accomplishing such morality? How could some objective set of rules gain a pragmatic justice in society that contains ideological heterogeneity and plurality? Moreover, what is meant to establish rule of law? Does it mean a strict literal implementation and obedience to rules as they have codified and written by sovereign? Alternatively, does it mean to include and satisfy entire subjectivity of a society through legal precepts? What is meant by procedural accuracy and fairness? Is it mean to apply the law in its true letter and spirit regardless to its austerity and intricacy or means to use administrative discretions to accommodate individualistic subjectivity?

³⁹⁸ Ibid., 504-505: He focuses on an optimal justice in accordance with constitutional and international human rights norms with a method of treat like cases alike according to settled law and precedents instead of arbitrary judgments and by ignoring all kinds of majority's passions. However to lessen the equality to benefit all [national security concerns etc] must be measured up the least benefited or equals. Thus law of diminishing utility is applied to benefit least well off by a sum raking of total happiness.

³⁹⁹ Ibid., 239: Vague and imprecise Statues and rules not only takes away ,integrity, dignity and moral agency incorporated in categorical imperative through original position of social contract, but also stemming procedural and political injustice.

⁴⁰⁰ Ibid., 243, and at 249: " the principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society. Others [institutions] are authorized and sometimes required to act on our behalf and to do what we would do for ourselves if we were rational."

⁴⁰¹ Ibid., 235, 504-505, 565-566.

To get the answer of such queries one ought to concentrate on Fuller's "*legalism*" and his ethics of legislation.⁴⁰² His rule of law is an overall respect, sanctity, and authority of a specific legal system, which he identifies as "*fidelity to law*," yet conditional to its "*legality*."⁴⁰³ Such legality is resulting from a compatible alignment between "*external and internal morality*" of law to get its maximum efficacy. Former deals with an ideological superstructure, relates to moral aims and objectives of legislature and latter relates to infrastructure, focusing on the procedural fairness, transparency and accountability of methods that are resorted to apply the law.⁴⁰⁴ Accordingly, if intention, purpose and wording of law are clear and prescribe logical course of action. In addition to certainty, durability, compatibility with routine life and existing laws and intends to empower socio-economic and political justice then it is capable to fulfill the criteria of legality under "*fidelity*" [obedience to law].⁴⁰⁵ Fuller describes this political obligation as "*morality of duty*" and considers it essential to maintain a social order.⁴⁰⁶

Like Rawls, he believes that lack of procedural fairness has a negative impact on an overall respect to law. Cotterrell elaborates this point in his words as, "*Legality is a matter also of how the rules are drafted, promulgated, applied, interpreted and enforced---* Legal order must be 'good order' so as to create conditions for fidelity to law. Good order demands conformity, at least to a minimum extent, with the internal morality [procedural fairness] of law. Legality for Fuller is

⁴⁰² See Lon L. Fuller, *The Morality of Law* (Fourth Indian Reprint. Delhi: Universal Law Publishing Co.Pvt Ltd, 2006), 5-6.

⁴⁰³ See Cotterrell, *The Politics of Jurisprudence*, 124-125.

⁴⁰⁴ See Phil Harris, *An Introduction to Law* (Cambridge: Cambridge University Press, 2007), 34-35: "The 'natural law' element in Fuller's writing tends to be reflected in this concern with legality or due process."

⁴⁰⁵ See Fuller, *The Morality of Law*, 5-10, 39-47: for a fidelity to a positive legal order.

⁴⁰⁶ *Ibid.*, 5-6.

thus a special kind of morality--.”⁴⁰⁷ Fuller further elaborates a sustainable public order as “*legalism*” through equilibrium between “*morality of aspiration*” and “*morality of duty*” as narrated in the following diagram [**Figure: 4**]. Former as an external morality represents a moral perfectionism in the aims and intentions of legislator. It is a maximal desired position of the law giver in an ideal situation as has been perceived by him at the time of legislative drafting. The latter represents an actual state of obedience to law in a given society with twofold position. Its high threshold depicts an absolute [yet seems a utopian] obedience of subjects with a minimum probability of deviance, where as its lower threshold has a high probability of deviance beyond which anarchy emerges as a law and order crisis. Therefore, the existence of “*fidelity to law*” requires at least a minimum level of “*morality of duty*.”⁴⁰⁸ But such a minimal position has a vulnerability of lawlessness; however, a contingency between medium thresholds of perfectionism and actual obedience to law represents a pragmatic rule of law as legalism in a respective society.

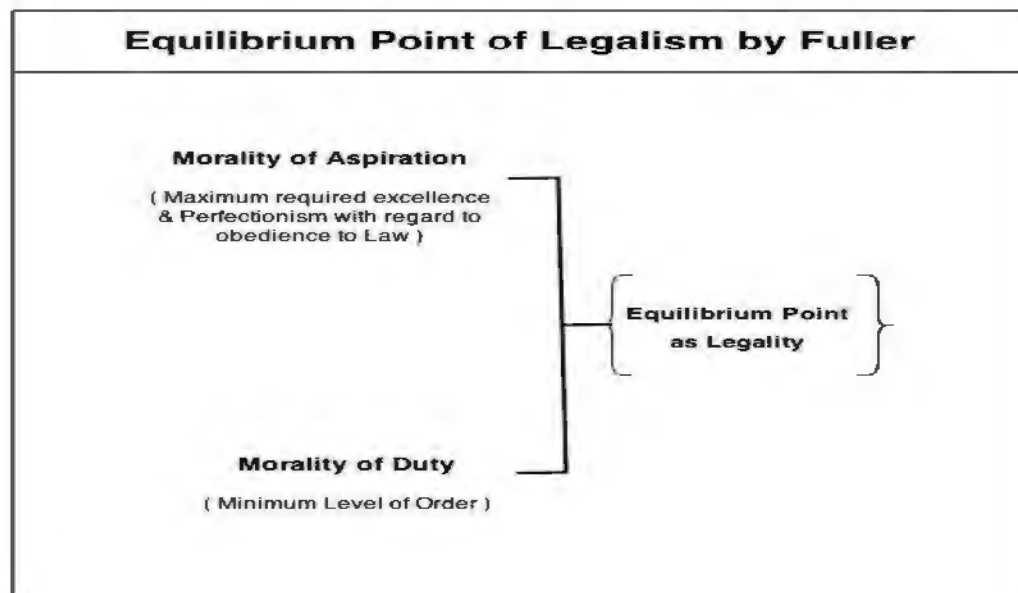
A critical analysis of this paradigm depicts a classical utilitarian approach of procedural justice as Hart quotes in these words, “*Justice, as Bentham seems to have thought, merely a name for the efficient distribution of utility or welfare.*”⁴⁰⁹ It seems that strict observance of procedure, which has transparency, accountability, predictability, plausibility and durability acts as a catalyst of protection against administrative discretions and other abuses of a stringent laws. Nevertheless Fuller’s rule of law is based upon procedural

⁴⁰⁷ See Cotterrell, *The Politics of Jurisprudence*, 128-129.

⁴⁰⁸ *Ibid.*, 130-134.

⁴⁰⁹ See H.L.A. Hart, *Law, Liberty and Morality* (California: Stanford University Press, 1963), 4.

justice coupled with due process, besides this form of social legality seems an effective remedy to protect core personal and civil liberties.



{Figure: 4}

Such procedural justice is also close to Finnis's deontological perception of "general welfare and public interest."⁴¹⁰ Since his "practical reasonableness" is a moral, response of law to human needs amid general welfare conditions. It creates a conception of justice among citizens, which is directly proportional to respect for law.⁴¹¹ Nevertheless, to attain practical reasonableness and its consistent implementation, community needs either unanimity or authority. Here he says that unanimity is impractical in a pluralistic society, consequently an accountable and responsible authority is a viable option to implement

⁴¹⁰ See Finnis, *Natural Law & Natural Rights*, 155-156.

⁴¹¹ *Ibid.*, 351-355, 359-362.

practical reasonableness.⁴¹² This authority in a liberal democracy has two compatible Rawlsian parameters, utilitarianism and natural law. Former ascertains its responsibility with regards to collective well-being and brings socio-economic justice. And later focuses on personal liberty, equal protection of laws [civil liberties] and fundamental right of nondiscrimination to bring political justice.⁴¹³ Hence Rawls's "*justice as regularity*", Finnis's "*practical reasonableness*"⁴¹⁴ and Fuller's "*morality of duty and aspiration to law*"⁴¹⁵ serve as a theoretical foundation for equality of citizens before the law.

An ultimate objective of authority with practical reasonableness is to achieve and maintain socio-economic and political justice in a particular society. And contrary to it brings "*diminished collateral*" which falls out into an unjust legal system with an extralegal conformity to law out of coercion.⁴¹⁶ Finnis's "*diminished collateral*" [officials and

⁴¹² Ibid., 231-233.

⁴¹³ Ibid., 351-360.

⁴¹⁴ Ibid., 100-127: He gives a practical plan of action for institutional justice and describes it conducive for the attainment of common well-being. He says that law which lacks any of the core element of practical reasonableness is reciprocally '*lex injusta non est lex*' (unjust law does not have any authority to bind). His practical reasonableness consists of "A coherent plane of life (like Rawlsian rational plan of life for pursuit of happiness), No arbitrary preferences amongst values, No arbitrary preferences amongst persons, Detachment and commitment, Efficiency within reason, Respect for every basic value in every act, Following one's conscience."

⁴¹⁵ See Lon L. Fuller, *The Morality of Law* (Fourth Indian Reprint. Delhi: Universal Law Publishing Co. Pvt Ltd, 2006), 37-91: Though like Hart, he is a legal formalist and has no concern for socio-political or cultural stimulants to form a law. Yet he describes in the form of '*morality of law*' (Ethics of Formalism) that to be qualified as a legitimate legal system, it must consist of the following elements. Firstly there must be a set of rules instead of ad hoc injunctions and arbitrary orders. Secondly these rules must be known to every member of the respective legal system. Thirdly rules must not have retrospective effects to implicate past actions. Fourthly, rules must not be in vague language rather they must be in an understandable form. Fifthly, a legal system must have a consistent set of rules. Sixthly rules must not demand some impossible actions from its subjects. Seventhly, rules must not be changed frequently and lastly, administrative actions must be in conformity with the announced set of rules. Fuller says further that lack of any of the above mentioned elements disqualify a legal system to be called as a legitimate and valid legal system. He personifies an autocratic legal system through an imaginary ruler "Rex" and describes its failures on the threshold of above mentioned criteria of rule of law.

⁴¹⁶ Ibid., 361-362.

citizens together have reduced legitimacy for an incoherent or unjust law] is identical to Hart's conception of "*observer's external point of view*"⁴¹⁷ regarding a legal system. Hart says that for a sustainable legal system coercions must be equalized by internal efficacies. And to maintain a prolonged legitimacy, internal obligations [respect for law out of efficacy] ought to be more in number than observer's external obligations [law abiding out of duress].⁴¹⁸ Consequentially, Hart's voluntarily internal obligations to obedience, addresses procedural justice in accordance with the aspirations of community.⁴¹⁹

Cotterrell treats Hart's perspective in a different dimension to understand conformity and nonconformity to laws in a respective society. For him obligation is basically a sociological perspective of law which intends to focus on the behavior of citizens. It is further divided into two main categories, as internal and external obligations. Former is also known as "*insider's view*"; it is a bottom up approach, primarily used to educate and maneuver the participants of society about a particular and proposed plan of action. After attaining a sufficient general support from them and from other specific stakeholders, a proposed bill is introduced to be transformed into an act of parliament. Accordingly an incremental approach is adopted for a pragmatic implantation of such law in a society.

⁴¹⁷ See in Hart, *The Concept of law*, 89: "as an observer who does not himself accept them,---observer may, without accepting the rules himself--" and at 91: "those who on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment."

⁴¹⁸ Ibid., 91-92.

⁴¹⁹ Ibid., 82-91, 202-203, 210.

Since citizens have already given their consents in this context, hence they would be under moral obligation to obey these commands.⁴²⁰Such an intrinsic normative attitude is basically a characteristic of a contractual society based on Hegelian dialect with a least probability of deviant behavior. And this deviance is only an outcome of some anomalous external factors such as individualist biological or psychological abnormality and unusual sociopolitical and economic occurrence.⁴²¹ In the case of latter, an “outsider’s view” a top down hierarchal approach is adopted by the political sovereign. Here law is introduced and made by regimes in isolation and handed over to executive for implementation. Such delegated scheme provides a rationale for discretions and coercion on the administrative side. Resultantly subjects observe obedience to law out of predictive punishments and sanctions. Under this paradigm governments not only require lot of resources, but also need a specific bureaucratic set up for a tangible enforcement of the laws.⁴²²

But does the procedural justice intrinsically capable to deal with potential emergence of “diminished collateral” arise amid the socio-economic wrangling and free market competition? To answer this question authoritatively, Cotterrell looks at Hart’s analytical process of legal order where rule of recognition, adjudication and change can invalidate a precept which is incompatible to the primary rules. And as has been discussed above these primary rules are based upon “*The bare minimum of the natural law.*”⁴²³It seems that Hart’s analytical process as is illustrated in the subsequent diagram [**Figure: 5**]

⁴²⁰ See Cotterrell, *The Politics of Jurisprudence*, 87-90.

⁴²¹ See Jones Stephen , *Criminology* (Clarendon Street, Oxford: Oxford University Press, 2006), 112-123, 151-230; Frank Schmalleger, *Criminology Today* (New Jersey: Prentice Hall, Inc., 1999), 187-260.

⁴²² See Cotterrell, *The Politics of Jurisprudence*, 90-92.

⁴²³ See in Stumpf, *Morality and the Law*, 211-217.

systematically revolves around primary and secondary rules. Being a rationale of common law legal system, it not only establishes rule of law but also overrules such sociopolitical whims of aristocratic regimes which are contrary to the core principles of the primary rules.⁴²⁴

To prove his argument in the realpolitik paradigms where bargains, compromises and discretions take place to form governments, Cotterrell takes the help of Kelsen's pure theory of law and makes it compatible with the Hart's analytical process. He along with Stumpf believes that the 'genesis' of Kelsen's grund-norm and Hart's primary rule is the same "*bare minimum of the natural law.*"⁴²⁵ Besides Kelsen's normative legal order is not only internally interconnected but also seamless, thus no perilous sociopolitical stimulus can penetrate or manipulate the legal process.⁴²⁶ Hence on the one hand such self-sustained interconnectivity maintains the mechanical process of rule of law and on other hand it protects the fundamental rights of citizens during all kind of charismatic impulses.⁴²⁷

Yet a question arises here that which institution is responsible to protect the fundamental rights under this paradigm? Cotterrell believes that judiciary is an ultimate organ to do so through the help of the above mentioned 'genesis' of the law, which also functions as

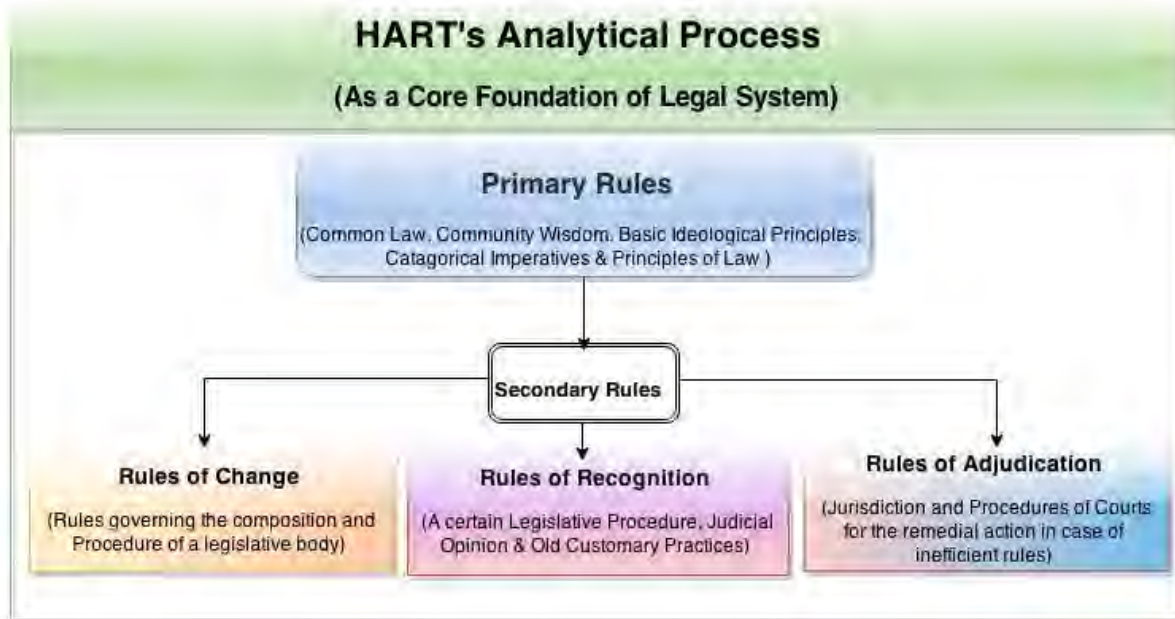
⁴²⁴ See in Cotterrell, *The Politics of Jurisprudence*, 92-95, 104-107.

⁴²⁵ *Ibid.*, 104-107; Stumpf, *Morality and the Law*, 189-217.

⁴²⁶ See Stumpf, *Morality and the Law*, 184: "Kelsen had made point—that law is a norm which derives from another norm---for the matrix of law is the moral judgment of man [Hobbes's minimum argument for natural law]", therefore Kelsen's grund norm is based upon reasoning and moral values as derived from the Kant's categorical imperative.

⁴²⁷ See Cotterrell, *The Politics of Jurisprudence*, 107-111, 122-123: " In times of stability positivist criteria of legal authority typically seems sufficient [yet] in times of political turmoil or rapid political change they frequently seem inadequate[thus] Kelsen's efforts to establish a pure theory of law are, in part, an attempt to protect law from politicization"

higher law for the validity of positive law. Accordingly he identifies it as a “link” between natural law and positive law to accomplish the right to fair trial along with other fundamental rights.⁴²⁸



{Figure: 5}

This study indicates that socio-political justice as regularity or practical reasonableness or morality of law deals with procedural justice under constitutionalism. It depends upon a set of institutions for its dispensation through a blend of due process of law with rule of law to maintain public order. Friedmann as well in this regards focuses on the institution of judiciary to gain “reasonableness” in the society. This reasonableness demonstrates a balancing of conflicting interests through social engineering in judicial arena.⁴²⁹Harris

⁴²⁸ Ibid., 116-123.

⁴²⁹ See Friedmann, *Legal Theory*, 133-136.

declares that judiciary performs this function in the context of “*public interest.*” It is when society confronts a novel situation not covered as such through prior precedents or legislations.⁴³⁰

At this point, it is appropriate to mention Radbruch to understand justice and law in their particular domains and then attainment of a just society as their entirety.⁴³¹ He categorizes law in to three conflicting categories of “*directive of justice,*” “*legal certainty,*” and “*purpose conformity.*”⁴³² He along with Friedman identifies this notion as “*legal antinomies,*” and argues that equal protection of law is a readjustment of these elements without extinguishing their variances under a parameter of individual equality.⁴³³ For such purpose he formulates a theory of relativism by placing justice as a subjective value and law as a time and space centric objective reality.⁴³⁴ He says that for “*purpose conformity*” and “*legal certainty*” to achieve intended objectives, authority conducts “*value relating evaluation*” of law with two possibilities. Positive law either sustains with a “*value blind*” notion or achieves intended results irrespective of any inequality, or justice as an equality

⁴³⁰ See Harris, *An Introduction to Law*, 204.

⁴³¹ See Stone, *Human Law & Human Justice*, 238: “Justice as the reality of the idea of law”

⁴³² *Ibid.*, 245-247: “Antinomies between the elements or idea of law----- antinomy (inevitable tension) between justice and purpose conformity and antinomy between justice and legal certainty. “Antinomy between justice and purpose conformity breeds discretionary use of executive power in the domain of secondary legislations and leads to judicial review of administrative actions for its conformity to basic human rights and antinomy between justice and legal certainty leads to judicial review of legislation for the scrutiny law

⁴³³ See Friedmann, *Legal Theory*, 82-92: As has been mentioned above the principal legal antinomies [conflicts and contradictions] in legal theory consist of between ‘intellect and intuition’, ‘stability and change’, ‘collectivism and individualism’ and ‘nationalism and internationalism’.

⁴³⁴ See Stone, *Human Law & Human Justice*, 238.

of procedure neutralizes the law when equity is intended for distributive justice.⁴³⁵ Similar to Rawls he too places theological values and faith outside of this relativism and calls it “*value conquering*,” illogical phenomena to suppress equality.⁴³⁶ Thus Radbruch’s rule of law must conform to “*absolute minima of justice*” to gain obedience through this relative theory of values.⁴³⁷ Like Pound, Radbruch’s appraisal of law also falls in to three institutional domains. Accordingly, “*legal certainty*” relates to legislature, “*purpose conformity*” associates with executive and “*directives of justice*” deal with judiciary.⁴³⁸

This institutional setup is close to Weber’s conception of social organization in a postindustrial political society.⁴³⁹ An organizational system for public order consists of parallel, interconnected,⁴⁴⁰ yet antagonist structures of elected parliament and selected bureaucracy. Parliament under democratic norms of majority rule tries to expand its influence. On the other hand bureaucracy due to its permanency of structure, hierarchy and impersonal rules resist this expansion.⁴⁴¹ This dialectical social stratification produces a compatible status group, who manage to control “*means of administration*” through legal

⁴³⁵ Ibid., 239-241, 245-247: He argues that even in the case of equity, when state applies distributive justice for the benefits of least well offs , individual equality as a core logic and principle of justice must not be ignored, for such purpose he like Rawls emphasizes on the equality of procedure.

⁴³⁶ Ibid., 238: “as limits of knowledge in the realm of justice”; Rawls, *A Theory of Justice*, 216.

⁴³⁷ See Stone, *Human Law*, 247-251: ‘Absolutes for Relativists’, and at 251-255: ‘Higher law: Absolutes and Resistance Power’: argues by relying on Radbruch that positive law must contain certain minimum norms of natural law to gain legitimacy among its audience.

⁴³⁸ Ibid., 247-251, 269-270.

⁴³⁹ See Anthony M.Orum, “The Vision of Max Weber,” in *Introduction to Political Sociology* (New Jersey: Prentice-Hall, INC, 1983), 52-53: Weber presents State as a political society, and his State Sovereignty is a monopoly to use legitimate force and capacity for counter violence in a specified territory of respective State.

⁴⁴⁰ Primary legislation in Parliaments depends upon bureaucracy for implantation, also authorizes it for secondary legislation in bureaucratic domain for creation of by laws.

⁴⁴¹ See Orum, *Political Sociology*, 46-52.

rational authority and legitimacy.⁴⁴² The “*status group*” perception of Weber is close to Marx’s (1818-1883) conception of class domination through an absolute control over “*means of production*” and manipulative legislations under majority rule.⁴⁴³

Due to majority rule and domination over means of administration and production, Mills describes this phenomenon as an elite system of government even under constitutionalism.⁴⁴⁴ Weber argues ahead that on one hand status group manages the “*means of administration.*” And on other hand it depends upon this same administrative tool for status quo. Since owing to legal rational legitimacy and reciprocal obedience, law plays a crucial role for an effective status quo and serves the interests of status group.⁴⁴⁵ Even Hart acknowledges this tactical use of law and administrative tool for a possible domination of tyranny.⁴⁴⁶ Similarly, Radbruch recognizes it in the horizon of antinomy of

⁴⁴² Ibid., 45, 53-56: Weber classifies authority in to charismatic authority, traditional authority and legal rational authority . Obedience to first type of authority is based upon personal charisma, affiliation, affection and intimacy but it is transitory and withers away along with the demise of authority. Obedience to second type of authority depends upon coercion and custom, often feudal societies, monarchies and totalitarian regimes demonstrate such type of authority and obedience relationship. Obedience to legal rational authority depends upon the legitimacy of a legal system. People obey laws because they rationally believe that positive law comes in to existence through a valid procedure and contains legality according to their perception of justice. Citizens of State perceive the set of laws as efficacious and efficient for collective wellbeing, therefore they voluntarily surrender their will to a valid authority, which reciprocally implement these laws through popular consent under majority rule. Due to legality and validity the respective legal system maintains its permanency and hegemony to use legitimate force for social control and collective public order.

⁴⁴³ See Orum, *Sociology*, 15-41, 46-49: for compatibility between Weber’s status group and Marx’s social class.

⁴⁴⁴ See C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956), 269-287: “ The higher members of the military ,economic ,and political orders are able readily to take over one another’s point of view, always in a sympathetic way, and , and often in a knowledgeable way as well.”

⁴⁴⁵ See Orum, 53-61: “organized domination---requires the control of these material goods which in a given case are necessary for the use of physical violence.”

⁴⁴⁶ See Hart, *The Concept of law*, 210: “So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the form of law as one of their instrument. Wicked men will enact wicked rules which others will enforce”

legal certainty.⁴⁴⁷Such milieu of formalism is not only counterproductive for due process of law in contractual paradigm but also harmful for rule of law in the analytical jurisprudence of evolutionary model.⁴⁴⁸Irrespective of the morally fallible tilt of positive law, grave irregularities in procedural justice and harsh treatment of law itself bring a diminished political obligation to respect legal rational authority.⁴⁴⁹It not only engenders “*philosophical anarchism*”⁴⁵⁰and Marxist’s “*relative deprivation*”⁴⁵¹among protesting citizens but also hampers collective obedience to law.

This kind of resentment and dissent is a subject matter of part II of the study, which is coherently linked with above-mentioned arguments. However, before proceeding to the next part of the theoretical debate, it seems plausible to contextualize whole debate in the perspective of Pakistan.

⁴⁴⁷ See Stone, *Human Law & Human Justice*, 245-247: “demanding that the law be applied even if it is unjust –in the sense that the strict application of positive law may lead to the worst injustice.”, and at 247-251 “the supremacy of positive law ceases where the contradiction of positive law and justice assumes intolerable proposition [legal antinomies]. In that situation the positive law must give way to justice, ---- in the sense that it is not to be regarded as positive law; it is not even legally compelling.”

⁴⁴⁸ See Arato and Cohen, “Civil Disobedience and Civil Society,” in *Civil Society and Political Theory*, 589-593.

⁴⁴⁹ See *The Stanford Encyclopedia of Philosophy*, Leslie Green, “Legal Obligation and Authority,” ed. Edward N. Zalta, accessed March 22, 2014,

<http://plato.stanford.edu/archives/win2012/entries/legal-obligation/>: “it is common ground [that] the [political] obligation (obedience to law) exists only when a threshold condition of justice is met.”

⁴⁵⁰ *Ibid.*: Philosophical anarchism is different than the political anarchism. Later leads to question the legitimacy of government through coercive means but former are a skepticism regarding political obligation of citizens to obey law. This political anarchism either engenders a pacifist’s conscious objection (in private capacity not necessarily in public) by disobeying law which lacks procedural justice or produce mass disobedience (necessarily in public and political domains) against an unjust law or set of laws.

⁴⁵¹ See Orum, *Political Sociology*, 35: for “The Vision of Karl Marx.”

Since Paul argues that due to geo strategic vulnerabilities, the ruling elites of Pakistan rely heavily on Hobbesian model of statehood rather than Lockean and Kantian Model.⁴⁵² Consequently, authoritarian intents of strong center and absolute administrative control under “*hyper realpolitik*” exist in Pakistan.⁴⁵³ Cohen claims that such an “*operational code*” emerged in Pakistan since its emergence and sustained unaltered until today to achieve a strong statehood and a likely writ of state.⁴⁵⁴ However, unlike the Hobbesian conception of “*bare minimum of natural law and mutual existence,*” civil society and civil liberties remained improvised under the notion of national security and public order in Pakistan.⁴⁵⁵ While Pakistan has a constitution and constitutional guarantees under Kantian perspective of social contract, egalitarianism and categorical imperative,⁴⁵⁶ then whether she has a resulting constitutionalism⁴⁵⁷ as well or not? If yes, then is it also capable to neutralize the above-mentioned “*hyper-nationalism,*” and if not then why so? Hence

⁴⁵² See T.V. Paul, *The Warrior State: Pakistan in the Contemporary World* (Haryana: Random House India, 2014), 24-28: The vulnerabilities includes the hostile neighborhood of India, traditional patterns of antagonism between Hindus and Muslims based on two nation theory, along with the simmering and persisting conflict of Kashmir. Pusthunes living in the both sides of Durand line in Pakistan and Afghanistan and their likely skepticism about the ideology of Pakistan. Probability of aggression on the borders from India and non-state actors assembled in Afghanistan on the name of pan Islamism. International realpolitik over natural resource between America, China and Russia and geo- strategic location of Pakistan, its role in the Arab countries by perceiving herself as a military leader and protector of Muslim Ummah. On such grounds the establishment of Pakistan perceives her insecure in the anarchical international order. Due to such perceived insecurity it urges a strong statehood to protect the territorial and ideological integrity of Pakistan under the notion of national security. It is also identical to Hobbes model of strong statehood to protect common wealth of community.

⁴⁵³ *Ibid.*, 28-31.

⁴⁵⁴ See Stephen P. Cohen, *The Idea of Pakistan* (Washington D.C.: Brooking Institute Press, 2004), 72, quoted in Paul, *The Warrior State*, 24-25.

⁴⁵⁵ See Hassan Askari Rizvi, *The Military & Politics in Pakistan: 1947-1997* (Lahore: Sang-e Meel Publishing, 2011), 30-80, 100-150, 180-200; Paul, *The Warrior State*, 186-197.

⁴⁵⁶ See M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 105-126: “Preamble.”

⁴⁵⁷ See Christopher C. Mojekwu, “*Nigerian Constitutionalism,*” in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 163-165: Governance in accordance with constitutional principles along with an ability to control the abuse of power and to maintain the rule of law in society is called as constitutionalism.

following portion of the part I of this theoretical framework intends to find out answers of such quires from the prevailing constitutional structure of Pakistan.

Constitutional Perspective of State and Society in Pakistan

A critical analysis of the constitution of Pakistan, 1973 elaborates that all of the three perspectives of the state sovereignty are incorporated in it. The notion of egalitarianism as incorporated in the second last paragraph of the preamble of the said constitution along with its other objectives and aims are identical to the contractual paradigm. Moreover the primacy of fundamental rights as is given in the Article 9-28, under the auspices of the due process clause of the Article 4 and through the writ jurisdiction of high court under Article 199(1) and (2) as well as ‘*writ of amparo*’ under Article 184(3) is similar to the Kant’s perspective of the categorical imperative. It is also identical to Locke’s and Hobbes’s perceptives to form civil and political society solely to protect fundamental rights of egalitarians.⁴⁵⁸

Besides it the placement of objective resolution as a substantive part of the constitution through Article 2A is implicitly identical to contractual parameters. Since it is conditional here not to make reform or amend constitution in contravention to the categorical imperative. It seems that objective resolution as a categorical imperative of Pakistan binds all constitutional and procedural amendments to follow its values. It has only one vital

⁴⁵⁸ See *Haji Lal Muhammad v. Federation of Pakistan*, PLD 2014 Peshawar 199; *Foundation for Fundamental Rights v. Federation of Pakistan and 4 others*, PLD 2013 Peshawar 94: Reliance has been made on international bill of rights to protect fundamental rights of citizens of Pakistan.

difference to the contractual notion, as the contractual philosophy is a secular notion whereas objective resolution emphasizes on Islamic Philosophy. Hence, the contractual concept of sovereignty is fundamentally different from Islamic concept of sovereignty. Since former is based on egalitarian's majority and will, while the latter is based on the Supremacy of Allah.⁴⁵⁹ However to evade such debate and to place a focus on personal and civil liberties as enunciated by universalists, this study focuses on the above mentioned (Figure:1) for its conceptual framework.⁴⁶⁰ Hence, to establish fictional egalitarianism it places religion as a personal element of man of rationality and places it beyond the influence and maneuvering of civil as well as political society. However if government adopts such measures as to enforce a specific religious, ethnic or socio-cultural ideology through administrative means then a probable reaction would emerge from minority as illustrated above in the "total state" paradigm.⁴⁶¹ Accordingly, Cotterrell's illustration of Hart and Kelsen's analytical theory helps to immune the legal system from "charismatic" impact of religious ideology.

Furthermore the constitutional emphasize on the elimination of all forms of exploitation as incorporated in the Article 3 of the constitution is an attempt to promote socio economic justice. It is identical to Rawls perspective of institutional justice through equality and equity. A compatible interpretation of Article 3 and 4 of the constitution if read with the

⁴⁵⁹ See Paul, *The Warrior State*, 127-131, 148-149.

⁴⁶⁰ According to **Figure: 1**: This study places religion in "b" portion of the individual, and perceives it beyond governmental or socio-political influence. It is also evident from the Article 18 of the International Covenant on Civil and Political Rights, 1976 along with Article 20 of the constitution of Pakistan, 1973. Freedom of religion and to profess a religion of one's own choice is fundamental human rights, beyond the governmental as well as social influence.

⁴⁶¹ See into **Figure: 2** of the Theoretical Perspective Part: I of this study.

combination of fundamental rights and principles of policy provides a pragmatic rationale of Pound's sociological jurisprudence to avoid conflicts of interests in Pakistan. The objectives to establish new contract under egalitarian philosophy as are stated in the fourth, eighth and seventeenth preambular paragraph of the preamble of the constitution are also in consonance with Hobbesian 'bare minimum of the natural law'. The formation of general will to establish order and for such order an explicit reliance on the parliamentary democracy as is stated in second and third paragraph of the preamble is in accordance with Rousseau's '*amour de soi*', and Kelsen's perspective of parliamentary democracy. Such reliance on parliamentary democracy in the preamble and in Article 67 of the constitution is an attempt to protect minorities from a probable Madison's "*violence of majority*". It is designed to be achieved through rule of law and for this purpose; a special reliance is on the freedom of judiciary as suggested by Kant's "*imperfect obligations*."⁴⁶² A harmonious interpretation of the Article 4, 184(3), 187 and 190 of the constitution of Pakistan, 1973 also elaborates this judicial obligation to materialize a just society based upon due process of law.⁴⁶³ While the court construes the notion of due process of law as enshrined in the Article 4 of the Constitution of Pakistan, since it observes, connotation of the word 'Law' is restricted to positive law that is to say a formal pronouncement of the will of a competent law-giver and did not include what were mere legal precepts or theories."⁴⁶⁴ It appears accordingly that *due*

⁴⁶² See Sen, *The Idea of Justice*, 372-376.

⁴⁶³ See *Kamran Murtaza v. Federation of Pakistan*, 2014 SCMR 1667.

⁴⁶⁴ See *Rustam Ali v. Martial Law Administrator, Zone 'C' and 3 Others*, PLD 1978 Karachi 736.

process of law means protection of the natural rights of citizens as incorporated in the chapter of fundamental rights of the Constitution through the force of positive law.⁴⁶⁵

Moreover, the Article 174 of the constitution binds the state and its constituent units as legal entities to fulfill its tortuous obligations to protect the common good of contractual patterns. As stated above the institutional justice in accordance with Hart's and Kelsen's analytical jurisprudence and in consonance with Rawls and Sen's perspective is enshrined in Principles of Policies contained on the Article 29-40 of the Constitution. Along with it Fuller's external and internal morality of law is enshrined in the Article 8, as any precept loses its validity if contrary to fundamental rights and Islamic spirit. Furthermore formation of federation as expounded by Madison is enshrined in the Articles 184(1) and (2), 142, 144 and 148(3) by incorporating American doctrines of original position, pith and substance, incidental trespass, prohibitory field and implied power. It is also in accordance with contractual philosophy of equality of legal entities to establish fiduciary relationships between federation and its constituent units.⁴⁶⁶

However contrary to the contractual paradigm Article 260 of the constitution leads to the state law theory. As its definition '*security of Pakistan*', gives primacy to protection of the state instead of civil liberties and emphasizes on the maintenance of the public order. Moreover the constitutional protection of the preventive detention as evident from clauses

⁴⁶⁵ See *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307.

⁴⁶⁶ See *Watan Party v. Federation of Pakistan*, PLD 2011 SC 997.

(3) to (9) of the Article 10 is not only contrary to the contractual due process of law but also opposing to the notion of rule of law associated with the “*state law theory*”. Such law of necessity leads to the total state theory where ‘public order and security of state’ as paramount moral value overrules all other ingredients of a just society.⁴⁶⁷

Likewise, jurisdictional bar on judicial review of administrative actions during law and order operations of police and other law enforcement agencies as incorporated in the Article 199(3) also leads to the *hyper-nationalism*. As it leads to executive impunity with regards to enforcement of public order. Identically proclamation of public emergency as designed in the Article 232-236 with partial infringement of fundamental rights and exclusion of judicial and parliamentary oversights are potentially precarious to “*bare minimum of natural law*” and “*categorical imperative*” with a vulnerability of Jus-Cogens norms. Newberg believes that these emergency powers are outcomes of colonial legacy, inherited by Pakistan through the Government of India Act 1935, which was unworkable configuration of imperial autocracy and democracy. Accordingly, for Newberg emergency provisions, executive powers, autocracy and human rights abuses have tautological relationships in this horizon.⁴⁶⁸

⁴⁶⁷ See Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: University Foundation Press, University of Peshawar, 1989), 237-260, 283-287; Fuller, *The Morality of Law*, 37-40; Newberg, *Judging the State*, 101-106: As preventive detention is an emergency law formulated for the war like situation to detain suspects, so due to its retrospective effect it compromises the core concept of rule of law as given by Fuller. Therefore “preventive detention---makes an inroad on the personal liberty of a citizen without the safeguards inherent in a formal trial-----would deny fundamental rights.”

⁴⁶⁸ See Newberg, *Judging the State*, 36-38, 70.

The conspicuous role of the armed forces in aid of civil power as incorporated in the Article 245 of the constitution of Pakistan, 1973 also leads to the magnified role of the executive to enforce the hyper nationalism. Such total state perspective is not only hazardous to the natural person but also the same for legal person because of its incompatibility to the Kant's "*categorical imperative*." The executive indemnity as designed in the Article 237 of the constitution, with regards to restoration of public order is potentially capable to engender executive impunity. It not only violates the spirit of due process as is incorporated in the above-mentioned Article 4 but also violates the equality of citizens as incorporated in the Article 25 of the same constitution.⁴⁶⁹

Nevertheless, constitution of Pakistan carries theoretical perspectives of all three above-mentioned jurisprudential and constitutional paradigms. Resultantly in-built philosophical contradictions prevail in it that hinders a pragmatic constitutionalism in Pakistan and produces "*uneasy relationships between its state institutions and civil society*."⁴⁷⁰ Newberg considers that vulnerability of constitutionalism in Pakistan produces inter and intra provincial polarization that fosters political violence. Besides, it has transformed this

⁴⁶⁹ See e.g. into M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 153-196, 205-392, 471-472, 548-560, 587, 611-640, 688-692, 716-718, 1117-1130, 1142-1146: for "Preamble", Art.2A "Objective Resolution to form part of o substantive provision", Art.3 "Elimination of Exploitation", Art.4 "Due process of law", Art.8 "Laws inconsistency with or in derogation of Fundamental rights to be void" Art.9-28 "Fundamental Rights", Art.29-40" Principle of Policies", Art.10(3-4) "Preventive Detention", Art.67 "Rules of Procedure[Parliament]", Art.142 "Subject matters of Federal and Provincial Laws", Art.144 "Powers of Parliament to legislate for two or more Province by consent", Art.147 "Obligation of Province and Federation", Art.174 "Suits and proceeding[Tortious liability of state]", Art.184 "Original jurisdiction of Supreme Court", Art.187 " Execution of process of Supreme Court to achieve[complete justice]", Art.190 " Action in aid of Supreme Court", Art.199 " Jurisdiction of High Court", Art.232-236 "Emergency Provisions", Art. 237 "Parliament may make laws of indemnity", Art.245 "Function of Armed forces [in aid of civil power]."

⁴⁷⁰ See Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Trumpington Street, Cambridge: Cambridge University Press, 2002), 2.

republic in to a bureaucratized and militarized state.⁴⁷¹ Sequential military interventions either under necessity or “*to preserve the integrity of country,*” as mainly emerges from “*total state*” perspective have made this situation from bad to worse.⁴⁷² Subsequently coercion and state violence are adopted as administrative measures to sustain federation and to manage diverging civil society.⁴⁷³

Under such political milieu of Pakistan, Newberg narrates; “[*within*] domestic battles over conflicting ideas of citizenship, equality, and representation--- Civil society has more frequently been the state’s opponent than its legitimator. As a corollary, civil rights have been violated in order to silence dissent and reasserted by civil society in order to establish an uneasy balance with the state.”⁴⁷⁴ Maluka portrays such indigenous scenario as “*mockery*” of constitutionalism and federalism.⁴⁷⁵ Then Jalal along with Newberg considers it responsible for the ‘civil war’, which has departed the east wing of Pakistan in 1971.⁴⁷⁶ Moreover, alike Newberg,⁴⁷⁷ Patel says that laws and law enforcement agencies have been resorted in Pakistan to suppress the political dissents with an implied passivity of judiciary.⁴⁷⁸ It is evident from Munir’s (C.J.) observations about the functions of armed forces in aid of civil

⁴⁷¹ Ibid., 69-71.

⁴⁷² Ibid., 3, 117.

⁴⁷³ See Ayesha Jalal, *The State of Martial Rule: The origins of Pakistan’s Political Economy of Defense* (Lahore: Sang-E- Meel Publications, 1999), 1-44, 136-275.

⁴⁷⁴ See Newberg, *Judging the State*, 9, 11.

⁴⁷⁵ See Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Karachi: Oxford University Press, 1995), 1-42, 118-169.

⁴⁷⁶ See Jalal, *The State of Martial Rule*, 1-2; Newberg, *Judging the State*, 9-11.

⁴⁷⁷ See Newberg, *Judging the State*, 5: “Their judgments have often supported the government of the day---- To remain open for business, courts accepted limits on their practice that were not always consonant with the conceptual foundations of their rulings.”

⁴⁷⁸ See Dorab Patel, *Testament of a Liberal* (Karachi: Oxford University Press, 2000), 85-117.

power during civil commotion.⁴⁷⁹ Besides an explicit inability of the then East Pakistan's higher judiciary to oversee an executive impunity during law and order operations establishes the same views.⁴⁸⁰

This position seems menacing for the native civil society in two different dimensions. Firstly, it creates a legal vacuum during political conflicts and civil unrests, which are usually covered by human rights abuses engendered through unclogged executive impunities. Secondly, it creates such constitutional vacuums, which are attempted to be filled by crafting incompatible jurisprudential frameworks in domestic legislations. Accordingly, Setalvad narrates that insertion of fundamental rights in the constitutions of India and Pakistan along with writ jurisdiction of high courts and original jurisdiction of Supreme Court to protect them is a failed attempt to alter a British constitutional model. As based on a conspicuous role of executive whereas the notion of fundamental rights with a conspicuous role of judiciary is conceived from the contractual philosophy of American jurisdiction.⁴⁸¹ Therefore, a superficial combination of these diverging philosophies without a structural change of procedural law is unproductive to break away from colonial legal

⁴⁷⁹ See *Muhammad Umar Khan v. The Crown*, PLD 1953 Lahore 528, 539: "martial law is the law of military necessity, actual or presumed in good faith----all acts done by military which are either justified by civil law or were dictated by necessity and done in good faith will be protected, even if there be no bill of indemnity."

⁴⁸⁰ See *Farid Ahmad v. Province of East Pakistan*, PLD 1969 Dacca 961: "From a reading of the provisions of Section 144, Criminal Procedure Code, we are satisfied that the Magistrate who have passed the aforementioned orders were competent to impose curfew under the provision of section 144, criminal procedure Code----If there has at all been any shooting, we do not know under what circumstances force to that extent had to be used, either in the right of private defence and/or to suppress riot or tumult or in the protection of life and property while enforcing the curfew order. Adjudication of this point needs investigation of facts and taking of evidence which this Court, sitting in its Writ Jurisdiction, cannot do."

⁴⁸¹ See M.C. Setalvad, *The Role of English Law in India* (Jerusalem: Magnes Press, The Hebrew University, 1966), 58-59.

order.⁴⁸²Newberg agrees with it and says that a comparatively easy procedure of constitutional amendments has been adopted by indigenous polity to control expanding horizons of writ jurisdictions of courts relating to protection of civil liberties. Resultantly commons are not only incapable to break the vicious cycle of “*colonial legacy*” but their attempts are also ineffective to write and execute a popular constitution in Pakistan.⁴⁸³ Sayeed classifies such legacy as “*constitutional autocracy*” which consists of a workable confluence of elite civil and military bureaucracy, aristocratic parliament and passive judiciary under legal positivism.⁴⁸⁴

On the basis of above narrated arguments it seems that civil society as perceived in contractual model and political dialect as perceived by state law model does not exist in Pakistan as such. Since liberal and Universalist perspective of contractual model is secular by its nature. Whereas parliamentary dialect of state law theory seems to extract synthesis between political majority and minority by excluding the subjectivity of religion. Yet in the domestic paradigms an ‘*instrumental*’ use of religious, ethnic and cultural identities to gain political powers usually overrule secular and political characteristics of liberal democracy.⁴⁸⁵ Resultantly a culture of socio-political and religious radicalization emerges

⁴⁸² Ibid., 38-55.

⁴⁸³ See Newberg, *Judging the State*, 3, 35-44, 69-70.

⁴⁸⁴ See Khalid B. Sayeed, *The Political System of Pakistan* (Boston: Houghton Mifflin Company, 1967), 101-158.

⁴⁸⁵ See Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (Karachi: Oxford University Press, 2003), 24-32, 287-297: Diminutive ethnic and religious differences lead to ethnic and religious ideologies with a gradual snowball effect. During this transitional phase, leaders of such community use ethnic and religious ties as an instrument to form and sustain the solidarity, identity and socio-political influence of the respective community. When such ethnic and religious conflicts gain momentum violence is strategically used to monopolize the emotion and affiliation of apparently mild and secular mindset of that respective community. Such dynamics of ethnic and religious politics are hazardous for public peace and

to enforce conflicting perceptions of state sovereignty, legitimacy, civil society and civil liberties.⁴⁸⁶Such frictional subjectivity engenders not only crisis of governance and socio-political polarization,⁴⁸⁷ but also a vicious cycle of violent behaviors that diminishes an overall tolerance for political disagreement and dialogue in society.⁴⁸⁸

Thence it seems that these indigenous socio-political and constitutional dynamics lead to the total state model with a high probability of political dissents in Pakistan.⁴⁸⁹ Yet a question arises here that how the legal order and especially maintenance of public order responds in this situation. The next part as a sequential portion of the existing theoretical debate intends to know the nature of relationships between politics of dissent and maintenance of public order in Pakistan.

public order because they engender a paradoxical debate between faithfulness to the specific community and obedience to specific legal order. Since obedience to law usually demands a nonpartisan approach whereas obedience to a respective ideology requires a conviction and radicalization.

⁴⁸⁶ See Newberg, *Judging the State*, 1-6.

⁴⁸⁷ See in Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New Delhi: Cambridge House, Foundation Books Pvt. Ltd., 2005), 238-239, 241-243, 252-256.

⁴⁸⁸ See Talha Makhdoom, "3 PIA strikers die in Karachi airport clashes: Three journalists among 17 injured: Rangers, police deny firing on protesters: PIA chairman tenders resignation," *The News*, February 3, 2016, national edition, 1-2: A prototype example of administrative highhandedness in which civil armed forces had been employed to counter an unlawful assembly of employees of the Pakistan International Airlines who were protesting against a probable privatization of this Airline. However instead of negotiations police and civil armed force (Rangers, who had already been deployed in Karachi under Ss.4-5 of the Anti-Terrorism Act, 1997) had resorted to indiscriminate firing in Jinnah International Airport, Karachi on 2nd February, 2016 to disperse such unlawful yet unarmed assembly. Apart from the resort to use of lethal force, a deployment of civil armed forces merely to disperse protesters is itself an indicator of administrative intolerance and highhandedness even during peacetimes in Pakistan.

⁴⁸⁹ See into **Figure: 2** of Theoretical Perspective Part: I of the study.

Part: II: Politics of Dissent and Maintenance of Public Order

Since Rawls, Dworkin, Friedmann, Zinn, Bedau, Singer and Arendt provide a double edge remedial mechanism to neutralize majoritarian charisma and procedural injustice. It is either by adopting constitutional means to protest and challenge an unjust law or policy in the court of law through judicial review of legislation, or to resorts to an extra-constitutional means in the form of civil disobedience.⁴⁹⁰ Hence, as a last resort to address socio-political and economic wrongs of public importance,⁴⁹¹ civil disobedience is a non-violent, expressive, conscientious, secular, illegal and public political protest in a liberal democracy.⁴⁹²

⁴⁹⁰ See Rawls, *A Theory of Justice*, 363-387, 390; Dworkin, *Taking Rights Seriously*, 210-212, 216, 219; W. Friedmann, *Law in a Changing Society* (London: Stevens & Sons, 1972), 37-44; Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* (Cambridge, M.A: South End Press, 2002), 15-18, 35-44; H.A. Bedau, "Civil Disobedience and Personal Responsibility for Injustice," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 49-67; Peter Singer, "Disobedience as a Plea For Reconsideration," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 122-129; See also for Hannah Arendt (1906-1975) in Jean L. Cohen and Andrew Arato, "Civil Disobedience and Civil Society," in *Civil Society and Political Theory* (London: The MIT Press, 1994), 590-604.

⁴⁹¹ See e.g. into Ralph Crawshaw et al., "Human Rights and Democracy," in *Human Rights and Policing* (Boston: Martinus Nijhoff Publishers, 2007), 42-43; O'Byrne, "Universal Declaration of Human Rights" in *Human Rights: An Introduction*, 398-405; Bryan A. Garner et al., ed. "Universal Declaration of Human Rights, 1948," in *Black's Law Dictionary*, eds., Bryan A. Garner, et al., 8th ed. (Boston: West Publishing Company, 2004), 1783-1787: A combination of third and fifth paragraph of the preamble of UDHR, 1948 gives a plausible ground to resist and rebel against a subjugation to establish "larger freedom". The 3rd Paragraph of the Preamble of UDHR narrates, "Whereas it is essential, if man is not to be compelled to have resources, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." And its 5th Paragraph says, "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom." The third paragraph of the preamble of UDHR also implicitly differentiates between due process of law (protection of rights) and rule of law (Equality before the law, application of law with like cases alike). Hence it may happen that rule of law has been established without a due care to human rights. Thus under such a majoritarian democracy if minority or any vulnerable segments become the victim of human rights abuses and other unjust public policies then as a last resort they can resist through political protest, irrespective of its legality or validity.

⁴⁹² See Mathew R. Hall, "Guilty But Civilly Disobedient: Reconciling Civil Disobedience and Rule of Law," *Cardozo Law Review* 28, no. 5 (2007): 2083-2132, 2083-2093; Rawls, *A Theory of Justice*, 364-365.

Cohan, Bedau and Rawls indicate that it is directed to the conscious of a majority over a persistent infringement of core human rights values and other civil liberties.⁴⁹³ It mainly stems from the following civil and political rights such as; freedom of expression and speech, freedom of thought, freedom of assembly, freedom of association, freedom of self-determination and equality before the law enshrined in an egalitarian contractual society.⁴⁹⁴ Bedau argues that under vicarious liability of the social contract model, it is a political obligation of citizens to resist unjust laws and governmental policies.⁴⁹⁵ However Morreall, Smart, indicate that in a case of non-responsive majority, peaceful political protest attract violence to bring persuasion, coercion and conclusiveness in the minority's political demands.⁴⁹⁶ It becomes a transitional phase of political protest to political violence to gain intended, targeted and planned ends.⁴⁹⁷

⁴⁹³ See in Jhon Alan Cohan, "Civil Disobedience and the Necessity Defense," *Pierce Law Review* 6, no. 1 (2007): 111-175, 166-173 " Stemming from the Nuremberg Principle, Article.6 of the London Charter, 1945 regarding war crimes is analogized to justify individual and collective civil disobedience. And at 167-169: "The strategy to civil disobedience is to argue that their actions were designed to prevent others from violating the law embodied in the Nuremberg Principles---on the common law privilege of using reasonable force to prevent a crime that is being committed or is about to be committed in their presence — sometimes referred to as the citizen's privilege[under social contract]"; H.A. Bedau, "Civil Disobedience and Personal Responsibility for Injustice," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 58; Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order*, 41-42; Rawls, *A Theory of Justice*, 365-366: " The persistent and deliberate violation of basic principles of this conception[commonly shared conception of justice that underlies the political order---to which citizen regulate their political affairs and interpret the constitution] over any extended period of time, especially the infringement of the fundamental equal liberties ,invites either submission or resistance. By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way, or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of minority."

⁴⁹⁴ See Jean L. Cohen and Andrew Arato, "Civil Disobedience and Civil Society," in *Civil Society and Political Theory* (London: The MIT Press, 1994), 577, 588, 598-599, 602-604; Joseph Raz, "Civil Disobedience," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 166-169.

⁴⁹⁵ See Bedau, *Civil Disobedience in Focus*, 58-59.

⁴⁹⁶ See John Morreall, "The Justifiability of Violent Civil Disobedience," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 130-141; Brian Smart, "Defining Civil Disobedience," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 200-211.

⁴⁹⁷ *Ibid.*, 142-143, 210-211; Hall, "Guilty But Civilly Disobedient", 2086-2087.

Franks and Weinstein argue that violence is strategically used not only to attract the majority's audience, but also to bring the government to the negotiation table.⁴⁹⁸ Engeland and Rudolph believe that negotiation phase is crucial because it may transform dissenting groups into political stakeholders after inclusion or rebellions after exclusion from the mainstream national politics.⁴⁹⁹In the case of exclusion and indiscriminate counter violence by the state, such political violence of lower threshold further transforms either into revolutionary terrorism or into reactionary terrorism. The former is state centric, focuses on the change of government and legal order and the latter is community centric, focuses on the structural socio-political and economic reforms.⁵⁰⁰A higher threshold of revolutionary terrorism further transforms either into protracted internal armed conflict or a full scale insurgency which potentially leads to civil war.⁵⁰¹

Order and Dissent in Contractual Paradigm

Public order as an outcome of the general will of a state represents the majority's opinion and conception about the form of sovereignty.⁵⁰²And the maintenance of public order is an ultimate end of proclaiming governmental legitimacy to protect the state and its citizens from anarchy. It has mainly stemmed from the categorical imperative of the contractual

⁴⁹⁸ See Franks, *Rethinking the Roots of Terrorism*, 17, 86-119; Weinstein, *Inside Rebellion*, 8-13, 198-210.

⁴⁹⁹ See Anisseh Van Engeland and Rachael M. Rudolph, *From Terrorism to Politics* (Aldershot, Hampshire: Ashgate Publishing Limited, 2008), 181-190.

⁵⁰⁰ See Franks, *Rethinking the Roots of Terrorism*, 26, 30-31.

⁵⁰¹ *Ibid.*, 52-53.

⁵⁰² See Hans Kelsen, "On The Essence And Value of Democracy," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 89.

model, not only to bring but also to retain rightful conditions.⁵⁰³ Under such perspective, it becomes a majority's pledge to minority to maintain the status quo of the rightful conditions.⁵⁰⁴

As has been indicated in the preceding part of theoretical perspective, Madison and Kelsen, both are conscious of a monopoly of majority in this regard. The former in a contractual scheme presents due process of law with a significant judicial role under constitutionalism to tackle such possibility. And later in an evolutionary model of positive law believes in an intra-parliamentary dialectical process with rule of law to neutralize a possible coercion of majority rule.⁵⁰⁵ Pound and Stone in this regards place the responsibility for legislative and judicial domains together to uphold justice and Rawlsian deontological utilitarianism with sociological jurisprudence. Hart along with Dworkin in this horizon deems judicial role appropriate to protect '*mere helpless victims of the system*' through a minimum content of natural law.⁵⁰⁶

Nevertheless, in the realm of maintenance of public order, the legitimate coercive measures are permitted. In the social contract perspective, these are intended to counter deviant contests and intrusions made against categorical imperative by in or out-group

⁵⁰³ See Franks, *Rethinking*, 55-57.

⁵⁰⁴ See Kelsen, *On The Essence*, 91-93, 103-104: General will is created by majority principal of democracy, and prolong restraints on political rights creates hindrance to achieve a genuine general will, because majority principle is already based upon utilitarianism hence a constant neglect of minority's interest engender polarization in a society. In this context if compromises are not achieved with in a parliamentary democracy between majority and minority for a formulation of governing will of the state, then class conflict, disintegration and use of violence occur for class domination.

⁵⁰⁵ *Ibid.*, 100.

⁵⁰⁶ See Hart, *The Concept of law*, 201.

members.⁵⁰⁷ Either due to their ideological differences in the original position or prolonged and unhealed inbuilt wrong-full constraint during perfect competition such as unequal distribution of resources or failure of federalism.⁵⁰⁸ As for ‘*in-group*’ members are concerned, they politically resist against an unjust law or policy through the above discussed means of direct civil disobedience.⁵⁰⁹ Since ‘unjust’ means here, anything contrary to common good, public interest, civil liberties and institutional justice provided and protected under the constitution. It seems that under constitutionalism, in-group protest is intended to attract legislative attention⁵¹⁰ or to seek judicial remedy.⁵¹¹ Accordingly Friedmann perceives such protests as a catalyst of legal change as he narrates, “civil disobedience has at least in some countries, become a powerful instrument of legal change where public conviction of the moral rightness of the existing legal system is shaky or divided, it can promote or accelerate overdue legal change. There is a definite casual connection between the protest actions of the early 1960s and the civil rights legislation of 1964 and 1965 in the United States of America”⁵¹²

⁵⁰⁷ See Franks, *Rethinking*, 55: In the context of ‘*inherency theory*’, state as a ‘*rational actor*’ has an inherent right to protect its existence, sovereignty and legitimacy; here “in-group” means citizens who are committed to categorical imperative and “out-group” means citizens who have reservations regarding basic premises of categorical imperative and are inclined toward anarchy for their self-determination

⁵⁰⁸ See Rawls, *A Theory of Justice*, 196-198, 250-257; Grimsley, *Rousseau*, 112.

⁵⁰⁹ See Mathew R. Hall, “Guilty But Civilly Disobedient: Reconciling Civil Disobedience and Rule of Law,” *Cardozo Law Review* 28, no. 5 (2007): 2093: “Civil Disobedience takes two distinct forms: direct disobedience, in which a protester violates the unjust law itself; and indirect disobedience, in which a protestor violates a generally legitimate law to protest an unjust law or governmental policy. With direct disobedience, a court may strike down the unjust law upon judicial review. Accordingly, some cases of direct disobedience constitute “test cases”, --- the logic of indirect disobedience lies in the fact that some unjust laws, or policies, will not allow direct disobedience. Indirect disobedience, thus, treats the otherwise just law as a surrogate for the targeted, but unreachable, injustice”

⁵¹⁰ See Rawls, *A Theory of Justice*, 57: “It is the aim of the ideal legislator in enacting laws and of the moralist in urging their reforms.”

⁵¹¹ See Dworkin, *Taking Rights Seriously*, 205-219.

⁵¹² See Friedmann, *Law in a Changing Society*, 37-44.

However, as a last resort an indirect civil disobedience is selected through the means of following acts. Such as an unlawful assembly, sit-ins, illegal strikes, road and traffic blocking for a political persuasion and coercion.⁵¹³Cohan justifies such acts through legal principles of necessity, self-defense and self-help to protect society from mass injustices.⁵¹⁴ Amid such scenario, reactionary violence is strategically used by ‘in-groups’ members to intimidate the political society either to negotiate or to surrender in the face of such political demands. Therefore an indiscriminate or disproportional reactionary violence by in-group members become perilous to public order. Resultantly counter violence is used to restore law and order, yet it too is under the constraints of proportionality and distinction.⁵¹⁵

However a contrary and stringent approach become counterproductive and transforms ‘in-group’ into an ‘out-group’, which further enhances the scope of its political violence through political terrorism.⁵¹⁶Friedmann says in this regard, that when courts hesitate to address such protests in the wake of doctrine of political question or unable to adjudicate due to lack of jurisdictions to address them, then they usually transform into revolution.⁵¹⁷Consequently prolong the vicious cycle of terrorism and anti-terrorism

⁵¹³ See Brian Smart, “*Defining Civil Disobedience*,” in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 202-206.

⁵¹⁴ See Jhon Alan Cohan, “Civil Disobedience and the Necessity Defense,” *Pierce Law Review* 6, no. 1 (2007): 166-173.

⁵¹⁵ See Crawshaw, *Human Rights and Policing*, 305-308; Evan J. Criddle, “Proportionality in Counterinsurgency: A Relational Theory,” *Notre Dame Law Review* 87, no. 3 (2012): 1088-1097: “A Relational Theory of the Use of Force”; Mathew R. Hall, “Guilty But Civilly Disobedient: Reconciling Civil Disobedience and Rule of Law,” *Cardozo Law Review* 28, no. 5 (2007): 2128-2131; Dworkin, *Taking Rights Seriously*, 204; Rawls, *A Theory of Justice*, 219.

⁵¹⁶ See Franks, *Rethinking*, 30-31.

⁵¹⁷ See Friedmann, 21-22, 37-44, 47-90.

engenders segregation as well as actual and relative deprivations among isolated out-groups.⁵¹⁸ Such isolation potently leads to the formulation of a deviant ideology. It not only politically justifies their claims, but also leads to an ideological terrorism to magnify and assert such philosophy.⁵¹⁹

Hafez explains this phenomenon through the help of two core variables, name as repression and exclusion.⁵²⁰ According to him undue punitive measures of governments create such an environment of ‘*spirals of encapsulation*’, which stimulates the animosity of members of the proscribed organizations against the existing legal order.⁵²¹ Under this hostile mindset, which also qualifies as ‘*moral disengagement*,’ they wishfully and violently target the entire public order along with those officials and citizens who observe the obedience to the existing law.⁵²² And when they face the writ of such law, they further hide under this irrational ‘*spirals of encapsulation*’.⁵²³ These out-group members of contractual as well as evolutionary order devote themselves from civil and political society. Then by denouncing from the general will and citizenship, they turn into the non-state actors.⁵²⁴ Through their dissenting common or individual will, they try to assert their

⁵¹⁸ See Franks, *Rethinking*, 31-32.

⁵¹⁹ *Ibid.*, 27-28, 101-112.

⁵²⁰ See Mohammed M. Hafez, *Why Muslim Rebel: Repression and Resistance in the Islamic World* (New Delhi: First Indian Reprint by the Permission of Lynne Rienner Publisher, Inc. Viva Books Pvt. Ltd., 2005), 1-22, 28-31.

⁵²¹ *Ibid.*, 155-166, 199- 203.

⁵²² *Ibid.*, 187-192, 157-161.

⁵²³ *Ibid.*, 203-211.

⁵²⁴ See Franks, *Rethinking*, 26-29; Mason and Leach, *In Quest Of Freedom*, 11-14.

rights to self-determination through a violent revolution to form a new contract, according to their ideologies.⁵²⁵

However, similar to Rousseau's conception of secular social contract,⁵²⁶ Rawls rejects the notion of ethnic or religious ideologies in the original position.⁵²⁷ Resultantly he resorts to the veil of ignorance in a secular contractual society.⁵²⁸ However, the role of religion, cultural and ethnic ties inherent in oriental civilization cannot be ignored empirically or logically in the course of such idealistic hypothetical original position.⁵²⁹ Likewise, the possibility of civil disobedience is mainly a contractual, impersonal, secular, rights based liberal and political phenomenon.⁵³⁰ It is oriented only to expand collective civil liberties or to cure institutional injustice as well as to readdress socio-political issues in the common interests.⁵³¹ Therefore is considered to be ineffective in a theocracy and ethnocentric

⁵²⁵ See Grimsley, *Rousseau*, 104-105, 116-118; John Morreall, "The Justifiability of Violent Civil Disobedience," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 142: "There is a logical relationship between civil disobedience and civil rebellion--- a program of civil disobedience designed to confuse and weaken a community to the point at which a revolution could be launched and succeed--- since revolution and civil disobedience would otherwise be indistinguishable---upon the criteria of violence to distinguish them."

⁵²⁶ *Ibid.*, 114-115.

⁵²⁷ See Rawls, *A Theory of Justice*, 216: "upon theological principles or matters of faith, no argument is possible"

⁵²⁸ *Ibid.*, 252.

⁵²⁹ See David Barsamian and Edward W. Said, *Culture and Resistance* (London: Pluto Press, 2003), 103-129; Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (First Pakistani Reprint. Karachi: Oxford University Press, 2003), 281-300; Joseph Raz, "Civil Disobedience," in *Civil Disobedience in Focus*, ed. Hugo Adam Bedau (London: Routledge, Chapman and Hall Inc, 1991), 166-169: mainly stemming from freedom of speech and expression civil disobedience is a novel and exceptional way to readjust and enlarge pluralism in liberal states.

⁵³⁰ See Rawls, *A Theory of Justice*, 364-365.

⁵³¹ See Crawshaw, *Human Rights and Policing*, 42-43: As analogized from third and fifth paragraph of the preamble of UDHR, 1948 "---as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,-- to promote social progress and better standards of life in larger freedom" and if the constitutionally protected remedial mechanism does not work, then Lockean reasonable man and Kant's man of integrity has an option of dissent as a last resort to save the ethical common wealth.

nationalism as well as in an ideologically polarized state.⁵³²Friedmann describes this situation in the following words; “where the legal order is so generally [inefficient] or weekend that if it is widely defied then civil disobedience is nothing but the prelude to revolution.”⁵³³Consequently, focus of the study turns toward state centric, state law as well as total state perspective.

Order and Dissent in State Centric Paradigms

In the above mentioned scenario, state coercion seems to be justified to protect the general will, territorial corpus of the state and efficacy of the legal order.⁵³⁴Below this horizon a marginalized ethnic or religious minority resists to protect its identity, when majoritarian socio-political, cultural and religious perspective becomes the national ideology.⁵³⁵This quest for identity has two probabilities. Firstly, it emerges in the form of “*irredentism*,” which compels an “*uprooted*” minority to find moral, financial, and political and strategically help from an identical ethnic or religious group located in the neighboring country.⁵³⁶Secondly, it evolves as an indigenous secessionist movement, which transcends into the internal armed disturbance, insurgency or civil war.⁵³⁷It is mainly due to a

⁵³² See Rawls, *A Theory of Justice*, 388: “in a fragmented society as well as in one moved by egoism, the condition for civil disobedience do not exist.”

⁵³³ See Friedmann, *Law in a Changing Society*, 43-44.

⁵³⁴ See Kelsen, *On The Essence And Value of Democracy*, 84-89.

⁵³⁵ See Roy, *Listening to Grass-Hoppers*, 133-160.

⁵³⁶ See Laitin, *Nations, States, and Violence*, 3-4.

⁵³⁷ *Ibid.*, 5-6.

persistent exclusion, segregation, indirect centralized administration and absolute totalitarianism.⁵³⁸

In this milieu armed insurrection become catalyst of social political change, which seems otherwise impossible under a normal democratic process for such marginalized minorities.⁵³⁹ Between these two edges, Laitin and Roy identify another category of identity crisis in the form of “*son of soil resistance*,” as an already deprived minority resort to political violence. It occurs when an authoritarian center either imposes an artificial demographic imbalance to manipulate an isolated periphery or allocates its natural resources to the majority.⁵⁴⁰

These above-mentioned contexts attract violence and armed struggle through ‘*levee n masse*’, as the armed militia of such minority challenges the legitimacy and sovereignty of the host state.⁵⁴¹ Weinstein split such insurrections into two horizons, macro, and micro. Former contemplates an actual territorial control and later deals with an effective control over the neutral population to manage sustainable resources for conflict.⁵⁴² Franks says that three dimensional strategies are used to accomplish the objectives of above mentioned insurrectional horizons.⁵⁴³ In the ‘*functional*’ sense armed groups use violence to provoke

⁵³⁸ See Franks, *Rethinking*, 59; Roy, *Listening to Grass-Hoppers*, 37, 147-152, 175-177.

⁵³⁹ See Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge: Cambridge University Press, 2007), 7-11.

⁵⁴⁰ See Laitin, *Nations, States, and Violence*, 6-7; Roy, *Listening to Grass-Hoppers*, 153-155.

⁵⁴¹ See Marco Sassoli, “State Responsibility for Violations of International Humanitarian Law,” *International Review of Red Cross* 84, no.846 (2002): 409; Franks, *Rethinking*, 2-3, 13-15.

⁵⁴² See Weinstein, *Inside Rebellion*, 17-20.

⁵⁴³ See Franks, *Rethinking*, 18.

counter violence to stigmatize the state globally for inevitable human rights abuses and alleged executive impunities.⁵⁴⁴ In the ‘*symbolic*’ form they simultaneously intimidate the government and the general public through their terrorist activities. These are not only intended to enhance audience, but also to demonstrate the intensity of dissenting force.⁵⁴⁵ Weinstein argues that during such phase, bilateral violence is used to enlarge an actual control over the contested population and territory. Hence threshold of contestation is directly proportional to intensity of violence; lesser contestation of either side demonstrates the least amount of violence. Resultantly armed groups and law enforcement agencies, both resort to indiscriminate and disproportionate symbolic violence and counter- violence to establish and prove their respective writs. According to him, rational and calculated use of violence is a strategy not only to raise the price of continued conflict, but also to gain better position for political bargains.

Under his dynamics of conflict and control civilian populations ought to bear a double edge brunt, it is law enforcement agencies as well as from armed groups. Out of this triangle neutral population too becomes a rational actor. It provides logistical and tactical support as well as demonstrated obedience to a relatively stronger side. The one which can perform not only a severe violent, but also has an actual control over territory.⁵⁴⁶ According to the theory of contestation extreme socio-political and legal dissent increases a probability of violence as a sign of severe disagreements. Escalation of violence is

⁵⁴⁴ Ibid. 18-19.

⁵⁴⁵ Ibid., 19.

⁵⁴⁶ See Weinstein, *Inside Rebellion*, 163-175,198-207.

premeditated to gain intended and unintended audience, its threshold and scope of the conflict determines the bargaining position.⁵⁴⁷As has been indicated above this, the stage is decisive because failure in political negotiation boosts the intensity of armed conflict.⁵⁴⁸Furthermore, in ‘*tactical*’ sense both sides exhibit violence to bargain and negotiate over strategic issues. Armed groups carry out abductions, high jacking and target killing of high value target. And law enforcement agencies execute enforced disappearances, arbitrary detentions, torture, extra judicial killings in this regard.⁵⁴⁹

To deal with stated circumstances, international law and even human rights instruments recognize the prerogative of the state to independently restore and protect its existence and to manage its geographical and ideological integrity.⁵⁵⁰For such objectives temporary yet accountable limitations on civil liberties are also legally permissible to focus and deal with a perceived or actual threat. However, it is only for a transitory period to save the state’s ‘*amour de soi*’ with an absolute inviolability of jus-cogens norms.⁵⁵¹Rawls recognizes such

⁵⁴⁷ Ibid., 208-210.

⁵⁴⁸ Ibid., 219; Engeland and Rudolph, *From Terrorism to Politics*, 148-149, 180.

⁵⁴⁹ See Franks, *Rethinking*, 19-20, 22-24.

⁵⁵⁰ See U.N. General Assembly Resolution 375(IV), *Draft Declaration on Rights and Duties of State*, by International Law Commission (Year Book of The International Law Commission, 1949), 1-3: for Article 1-5, 7-14.

⁵⁵¹ See Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*(New York: Oxford University Press Inc., 2007), 375-394; Crawshaw, *Human Rights and Policing*, 80-83: “Before a State moves to invoke Article 4[ICCPR, 1966], two fundamental conditions must be met: the situation amount to a public emergency that threatens the life of the nation, and the State party must have officially proclaimed state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.[under this situation] States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency Power.”, and at 48: “Respect for the rule of law by police is not only necessary because police enforce law; it is also necessary because social order is dependent upon a number of conditions, one of which is that rule of law should prevail. Unlawful and arbitrary policing undermines the rule of law and it is a very serious form of social disorder. It is a form of ‘tyranny and oppression’ that may, in its turn, provoke disorder by those against whom it is practiced.”; See also into O’Byrne, “International Covenant on Civil and Political Rights,” in *Human Rights: An Introduction*, 405- 425: Article 4(1) of the Covenant deals with the saving of life of the nation in time of public emergency. Under such situation certain

necessity in the wake of “*an unequal distribution of any, or all, to everyone’s advantage.*”⁵⁵² And Finnis acknowledges it as a “*practical corollary*” with a temporary departure from the rule of law and constitution.⁵⁵³ As it is in-fact to save and preserve the “*common good of person in community.*”⁵⁵⁴ Former achieves this utilitarian objective through institutional justice without compromising the core deontological principles of categorical imperative such as right to life, dignity, self-esteem, and equality before the law. Since restrictions are imposed to save them not to compromise them. Hence, the Kantian integrity and Lockean reasonability maintain its pre and post contract essentialist position in his realm of “*collective inequalities.*”⁵⁵⁵ And latter in this regard, emphasizes on political justice through a mature statesmanship under democratic norms. It is to tackle complex situations like public emergency amid transitory restrictions on judicial review.⁵⁵⁶ During such “*practical possibilities,*”⁵⁵⁷ authorities are required not only to

limitations on civil liberties are permissible. But according to Art.4(2) it is without derogating from individual’s right to life, dignity, freedom, liberty, fair trial, protection from retrospective punishment, self-incrimination, torture, and freedom of conscious and religion. Moreover Art.4(3) puts an extra check on these powers by binding the respective state to communicate the reasons and period of proclamation of emergency to other state parties of this Covenant through the office of Secretary General of the U.N. Along with it Article5(1) of this Covenant prevents not only State but also groups and other natural or legal person to resort to human rights abuses ;See also in for United Nations, “Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986,” *United Nations Publications* II-5, no. E 94 (2005): 23: Article53; U.N. General Assembly Resolution 375(IV), *Draft Declaration on Rights and Duties of State*, by International Law Commission (Year Book of The International Law Commission, 1949), 2: Article,6; Grimsley, *Rousseau*, 99-100: “An indispensable self-preservation of the state.”

⁵⁵² See Rawls, *A Theory of Justice*, 62, 215.

⁵⁵³ See Finnis, *Natural Law & Natural Rights*, 275.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ See Rawls, *A Theory of Justice*, 62-63, 210-215, 250-252: According to his first priority rule for rational pursuit of value “a less extensive liberty must strengthen the total system of liberty shared by all.”

⁵⁵⁶ See Finnis, *Natural Law*, 351-352.

⁵⁵⁷ *Ibid.*, 232-233.

minimize frictions of interests,⁵⁵⁸ but also to avoid an imposition of ‘*unanimity*’,⁵⁵⁹ or to legislate contrary to public interest.⁵⁶⁰ Such efforts of unanimity plunge into the Roy’s criteria of hyper nationalism; it results into wide and vague anti-terrorism and national security legislations.⁵⁶¹ She says that these legislative postulates are not only counterproductive to minorities, but also hazardous to the public.⁵⁶²

Away from the majority-minority debate, prolong and improper use of such preventive measures engender collective unrest in society. Crawshaw, Hurton and Hunt say that administrative approach is critical during this phase. Because extreme measures not only enlarge the scope of conflict but also crop up sense of injustice, status inconsistency and a relative deprivation in general public.⁵⁶³ A prolong accumulation of this public unrest transforms a contained resistance into a mass resistance against regimes or against status quo forces and ruling classes. Class conflict, religious fragmentations, and ethnic ties give intellectual inputs to establish a time and space bound ideology.⁵⁶⁴ It consists of economic, moral, religious and social beliefs. Since gathers momentum due to persistent and generalized social discontent and isolation, downward social mobility, personalized maladjustments, and crises of governance.⁵⁶⁵

⁵⁵⁸ See Stone, *Human Law & Human Justice*, 263-265: “adjustment of relations and ordering of conduct--- in social, public and individual interests.”

⁵⁵⁹ See Finnis, *Natural Law*, 232-233; Kelsen, *On The Essence*, 101.

⁵⁶⁰ See Finnis, *Natural Law*, 351, 359-360.

⁵⁶¹ See in Roy, *Listening to Grass-Hoppers*, 25-28.

⁵⁶² *Ibid.*, 29-40.

⁵⁶³ See Crawshaw, *Human Rights and Policing*, 19-28, 210-212, 229-243, 299-304; Paul B. Horton and Chester L. Hunt, “Social Movements,” in *Sociology* (Tokyo: McGraw-Hill Kogakusha, Ltd., 1972), 496-502.

⁵⁶⁴ See Franks, *Rethinking*, 86-119.

⁵⁶⁵ *Ibid.*, 30-45.

This ideological base engenders two different, yet interrelated approaches for dissenting reasoning, the reformist's and radical's school. At this point, characteristics of respective leaderships and the manner of institutionalization of these two wings are significant determinants. As they either lead to a peaceful socio-political change which reforms the structural inequalities of the system or lead to a violent revolution.⁵⁶⁶ Such perspective is also aligned with the positive school of criminology, where reformists are evaluated under the critical school whereas revolutionists are analyzed under the radical school.⁵⁶⁷ While crimes conducted by the both streams are classified as political offences against state and public order.⁵⁶⁸ Resultantly the political scientists, Arato and Cohen say that institutionalization phase either transcends in to the formation of political party and a legitimate pressure group or result into a polarized band of radicals. As a political party it demands inclusion of its respective ideology in a mainstream politics. If accommodated by ruling classes through aligned political actions, the reform or reactionary movement diffuses accordingly, yet contrary to it strengthens the polarized radicals.⁵⁶⁹

Such rise of radicals initially engenders sporadic acts of sabotage and terrorism to weaken status quo forces through law and order crisis.⁵⁷⁰ Afterward compresses into a specific

⁵⁶⁶ See Horton and Hunt, *Sociology*, 505-507.

⁵⁶⁷ See Stephen Jones, *Criminology* (Clarendon Street, Oxford: Oxford University Press, 2006), 232-275, 285-293; Freda Adler, Gerhard O. Mueller and William S. Laufer, *Criminology* (New York: McGraw-Hill, Inc., 1991), 109-127, 203-205, 386-390.

⁵⁶⁸ See Frank Schmalleger, *Criminology Today* (New Jersey: Prentice Hall, Inc., 1999), 360-386.

⁵⁶⁹ See Cohen and Arato, *Civil Society and Political Theory*, 556-560.

⁵⁷⁰ See Weinstein, *Inside Rebellion*, 31, 37: Sabotage is a selective and distinctive strategy of violence and terrorism is an indiscriminate violence to gain high value targets as a military advantage. Both of these

territory and evolves as an insurgency or spreads broadly in an overall society in the form of violent revolution or civil war.⁵⁷¹ Either crushed or succeeded, nonetheless both phases of radical actions bring an indiscriminate violence or collateral damages along with a high threshold of human rights abuses.⁵⁷² Horton and Hunt argue that after a sustained period of such vicious cycle of violence, normality returns with a rise of moderates in a post-revolutionary society.⁵⁷³ These moderates are not only compatible with few likeminded pre-revolutionary stakeholders, but also accumulate ideological and strategic gains of revolution through a formation of the new general will and legal order.⁵⁷⁴

In the light of supra generalized and theoretical arguments, this study determine that emergence of dissents and likely conflicts are an outcome of spontaneous or sustained socio-economic inequalities, political segregation, and institutional injustice. Parliamentary democracy provides a mechanism of dialectical synthesis to neutralize such injustices.⁵⁷⁵ In the case of deadlock between conflicting demands, higher judiciary has a prerogative to enforce complete justice under the notion of constitutionalism. For such purpose natural

strategies create anarchy. "The existence of an environment of anarchy is deemed sufficient to make sense of the participation of individual in conflict"

⁵⁷¹ Ibid., 7-13.

⁵⁷² Ibid., 37: "Counterinsurgency armies are notoriously brutal, employing tactics that target civilians indiscriminately in an effort to dry up the support base for guerrilla movement."

⁵⁷³ See Horton and Hunt, *Sociology*, 508-509.

⁵⁷⁴ Ibid., 508; also see into Ernst Rudolf Huber, "Constitution," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 328: "A post revolution constitution contains new principles like the principles of people's unity and wholeness of the movement and of leadership, thus qualifies as people's constitution."

⁵⁷⁵ Under contractual perspective anything either perceived by a large segment of society or actually happens, which is less than equality and equity or contrary to the core premises of categorical imperative. And under nation state (evolutionary state law theory) perspective anything contrary to basic norm and general will. In other words actions taken by governments and status quo forces, contrary to the combination of due process of law and rule of law are considered to be institutional injustice.

and positive law supplement each other through a constitution. It not only incorporates due process clauses, but also gives a workable confluence of rule of law with due process of law for the protection of personal and civil liberties. If such curative mechanism fails to address injustices, then political protest proves to be a last resort to save the ethical commonwealth. It is an effective tool to engage the majority's conscious not only in a contractual society, but also in an evolutionary model of the nation state, where state and nationalism precede the constitution. With These perspectives Zinn declares it a fallacy that political protest weakens law and order situation.⁵⁷⁶It rather enhances the legitimacy of a relevant legal order through inclusion of dissents for bringing some positive social political and legal changes. Pound in this regard focuses on sociological jurisprudence firstly for legislative and then judicial postulates to minimize conflicting interests.

However, in case of exclusion, Rawls, Dworkin, Friedmann, and Stone solely concentrate on judicial domains. It is through realist jurisprudence for a pragmatic enforcement of natural law to accommodate reactionary or reformatory dissents. It seems that either under sociological realism or under Hartian connotation of 'open texture', higher judiciary is supposed to supersede the doctrine of separation of powers. As to enlarge the scope of 'complete justice'⁵⁷⁷ in the 'public interests'⁵⁷⁸ by curing institutional or socio-economic injustices, which otherwise lead to civil unrest.⁵⁷⁹Such like judicial activism through public

⁵⁷⁶ See Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* (Cambridge, M.A: South End Press, 2002), 2-9.

⁵⁷⁷ See M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 688-692: Article 187 of the Constitution of Pakistan, 1973.

⁵⁷⁸ *Ibid.*, 611-64: Article 184(3) of the Constitution of Pakistan, 1973.

⁵⁷⁹ See *Kamran Murtaza v. Federation of Pakistan*, 2014 SCMR 1667.

interest litigations not only complements the legitimacy of the concerned legal order, but also enhances pluralism to form popular sovereignty.⁵⁸⁰ However, a complete failure in this regard ends up into a revolutionary political violence aiming at the radical change of entire legal order.⁵⁸¹

Order and Dissent in Domestic Paradigms of Pakistan

A core objective of this portion is to contextualize theoretical and generalized perspectives of maintenance of public order and politics of dissent in contemporary situations of Pakistan. As it deals with protests, sit-ins, strikes and long marches for independence of judiciary, human rights protections, constitutional as well as electoral reforms in Pakistan.⁵⁸² It helps to evaluate the philosophical foundations of indigenous legal system, especially its criminal law with regards to existing and probable political dissents and violence.⁵⁸³ Such evaluation is to find an equilibrium point between the scope of dissent and the scope of public order to avoid excess of criminal force from the both paradigms.

⁵⁸⁰ See Friedmann, *Law in a Changing Society*, 21-22, 47-90: “The interplay of State Action and Public Opinion-- The kind of interrelation that obtains in any given situation is essentially determined by two factors : (a) the type of political system that control legal action, (b) the type of social interest which is the object of the legal regulation in question.”----- “it is not only right but the duty of the judge to take note of fundamental changes in public opinion---- It is now increasingly recognized by contemporary jurists that cooperation rather than separation, in a constant interchange of give and take between legislature, executive and judiciary, reflects the reality of the legal process. ”

⁵⁸¹ *Ibid.*, 22-23, 43-44.

⁵⁸² See *Kamran Murtaza v. Federation of Pakistan*, 2014 SCMR 1667; *Gohar Nawaz Sidhu v. Province of Punjab*, 2014 CLC 1558 Lahore; *Haji Lal Muhammad v. Federation of Pakistan*, PLD 2014 Peshawar 199; *Muhammad Kamran v. Federation of Pakistan*, 2014 CLC 1549 Lahore; *Foundation for Fundamental Rights v. Federation of Pakistan and 4 others*, PLD 2013 Peshawar 94; *Sindh High Court Bar Association through its secretary and other v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad*, PLD 2009 SC 879.

⁵⁸³ See *Nurur Rhman and other v. Hatem Ali Khan*, 1969 PCr.LJ Dacca; *Akbar Gul Khan v. The Government of Pakistan through Secretary Defence and 11 others*, 1995 CLC 1189 LHC; *Nawabzada Shahzain Bugti v. The State*, PLD 2013 SC 160.

As declared in PLD 2014 Peshawar 199,⁵⁸⁴ “Thus all those, who are seeking to express their impugned anguish, may do so but in a lawful manner, without infringing upon the rights of others and violating the law.” However, what are the limits of anguish and how law ought to cater such anguish as well as what is the intrinsic behavior of implementing agencies in this regard is yet not clear. Because court observes on the other hand, “in a democratic state, the citizens have a right to criticize the government measures and its activities, but they cannot use this as a license to bring the government in a hatred or contempt or to create a law and order situation or to do prejudicial act.”⁵⁸⁵ But does not elaborate the threshold from where such criticism transforms in to contempt of government and such contempt transforms in to law and order crisis. Since independence Pakistan has the legacy of colonial laws, which are currently not only applicable in courts but also, have constitutional protection.⁵⁸⁶ As no serious efforts have been made yet to replace these century’s old substantive laws, resultantly the focus of study revolves around their chronological origin and likely impacts on domestic socio-political attitudes.

During the formative phase of East India, government in subcontinent the paternalist philosophy was adopted to administer the newly annexed areas of Sindh, Punjab and NWFP.⁵⁸⁷ Under this school, the emphasis was on military styled chain of command, and hierarchy of office based on procedural rules along with a special emphasis on written

⁵⁸⁴ See *Haji Lal Muhammad v. Federation of Pakistan*.

⁵⁸⁵ See *Nurur Rhman and other v. Hatem Ali Khan*, 1969 PCr.LJ Dacca.

⁵⁸⁶ See M.C. Setalvad, *The Role of English Law in India* (Jerusalem: Magnes Press, The Hebrew University, 1966), 52-53; M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 1175-1176: Article 269 “Validation of Laws, acts, etc.”

⁵⁸⁷ See Eric Stokes, *The English Utilitarians And India* (Clarendon, London: Oxford University Press, 1959), 238-248.

reports and records. Since the higher education was considered as a potential threat with a probability of dissent based upon reasoning and logic.⁵⁸⁸ Therefore identical to classic notions of John Austin,⁵⁸⁹ a basic elementary education was preferred to get a better compliance from subjects for authoritarian precepts.⁵⁹⁰ It seems that paternalists perceived teachers, teaching staff and teaching institutions as instruments to enforce conformity in colonial territory. Moreover, a district based administration under strong centralized government along with institutions of magistracy and police. As well as partial local governments on the union council and municipality level was anticipated for an effective rule.⁵⁹¹ With regards to public order and criminal law, executive with discretionary powers and summary proceedings were preferred instead of a due process of the court of law.⁵⁹² Apparently, it was a '*personal administration by a single head, without a due consultation of council*'; such an autocracy was virtually unaccountable yet considered appropriate for an absolute control over colonial territory.⁵⁹³

The purpose behind this fundamentalist perspective of public order was to rule not to govern and to establish governance in accordance with Kant's "categorical imperative," or

⁵⁸⁸ Ibid., 254-55: "The paternalists had always disliked the urban product of an exclusively literary English education, and thought the liberal assertion that they would be zealous supporters of British rule a highly dubious proposition [as evident from given excerpt] ---"Bengalese who learn English may become bad subjects and servants, and (if permitted to do so) they may write any amount of treason" --- Written four years before Mutiny this was a remarkably true forecast. Campbell saw that without a sense of national-ism there was no danger to British rule from such a class. If in the improbable future such a sense of political unity was developed, Britain would no doubt have to make concessions to it."

⁵⁸⁹ See Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: Lexis Nexis, Butterworths Tolly Ltd., 2003), 73-74: "Universal education is thus Austinian prescription for a sound, enlighten policy to understand the utility of strong centralized government and codified law."

⁵⁹⁰ See Stokes, *The English Utilitarians*, 252-254.

⁵⁹¹ Ibid., 255: "George Campbell declared that he saw no object in attempting the political elevation of the native beyond the limits of small municipalities."

⁵⁹² Ibid., 255, 270-271.

⁵⁹³ Ibid., 268-271.

Hobbes's "bare minimum of natural law" for mutual existence of society. It is as evident from Stokes's narration, "British rule which stood for cold, aloof impartiality, rejected all idea of winning over particular classes to its support, and almost prided itself on its estrangement from its subject--- Its leading principle of government was force rather than consent. It had to be maintained in the face of the nascent nationalist movements in India."⁵⁹⁴ Even in Bengal and other presidency towns where the utilitarian had an ample influence, the focus was only to apply and enforce procedural laws directly borrowed from English Jurisdiction.⁵⁹⁵ Such approach was directly influenced by the philosophy of Bentham for whom "Justice is merely an efficient distribution of utility."⁵⁹⁶ And for this purpose "Law not liberty-- was the great instrument of all improvement."⁵⁹⁷ It was also in accordance with Austin as for him, "-- law as a technical instrument of government or administration, which should however, be efficient and aimed at common good as determined by utility...[thus] law is [in-fact an] effective government."⁵⁹⁸

With this milieu a law commission, headed by Lord Macaulay, aided by John Stuart Mill and influenced by the teaching of Bentham, James Mill and Austin drafted substantive laws for colonial India in 1830's.⁵⁹⁹ Under this utilitarian and positivist approach, the commission had not only deviated from the common law traditions but also deviated from the contractual philosophy as was expounded in those days in the revolutionary America.

⁵⁹⁴ Ibid., 285.

⁵⁹⁵ Ibid., 140-220, 266: "It was a system founded on foreign principles, worked by imperfect instruments, and set down in a society afflicted by poverty and ignorance."

⁵⁹⁶ See H.L.A. Hart, *Law, Liberty and Morality* (California: Stanford University Press, 1963), 4.

⁵⁹⁷ See Stokes, *The English Utilitarians*, 293.

⁵⁹⁸ See Cotterrell, *The Politics of Jurisprudence*, 57.

⁵⁹⁹ See Stokes, *The English Utilitarians*, 240-260; M.C. Setalvad, *The Role of English Law in India* (Jerusalem: Magnes Press, The Hebrew University, 1966), 5-23.

Identical to ‘*Code Penal of Napoleon*’, these legislative drafts were not only codified but its penal code and criminal procedure code also gave priority to offences against state and public over the offences against person.⁶⁰⁰ Furthermore, through general exceptions, justifications and defenses such offences against person if committed by public official were given immunity from prosecution.⁶⁰¹

In this way it was not only attempted to make the institution of judiciary as a mere ‘*delegate of sovereign*’ but implicitly it had also been made subservient to the executive.⁶⁰² Though the former characteristic was in conformity with the Austin’s spirit, the latter was not only contrary to utilitarian philosophy but in fact close to fundamentalist perspective of public order.⁶⁰³ Consequently, the focus of such legislation was to protect the public tranquility and peace along with public nuisance as a core morality of society.⁶⁰⁴ However prior to the proper enactments of such legislative drafts, an uprising broke out in 1857, mainly as a war of hegemony and position to regain a control over means of production and administration.⁶⁰⁵ Initially it was a politics of dissent at the micro level by natives especially through sepoy and peasants, but then gradually transformed in to macro

⁶⁰⁰ See in Stokes, *Utilitarians*, 226-228.

⁶⁰¹ Ibid., 229-233; Anil Kalhan, “Colonial Continuities: Human Rights, Terrorism and Security law in India,” *Columbia Journal of Asian Law* 20, no.1 (2006): 93-234.

⁶⁰² See Cotterrell, *The Politics of Jurisprudence*, 70-72.

⁶⁰³ See W. Friedmann, *Law in a Changing Society* (London: Stevens & Sons Ltd., 1972), 191-194.

⁶⁰⁴ See Hart, *Law, Liberty and Morality*, 48.

⁶⁰⁵ See Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (London: Duke University Press, 1999), 56-76, 220-270; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New Delhi: Cambridge House, Foundation Books Pvt. Ltd., 2005), 11-12, 15-17, 17-21.

dissenting politics on a high threshold.⁶⁰⁶ Though it was crushed through the reprisal measures of the then British empire such as summary trial for capital punishments, life imprisonment in exile, banishing, and proscribing the entire clan, as well as use of disproportionate and indiscriminate lethal force during combat.⁶⁰⁷ Yet it had also a negative impact on the legislative drafts, especially relating to criminal laws which were still pending in the British parliament.⁶⁰⁸ Resultantly the paternalistic model of the fundamentalist school of public order overruled the pure utilitarian school,⁶⁰⁹ which was already not inclined as such in the favor of natural rights or fundamental rights.⁶¹⁰

Hence enactments of the late nineteenth century in India carried through them a plethora of preventive and punitive measures to avoid a probability of civil strife, insurrection and mutiny as had been experienced in 1857.⁶¹¹ Such colonial legislative intentions were finally materialized in the form of stringent police powers coupled with magisterial executive powers with a limited scope of judicial oversight on the offences against state and public

⁶⁰⁶ See Rajagopal, *International Law from Below*, 13-15: The Micro-politics of power contains localized resistance from individuals, groups and communities to gain and regain power or to rebel against a legal order. And Macro-politics of power contains resistance from big administrative units, provinces or an insurrection by a territory against a strong center.

⁶⁰⁷ See Guha, *Elementary Aspects of Peasant Insurgency*, 300-332.

⁶⁰⁸ See Stokes, *Utilitarians*, 258-259.

⁶⁰⁹ *Ibid.*, 268-270, 274-290.

⁶¹⁰ See Cotterrell, *The Politics of Jurisprudence*, 57: "Like Bentham, Austin has no patience with idea of natural or fundamental rights: there are no rights or laws that are somehow inherent in the human condition, in human nature, or in the very essence of social or community life. All rights and duties are created by setting down rules as an act of government. Consequently there can be nothing inherently sacred about civil or political liberties. Insofar as they are valuable they are the byproduct of effective government in the common interest."

⁶¹¹ See Anil Kalhan, "Colonial Continuities: Human Rights, Terrorism and Security law in India," *Columbia Journal of Asian Law* 20, no.1 (2006): 93-234, 110-112; Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: University Foundation Press, 1989), 83-85.

order.⁶¹² Accordingly Rajagopal perceives such ‘*total rule*’ as an outcome of ‘*colonial schizophrenia*’ about mass and nationalist movement, as says further, “this enabled the colonial authorities to treat anti-colonial resistance as criminal acts and deal with them through law enforcement measures, especially through the doctrine of emergency.”⁶¹³ He also believes that such ‘*violence of positive law*’ ostriches the existence of any socio-political dissent in society, and perceives its slightest likelihood as a law and order crisis to invoke public emergency.⁶¹⁴ Consequently, under such corpus of criminal law in colonial India all kinds of political disagreements either were crushed through brutal police powers since their inception or were further transformed in to a large-scale civil unrest or internal commotion as an accumulation of ‘*passive resistance*.’⁶¹⁵ Under this paradigm, extensive powers of arrest and detention along with the legitimate use of lethal force to establish public order were incorporated in Defense of India Act, 1915⁶¹⁶ and Rowlatt Act, 1919.⁶¹⁷ It was followed by the *Jallianwala Bagh Massacre 1919*, in Amritsar city where indiscriminate and disproportionate lethal force was used with impunity to disperse an unlawful assembly after imposition of relevant sections of the Code of Criminal Procedure, Act V of 1898.⁶¹⁸

⁶¹² See *Abdual Fatah v. The State*, 1990 MLD 1087, Karachi, 1088-1089; Hussain, *Personal Liberty and Preventive Detention*, 90-97, 101-103; Kalhan, “Colonial Continuities,” 111, 126-132.

⁶¹³ See Rajagopal, *International Law from Below*, 11-12, 177-179.

⁶¹⁴ *Ibid.*, 180-182.

⁶¹⁵ *Ibid.*, 20-21, 241-243; Kalhan, “Colonial Continuities,” 126-128.

⁶¹⁶ See Hussain, *Personal Liberty and Preventive Detention*, 86-87.

⁶¹⁷ *Ibid.*, 88-89: “The Anarchical and Revolutionary Crimes Act, 1919 (known as Rowlatt Act) was based on the recommendation of “Sedition Committee” constituted to consider measures for the suppression of revolutionary movements in India”.

⁶¹⁸ See Muhammad Mazhar Hassan Nizami, ed., *The Code of Criminal Procedure* (Lahore: PLD Publishers, 1999), 122-126, 139-144: Chapter IX: “Unlawful Assemblies and Maintenance of Public Peace and Security”: Section 127-132----- Chapter XI: “Temporary Orders in Urgent cases of Nuisance or Apprehended Danger”: Section 144: Ironically these magisterial and police powers are still operative in India, Bangladesh and Pakistan as the Cr.P.C 1898, is still a substantive criminal law of these countries.

These protesters were in fact agitating non-violently against the draconian powers as were given to executive in the above-mentioned Rowlatt Act.⁶¹⁹

Yet in spite of repression, such political dissent proceeded further in form of a wide scale civil unrest as the noncooperation movement in colonial India in 1920.⁶²⁰ The above mentioned scenario illustrates that the colonial legal framework with utilitarian and imperialistic outlook as ‘*white man’s burden to enlighten the so-called backward classes*’, was neither inclined nor capable to cope with indigenous political dissents and protests.⁶²¹ Resultantly it had to rely on exclusions, violent repressions, persecutions, and labeling beyond the judicial domains.⁶²² It is evident from this excerpt, “the administrative and judicial system of British rule, which sustained in [India and Pakistan even after the independence], was based in the realm of authority not liberty.”⁶²³

However such authoritarian administration based on ‘*soldier-political school*’ usually proved counterproductive as it often enlarged sociopolitical fragmentations.⁶²⁴ Besides, it proved to be ineffective as well as indifferent to control ethnic mass violence especially

⁶¹⁹ See Helen Fein, *Imperial Crimes and Punishment* (Honolulu: University Press of Hawaii, 1977), 20-47.

⁶²⁰ *Ibid.*, 48-92.

⁶²¹ See Stokes, *Utilitarians*, 298-312: “--in his essay on Liberty, John Stuart Mill had carefully stated that its doctrines [civil and political liberty along with self-government] were only meant to apply to those countries which were sufficiently advanced in civilization to be capable of settling their affairs by rational discussion [thus attempting to exclude colonial India] unless it sufficiently gained a progress in civilization.”

⁶²² See Shaukat Mahmood and Nadeem Shaukat, ed., *The Pakistan Penal Code: XLV of 1860* (Lahore: Legal Research Center, 2008), 385- 416: Sec.121-140 relating to offences against state and armed forces have jurisdictional bar.

⁶²³ See Stokes, *Utilitarians*, 320-322.

⁶²⁴ *Ibid.*, 314-318: A resort to military force in law enforcement operations instead of negotiations and bargains to settle political disputes.

during Hindu-Muslim communal riots in 1946-47.⁶²⁵ It was mainly due to its relatively more state centric approach than public, community, and persons. Then few questions arise here, what was the social relevancy of these criminal laws? Why did natives reveal their delinquency in spite of such a stringent legal order? What kind of imperative had been given to the contemporary theories of the social control in Pakistan by such criminal law? Lastly, what could be the best practices by keeping in mind the socio-political and religious diversity of India and Pakistan?

Henceforth a contextualization of Fuller's morality of aspirations and morality of duty along with Hart's internal-external debate seems appropriate to understand legal and its social behavior of such '*imperialist cum utilitarian*' approach of public order. In Fuller's paradigm, the morality of aspirations of colonial rulers was to obtain maximum obedience from an extremely polarized society. Though theoretical framework of the Indian criminal law was based on utilitarian penology yet practically it was close to the paternalist's perspective of retribution.⁶²⁶ Therefore, it was highly dependent on the subjective satisfaction of executives to use force while dealing with unlawful assemblies and their

⁶²⁵ See Lionel Baixas, "Thematic Chronology of Mass Violence in Pakistan, 1947-2007," *Online Encyclopedia of Mass Violence*, June 2008, 2-6; Violette Graff and Juliette Galonnier, "Hindu-Muslim Communal Riots in India I (1947-1986)," *Online Encyclopedia of Mass Violence*, July 2013, 2-7.

⁶²⁶ See N.V. Paranjape, *Criminology and Penology* (Allahabad: Central Law Publications, 2007), 218-200: Under the preventive theory of utilitarianism punishment is not to avenge crime but to prevent it through special measures, whereas its punitive measures are focused on institution of prison, by incapacitation of criminals society prevent itself from the negative externalities of offenders. Therefore through least cost of preventive measures or punitive measure more gains of social order can be achieved under utilitarian. Under the Retributive School of Penology (Fundamentalist's perspective of public order) punishment s and specially stringent punishments are considered as a means to attain social security, for them evil should be essentially returned through evil, so through an eye for an eye instincts and socio economic benefits to commit crime can be discouraged. Resultantly retributivists were least concern for the consequences of crime whereas reformation is an ultimate intended objective of utilitarian penology.

mere suspicion to detain preventively to maintain public order.⁶²⁷ The executives in this regard were mainly consisting of the institution of police, district administration, and armed forces in aid of civil powers with a least probability of parliamentary or judicial oversight.⁶²⁸ Resultantly these executive were least bother about '*locus poenitentiae*'⁶²⁹ of preventive measures and rational calculation of social harm and gains of punitive measures, especially the psychological and sociological efficacy of penal actions in society.⁶³⁰ Their retributive doctrine of eye for an eye to attain public order without considering consequences obviously lead to executive impunity, which was eventually desired by colonial rulers in the realm of political realism.⁶³¹

The retributive morality of aspiration required an irrational morality of duty of from subjects. It was logically impossible by considering the divers ground realities of colonial India. Hence delinquency with regards to political offences like offences against state and public order was considered by subjects as a contingent part of liberation movement.⁶³² Consequently, social mobilization and activation emerged for socio-political change,

⁶²⁷ See Hussain, *Personal Liberty and Preventive Detention*, 101-167.

⁶²⁸ See Setalvad, *The Role of English Law in India*, 25-60: Absence of writ jurisdiction of high courts and tortious liability of state in the colonial India.

⁶²⁹ See Bryan A. Garner, et al., ed. *Black's Law Dictionary*, eds., Bryan A. Garner, et al., 8th ed. (Boston: West Publishing Company, 2004), 960: "A state of mind and rational place of repentance, A point at which it is not too late for one to change one's intended course of actions or a possibility of withdrawing from a contemplated course of action, especially a wrong, before being committed.": *Mst. Nasim Fatima v. Government of West Pakistan and Superintendent, Central Jail, Dera Ismail Khan, PLD 1967 Lahore 103, 144*: "Keeping in mind the opportunity under the doctrine of *Locus Poenitentiae* –order of further detention (of an already detained person] not to be mechanically or automatically passed but with full realization of responsibility whether further detention was necessary."

⁶³⁰ See Paranjape, *Criminology and Penology*, 216-234.

⁶³¹ See Kalhan, "Colonial Continuities," 126-150.

⁶³² See Rajagopal, *International Law from Below*, 9, 21-23, 165-171, 187.

attainment of self-government and attainment of civil rights.⁶³³ Such colonial mass discontentment led to political resistance through passive and violent moves which lastly transformed in to political crimes as crimes against state as well as riotous unlawful assemblies. Since Hart's perspective illustrated that indigenous aspiration, ground realities and local inputs were not incorporated in the process of drafting, which took place in an aloof aristocratic manner.⁶³⁴ Therefore local population perceived such law and especially criminal law being enforced by tyrannical colonial rulers and usually gave their consent out of coercion and fear of punishments. Their compliance to law could be categorized as external obligations of intimidated classes, whereas affiliation to rules and procedures by native officials only for their own ranks and promotion could be categorized as internal obligation to law.

This segregation of internal and external obligation in to two broad categories furthered the distance among government official and general public. Because excluded, disengaged and coerced classes perceived such officials as close aid of the colonial ruler.⁶³⁵ Consequently it enhanced probability of violence against this assumed unjust legal order and its corresponding officials. Hafez identifies this phenomenon as an ethical dimension of antisystem frame and narrates, "antisystem frames make the advantageous comparison [attempts

⁶³³ Ibid., 177-182; Kalhan, "Colonial Continuities," 130-131, 140-145; Hafez, *Why Muslims Rebel*, 1-25, 27-63.

⁶³⁴ See Stokes, *Utilitarians*, 184-240.

⁶³⁵ See Hafez, *Why Muslims Rebel*, 156-158.

to find moral justifications] of violence possible by insisting that the system, with all its governors, institutions, and agents, perpetrates grave injustice through its mere functioning.”⁶³⁶

It is interesting to apply Kelsen’s fictional tool of basic norm to find out a presumed validity and efficacy of such colonial legal order. As has been discussed in the preceding paragraphs, the core morality of such legal system was based on the retributive penology, thus all the other norms of the entire system ought to conform this basic norm. Hence, fear of repression and coercion was legitimate to gain and sustain habitual obedience from public. Now responding to the question of relevancy with Pakistan, The Penal Code (Act XLA of 1860), The Criminal Procedure Code (Act V of 1898), The Police Act, 1861, The Explosive Act, 1884, The Telegraph Act, 1885, The Prison Act, 1894 (Act IX of 1894), The Reformatory Schools Act, 1897, The Prisoners Act, 1900, The Explosive Substances Act, 1908, Official Secrets Act, 1923, The Punjab Borstal (Act XI of 1926). Along with other substantive colonial laws, relating to public order sustained in the contemporary domestic criminal justice system.⁶³⁷ Kalhan categorizes such contingency as ‘*colonial continuities*,’⁶³⁸ Dhillon identifies this situation as ‘*colonial hangovers*,’⁶³⁹ and Paranjape narrates that it is a philosophical continuation of ‘*para-militarism*’ associated with threat and coercion.⁶⁴⁰ As has been discussed above that such legal order was not compatible as such with a vibrant

⁶³⁶ Ibid., 158.

⁶³⁷ See Mansoor- ur- Rehman Khan Afridi, ed., *Manual of Police Laws in Pakistan* (Lahore: Civil & Criminal Law Publication Publishers & Book Sellers, 2003), 83-91, 251-261, 449-1299; M. Farani, ed., *Criminal, Local & Special Laws: Minor Acts* (Lahore: Lahore Law Times Publications, 2004), 520-529, 807-815, 959-1000, 1424-1435; S.A Khan, ed., *Pakistan Prison Rules* (Lahore: Mansoor Book House, 1995), 1- 497; Hussain, *Personal Liberty and Preventive Detention*, 107-26; Kirpal Dhillon, *Police and Politics in India* (New Delhi: Manohar Publishers, 2005), 51-90; Paranjape, *Criminology and Penology*, 300-304.

⁶³⁸ See Kalhan, “Colonial Continuities,” 126-135.

⁶³⁹ See Dhillon, *Police and Politics in India*, 52-54.

⁶⁴⁰ See Paranjape, *Criminology and Penology*, 300.

concept of civil society and civil liberties as enshrined in the contractual paradigm. Yet this situation has become more complex in Pakistan with regards to its legal response and administrative response to emerging concepts of Islamic welfare state, egalitarianism, civil liberties of the new order, protection of minorities, federalism and democracy as enshrined in the Objective Resolution. This '*morality of aspiration*' given by the then legislatures ought to reach masses through the instrument of legal order, to accomplish a corresponding '*morality of duty and legality*'. Hence the '*internal morality*' of legal and administrative order has remained the same as was given by fundamentalists and positivists in the wake of 1857's uprising.

This theoretical incompatibility is stimulating a sociopolitical wrangling of competing perspectives of national security, authority, public order and citizenship especially according to the conflict perspective of criminology.⁶⁴¹ Such transition from subjects to citizenship along with insertion of writ jurisdiction to transform a passive judiciary as '*mere delegates of sovereign*' to '*custodian of categorical imperative*' proves ineffective to alter the '*colonial legacy*' of administration in Pakistan.⁶⁴² Administrative '*morality of aspiration*' of strong center, indirect rule through bureaucracy, emergence of civil and military establishment with a '*priori*' of national security, doctrine of necessity deduced by martial law regimes has produced a state centric legalism in Pakistan with a plenty of laws

⁶⁴¹ See Schmalleger, *Criminology Today*, 365: "Conflict Perspective is an analytical context of social organization and social order, it holds that conflict is a fundamental aspect of social life itself and can never be fully resolved"; Noam Chomsky, *Necessary Illusion: Thought Control in Democratic Societies*, (New Delhi: First Indian Edition, Viva Books Pvt. Ltd., 2007), 269-356; Newberg, *Judging the State*, 2-10.

⁶⁴² See Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership-Pakistan, 2008), 19-37.

relating to public order and security.⁶⁴³ Such body of law is highly influenced by retributive penology with a meager amount of utilitarian preventive penology, it contains; The Security of Pakistan Act 1952, The Pakistan Army Act (XXXIX of 1952) [S.2 d], Public Order (Meeting) Ordinance, 1958, W.P Maintenance of Public Order, Ordinance,1960, Pakistan Arms Ordinance, 1965, The Anti-Terrorism Act, 1997, Suppression of Terrorist Activities (Special Courts) Act, 1975, Terrorist Affected Areas (Special Courts) Act, 1992, Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998, The Protection of Pakistan Act, 2014 (X of 2014).⁶⁴⁴

Accordingly Brownlie believes that “ [due to] the increase in preventive justice and refinement of the concept of apprehending a breach of the peace, coupled with a large amount of discretion allowed to those enforcing the law--- there has been a general increase in legal restraints in [civil and political] liberty.”⁶⁴⁵ It seems that a stringent behavior of domestic law does not tolerate any kind of political protest; resultantly resort to indiscriminate use of force is an ultimate choice for the law enforcement agencies. Since the ‘*grund-norm*’ of this body of law is to ensure public order at all cost, so executive impunity as logical outcome of discretions seems plausible as a doctrine of necessity. Yet in spite of this stringency Pakistan suffered from a large amount of mass violence in the form of civil

⁶⁴³ See Farzana Shaik, *Making Sense of Pakistan* (London: Hurst & Company, 2009), 46-208.

⁶⁴⁴ See Farani, ed., *Criminal, Local & Special Laws: Minor Acts*, 851-861, 1100-1101, 1424-1434, 1731-1741; Mian Ghulam Hussain, *Manual of Anti-Terrorism Laws in Pakistan* (Lahore: Civil & Criminal Publications, Law Books Publishers & Sellers, 2014), 18-196, 388-635.

⁶⁴⁵ See Ian Brownlie, *The Law Relating to Public Order* (London: Butterworth & Co Publishers Ltd., 1968), 185, 190.

unrests, internal armed disturbances, ethnic and political riots, political and religious terrorism, insurrectional movements and full scale civil war.⁶⁴⁶

It seems that collective social response to the indigenous legal order in Pakistan is also having the colonial shadows, a large number of people have developed distrust over the dispensation of justice and utility of existing laws. Davies portrays this phenomenon as relative deprivation; it occurs when masses experience a huge gap between expected and actual gains of a new order.⁶⁴⁷ As the expectations of masses from their leadership were very since the inception of Pakistan in 1947, but due to their socio-political isolation a perceived sense of injustice had developed in them. It led to the first martial law in 1958, with another wave of high expectations, but soon diminished due to the unaccomplishment of socio-economic justice. The autocracy of martial law regime with an undue emphasis on strong center not only produced a sense of insecurity but also had a negative impact on federalism. It led to insurrectional movements in the East wing of the country along with a rise of separatist movements in West wing, especially in the tribal belt along with settled areas of KPK and Balochistan.⁶⁴⁸ Such political instability, lack of constitutionalism and federalism, inability of the courts to protect civil liberties and the use of brutal force to suppress dissent ended up in the shape of civil war and then a subsequent

⁶⁴⁶ See Newberg, *Judging*, 116-122; Jalal, *The State of Martial Rule*, 1-4; Musa Khan Jalalzai, *Dying to Kill us: Suicide Bombers, Terrorism and Violence in Pakistan* (Lahore: Al-Abbas International, 2005), 23-145, 152-169; Lionel Baixas, "Thematic Chronology of Mass Violence in Pakistan, 1947-2007," *Online Encyclopedia of Mass Violence*, June 2008, 5-28; South Asia Terrorism Portal, "Fatalities in Terrorist Violence in Pakistan 2003-2015," last modified March, 2015, Institute For Conflict Management, <http://satp.org/satporgtp/countries/pakistan/database/casualties.htm>.

⁶⁴⁷ See James C. Davies, "Toward A Theory of Revolution," *American Sociological Review* 22, no. 1 (1962):5-19.

⁶⁴⁸ See Newberg, *Judging*, 35-109.

secession of East Wing of Pakistan in 1971.⁶⁴⁹ Bhuto government has tried to form a popular sovereignty by giving a constitution under contractual paradigm in 1973, yet not modified the existing legal order that was based on legal positivism. Under such notion constitution is mere a positive morality unable to bind sovereign, only has a little persuasive impact on him, as it lacks the core ingredient of ‘sanctions’ to be even qualified as law.⁶⁵⁰ Thus, a very unusual attempt has been made to save the constitution from subversion or abrogation, by inserting in it the sanction clause of high treason.⁶⁵¹ Yet it again reflects a vulnerability of constitutionalism in Pakistan, because help is taken from mere a force of positive law to save a sacred trust of egalitarians. Moreover does the abrogation of constitution means the abrogation of its letters or abrogation of its spirit? If the protection of its spirit is intended then its emergency provisions which are identified by Kalhan as ‘*civil martial law*’⁶⁵² as well as jurisdictional bar on writ prerogative of high courts. Besides it a constitutional protection of preventive detention and placement of security laws along with laws relating to maintenance of public order beyond the validation on touchstone of fundamental rights, are inbuilt and implied subversions of

⁶⁴⁹ Ibid., 110-135.

⁶⁵⁰ See Cotterrell, *The Politics of Jurisprudence*, 63-70: Austin’s perspective.

⁶⁵¹ See M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan* (Lahore: Alqanoon Publishers, 2014), 302-304: Article 6 “High Treason”; Farani, ed., *Criminal, Local & Special Laws: Minor Acts*, 625: High Treason (Punishment) Act, 1973: “Sec.3-- No court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by a person authorized by the federal Government in this behalf” ; *Main Nawaz Sharif v. President of Pakistan*, PLD 1993 S C 473: “In term of Section 3 of the high treason (Punishment) Act, 1973, the Federal Government has not so far designated the authorized person on whose complaint such an offence can be taken cognizance of by the Court. The failure here is not of the constitution, not of the parliament but of the executive Government and that too since 1973 of not giving a salutary constitutional provision a meaningful content and operational mechanism, thereby frustrating it altogether.”; *Syed Pervez Musharaf v. Appellate Tribunal for General Election 2013*, PLD 2013 Peshawar 105; *Moulvi Iqbal Haider and other v. Federation of Pakistan*, 2013 SCMR 1683.

⁶⁵² See Kalhan, “Colonial Continuties,”: 130.

constitutionalism.⁶⁵³ Therefore Zia's martial law not only abrogated this constitution with impunity in 1977, but also got its judicial validation in the name of doctrine of state necessity. That is why Newberg identifies this era as 'silencing courts and muting justice.' Moreover regime tried to insert sharia in the local English jurisprudence in the wake of Soviet invasion of Afghanistan in 1979. Such Islamization as 'hyper nationalism' was assumed to be enforced through administrative tool especially under total state perspective.⁶⁵⁴

However as its negative externality a specific school of thought emerged as an ideological majority with a transnational concept of Jihad under 'levee en masse' paradigm. Initially this mass mobilization for a presumed glorification of Islam through Jihad was strategically used against Russia under the notion of 'revanchism', with two core purposes. First to defend territorial and ideological state boundaries and secondly designed to gain a strategic depth in Afghanistan in case of an expected Soviet withdrawal, which actually happened in 1989. Henceforth such philosophy was contextualized in the Kashmir liberation movement through irredentism till the terrorist attacks on the twin towers of the world trade center in America on 9th September 2001.⁶⁵⁵ Since al-Qaeda being a continuity

⁶⁵³ See M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 205-218, 1193: Art. 8(3) "Exceptions of laws relating to maintenance of public order if inconsistent with or in derogation of Fundamental rights"---- First Schedule "Laws exempted from operation of Article 8(1) and (2)"; The Constitution (Twenty-First Amendment) Act, 2015.

⁶⁵⁴ See Newberg, *Judging*, 171-199; Jalal, *The State of Martial Rule*, 320; Shaikh, *Making Sense of Pakistan*, 98-113.

⁶⁵⁵ See Laitin, *Nation, States and Violence*, 1-59: **Levee en masse** is a voluntarily armed uprising against a perceived and unjust occupation and aggression from a belligerent state; it is usually based on the shared and common perceptions as well as common religious, ethnic or cultural identity. **Revanchism** is also an armed struggle of an ethnic or religious group to form an independent nation state, this group may be geographically split in to two or more than two states thus their struggle is usually base on the common cultural ,religious

of this transnational campaign of 'levee en masse' was alleged to be the main perpetrator of this mass murder, subsequently an international war against terrorism was launched to eliminate these non-state actors. As Pakistan being a close strategic ally of America is part of this counter-terrorism campaign, hence it is bearing reactionary violence till today from Tahrir e Taliban Pakistan, an offshoot of al-Qaeda mainly based in Afghanistan, Central Asia and Middle East. This political violence has transformed in to internal armed conflict in the Federally Administrated Tribal Area (FATA) and extended up to the entire settled area of Pakistan in the form of sporadic acts of terrorism.⁶⁵⁶ Therefore official disengagement from masses, their political exclusion and resultant spirals of encapsulation in radicalism as well as official manipulation of social values has transformed this republic in a 'police state'.⁶⁵⁷ With a little tolerance for dissent such administrative behavior is not only incompatible for a formation of conscious civil society in Pakistan. But also has a negative impact on an overall accomplishment of civil and political liberties.⁶⁵⁸ As being contentious for their fundamental rights, citizen under liberal democracy and constitutionalism strive to protect them either through institutional means of judicial review, or through political means of persuasion and protests.

and ethnic ties, hence is known as transnational movement. **Irredentism** is a state base policy to redefine its boundaries by sensitizing an ethnic or religious group present in neighboring countries, it is basically an expansionist strategy of realism; Muhammad Amir Rana, *A to Z of Jehadi Organization in Pakistan* (Lahore: Mashal Books, 2004), 83-114; Ayesha Jalal, *Partisans of Allah: Jihad in South Asia* (Lahore: Sang-e-Meel Publications, 2008), 239-301; Amrith Rohan Perera, *International Terrorism* (New Delhi: Vikas Publishing House Pvt. Ltd., 1997), 9-13, 113-131; Shaikh, *Making Sense of Pakistan*, 205-208.

⁶⁵⁶ See Naiz A. Shah, *Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan* (New York: Routledge Taylor and Frances Co, 2011), 91-144; Jalalzai, *Dying to Kill Us*, 121-169; The Protection of Pakistan Act, 2014; The Balochistan Civilian Victim of Terrorism (Relief and Rehabilitation) Act, 2014; The Pakistan Army (Amendment) Act, 2015; The Constitution (Twenty-first Amendment) Act, 2015.

⁶⁵⁷ See Jalal, *The State of Martial Rule*, 75.

⁶⁵⁸ See Shaikh, *Making Sense of Pakistan*, 68-80; D.K. Ganguly, *Law Relating to Protection of Human Rights and Violation of Human Rights Problems* (Allahabad: Dwivedi Law Agency, 2012), 240-241; W. Friedmann, *Law in a Changing Society* (London: Stevens & Sons Ltd., 1972), 22-23, 76.

Yet out of a chronology of conflicts with masses since 1857, a paternalistic bureaucracy has developed a skeptical attitude towards pluralism in Pakistan with a culture of excessive subordinate legislations and administrative discretions. It is mainly due to retributive ideology of domestic criminal law and its inherent means of administrative and preventive penology to apprehend prejudicial activities.⁶⁵⁹ Along with a prolong absence of popular electoral process till 1970 and then its sequential abruptions through total and partial military coup d'état till 2008.⁶⁶⁰ Besides a late entry of writ jurisdiction of high courts in domestic legal corpus in 1954 with lots of jurisdictional limitations especially during law enforcement operations, preventive detentions and proclamation of public emergencies.⁶⁶¹ Therefore neither the parliamentary oversight nor the judicial scrutiny was capable to restrain these administrative discretions, which were also indifferent to overall human rights protections in Pakistan. As outcome discretions regarding the use of force, nature of force, its extent, scope and implications has remained unrestrained especially in the context of maintenance of public order.

This scenario has also an implicit incentive for police and district administration because they are not only capable to maintain order and status quo with this strategy but also deter

⁶⁵⁹ See Paranjape, *Criminology and Penology*, 29-30.

⁶⁶⁰ See Kamran, *Democracy and Governance*, 103-129, 173-205.

⁶⁶¹ See S. Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* (Lahore: All Pakistan Legal Decisions, 1966), 64-65; M. A. Fazal, *Judicial Control of Administrative Action in India and Pakistan* (Oxford: Clarendon Press, 1969), 24-25; *Ch. Muhammad Anwar v. Govt. of West Pakistan*, PLD 1963 (WP) Lahore 109: The Government of India (Amendment) Act, 1954-- insertion of S.223A to confer the Writs of Prohibition, Habeas Corpus, Quo Warranto, Certiorari, Mandamus to respective High Courts in Pakistan.

general public to resort to political protests. As a result of this administrative attitude, all kind of protests irrespective of their magnitudes and intents are potentially capable to be transformed in to riotous assemblies. Because police along with district administration perceives a least probability of protest as a potential danger for public order, and uses all kind of preventive and punitive measures to deter such probability. Yet it usually proves counterproductive as masses either develop a perceived sense of fear and injustice or experience an actual harm. Both of these possibilities engender a skeptical social behavior about the law enforcement agencies. Tittle(1995) illustrates it as a '*control imbalance*', since due to surplus of punitive control other social forces like media, intelligentsia, community and family which otherwise act as an informal control mechanism react against conventional law enforcement apparatus.⁶⁶²Resultantly any socio-political, economic or religious stimulus can instigate the implied resentments to the existing legal order. Eventually it leads to occurrences of unlawful assemblies and riots, while their sequential repetition embodies a situation of civil unrest in a specific territory. Likewise any social activism if managed through control surplus leads to prolong socio-political movement, which uses political violence as a tool to initiate bargains with sitting government.⁶⁶³ Similarly Dahrendorf (1959) and Turk (1969) explain an antagonism between rulers and ruled under conflict theories and radical criminology, and present four different paradigms of conflicts in a respective society. In first scenario with a high threshold of conflict, authorities strongly legislate and enforce a specific preventive or

⁶⁶² See Charles R. Tittle, *Control Balance: Toward a General Theory of Deviance* (Boulder: Westview Press, 1995), quoted in Katherine S. Williams, *Text Book on Criminology* (New Delhi: First Indian Reprint, Oxford University Press, 2002), 376.

⁶⁶³ *Ibid.*, 377-378.

punitive law, but subject with same reciprocity oppose and break it. In the second scenario with a low threshold of conflict, authorities strongly legislate yet resort to its mild enforcement, while subjects being aware of such legislation also perform a reciprocal mild conformity. In the third scenario authorities strongly legislate as well as enforce a law and subjects too strongly show their conformity with it. However a moralized minority in spite of knowing the significance of such law deviates from it due to any ideological differences. If such deviance gain momentum then a probability of conflict also increases yet its scope is usually tolerable and manageable through preventive penology. In the fourth scenario authorities strongly legislate due any external pressure yet not enforce with vigor and subjects are also reluctant to comply with such law, then there are least chances of conflict. Consequently, to legislate and enforce a law is a cultural norm of authorities while a reciprocal obedience and actual observance of law is a cultural norm of subjects. It is mandatory to have harmonious relationships between both of such normative behaviors to attain social order in a respective society.⁶⁶⁴ However it does not seem so in an indigenous context of Pakistan where imbalances and disharmony occur between these reciprocal behaviors.

As a corollary Pound narrates in the South East Asian context, “*Both judge made and statutory precepts have failed because they lacked social psychological guarantee. The difficulty may be, either that a precept runs counter to the individual exceptions of the greater number or of*

⁶⁶⁴ See Ralf Dahrendorf, *Class and Class Conflict in Industrial Society* (London: Routledge & Kegan Paul, 1959); Austin T. Turk, *Criminology and Legal Order* (Chicago: Rand McNally, 1969), quoted in Katherine S. Williams, *Text Book on Criminology* (New Delhi: First Indian Reprint, Oxford University Press, 2002), 440-442.

the more aggressive of a dominant class, or that it runs counter to settle moral ideas of individuals or of an obstinate minority."⁶⁶⁵ While discussing the evolution of common law on the touch stone of Austin's perspective of '*maturity of law*', he says that the objective of primitive law was to attain strict rules for an absolute social order. Then owing to contractual and naturalist perspective, the ultimate end of law in eighteenth and nineteenth century was individual and its liberty. And then in twentieth century the end of law is to attain a welfare state through socioeconomic justice. Since contemporary approach is to weigh and balance the conflicting interests in society for an accomplishment of maximization of justice.⁶⁶⁶ In the light of this debate it seems that domestic law of Pakistan is still in the domain of '*primitive law*.' As its criminal justice system is focusing to attain an absolute public order by combating terrorism and managing law and order crisis with strict punitive and preventive laws.

As Barkun indicates, "Due to heterogenic cultural roots, a society become heterogenic and complex--- the more complex a society is, the more complex its legal institution."⁶⁶⁷ Hence for an alternative course of action, '*bare minimum of natural law*' as an assumed basic norm with a hierarchical priority of offences against person over offences against public seems plausible to attain collateral peace. Besides offences against state, being under the category of political offences ought to be countered through an instrumentality of Hegelian

⁶⁶⁵ See Roscoe Pound, *The Ideal Element in Law* (Calcutta: Calcutta University Press, 1958), 90-102.

⁶⁶⁶ *Ibid.*, 105-130.

⁶⁶⁷ See Michael Barkun, *Law without Sanctions: Order in Primitive Societies and the World Communities* (New York: Yale University Press, 1968), 59-60, 71-72.

dialect.⁶⁶⁸ Because their administrative resolve may lead to either an absolute submission or to a counterproductive vicious cycle of violence with probability of polarized isolation or secessionist movements. However both of the possibilities are dangerous not only for idealist model of social contract and constitutionalism but also for state law perspective of the security of state. Since these offences have political orientations, so their prevention should be through political means and strategies like conflict resolution or dialectical synthesis either within or outside the parliamentary domain. For such assumption horizontal model of local governments with an institution of '*punchayet*' seems a pragmatic remedy by keeping in mind the cultural and social diversity of India and Pakistan. The governmental focus on development and good governance at grass root level has a probability to neutralize socio-political polarization in Pakistan. For this purpose institutional justice under the core parameters of Rawlsian equality and equity is preferred to achieve egalitarianism. And in jurisprudential context, collaboration between legislature, executive and judiciary is required to accomplish the preamble and objective resolution of the constitution of Pakistan, 1973.⁶⁶⁹

⁶⁶⁸ See Ronald J. Berger, Marvin D. Free Jr., and Patricia Searles, *Crime, Justice, and Society: An Introduction to Criminology* (New Delhi: First Indian Edition, under agreement with Lynne Rienner Publishers, Inc., Viva Books Pvt. Ltd., 2007), 363-367: Ethno-political riots, civil unrests, internal disturbances, passive resistance and civil disobediences, terrorism and internal armed conflict along with insurrection are basically political offences against the legal system and government of a state.

⁶⁶⁹ See Rajagopal, *International Law from Below*, 238-239, 241-243, 245-249, 252-256; Friedmann, *Law in changing Society*, 89; Barkun, *Law Without Sanctions*, 65-67, 72-77, 80-84, 113-115.

Human Rights Concerns in the Laws and Practices Relating to Public Order in Pakistan

This study intends to assess substantive and special criminal laws relating to offences against state and public at large. It is mainly on the touchstone of constitutionally protected fundamental rights, core principles of objective resolution, due process of law and a notion of procedural justice in Pakistan. It is to find answers of the following queries like, what are the core characteristics and objectives of these laws? Whether they are legislated with preventive or retributive intents? Whether they are capable to establish deterrence in society? If yes then why special laws are legislated to gain the same? What kind of implementing agencies they required to accomplish their inherent intents? What are the primary and secondary role occupants during implantation phase and what are their respective problematic behaviors?⁶⁷⁰ How much inbuilt discretions these laws have and is there any mechanism of internal monitoring available to manage such discretions? Whether these administrative discretions are potential cause to yield executive impunities during law enforcement operations and maintenance of public order? Whether such executive impunities act as core determinants to infringe principles of proportionalities and distinctions, which further lead to violations of jus-cogens norms? And up to what extent

⁶⁷⁰ See M. Rashid Mafzool Zaka, ed., *Drafting and Assessing Legislation* (Islamabad: Pakistan Institute for Parliamentary Services, 2012), 6-91; Ann Siedman, Robert B. Siedman and Nalin Abeysehere *Legislative Drafting for Democratic Social Change* (London: Klumar Law International Ltd., 2001), 177-189, 243-251: For a qualitative suffice this study is also relying on a standardized tool of assessing legislation to find out problematic behaviors of its subjects and its implanting agencies. For this purpose ROCCIPI { Rule, Opportunity, Capacity, Communication, Interests /Incentives, Process, Ideology [of primary role occupant “subjects” and secondary role occupants “implementing agencies”]} model is rallied upon to identify the ideology behind the formulation of laws and to understand cognitive process in which legislative precepts are converted in to administrative actions. The purpose behind such reliance is to achieve objectivity and clarity amid assessing the domestic laws relating to public order, anti-terrorism, public emergency and internal disturbances.

criminal justice system of Pakistan is in compliance with the international bill of rights?⁶⁷¹

Due to comprehensiveness of the canvass of study, this chapter is primarily dividing in to two core parts. This chapter mainly deals with general criminal law relating to unlawful assembly, maintenance of public order, security and public nuisance. It also includes offences against the state and armed forces. Moreover it critically evaluates the special laws relating to maintenance of public order and prevention of anti-national activities.

Analytical Assessment of the Pakistan Penal Code, Act No. XLV of 1860 and The Code of Criminal Procedure, Act No. V of 1898

As being substantive law the Pakistan Penal Code and the Criminal Procedure Code⁶⁷² supplement each other for the enforcement of criminal law in Pakistan. Accordingly this study analyses them jointly and prioritizes Chapter IX of the Cr.P.C. which deals with “unlawful assemblies and maintenance of public peace and security.”⁶⁷³ Its Section.127 deals with magisterial/ police powers and theoretically relies upon on preventive penology to disperse a potential unlawful assembly, as the word ‘likely to cause’ indicates a

⁶⁷¹ See M. Rashid Mafzool Zaka, M. Faisal Israr, and Kashif Mahmood Tariq, comps., *Human Rights Frame Work in Pakistan* (Islamabad: Pakistan Institute for Parliamentary Services, 2014), 32-33: the objective is to analyze the domestic body of criminal laws in the context of international human rights law. Three parameters such as Excellent [government has ratified and respect a specific right and have equipped the respective implanting agency to enforce such right], Satisfactory [government has ratified and respect a specific right yet trying to equip the respective implementing agency to enforce such right] and Unsatisfactory [though government has ratified a specific right but neither has resources nor is willing to enforce such right] compliance of domestic laws with human rights norm are selected as core variables to reaffirm social contract and civil society in Pakistan.

⁶⁷² [hereinafter P.P.C. and Cr. P.C. respectively]

⁶⁷³ See e.g. into *Abid Hussain v. Chairman, Pakistan Bait-ul Mal*, PLD 2002 Lahore 482; *Muhammad Saeed v. The State*, PLD 2015 Peshawar 65; Shaukat Mahmood and Nadeem Shaukat, eds., *The Pakistan Penal Code* (Lahore: Legal Research Center, 2008), 2; See in Shaukat Mahmood and Nadeem Shaukat, eds., *The Code of Criminal Procedure* (Lahore: Legal Research Center, 2003), 3-4.

preventive nature of this section.⁶⁷⁴ It is with lots of discretions given to the concerned station house officer of police to judge and apprehend a likely danger caused by an assembly of more than five persons. The word ‘may’ indicates discretionary power of respective authority to issue commands of dispersions according to its own satisfaction. And if during such decision the concerned authorities make any mistake to ascertain the actual intention and objectives of assembly. As well as evaluate and analyze the situation wrongly out of their subjective satisfaction or any other bias. Then punishments under Ss.145 and 151 of the P.P.C have detrimental impact on the freedom of movement and assembly as enshrined in the Art.15 and 16 of the constitution of Pakistan, 1973.⁶⁷⁵ With regards to the punishments under Ss. 145 and 151, court bifurcate them in to two contexts, one is pre and other is post lawful orders to disperse. And if, there is no lawful command of dispersal, then punishment on merely an unauthorized gathering in preview of S.141 rests with S.145. Whereas S.144 of the Cr.P.C is a precautionary administrative measure to prevent such turbulences,⁶⁷⁶with a cognizance under S.151of the P.P.C.⁶⁷⁷ However literal meanings of Ss.145 and 151 are almost identical by causing complexity and duality in

⁶⁷⁴ See Shaukat, eds., *The Code of Criminal Procedure*, 411-412: Section 127 “Assembly to disperse on command of Magistrate or police officer.”

⁶⁷⁵ See Shaukat, eds., *The Pakistan Penal Code*, 436-437, 502-503: Chapter VIII of Offences against the public tranquility, Section 145“joining or continuing in unlawful assembly, knowing it has been commanded to disperse” and Section 151“Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.”; M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 271-278: the freedom of assembly is subject to the following conditions. 1) Such assembly must be peaceful and for peaceful purpose, 2) must consist of unarmed members, 3) compatible with public order, but like Sec127 of Cr.P.C. the term “public order” is not defined. A subjectivity of authorities to construe one’s prejudicial activities with regards to public order, gives discretionary powers to police and magistrates. Therefore freedom of movement and assembly with restrictions also count as a systemic problem in the context of pragmatic enforcement of civil liberties in Pakistan.

⁶⁷⁶ See *Mst. Misbah Tabassum v. Government of Punjab*, 2007 P.Cr LJ 1776 Lahore.

⁶⁷⁷ See *M.D Rezzaqul Islam v. The State*, 1969 P.Cr.L J 373 Dacca.

procedure.⁶⁷⁸ Moreover the term ‘disturbance of public peace’ is also vague as the statutes do not define the term public peace.⁶⁷⁹ Subsequently during conversion process it has a potential to produce administrative discretions for implementing agencies with regards to the interpretation of public peace. And in case of disobedience of such directives either given by magistrate during of the imposition of S.144⁶⁸⁰ or is given by a respective police official to apprehend a probability of disturbance. Its cognizance comes under Ss.127 and 144 of the Cr.P.C along with Ss.141, 142, 143, 145, 151 and 188 of the P.P.C.,⁶⁸¹ however it is critical to avoid violence because under this paradigm an unlawful assembly is yet not riotous, violent or hostile.⁶⁸² Suppose there is initially a passive gathering of conscious civil society,⁶⁸³ just criticizing the sitting government by chanting slogans against its policies. However it finally resorts to a sit-in on a busy road to attain due attention and negotiation with government, then does it amount to unlawful assembly? The bare reading of the corresponding penal sections perceives it an unlawful assembly with a potential danger to public order.⁶⁸⁴ Even court of law on the one hand acknowledges the right to

⁶⁷⁸ See Lon L. Fuller, *The Morality of Law* (Delhi: Fourth Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2006), 37-40: duality and complexity of procedure disturbs the notion of formalism and rule of law.

⁶⁷⁹ See *Qari Abdul Hanmid v. District Magistrate Lahore*, PLD 1957(W.P) Lahore 213.

⁶⁸⁰ See Shaikat, eds., *The Code of Criminal Procedure*, 480-516: Chapter XI “temporary orders in urgent cases of nuisance or or apprehend danger”: Section 144 “power to issue order absolute at once in urgent cases of nuisance or apprehend danger”.

⁶⁸¹ See Shaikat, eds., *The Pakistan Penal Code*, 417-437, 502-503, 637-646: Section. 141 “Unlawful Assembly” Special focus is on the Explanation of this Section, which narrates “An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly”, Section 142 “being member of unlawful assembly”, Section 143 “Punishment to be a member of unlawful assembly”, Section 188 “disobedience to order dully promulgated by public servant.”

⁶⁸² See *Khair Muhammad v. The State*, PLD 1975 SC 351.

⁶⁸³ See *Ramachandran and others v. State of Kerala*, 2012 SCMR 1156, Supreme Court of India.

⁶⁸⁴ See *Muhammad Akram v. The State*, 1971 P Cr.L J 528.

protest but on the other hand qualifies such protest within the legal parameter, “who are seeking to express their anguish may do so but in a lawful manner.”⁶⁸⁵

But then what is “lawful manner” and whether law relating to public order permits such contentious motives? Even courts sitting in their writ jurisdictions are unable to decide authoritatively about prescribed limits of such practical protests.⁶⁸⁶ Though the arena of judicial review of legislation is available to assess the law and governmental policies on the touchstone of constitutionalism and fundamental rights but it too has conditionality of a litmus test of ‘public importance’.⁶⁸⁷ And due to this conditionality priority is usually given to fundamentalist perspective of public order with a potential curtailment of private rights as court observes, “prevention of public peace and tranquility being the primary function of the government, if it may be found necessary for this object to override private right temporary—in case of conflict between the public interest and private interest the former must prevail.”⁶⁸⁸ Then again what is meant by public interest in this regard? The court’s answer to this query is “for a larger public interest, private right can be curtailed under S.144 of the Cr.P.C as it regulatory rather than confiscatory in nature.”⁶⁸⁹ It means that law gives wide discretions to administration to regulate social order, so in spite of a preventive ideology, such public order law has retributive impact during the conversion process.

⁶⁸⁵ See *Haji Lal Muhammad v. Federation of Pakistan*, PLD 2014 Peshawar 199.

⁶⁸⁶ See *Farid Ahmad v. Province of East Pakistan and 2 others*, PLD 1969 Dacca 961.

⁶⁸⁷ See *Mrs. Shahida Zahir Abbasi v. President of Pakistan*, PLD 1996 SC 632; *Watan Party v. Chief Minister*, 1999 P Cr. L J 2003, Lahore.

⁶⁸⁸ See *M.D Tahir, Advocate v. Government of the Panjab, through Chief Secretary, Civil Secretariat*, 2001 YLR 381, Lahore.

⁶⁸⁹ See *Watan Party v. Chief Minister*, 1999 P Cr. L J 2003, Lahore.

Accordingly court observes,“ Basic ingredient of S.144, Cr. P.C. is that in the opinion of the District Magistrate there should be sufficient ground for proceeding under this section for immediate prevention of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquility or a riot or an affray-----Scope of [this section] is a transitory provision meant to cater for temporary situation or to facilitate the stop-gap arrangement till alternate measures could be taken to safeguard the interest of the individuals and to preserve public peace and tranquility.”⁶⁹⁰ It appears that as an alternative course of action the conflict management skills at this ‘transitory point of emergency’⁶⁹¹ have potential to avoid punitive actions and counter violent reactions.⁶⁹² However problematic behaviors of protestors as well as local administration and police under conflict criminology indicate that both parties habitually resort to violence and counter violence.⁶⁹³ Since the codified substantive and procedural criminal law of Pakistan is based on rational choice theory of the utilitarianism, hence subjects ought to select between the specified cost and benefit of a proscribed action.⁶⁹⁴ Yet one thing which law ignores that out of an actual or a perceived injustice caused by disproportionate administrative measures. Subjects usually do not act as rational actors to decide that whether an intended action is in their benefit or loss. For positivist criminology it happens

⁶⁹⁰ See *Asia Flour Mills and others v. Director of Food*, PLD 1996 Lahore 133; *Maqbool Ahmad and others v. Additional Deputy Commissioner, Bahawalpur*, 1980 PCR.LJ 851.

⁶⁹¹ See *Muhammad Anwar v. Administrator City District Government*, 2013 MLD 1277 Lahore.

⁶⁹² See Frank Schmalleger, *Criminology Today* (New Jersey: Prentice-Hall Inc., 1999), 364: “According to the pluralistic perspective, conflict is essentially resolved through the peace-keeping activities of unbiased government officials exercising objective legal authority.”

⁶⁹³ *Ibid.*, 365: “From the conflict point of view, laws become a tool of the powerful, useful in keeping others from wresting control over important social institutions. Social order, rather than being the result of any consensus or process of dispute resolution, rests upon the exercise of power through law.”; *Mst. Hamida Bano v. Ashiq Hussain and State and others*, PLD 1963 SC 109.

⁶⁹⁴ See Eric Stokes, *The English Utilitarians and India* (Calredon: Oxford University Press, 1959), 219-235; Freda Adler, Gerhard O.W. Mueller and William S. Laufer, *Criminology* (New York: McGraw- Hill, Inc., 1991), 203: “The Rational Choice Theory of Crime.”

mainly due to situational inputs,⁶⁹⁵ whereas Hafez identifies such deviance as a ‘*moral disengagement under spiral of encapsulation*.’⁶⁹⁶ It seems that with regard to public order administration and law enforcement agencies irrationally overact due to excessive discretions and subjects do so out of relative deprivation.

Consequently S.128 authorizes the concerned police officer to use force to disperse such assembly, yet the word ‘force’ is not defined objectively as well as its magnitude and threshold is not clear.⁶⁹⁷ Besides the term “civil force” is also not defined in this section, so does it concern only with police department or the district administration and police together or does it include the para military force like Rangers as well? As with regard to the law and order crisis in Karachi, court perceives Ranger as civil force, since they have police powers to maintain public order in the city.⁶⁹⁸ However this scenario leads to another query that how P.P.C. and Cr. P.C deal with a high threshold of protracted lawlessness in a vast area like Karachi? Does it amount to offences against public orders like unlawful assembly, rioting or affray? And alternatively, does it amount to waging war against Pakistan?⁶⁹⁹ If both of the above stated contexts do not comprehend the

⁶⁹⁵ See Laufer, *Criminology*, 204.

⁶⁹⁶ See Mohammed M. Hafez, *Why Muslim Rebel: Repression and Resistance in the Islamic World* (New Delhi: First Indian Edition, Viva Books Pvt. Ltd., 2005), 199-208.

⁶⁹⁷ See Shaukat, eds., *The Code of Criminal Procedure*, 412-414: Section 128 “Use of civil force to disperse.”

⁶⁹⁸ See *Suo Motu Case no. 16 of 2011 along with CMA’s (Implementation proceedings of judgment of this Court reported as PLD 2011 SC 997)*, PLD 2013 SC 443.

⁶⁹⁹ See in Shaukat, eds., *The Pakistan Penal Code*, 385-395: Chapter VI “Of Offences Against The State” Section 121 “Waging or attempting to wage war or abetting waging of war against Pakistan, Section 121-A “Conspiracy to commit offences punishable by section 121”, Section 122 “Collecting arms, etc., with intention of waging war against Pakistan”, Section 123 “Concealing with intent to facilitate design to wage war.”

contemporary law and order crisis in Karachi then does it amount to public emergency?⁷⁰⁰ Hence court considers this milieu as an aggravated form of unlawful assembly and rioting under the domain of offences against public tranquility and nuisances.⁷⁰¹ Accordingly this study initially focuses on the magisterial and police power in paradigm of “use of civil force.” As court observes, “civilis” denotes pertaining or appropriate to a member of a civitas or free political community. It may further be observed that the word “power” inter alia means the right, ability, authority or faculty of doing something.”⁷⁰² So civil force means a legitimate administration to deal and manage the rights and affairs of the members of civil society.

Nevertheless scheme of S.128 of the Cr.P.C. illustrates that warning leads to use of force less than firing. It further leads to arrests and detention and lastly permits the use of fire arms for dispersal. But a literal reading of statute indicates that such assembly is still non-violent, simply refusing to be dispersed. Since use of force less than firing as well as threshold of firing are conditional to the nature of assembly, so it forms a question of fact. Therefore subjective discretions in this regard have probability to yield indiscriminate and disproportionate use of force. As the following draft, “it [assembly] conducts itself in such a manner as to show a determination not to disperse” indicates that to evaluate “conducts and determination of assembly” is a vague and subjective notion.⁷⁰³ Such evaluation by implementing agency has an intrinsic potential of discretions during the conversion process. Subsequently whether raising slogans, shouting, speeches, narrations of

⁷⁰⁰ See *Watan Party and another v. Federation of Pakistan*, PLD 2011 SC 997.

⁷⁰¹ See *Farid Ahmad v. Province of East Pakistan and 2 others*, PLD 1969 Dacca 961; *Akbar Gul Khan v. The Government of Pakistan through Secretary Defence and 11 others*, 1995 CLC 1189 Lahore.

⁷⁰² See *Sh. Liaquat Hussain and others v. Federation of Pakistan*, PLD 1999 SC 504.

⁷⁰³ See Shaukat, eds., *The Code of Criminal Procedure*, 412-414: Section 128.

revolutionary literature and poems during protests illustrate the determination of an unlawful assembly that it is about to use violence? It seems that a valid answer of this query is difficult to attain, so if use of force is conditional to such assessment then abuse of power would be a natural outcome in this process. Moreover nature of fire arms, quantity of ammunition, and velocity of firing is also not defined. Only a qualifier of the superior ranks is implanted as precaution, since assistant or deputy superintendent of police or any other police officer above them are allowed to give such directives. Laufer, Mueller and Adler(1991) classify this milieu as ‘*abuse of discretions*’ and perceive it counterproductive for social order, since use of deadly force is an immediate reason for urban riots for them.⁷⁰⁴ But then whether these discretions have any monitoring process or judicial oversight?

The answer is in negative, since law itself gives protection to such actions taken in the course of official duty. The general exceptions as incorporated in Ss.76, 79, 80, 81 and S.52 which elaborate general exceptions with regards to official acts in the P.P.C.⁷⁰⁵, along with S.197 of the Cr.P.C. give an immunity of these subjective analysis of the facts.⁷⁰⁶ For that reason even the court acknowledges the necessity of such legal cover provided to public officials through the law. As it observes, “To entitle a person to claim the benefit of

⁷⁰⁴ See Laufer, *Criminology*, 386-389.

⁷⁰⁵ See *Mian Muhammad Nawaz Sharief and others v. The State*, PLD 2002 Karachi 152.

⁷⁰⁶ See in Shaukat, eds., *The Pakistan Penal Code*, 104-105, 154-155, 156-165: Section, 76 “Act done by a person bound, or by mistake of fact believing himself bound, by law”, Section 79 “Act done by a person justified, or by mistake of fact believing himself justified, by law”, Section 80 “ Accident in doing a lawful act”, Section 81 “Act likely to cause harm, but done without criminal intent and to prevent other harm”, Section 52 “Good faith--- official duty if done with due care and attention”; Shaukat, eds., *The Code of Criminal Procedure*, 1079-1102: Section 197“---when any public servant---is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the – sanction the [concerned federal or provincial Government].”

Section 76 [PPC] it is necessary to show the existence of a state of facts which would justify the belief in good faith, interpreting the later expression with reference to section 52 [PPC], --- that the person to whom the order was given was bound by law to obey it.”⁷⁰⁷ Then in another case it observes, “Protection is available to law enforcing agencies for using force in performing official duties—in order to maintain law and order situation, law enforcing agencies has been protected under general exception available in Ss.76, 79, 80 and 81 of the Pakistan Penal Code 1860.”⁷⁰⁸

Although court realizes this stringency and considers it contrary to Islamic injunctions, constitutionalism and fundamental right to equality of citizens, yet unable to alter this colonial continuity which has a protection of law.⁷⁰⁹ Resultantly court observes, “The right of immunity from prosecution except with requisite sanction, conferred on certain public servants by S.197 of the Cr.P.C. is a substantive right.”⁷¹⁰ As well as it observes, “the test to be applied in deciding its application is to see whether the public servant, if challenged could reasonably claim

⁷⁰⁷ See *Niamat Khan and others v. The Empress*, 1183 PR 17, quoted in *Sube Khan v. The State*, PLD 1959 (W.P.) Lahore 541.

⁷⁰⁸ See *Syed Ghulam Abbas Bokhari and others v. Raja Mushtaq Ahmad and others*, 2014 YLR 201 Lahore.

⁷⁰⁹ See *Matajog Dobey and others v. H.C. Bhari and others*, PLD 1957 SC (India) 160, quoted in *Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad v. Zafar Awan, Advocate, High Court*, PLD 1992 SC 72: on the one hand in the context of Sec.197 of Cr.P.C., court observes, “Such an unguided clog on the right of an aggrieved person to seek redress is clearly against Injunctions of Islam. As pointed out by the Federal Shariat Court, and as enjoined by the Constitution, a separate forum can certainly be provided for redressal against wrongful acts of public functionaries in the matter of crime committed in the colour of their offices, in the matter of wrongful civil acts in the form of damages and in the matter of administrative excesses in the form of declaration and injunction.” And on the other hand recognizes its skeptical legal validity “Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. It was argued that Section, 197, Criminal P.C., vested an absolutely arbitrary power in the Government to grant or withhold sanction at their sweet will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion” Resultantly it directed the Ministry of law to redraft the concern provisions of the law up to 30 June 1992 as directed by Federal Shariat Court, yet till no action has been taken in this regard; *Khan Ghulam Muhi-ud-Din Khan v. Syed Mohd Hassan Shah*, PLD 1951 Baluchistan 61: “ Accused who was in charge of government office and was on duty –is protected under S.197 of the Cr.P.C.”; *The Crown v. Abdur Rashid*, PLD 1959 (W.P.) Lahore 649: “ Sanction for prosecution of a public servant is necessary under S.197 of the Cr.P.C. if the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.”

⁷¹⁰ See *Dilber Hussain v. Ch. Khurshid Ahmad*, PLD 1956 (W.P.) Lahore 865.

that what he did, he did in virtue of his office.”⁷¹¹ In another case court declares, “Government servants have always enjoyed protection against frivolous and vexatious prosecution in respect of offences allegedly committed by them, while holding public offices, in the colour of offices or in the purported exercise of the powers of the public office.”⁷¹² Hence the wording “in the colour of office” in this judgment leads to another statutory protection given to public officials in the regard of their official duty as enshrined in the S.99 of P.P.C.⁷¹³ Even the irregularities in the garb of “good faith” are protected, besides no right of self-defense rests against any official highhandedness arouses during the so-called “colour of the office.” As the court observers, “the protection offered under S.99 of the P.P.C. to public servant is not lost even if they make any mistake in the exercise of their proper function.”⁷¹⁴

Therefore contrary to its preceding section, the ideology of S.128 of Cr.P.C. seems to be based upon a confluence of administrative and retributive penology.⁷¹⁵ As its core purpose appears to restore social order at any cost and even right to life, liberty or protection against torture have no restraint on it. Subsequently if conduct and behavior of an assembly is wrongly juggled, in spite of due care and intention as enshrined in S.52 of P.P.C as well as circumstantial evidence is also not able to prove mens rea. Then S.79 of the P.P.C. gives

⁷¹¹ See *Aminul Haque v. Abdual Wahab*, PLD 1956 Dacca 250.

⁷¹² See *Muhammad Abbas v. The State*, PLD 1981 SC 642.

⁷¹³ See Shaukat, ed., *The Pakistan Penal Code*, 244-271: Chapter IV General Exceptions---Of the Right of Private Defence, Section 99 “ Acts against which there is no right of private defence-----if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.”; *Ata Muhammad v. Crown*, PLD 1951 Lahore 279: “ S.99 of the P.P.C. makes it clear that if an act is done or is attempted to be done by a public servant in a good faith under colour of his office, there is no right of private defence unless it is apprehended that death or grievous body hurt would follow in spite of the fact that the act which the public servant was doing was not strictly justifiable by law.”

⁷¹⁴ See *Crown v. Fateh Muhammad*, PLD 1951 Lahore 142.

⁷¹⁵ See N.V. Paranjape, *Criminology and Penology* (Allahabad: Central Law Publications, 2007), 29, 218-219, 226-231.

an indemnity to public officials during a transition from Ss.127 to 128 of the Cr.P.C. Even the massacre of Jalianwala Bagh, 1919 was excused under the same scheme of law.⁷¹⁶ Since it was only considered as error of judgment about the manner and conduct of assembly and an analogous use of excessive force out of necessity and right of self-defense as incorporated in S.106 of the P.P.C.⁷¹⁷ Nevertheless use of force up to firing as inferred from S.128 of the Cr.P.C. indicates that if an authorized police officer gives an order of firing out of a wrongly perceived situation. Then not only the officer in charge but also his subordinates are protected from prosecution under the exceptions given in Ss.79 and 76 of the P.P.C. respectively.⁷¹⁸

Hence an assembly which simply refuses to be dispersed and has been declared an unlawful assembly either scattered or become hostile after facing a punitive action from authorities. The S.146 of P.P.C. recognizes such hostility as “rioting” with two possibilities, force or violence ‘*in terrorem populi*’, while former is considered a criminal use of force against property the latter is against human life and limb.⁷¹⁹

⁷¹⁶ See Helen Fein, *Imperial Crime and Punishment: The Massacre at Jallianwala Bagh and British Judgment* (Honolulu: The University Press of Hawaii, 1997), 20-92.

⁷¹⁷ See *Liaqat v. The State*, 1994 SCMR 1161; Shaukat, eds., *The Pakistan Penal Code*, 320: Section 106-“Right of private defence against deadly assault when there is risk of harm to innocent person.”

⁷¹⁸ See *Noor Muhammad v. SHO Police Station Klur Kot, District Bhakher and 4 others*, 2000 YLR 85 Lahore; *Jahir Mia and another v. The State*, PLD 1963 Dacca 47: “Protection might be claimed by a police constable under Section 76 of the Pakistan Penal Code for opening a fire, under the orders of a superior officer and killing a man thereby, if he could reasonably think that the officer had good reason for ordering a fire in to a disorderly crowd.”

⁷¹⁹ See Shaukat, eds., *The Pakistan Penal Code*, 438-440; *Muhammad Akram and 6 others v. The State*, 1971 P. Cr. L J 528 Lahore: “Ss. 141(4), 146 of the P.P.C.--- By use of criminal force or show of criminal force-- Whenever force is used by an unlawful assembly, to any person to take or obtain possession of any property or its right..”; *Muhammad Attique Butt v. The State*, 2009 YLR 507 Lahore: “A high threshold of violence is used by unlawful assembly against person under Ss. 146, 148, 149 of the P.P.C and S.7(c) and (h) [grievous body harm or injury is caused to any person through act of terrorism] of the Anti-Terrorism Act 1997.”

A presence of lethal weapons aggravates this situation under Ss. 144, 145, 146, 147, 148 and 149 of the P.P.C. It makes all participants of an unlawful assembly vicariously liable for acts done in this regard.⁷²⁰ Court perceives its threshold in these words, “For proving charge under section 148, P.P.C., following ingredients are essential, 1) five or more persons were assembled. 2) They constitute an unlawful assembly. 3) The members of such assembly used force or violence. 4) The accused was a member of that unlawful assembly. 5) In prosecution of the common object the assembly used force, and 6) the accused was armed with deadly weapon or anything used as a weapon for offence likely to cause death.”⁷²¹ At this point S.152 of the P.P.C deals with the reactionary violence of rioters, when they irrationally act against the lawful commands and actions.⁷²² This high threshold of conflict is also potentially dangerous for the jus cogens norms because both sides use maximum force to assault each other. As court observes in the context of riotous assault, “none can predict how mind of a criminal works at times of attack—human being can become the worst beast [in this scenario].”⁷²³

This volatility if goes beyond the control of civil forces comes under the domains of Ss. 129, 130, 131, 131 A and 132 of the Cr. P.C.⁷²⁴ A critical analysis of S.129 of the Cr.P.C.

⁷²⁰ See Shaukat, eds., *The Pakistan Penal Code*, 435-501: Section 144 “Joining unlawful assembly armed with deadly weapon---”, Section 146 “Rioting--- Whenever force or violence is used by an unlawful assembly, or by any member thereof in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.”, Section 147 “Punishment for rioting.” Section 148 “Rioting armed with deadly weapon.” And Section 149 “Every member of unlawful assembly guilty of offence committed in prosecution of common object.”

⁷²¹ See *Nazir Ahmad and others v. The State and others*, PLD 2005 Karachi 18.

⁷²² See *Haji Mubarak Ali and 4 others v. The State*, 1993 MLD 1172 Lahore; Shaukat, eds., *The Pakistan Penal Code*, 503-504: Section 152 “Assaulting or obstructing public servant when suppressing riot.”

⁷²³ See *Gulam Muhammad and others v. The State*, 1989 P. Cr. LJ 2089 Lahore: Murder and attempts to murder in the context of Ss.149 and 152 of the P.P.C.

⁷²⁴ See Shaukat, eds., *The Code of Criminal Procedure*, 414-419: Section 129 “Use of military force [for dispersion of an unlawful and riotous assembly]”, Section 130 “Duty of officer commanding troops required by Magistrate to disperse assembly”, Section 131 “Power of Commissioned military officers to disperse assembly”, Section 131A “Power [of provincial and federal Government] to use military force for public security and maintenance of

which deals with the use of military force to restore law and order, illustrates that in the domain of law enforcement agencies, district administration, police, para-military and military form an entity in Pakistan. It seems that all of these four components uphold each other with regard to maintenance of Public order. An interesting case law in this regard illustrates that the notion of unlawful assembly as incorporated in S.129 of the Cr.P.C. can be construed as an entire area of outlaws which is required to be cordoned off, sieged and searched to establish the writ of the state. As has been submitted by superintendent of police of district Mianwali in this case, “In order to solve the problem [of high intensity of lawlessness] the following recommendations are made [under S.129 of the Cr.P.C]. 1) The inhabitants of Bani Afghan may be disarmed and a sense of security protecting should be created among them. 2) Police personnel may be deputed who will gather intelligence about the activities of outlaws and observe movements and signs of activity of criminals. 3) Proclaimed offenders of Bani Afghans may be hauled up by exercising sincere efforts. A close surveillance may be kept over nefarious activities of criminals of Bani Afghans. 4) In case of emergency about 2000 military personal will be required in aid to civil power.”⁷²⁵In this scenario, district administration, police, para-military and military troops supplement each other as in the Lal Masjid incident in Islamabad.⁷²⁶ Rizvi explains this executive trend in an historical context while

law and order”, Section 132 “ Protection against prosecution for acts done under this Chapter. No prosecution against any person for an act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the [Provincial Government]; and----- [Federal Government].”

⁷²⁵ See *Akbar Gul Kahn v. The Government of Pakistan through secretary Defence and 11 others*, 1995 CLC 1189 Lahore.

⁷²⁶ See e.g. into Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan* (New York: Routledge, Taylor& Frances Group, 2011), 126: Operation Silence(Lal Masjid operation); Declan Walsh, “Red Mosque siege declared over,” *The Guardian*, July 11, 2007, international edition; Qudssia Akhlaque, “It’s ‘Operation Sunrise’ not Silence,” *Dawn*, July 12, 2007, national edition; Syed Mohsin Naqvi, “Red Mosque students surrender slowly,” *CNN*, July 4, 2007, <http://edition.cnn.com/2007/WORLD/asiapcf/07/04/Pakistan.mosque/index.html> ; BBC News, Red Mosque

offensive nears end’,” *BBC News*, July 11, 2007, http://news.bbc.co.uk/2/hi/south_asia/6290280.stm

#graphic: Lal Masjid (Red Mosque) Law Enforcement Operation Islamabad, 2007 in a Chronological Order,

“Since January 2006, Lal Masjid (Red Mosque) and the Jamia Hafsa (Girls madrasah) were being operated by two brothers, Maulana Abdul Aziz and Abdul Rashid Ghazi, who demanded imposition of Sharia in Pakistan and remained in constant conflict with government for 18 months prior to the military operation. They demonstrated power, were hand to hand with authorities, set fire to the Ministry of Environment building and attacked the Rangers who guarded it, the military responded, and resultantly the Lal Masjid was besieged from 3rd to 11th July 2007. After failure of negotiations, the complex was stormed and captured by the Pakistan Army's Special Service Group. The operation resulted in 154 deaths, and capture of 50 militants.-----**3rd July 2007 (Day 1):** students of Jamia Hafsa stole radio sets and weapons from the Pakistan Rangers at a nearby post which resulted in a battle between law enforcement agencies and students of Lal Masjid. Seeking disperse the students police fired tear gas. About students of 150 Lal Masjid attacked and set fire to Ministry of Environment office building, in which several vehicles were burnt. During the fight 9 people lost their lives including 4 students of mosque, a TV channel cameraman, a businessman and a pedestrian. Security forces immediately sealed the area, army troops were deployed and hospitals declared emergency. **4th July 2007 (Day 2):** On July 4, an indefinite curfew was announced in adjoining areas of the mosque. The security agencies were ordered to shoot any armed person leaving the mosque. The government announced that if anyone surrenders they will give a reward of Rs.5.000, plus to each as well as provide opportunities for free education. Moreover it announced that women inside the mosque were also offered safe passage to their homes. Deadlines were extended repeatedly by 15:30, 16:00, 18:00, 19:30 and finally 21:30, as some students were allowed by the Lal Masjid administration to surrender. At the end of day some 600 armed militants were reported to be inside the mosque. **5th July 2007 (Day 3):** Early in the morning, security forces set off a series of explosions around the mosque and gunfire was exchanged throughout the day, but no face to face clash took place. Deadline extensions continued and government desired to evacuate the mosque and Jamia Hafsa before the final assault. Interior Minister Aftab Ahmad Sherpao claimed in a press conference that between 300 to 400 students were left in the mosque out of which only 50 to 60 were militants. Maulana Abdul Aziz was caught by law enforcement agencies during the fourth deadline while he was trying to escape by wearing a burqa. Following capture of Lal Masjid’s leader, a number of about 800 male students and 400 female students surrendered. During negotiations, it was claimed by Ghazi Abdul Rashid that all the students were willing to leave and would lay down their arms, if were granted amnesty and were not shot. He further negotiated with government for provision of his safe passage and a guarantee for safety of his companions. Mr. Ghazi also received a promise for medical care of his ailing mother. In a telephone interview, Ghazi Abdul Rashid denied all the charges leveled against him. **6th July 2007 (Day 4):** Negotiations continued on July 6 without any solution to the matter, 22 more students surrendered and 2 were reported kills during shoot-out. It was decided by the government to delay the assault in a hope for more students to surrender. **7th July 2007 (Day 5):**, Army troops took control of the operation and replaced the paramilitary troops. A thirteen-year-old child managed to escape the besieged mosque. SSG commandos raided the outer area, blasted for making holes through the walls so that trapped women and children could escape. **8th July 2007 (Day 6):** After 1:00 AM security forces assaulted the mosque and faced heavy armed resistance. In charge of the operation SSG Commander Lt. Col. Haroon-ul-Islam was wounded on July 6 and died in the hospital. Commandos succeeded in collapsing the boundary wall of Lal Masjid and Jamia Hafsa. Abdul Rashid Ghazi refused to surrender and said that they had sufficient ammunition and rations for fighting a month. **9th July 2007 (Day 7):** A group headed by Maulana Salimullah Khan, representing different madrasahs, demanded an immediate cessation of the Lal Masjid operation. Considering the security situation, Finland temporarily closed its embassy in Islamabad. **10th July 2007 (Day 8):** On July 10, it was reported that 100 militants and some 300 to 400 women and children were left inside the mosque. And the government concluded that talks remained result less and ordered the security agencies to storm in to the mosque. It was attacked from south and assaulted from three directions at 4:00 am. As the SSG cleared the mosque's ground floor about 30 women and children came out from their hide out and ran toward the security forces for protection and surrender, which were saved resultantly by the security agencies Yet some of the militants were still hiding inside the mosque, armed with guns and rockets, moreover some areas were booby-trapped. During the fight, the soldiers of the Special Services Group of Army entered in to a room in

perceives military as an ‘instrument of policy’ to sustain order in a polarized society.⁷²⁷

According to him the colonial administration was conscious about a probability of emergence of nationalist and secessionist movements in India since the outbreak of mutiny in 1857. Consequently the indigenous criminal law authorized the armed forces to intervene to perform policing and to restore law and order. Thus such intervention in aid of civil power to suppress communal and political riots and uprising was considered as statutory obligation of the Royal Indian Army.⁷²⁸ However as a negative impact of this administrative trend indigenous political forces and civil administration became fragile to

which half a dozen militants were present; hence one of the militants detonated a suicide jacket which resulted in to the death of everyone around him. Abdul Rashid Ghazi in his last interview with Geo TV network told that he was hunkered down in the basement, claimed that his mother had been wounded by gunfire of security forces and said, "The government is using full force. This is naked aggression... my murder is certain now." Ghazi also claimed that 30 mujahids were still on stand against the government troops and they only had 14 AK-47s. Ghazi was killed during the crossfire. **11th July 2007 (Day 9):** Lal Masjid was reported to be cleared of militants, and troops remained engaged in searching the area for any possible booby traps and explosives. **Casualties:** 102 people were killed during the operation: 91 militants, 10 SSG commandos, and 1 Rangers soldier. A total of 248 people were injured, including 204 civilians, 41 army soldiers, and 3 Rangers. 1,096 people, 628 men, 465 women, and 3 children left or were rescued from the complex. **The Law Enforcement Agencies which took part:** Pakistan’s Army's 78th Paratrooper Brigade and 111th Infantry Brigade; its elite strike force, the Special Service Group (SSG) Division; the Ninth Wing Company of the Pakistan Army Rangers paramilitary force; and the Anti-Terrorism Squad of the Punjab Police. **Weapons Recovered:** According to Inter-Services Public Relations, weapons recovered included Russian and Chinese variant RPG rockets, anti-tank and anti-personnel landmines, suicide bombing belts, three to five .22-caliber Rifles, RPD, RPK and RPK-74 light machine guns, sniper rifles, SKS rifles, AK-47s, pistols, night vision equipment, and more than 50,000 rounds of various caliber ammunition. Lesser sophisticated items and weaponry recovered from the complex included three crates of gasoline bombs prepared in green soft drink bottles, gas masks, recoilless rifles, two-way radios, large plastic buckets containing homemade bombs equal the size of tennis balls, as well as knives.”

⁷²⁷ See Hassan Askari Rizvi, *The Military & Politics in Pakistan: 1947-1997* (Lahore: Sang-e Meel Publishing, 2011), 26-29.

⁷²⁸ Ibid., 30-34: It was evident from the military operations in aid of civil power during uprisings of “Wazir tribe (1919), the Mahsuds(1925), riots of Waziris, Afridis and Mohmand (1930-31), The Tori Khaal (1936-37) in North-West Frontier Province. As well as Political unrest in Amritsar (Jalianwala) 1919 and subsequent imposition of Martial Law for two days to quell consequent internal disturbance in Amritsar, Lahore, Gujranwala, Gujrat and Lyallpur in 1919. Moreover Army in aid of civil power had also been used to suppress Moplah uprising (1921), Civil disobedience movement and political rioting in Bihar and Bengal in 1930-31), The Indian Navy Strike in Bombay in 1946, and a confined mutiny of Indian troops in Jabalpur in 1946”; Also see for legislative cover and judicial bar with regards to the military operations conducted in aid of civil power during colonial Era and subsequent martial law in disturbed areas especially in the context of Punjab Disturbance in 1919 into *Emperor v. Chanappa Shantirappa*, I LR 55 Bom. 263 quoted in *Muhammad Umar Khan v. The Crown*, PLD 1953 Lahore 528: “ Act XXVII of 1919(Punjab Disturbances), Ordinance IV of 1930 (Sholapur Disturbances), Ordinance XVIII of 1943 (Sindh Disturbances)”

cope with structural sociopolitical conflicts and commotions. Resultantly ought to rely on the apolitical armed forces to resolve dispute autocratically by force rather than amicably through negotiations.⁷²⁹

The S.130 of the Cr.P.C. further elaborates duties of commanding officer of armed troops but its clause (2) has an absolute discretion with regards to the use of military force. As it illustrates, “every such officer shall obey such requisition in such manner as he think fit”, hence “as he thinks fit” seems immune to any monitoring or oversight. It is even against the spirit of the judicial review of administrative action as well as parliamentary oversight or the operation of the fundamental right.⁷³⁰ As court held, “ *Magistrates who have passed orders were competent to impose curfew under S.144 of the Cr.P.C. ---. It is lawful upon their satisfaction to impose such orders---Chapter IX of the Cr.P.C authorizes the civil Authorities to call Armed forces in its aid in a given situation--- to call in aid the Armed forces is inherent [power of civil authorities] and this is in exercise of its Police power--- under the curfew, shooting at violators and degree of force to be used depends on situation faced by person puts in charge of enforcing lawful command and suppressing lawlessness.*”⁷³¹ And in another case court observes, “If riot, rebellion or insurrection outrun the ordinary sources of law and order----the State would naturally look to its armed forces for assistance----During such period, all constitutional guarantees are

⁷²⁹ Ibid., 20-25.

⁷³⁰ See Shaukat, eds., *The Code of Criminal Procedure*, 414-415; M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 205-218, 733-985: Art 8 “Laws inconsistent with or in derogation of Fundamental Rights to be void------(3)The Provisions of this Article shall not apply to---(a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.”, Art.199(3); *Akbar Gul Kahn v. The Government of Pakistan through secretary Defence and 11 others*, 1995 CLC 1189 Lahore: high court was not able to direct paramilitary and military forces to cease the cordon of and siege the Bani Afghan in-spite of an apparent abuse of private rights as well as fundamental rights.

⁷³¹ See *Farid Ahmad v. Province of East Pakistan*, PLD 1969 Dacca 961.

suspended and the officer in chief command of the forces in the troubled area acquires for the time being supreme legislative, judicial and executive authority. In other words, he himself fixes the limits and definition of his authority.’⁷³²

It seems that such kind of doctrine of necessity is beyond any scrutiny, which has an ultimate probability of abuse of power. Though S.130 of the Cr.P.C. implicitly states “*but in so doing he shall use as little force and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such person.*” Yet as court says in this regard, “*In the instant case if there had at all been any shooting it is not known under what circumstances force to that extent had to be used, either in the right of private defense and or to suppress riot or tumult, or in the protection of life and property while enforcing the curfew order. Adjudication of this point needs investigation of facts and taking of evidence which this Court, sitting in its Writ jurisdiction, cannot do.*”⁷³³ Therefore, evaluation of distinction and proportionally during the use of military force is difficult to ascertain authoritatively.⁷³⁴

Resultantly a legal vacuum emerges which is susceptible for the core human rights protections like right to life, liberty, equality, fair trial and protection against torture as well as degrading treatment. Court acknowledges such vulnerability of human rights and observes, “ however interpretation of said legal provision might not be permitted to be made liberally in favors of forces so that innocent people were not be killed by guns plays because forces were constitutionally and legally mandated to jealously safeguard the lives, liberty and property of

⁷³² See *Muhammad Umar Khan v. The Crown*, PLD 1953 Lahore 528.

⁷³³ See *Farid Ahmad v. Province of East Pakistan*, PLD 1969 Dacca 961.

⁷³⁴ See *Syed Ghulam Abbas Bokhari and others v. Raja Mushtaq Ahmad and others*, 2014 YLR 201 Lahore.

subjects.”⁷³⁵ Moreover the phrase “as may be consistent with dispersing the assembly” of the supra Section is a question of fact, no authenticated criteria can be prospectively construed in this regard, consequently a subjective satisfaction of the authorities influenced by any momentous stimulus can aggravate the intensity of the use of force. Besides it is not clear in it nor is given in any explanation that when armed forces are arresting and detaining, then what are the parameters to be followed specially for “detention”. Such ambiguity of law⁷³⁶ can lead toward unauthorized detention and enforced disappearances, which court considers as a crime against humanity under international law by armed forces when acting in aid of civil power.⁷³⁷

The S.131 of Cr. P.C is again vague and full of discretions, as it seemingly deals with the suo motu powers of commissioned military officer to disperse unlawful assembly, when he has no opportunity to communicate with civil forces like police and district administration.⁷³⁸ Its phrase “when the public security is manifestly endangered by any such assembly,” does not elaborate who is responsible and under what conditions to decide and judge the “manifest danger.” Is it prior to in aid of civil power during normal course of time or deal with any emergency situation like curfew when armed forces are already deployed to suppress riots and insurrection? Moreover what is an objective threshold,

⁷³⁵ Ibid.

⁷³⁶ See *Naga People’s Movement of Human Rights v. Union of India*, AIR 1998 SC 431: “The provisions contained in Ss. 130 and 131, Cr. P.C cannot be treated as comparable and adequate to deal with the situation requiring the use of armed forces in aid of civil power...”

⁷³⁷ See *Human Rights Case No. 29388-K of 2013: in the matter of (Application of Muhabat Shah for recovery of Yassen Shah, Missing Person)*, PLD 2014 SC 305: “rules are silent with regard to detention [by armed forces] ---a dire need for new legislation in this regard--- The Army authorities are bound under the law to produce them before the court of law, they have no authority to retain their custody as such.”

⁷³⁸ See Shaukat, eds., *The Code of Criminal Procedure*, 415-416.

which indicates that at this instant, or at such point public security is manifestly endangered?

Apparently S.131 deals with curfew or a proclaimed emergency situation, when armed forces are already deployed in a disturbed area in aid of civil power.⁷³⁹ Whereas their police powers to punish “according to law” indicate that “law” means here the military orders of such period.⁷⁴⁰ This Section is also ambiguous about the form and kind of “military force” used to disperse an unlawful or riotous assembly, especially in the absence of civil administration when in an isolated incident public security is endangered.⁷⁴¹ But does it include a prior warning? Does it amount to a mere baton charge and use of tear gas for dispersal? Whether a military force is intrinsically trained to deal with such internal disturbances of lower threshold and if an intensity of violence increase then does it amount to “waging or attempting to wage war against Pakistan”?⁷⁴² Does the military force means an ultimate resort to firearm and shooting? Such issues are neither discussed in the statute nor are elaborated in the case laws. Since courts are barred to probe out these questions of

⁷³⁹ See *Muhammad Umar Khan v. The Crown*, PLD 1953 Lahore 528.

⁷⁴⁰ Ibid.

⁷⁴¹ See *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431.

⁷⁴² See into M. Mahmood, ed. *The Pakistan Penal Code 1860* (Lahore: Pakistan Law Research Academy, 2014), 584-594: for Ss. 121 “Waging, or attempting to wage war or abetting waging of war against Pakistan”, 121A “Conspiracy to commit offences punishable by S.121 of P.P.C.”, 122 “Collecting arms, etc with intention of waging war against Pakistan”, 123 “Concealing with intent to facilitate design to wage war”, 123A “Condemnation of the creation of the State, and advocacy of abolition of its sovereignty”, 123B “Defiling or unauthorizedly removing the National Flag of Pakistan from Government building, etc”, 124 “Assaulting President, Governor, etc. with intent to compel or restrain the exercise of any lawful power” and 124 A “Sedition”.

facts and are not able to adjudicate even in case of a colorable exercise of law enforcement agencies including armed forces.⁷⁴³

These queries about the intensity and threshold of disturbance and violence are crucial with regard to the use of force to restore order, because a lower threshold seems under a domain of unlawful assembly which can transform in to riots. Yet neither P.P.C. nor Cr.P.C., elaborate that if riots gain momentum then does it amount to waging war or terrorism? If yes then a high threshold of violence under the domain of waging war is barred from the cognizance of the court of law under S.196 of the Cr.P.C.⁷⁴⁴

Therefore under this uncertain paradigm, incidents like the Lal masjid operation 2007 sway around unlawful assemblies, riots, insurrection and waging war against the state for their legal classification. It is not only equivocal to determine the exact legal position but also misleading for the use of civil or military force and then its reciprocal monitoring and scrutiny. Moreover for a possible transition from S.128 to Ss. 129, 130 and 131 of Cr.P.C., it is hard to understand that how an intrinsically unlawful assembly would be able to comprehend a lawful command?

⁷⁴³ See *Crown v. Fateh Muhammad*, PLD 1951 Lahore 142; *Dilbar Hussain v. Ch. Khurshid Ahmad*, PLD 1956 (W.P.) Lahore 865; *Muhammad Abbas v. The State*, PLD 1981 SC 642.

⁷⁴⁴ See Shaukat, eds., *The Code of Criminal Procedure*, 1067-1079: Section 196 “Prosecution for offences against the State. No Court shall take cognizance of any offence punishable under Chapter VI [of offences against the State] of the Pakistan Penal Code-----unless upon complaint made by order of, or under authority from [the [Federal Government], or the Provincial Government concerned, or some officer empowered in this behalf by either of the two Governments]”; *Abdul Fatah and others v. The State*, 1990 MLD 1087: “Police was not competent to investigate the case or put up the challan as proper procedure as provided under S. 196 Cr.P.C had not followed –submission of challan and taking of cognizance by Court were thus ab initio and illegal and amounted to abuse of process of Court.”

As the expression in S.128 of Cr.P.C states “if, upon being so commanded, any such assembly does not disperse” is not able to realize that a contentious segment, which gathers out of a perceived or actual injustice is already immune to such “commands.” Because they protest to express they real or imagined anguish, which subsequently want an immediate response from authorities in the form of negotiations and bargains. Thus irrespective of modalities and threshold of the pre-firing force, a core issue of the emergence of unlawful assembly seems an outcome of some grievances. Hence catering of these mass unrests is an ultimate responsibility of governments regardless of contractual or state law theoretical paradigm. However if such anguish is met with arrogant, alienated and authoritative commands in a liberal democracy then logically the use of force less than firing would enraged such assembly. On the other hand severe force along with firing becomes counterproductive in such milieu of conflict.

Although an absolute obedience with ruthless force can be obtained through coercive tactics and indiscriminate use of force and firing. Yet has a probability to convert a localized conflict in to a protracted political marginalization. Besides the method of firing as a last resort is also not provided in these sections and does not elucidate that either it should be straight or an aerial and whether through heavy or light weapons? Nevertheless if firing has been opted for dispersal and it aggravates an already conflicting scenario, then under S.129 of Cr.P.C how can the armed forces cool down such simmering atmosphere? Subsequently to archive a maximum deterrence through the threat to use indiscriminate force seems an objective of Ss.129, 130 and 131 of the Cr.P.C. Such notion is akin to

Austin's view, when he says that the objective of primitive law was to attain strict commands to establish absolute social order and obedience.⁷⁴⁵ It seems that supra laws relating to public order in Pakistan are close to primitive law and are apparently incompatible with contemporary universalism of human rights and liberal democracy.

Furthermore the S.131 narrates that if amid the suo motu actions of commissioned officer, a probability to consult the respective senior police officer occurs then he should do so for the further action under the direction of civil administration. However the problem is that the word "should do so" seems a direction not a command, therefore apparently not binding on the armed forces. Secondly if he communicates with the concerned police officer after using an indiscriminate and disproportionate force then civil administration would not be able to comprehend the harm and grievances of the victims of such force. Therefor under the ROCCUPI model, neither the rule nor the process is clear as such and creates some following ambiguities with regards to the core implementing agency. Hence whether the section is solely addressing the armed forces or addressing them in conjunction with police? And whether institutional of magistracy is the part of such conjunction? Along with these issues it seems that the entire law relating to public order in Pakistan does not concentrate on capacity and sensitization of law enforcement agencies to respect fundamental guarantees of international human rights and humanitarian law in domestic jurisdiction. This lacuna becomes obvious especially in the case of S.130 of Cr. P.C., as it deals with armed forces and police simultaneously for the law enforcement

⁷⁴⁵ See Roscoe Pound, *The Ideal Element in Law* (Calcutta: Calcutta University Press, 1958), 105-130.

paradigm. Since former are basically trained to achieve target even through a proportionate or disproportionate civilian damage under military necessity, and are only accustomed with the notion of enemy combatant, hors de combat and civilian.⁷⁴⁶ Consequently this military approach of hit and capture does not allow negotiations or administrative bargains for conflict management and a restrained use of force for a mere dispersal of unlawful assembly.⁷⁴⁷

Moreover patterns of use of force for the law enforcement operations under human rights regimes also differ from use of force for armed conflict under humanitarian law. Since former is based upon right of self-defense and associated with intensity of opponent resistance as well as the degree of actual or perceived danger amid unlawful assemblies and riots. Whereas latter has no such limitations and military necessity determines the use of force with only one qualifier of the distinction of combatant and civilian. In this context, when armed forces act in aid of civil power, then apparently they come under the domain of human rights regimes with a qualifier of self-defense.⁷⁴⁸ And with regards to use of lethal force as a self-defense, Stephens indicates that subjectivity and discretions in this context are skeptical to the right to life along with other jus cogens norms. Though an

⁷⁴⁶ See Martin Van Creveld, *Technology and War: From 2000 BC to the Present* (London: The Free Press, 1989), 297, quoted in Alexandre Vautravers, "Military operations in urban areas," *International Review of the Red Cross* 92, no. 878 (2010): 437-452: Van uses the term "true war" for which armed forces are trained to fight with enemy alien and "real war" in which armed forces ought to confront the its own citizens especially under internal armed conflict. According to him the gap between true and real war creates such an environment in which "armies have been reluctant to fight in cities and conduct siege operations. Fighting in such conditions is generally devastating and costly."

⁷⁴⁷ See Dale Stephens, "Military involvement in law enforcement," *International Review of the Red Cross* 92, no. 878 (2010): 453-468.

⁷⁴⁸ *Ibid.*, 461-462: International human rights law authorizes a proportionate use of lethal force under doctrine of self-defense when law enforcement agencies are attacked and fired upon by riotous assembly and insurrectionists.

excess in the upper limits of right to self-defense would certainly enhance deterrence,⁷⁴⁹ yet is potentially dangerous to overall human rights protections.⁷⁵⁰ Along with this, it is important to know the kinds of weapon allowed under human rights regime to counter riots and other insurrections of lower threshold. Since an authorization for lethal weapon can enhance the probability of colorable exercise of power.⁷⁵¹ Thereby S.131 of the Cr.P.C. seems under the domain of human rights regime as it is a part of ordinary criminal justice system of Pakistan. Yet does not elaborate the term “military force” and its forms to disperse and arrest an unlawful assembly and is also silent about the kinds of weapon used for this purpose.

S.131A is about the provincial and federal government authority to declare procedural emergency in a particular and notified disturbed area and to use the military force for policing in aid of civil power.⁷⁵² This Section is inserted in the statute in 2002 by a

⁷⁴⁹ See Paranjape, *Criminology and Penology*, 217-218: According to the Deterrent theory of Punishment, fear of severe pain and infliction as punishment of a probable disobedience is capable to create a diminishing impact on rational actors. Therefore out of such fear man as a rational actor would not prefer disobedience in this regard.

⁷⁵⁰ See Stephens, “Military involvement in law enforcement,” 463.

⁷⁵¹ See Alexandre Vautravers, “Military operations in urban areas,” *International Review of the Red Cross* 92, no. 878 (2010): 437-452.

⁷⁵² See into Shaukat, eds., *The Code of Criminal Procedure*, 129-165, 250-296, 416-417: for Section 131A “Power [of Provincial and Federal Governments] to use military force [to perform police powers] for public security and maintenance of law and order-----in a particular and notified area for a limited period of thirty days extendable by another period of thirty days, as the circumstances may warrant.” And for the police powers of [armed and civil armed forces(para-military) includes Ss.46-49, 53,54, 55(a),(c), 58,61, 64-67, 102,103 of the Cr.P.C-----S.46 “ Power to arrest by confining the person ”, S.47 “ Search of Place entered by person sought to be arrested”, S. 48 “ Entering in to house without search warrant”, S.49 “ Power to break open doors and windows for purpose of liberation”, S.53 “ Power to seize offensive weapon”, S.54 “ Power to arrest without warrant”, S.55(a) “ Arrest of habitual vagabonds who conceal their identity for committing offences” and (c) “ arrest of habitual criminal and offenders”, S.58 “ Power of arrest beyond territorial jurisdiction within Pakistan”, S. 61 “ Detention for 24 hours---- power to get remand within twenty four hours of arrest”, S. 64 “ Magisterial power to arrest or command for such purpose if an offence is committed in his presence”, S. 65 “ Arrest by or in presence of Magistrate”, S. 66 “ power to re- arrest an absconder” S. 67 “ Use of power under Ss.46-49 of Cr.P.C for S.66 of Cr.P.C by any person including Police”, S. 102 “

Presidential Ordinance in an aftermath of Military coup d'état in 1999. And an alleged terrorist attacks by Al-Qaeda on the world trade center in the United States of America in 2001. It was followed by a subsequent “war against terror” in Afghanistan and bordering areas of FATA in Pakistan.⁷⁵³ Thereby the motive of such insertion was to counter indigenous political turmoil and other national security threats as posed by Tehrike Taliban Pakistan and Al-Qaeda as a probable backlash of the US led campaign against terrorism.⁷⁵⁴ Due to an environment of real and perceived sense of insecurity, this Section seems to be based upon a stringent convergence of preventive and administrative penology.⁷⁵⁵ As its subsection illustrates, “in doing so may use such force as the circumstances may require.” If read in conjunction with Ss. 52, 76, 79, 99 of the P.P.C., along with Art.199 (3) of the constitution of Pakistan, 1973,⁷⁵⁶ then apparently an unaccountable

Person in charge of closed places to allow search and to comply with warrants”, S. 103 “ Search to be made in the presence of witness and[police] Power to call local inhabitant to be witness during searches”; for legislative power to declare procedural emergency see in *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431.

⁷⁵³ See Shaikat, eds., *The Code of Criminal Procedure*, 416-417: F.N.9; The Code of Criminal Procedure (Amendment) Ordinance, Ordinance XV of 2002: “---in pursuance of the proclamation of emergency of the fourteenth day of October, 1999, and the Provisional Constitution Order No. 1 of 1999, read with the Provisional Constitution (Amendment) Order No.9 of 1999, and in exercise of all other powers enabling him in that behalf, the President of the Islamic Republic of Pakistan is pleased to make and promulgate [this] Ordinance---”; For counter insurgency operations against Taliban in Afghanistan and Pakistan see in Shah, *The Armed Conflict in Pakistan*, 93-113; T.V. Paul, *The Warrior State: Pakistan in the Contemporary World* (Haryana: Random House India, 2014), 61-65.

⁷⁵⁴ See Shah, *The Armed Conflict in Pakistan*, 118-124;

⁷⁵⁵ See e.g. into N.V. Paranjape, *Criminology and Penology* (Allahabad: Central Law Publications, 2007), 29: Administrative penology is also known as applied penology, used to implement the governmental penal polices to enhance the scope of social control and to ensure the state security; Tassaduq Hussein Jalani, “Impunity and the Emerging Patterns of International Justice,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Frias, Katja Lh Samuel and Nigeld White (Clarendon Street, Oxford: Oxford University Press, 2012), 247-254.

⁷⁵⁶ See M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 733-985: Art 199(3) “An order shall not be made under clause (1) [writ jurisdiction] on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.”

scenario emerges with a negative impact on the overall human rights protections.⁷⁵⁷ Since the expression “as circumstances may require” indicates dictionary delegated powers, which are further protected from judicial review of administrative actions.

S.132 of the Cr. P.C in this context states explicitly a kind of executive impunity, when it elucidates that “No prosecution----for an act purporting to be done.”⁷⁵⁸ Nevertheless “purporting” is alike the colourable exercise of the office⁷⁵⁹ in so called good faith,⁷⁶⁰ exempted from prosecution⁷⁶¹ on the basis of mistake of fact and law⁷⁶² or unintentional probability of harm during the law enforcement operations.⁷⁶³ Consequently all intended or unintended human rights abuses either caused by indiscriminate or disproportionate use of force, are hard to be addressed objectively in the court of law prior to sanctions of government.⁷⁶⁴ Therefore with regards to the stringency of this Section court observes, “--

⁷⁵⁷ See Shah, *The Armed Conflict in Pakistan*, 124-135: “The Pakistani forces and war crimes”, Construes the highhandedness of the armed and civil armed forces in context of the subjectivity of use of force “as the circumstances may require” during law enforcement operations in aid of civil power as war crimes.

⁷⁵⁸ See into Shaukat, eds., *The Code of Criminal Procedure*, 417-419: for Section 132 “Protection against prosecution for acts done under this Chapter. No prosecution against any person for an act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the Provincial ----Federal Government [alike S.197 of Cr.P.C] ; and (a) no magistrate or police officer acting ----in good faith, (b) no officer acting under section 131 in good faith [alike S.79 of P.P.C.], (c) no person doing any act in good faith under section 128 or section 130 or section 131A. (d) no inferior officer, or soldier,[sailor or airman in the armed forces] ,doing any act in obedience to any order which he was bound to obey[alike S.76 of P.P.C].”

⁷⁵⁹ See Shaukat, eds., *The Pakistan Penal Code*, 244-272: S.99.

⁷⁶⁰ *Ibid.*, 104-106: S.52.

⁷⁶¹ See Shaukat, eds., *The Code of Criminal Procedure*, 1079-1102: S.197.

⁷⁶² See Shaukat, eds., *The Pakistan Penal Code*, 154-162: Ss.76 and 79.

⁷⁶³ *Ibid.*, 162-166: Ss. 80 and 81.

⁷⁶⁴ See *Sher Sulaiman v. DSP Babar Khan and 2 others*, 2015 P Cr. LJ 433 Gilgit-Baltistan Chief Court: According to the facts of this case few people which were affected from Attaabad Lake accident[destruction of villages due to land sliding] stood together in front of a bank and trying to withdraw a relief amount through smart cards from this assigned bank in Hunza,. Yet were not able to do so due to some technical problems, but then as their number and frustration rose up, they started to protest against authorities. Authorities and especially police were concerned on such occurrence as the C.M G.B was supposed to visit Hunza on that day. Thus on his arrival on the disturbed spot the concerned SHO tried to negotiate with protestors and directed them to be dispersed peacefully. Meanwhile the respective DSP reached on the spot

the language of Ss. 197 and 132 of the Cr. P.C is the same. The Provisions of S.197 have been declared to be repugnant to the teaching of Islam,⁷⁶⁵ as such basis of the same analogy, a public servant is required to face the trial of an offence allegedly has been committed by him not in a good faith but mala-fidely as such, he is not allowed to take help from the provisions of S.132 Cr. P.C. This section is a protection against prosecution and has nothing to do with the ingredients of any offence. In order to take benefits of S.132 Cr. P.C, the respondents [police officials] have to prove that the act complained of was done under circumstances mentioned in the Section; they need not to prove that they committed no offence. They just place the materials and circumstances before the judge justifying that mob was unlawful and acts they did were purported to have been done while dispersing the mob ---Mere on the basis of version taken by the police that the firing was opened under compelling situation is not enough to over the murder of two persons---Such issues are if unheard, anarchy would prevail in the society.”⁷⁶⁶

with a high contingent of police, as he arrived there he started to misbehave with the peaceful protestors through abusive language and ordered them to dispersed immediately. Upon their refusal he ordered his subordinates to disperse such ‘unlawful assembly’ with baton charge and indiscriminate firing which resulted in to the death of two protestors while many others with critical injuries. As police claimed that incident come under the ambit of S.132 of the Cr.P.C so refuse to register an FIR under Ss. 302 and 324 against the responsible police officers and their subordinates, prior to any sanction in a prescribed manner. Upon this a case has to be registered under Ss.6 and 7 of the Anti-Terrorism Act, 1997 which served this purpose as a special to deal with heinous crimes and their speedy trial. Yet upon the arrival of challah during proceedings in Anti-Terrorism Court the sanctions levied from government were not collaborative with the intent and object of ATA, 97 and under the definition of terrorism as defined in Ss.6 and 7 of this Act. On such occurrence the appellate court decided to transfer the case to the ordinary criminal court to adjudicate the matter for the offence of murder and attempt to murder. And to determine that whether police personals had immunity under S.132 of the Cr P.C if the facts are in accordance with the ingredients as stated in this Section.

⁷⁶⁵ See *Federation of Pakistan through secretary Ministry of Law, Justice and Parliamentary Affairs v. Zafer Awan Advocate, High Court*, PLD 1992 SC 72.

⁷⁶⁶ See *Sher Sulaiman v. DSP Babar Khan and 2 others*, 2015 P Cr. LJ 433 Gilgit-Baltistan Chief Court.

It seems that a combination of Ss. 52, 76, 79, 80, 81, 99, 106, 188 of the P.P.C along with Ss.128, 129, 130, 131, 131A, 132, 144, 195(a)⁷⁶⁷ and 197 of the Cr.P.C, gives an indemnity to law enforcement operations and engenders a menace of executive impunity in Pakistan. Besides an ouster of parliamentary oversight or judicial scrutiny from such operations which come under necessity appears a core determinant behind this phenomenon. As seemingly align with patriarchal perspective of colonial era, it depicts a continuity of an unaccountable administrative legacy with regards to the maintenance of public order.⁷⁶⁸ As in United Kingdom and its colonies it was a royal prerogative to measure public interest and to establish peace and security for realm, subsequently delegated to administrative agencies by depriving courts from their judicial review of administrative action.⁷⁶⁹

⁷⁶⁷ See e.g. into Shaukat, eds., *The Code of Criminal Procedure*, 1025-1067: Section 195 “No Court shall take cognizance--- Prosecution for contempt of lawful authority of public servant. (a) of any offence punishable under-- S. 188 of the P.P.C, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate.”; *Muhammad Tanvir Khan Kundi v. Ashraf Khan and 3 others*, 2014 MLD 1645 Peshawar: Magistrate as a competent public servant is empowered to sanction complaint in case of disobedience to disperser from an unlawful assembly; and for the same ratio see in *Muhammad Nawaz v. The State and 3 others*, 2006 YLR 2815 Lahore; *Ghulam Akbar v. Nazim City District, Multan and 4 others*, 2009 P Cr.L J 160, Lahore; *Makhdom Khaliq Uz Zaman v. The State*, 1999 P Cr. L J 1081 Karachi; *Ameerullah v. The State*, 2003 YLR 2097 Karachi; *Sadiq Masih v. Bashir Masih and 2 others*, PLD 1978 Karachi 108: “ with regards to the expression “public Servant” in S. 195[1] (a) of the Cr. P.C. means the public servant holding for time being office held by public servant in respect of whom offence was committed.”; Therefore Ss. 52, 76, 79, 99 and 188 of the P.P.C give an exception to prosecution of such powers if these are under colourable exercise or purported to be done under the jurisdiction of the office, as S. 132 (a) illustrates “-- Magistrate--acting --to deal with unlawful and riotous assemblies in good faith.” And as has been held in *Farid Ahmad v. Province of East Pakistan*, PLD 1969 Dacca 961 : magistrates are empowered to impose curfew under S.144 of the Cr.P.C , thereby such context of the use of civil and military force is protected under S. 132 Cr.P.C. Hence the district administration along with police and armed forces has protection of law under the fundamentalist school of social order with a least concern to private rights as enshrined in the Universal Declaration of Human Rights, 1948, which emerged in jurisprudential paradigm as a synthesis to Nazi’s totalitarian regime of Germany.

⁷⁶⁸ See Eric Stokes, *The English Utilitarians and India* (Oxford: The Clarendon Press, 1959), 250-256.

⁷⁶⁹ See *Suleman and others v. Manager, Domestic Banking, Habib Bank, Ltd and another*, 2003 CLD 1797 Karachi.

But then whether such ‘prerogative’ still exists in Pakistan in spite of an assumed supremacy of constitution?⁷⁷⁰ If yes, in case of public order and national security, then whether state violence is also permissible under such administrative penology? If again yes, then what is an approved threshold of such violence, besides which kind of problematic behaviors and deviances are its targets? Is it only to deter criminals and habitual offenders in society or does it intend to crush political dissent and resistance? Is it intrinsically capable to deal with class conflicts, ethnic and religious polarizations and political fragmentations?

A case law is worthwhile to mention in this regard, as it identifies and categories problematic behaviors and offences relating to public order and their ensuing legal responses. Subsequently indicates three core categories and thresholds of internal disturbances under the legal corpus of Pakistan. While a mild threshold of internal disturbance relates to public nuisance, unlawful assemblies, affrays, limited public riots, shutter down strikes and sit inns protests under maintenance of public order and police domains. Its acute threshold relates to isolated and sustained acts of terrorism especially injurious to life and limb which potently lead to anarchy and commotion. It requires unusual remedial measures like special laws and special administrative measures such as deployment of paramilitary troops with police powers in aid of civil power. Whereas it’s extreme threshold relates to offences against state, its sovereignty and armed forces, which potentially leads to civil war and insurgency. The last category requires the utmost

⁷⁷⁰ Ibid.

corrective response from federation as existence of the entire state come in jeopardy with this milieu. Hence the court observes in this case, “---Internal Disturbances in the context of civil commotion may include an outbreak of large scale violence due to disturbances in any part of country.” Resultantly the proclamation of public emergency and deployment of armed forces in aid of civil power are last resorts to deal with it.⁷⁷¹ Accordingly Ss. 426(1A) and 497 of the Cr. P.C⁷⁷² are dealing with terrorism and Ss. 121, 121A, 122, 123, 123A, 123 B, 124, 124A, 125, 126 of the P.P.C cover the offences against state. Yet a question arises here that while dealing with acute or extreme disturbances what kind of legal antinomies are likely to occur? And whether security of person has some relevance over security of state if such ‘large scale violence’ is directed to ideological or territorial integrity of state? If no, then what is the position of jus cogens norms in such milieu?

With regard to the crime of large scale violence and its subsequent classifications, Ss. 426(1A) and 497 of Cr. P.C in their respective prohibitory clauses categorize such offenders in to hardened, desperate, dangerous criminals and terrorists. Since court declares in this context that, “A hardened criminal is one who has developed rigid behavior pattern toughened through experience and not likely to change. All those persons, who have

⁷⁷¹ See *President Balochistan High Court Bar Association v. Federation of Pakistan*, 2012 SCMR 1784; *President Balochistan High Court Bar Association v. Federation of Pakistan etc*, Constitutional petition no 77 of 2010, <http://www.supremecourt.gov.pk/2012/Judgments/Orders/>.

⁷⁷² See into Shaukat Mahmood and Nadeem Shaukat, eds., *The Code of Criminal Procedure* (Lahore: Legal Research Center, 2014), 2199-2265, 2621-3293: for Section 426(1A) “ Suspension of sentence pending appeal. Release of appellant on bail--- Provided that---shall not apply--- to a person who, in the opinion of the Appellate Court, is a hardened desperate or dangerous criminal or is accused of an **act of terrorism** punishable with death or imprisonment for life”, Section 497 “ When bail may be taken in case of non- bailable offence---[Provided –shall not apply --- to a person who, in the opinion of the Court , is a hardened, desperate or dangerous criminal or is accused of an **act of terrorism** punishable with death or imprisonment for life].” Both of the provisos were earlier omitted in 2001 by an Ordinance no 54, however been reinserted in 2011 by an Act no. 8 of 2011.

become rigid and devoid of any compassion, could be termed as “hardened”. Similarly a criminal could be considered “desperate,” if he is willing to take risk fearlessly out of helplessness and despair. A “desperate criminal” could commit an act as a last resort without realizing its consequences. However, the word “dangerous criminal” connotes a person, who is able to cause harm and injury having horrible effects against society. The definition of “dangerous criminal” can also be extended to a person from whom society at large is unsafe or who is involved in acts, which are squeezing the beauty of humanity. So it is the gravity of an offence of whatsoever nature which brings an offender within the category of a “dangerous criminal.” When viewed on this touchstone, even the first offender may be treated as a “dangerous criminal”. That is why the Legislature has excluded this category of criminals or offenders from the benefit of suspension of sentence as provided in subsection (1A) (c) of Section 426 of the Cr.P.C.----- or to take the benefit of the post arrest bail as provided in S.497 of the Cr.P.C.”⁷⁷³

And with regards to ‘*in- terrorem populi*’ court declares that, “terrorist does not mean that one should cause so many an incidence of violence or he should be previously convicted. Sufficient for a person to be a terrorist, if such person is causing constant fear or is mischievous and troublesome to the people at large.”⁷⁷⁴ In another case court observes, “wisdom of the Legislature behind the insertion of words “involved in terrorism” [in S.497 of the Cr.P.C] was that if the act of the accused is dreadful horrible or fearful and it creates panic or alarm for an individual, society or public-at-large, then it can be termed or construed as “terrorism”--- meaning of the “Act of Terrorism” ---- that involves a violent act or an act dangerous to human life that is a

⁷⁷³ See for S.426 (1A) (c) of the Cr.P.C. into *Omair Ahmad Siddiqui v. The State*, 1996 P Cr. LJ 22 Karachi; *Rana Nasarullah v. The State*, PLD 2011 Lahore 544; *Ghulam Mustafa and 2 others v. The State*, PLD 2011 Karachi 394; *Gulsher and 2 others v. The State*, 2013 YLR 298 Karachi; and for S.497 of Cr. P.C. See also in *Barkat Ali v. The State and another*, 2013 P Cr. LJ 668 Lahore.

⁷⁷⁴ See *Amir Jan Buladi v. The State*, 2000 MLD 574 Karachi.

violation of the criminal law of any State or that would be a criminal violation if committed within the jurisdiction of any State and appears to be intended (i) to intimidation or coerce a civilian population, (ii) to influence the policy of a Government by intimidation or coercion or (iii) to affect the conduct of a Government by assassination or kidnapping---- Fourth proviso to S.497(1), Cr.P.C. further suggest that after tentative assessment of evidence and keeping in view the nature of offence if it transpires that the act is callous, brutal or gruesome the doer of act can be termed as dangerous, desperate or hardened criminal.”⁷⁷⁵ Furthermore court has evolved an interesting classification between the phraseology of ‘criminal’ and ‘person’ in this context. As it observes that the word ‘*criminal*’ is associated with hardened, desperate, dangerous and habitual offenders whereas the term, ‘*person*’ is associated with a non-habitual first time delinquency.⁷⁷⁶

In the light of above mentioned case laws it seems that a rigidity and severity of lethal assaults with least concern for their negative impacts on society and humanity determine the scale of violence in criminal law. The criminal justice system of Pakistan perceives its high magnitude as sabotage, terrorism, internal disturbances, waging war against State, raising arms and insurrection and has evolved special laws to deal them accordingly.⁷⁷⁷ Yet

⁷⁷⁵ See *Dhani Bux v. The State*, 1999MLD 2028 Karachi.

⁷⁷⁶ See *Mashooq v. The State*, 2001 P Cr. LJ 874 Karachi.

⁷⁷⁷ See e.g. into M. Farani, comp., *Criminal Local & Special Laws Minor Acts: Central & Provincial* (Lahore: Lahore Law Times Publications, 2004), 37-74, 520-530, 807-815, 851-861, 1424-1434, 1731-1741: W.P. Maintenance of Public Order Ordinance, 1960, Anti-Terrorism Act, 1997, Explosive Act, 1884, Explosive Substances Act, 1908, Official Secrets Act, 1923, Security of Pakistan Act, 1952; Shaukat, eds., *The Pakistan Penal Code*, 385-415: Ss.121-140 of PPC: Waging or attempt to wage war against Pakistan and against any Foreign Power in alliance with Pakistan, Mutiny and other offences relating to the Army, Navy and Air Force; Ss. 2 (1) (d) (i), (ii), 31, 73, 74 and 76 of The Pakistan Army Act, 1952 (XXXIX of 1952); The Protection of Pakistan Act, 2014; M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 1117-1130, 1142-1146: Art.232-237, 245: Emergency Provisions to deal with ----Internal Disturbances.

jurisdictions of ordinary criminal courts have been barred under special and general laws to adjudicate the offences connecting to '*in-terrorem populi*'.⁷⁷⁸

It is same for offences like insurrection, waging war, sedition and mutiny covered under Ss. 121 to 140 of the P.P.C.⁷⁷⁹ Since Stephens describes them as '*political crimes*' usually intended to influence targeted population to raise arms against state.⁷⁸⁰ And S.196 of the Cr.P.C. narrates that a prior sanction of respective Provincial or Federal government is required to try such offences in the ordinary criminal courts.⁷⁸¹ Therefore court has evolved some principles of adjudication in this regard like, "(1) - Sanction for prosecution be on full application of mind to the facts. (2)- Prosecution can be proved by leading evidence to the above facts. (3)- The object of the restriction is to enable the government to decide that whether an offence of the kind mentioned in S.196 should be tried in Court or it would be more in the interest of the people and administration to suppress the trail due to seriousness of the offence. (4)- Cognizance by Court on complaint by prescribe person at the instance of the prescribed authority. (5)- The police report cannot be taken as compliant. And if court is barred under S. 196 of the Cr.P.C. then it can try an offence under the Anti- Terrorism Act, 1997 as a special law [if

⁷⁷⁸ See *Syed Mubbashar Raza v. Government of Punjab*, PLD 2015 Lahore 20; *Syed Nawaz Hussain v. The State*, 2014 P Cr.LJ 1256, G.B. Chief Court; *Saadullah v. Secretary, Home Department*, PLD 1986 Quetta 270.

⁷⁷⁹ See Shaukat, eds., *The Pakistan Penal Code*, 385-416.

⁷⁸⁰ See Stephens, "Military Involvement," 465: "---- The center of gravity is the population itself, who remain 'the deciding factor in the struggle'; *The State v. Sardar Ataullah Khan Mangal*, PLD 1967 SC 78.

⁷⁸¹ See Shaukat, eds., *The Code of Criminal Procedure*, 1067-1075; *Abdul Fatah and others v. The State*, 1990 MLD 1087 Karachi: "The offences under Ss. 121-A[conspiracy to commit waging or attempting to wage war or abetting waging of war against Pakistan], 123-A[Condemnation of the creation of the State, and advocacy of abolition of its sovereignty] and 124-A[Sedition] do fall under Chapter VI of the Pakistan Penal Code and therefore, the embargo under S.196 Cr.P.C is very much applicable which provides that no Court shall take the cognizance of the said offences unless upon a complaint made, by order of or under the authority from the Central or Provincial Government Concerned or any officer so authorized by any of the two Governments"

applicable according to the circumstances] ---in such case provisions of special law prevails over general law.”⁷⁸²

Since there are restrictions on police to take direct cognizance upon private complaint in case of offences against state,⁷⁸³ yet it is allowed to investigate the same after the initiation of prosecution as prescribed by law. As court says, “S.196 of Cr.P.C did not in any way debar the police to investigate the case in order to come to the truth---- [Such] investigation is immune from judicial scrutiny of High Court, unless it is being done by police officer not competent to do or is being done mala-fides or bad faith if no offence is made out on the face of allegation.”⁷⁸⁴ It seems that in case of political offences and offences relating to terrorism and national security, state has a lot of discretion to adjudicate under administrative penology.⁷⁸⁵ This paradigm is potentially hazardous to the right to fair trial⁷⁸⁶ and administrative accountability⁷⁸⁷ since court itself acknowledges, “in case where State security was involved, High Court would be reluctant to exercise constitutional jurisdiction even in case of detention if order was bona-fide ----- State has claimed privilege on the ground of State security,

⁷⁸² See *Main Nawaz Sharif v. The State*, 2000 MLD 946 Karachi: “Dealing with Ss. 120-B, 121, 121-A, 122, 123 of the P.P.C. Along with Ss. 6, 7, 12, 19, 30 and 32 of the Anti-Terrorism Act, 1997.”

⁷⁸³ See *Mulana Dost Muhammad v. The State*, 1976 P Cr. LJ 1984 Karachi.

⁷⁸⁴ See *Main Yasin Watto v. Government of Punjab*, 1997 P Cr. LJ 836 Lahore.

⁷⁸⁵ See Paranjape, *Criminology*, 29.

⁷⁸⁶ See Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973*, 246: “Article 10A. Right to fair trial--- For the determination of his civil rights and obligations in any criminal charge against him a person shall be entitled to a fair trial and due process.”

⁷⁸⁷ *Ibid.*, 733-992: “Art.199.”; See also in M.A. Fazal, *Judicial Control of Administrative Action in India and Pakistan: A Comparative Study of Principles and Remedies* (Oxford: Clarendon Press, Oxford University Press, 1969), 191-226: In case of a bias [such as national security] there is a high probability that the rule of “*audi alteram partem*” as enshrined in natural justice be compromised. Hence it is mandatory to sustain a judicial control over statutory powers of State to establish fairness, equity and justice; Sachin Verma, *Corruption and Human Rights* (New Delhi: Venus Books, 2014), 103-132, 201-235, 245-294: He deals the issue of fairness and accountability in a novel way, according to him an absolute and unchecked power is a source of corruption. Although he is focused on governance, yet discretionary powers are source of corruption for him, subsequently corruption is considered as human right violation as well.

in such a case---the detaining authority is not bound to give the full detail.”⁷⁸⁸ Hence under such security oriented theoretical framework of domestic legal order, national security has an absolute supremacy over Universalist perspective of human rights in Pakistan.

Even the court of law has similar connotation on this legal antinomy when it observes, “Loyalty to State and obedience to constitution and law is a first duty of the citizen of the country and if a person commits any offence against the State. Then he is not entitled to the protection of Fundamental Rights and is liable to be prosecuted and dealt with in accordance with law enforced for the purpose.”⁷⁸⁹ Although international law justifies the state’s right to self-defense alike the personal right of self- defense, yet it is conditional to armed conflict and aggression and that too has limitations of proportionality and distinction.⁷⁹⁰ Whereas due to the fundamentalist perspective of public order,⁷⁹¹ general and special criminal laws of Pakistan give immense powers to administration even during peace time. Apparently it is to deal with anti-State activities at any cost even by compromising the jus cogens obligations.⁷⁹²

Paul identifies this context as a national security paradigm of a ‘garrison state’, which empowers the law enforcement agencies, specially paramilitary and military to establish an absolute control in community.⁷⁹³ He explains this phenomenon by using the term

⁷⁸⁸ See *Saadullah v. Secretary, Home Department*, PLD 1986 Quetta 270; *Imtaiz Ahmad v. Government of Pakistan*, 1994 SCMR 2142.

⁷⁸⁹ See *Asif Mahmood v. Federation of Pakistan*, PLD 2005 Lahore 721.

⁷⁹⁰ See David Rodin, *War & Self-dense* (Great Clarendon Street: Oxford University Press, 2004), 104-121.

⁷⁹¹ See W. Friedmann, *Law in a Changing Society* (London: Stevens & Sons Ltd., 1972), 191-194.

⁷⁹² See Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan* (New York: Routledge, Taylor & Frances Group, 2011), 96-99, 124-130.

⁷⁹³ See T.V. Paul, *The Warrior State: Pakistan in the Contemporary World* (Haryana: Random House India, 2014), 70-71.

‘*praetorian state*,’ where military has a frequent involvement in socio-political and economic affairs of the State. It is further divided in ‘*arbitrator*’ and ‘*ruler*’ type involvement, since former deals with sporadic yet strategic interference without any ideological justification or impact. Whereas later deals with a legitimate and efficacious involvement along with an ideological justification and a subsequent sociopolitical impact in a respective society.⁷⁹⁴ Paul like Rizvi identifies this administrative mindset and institutional psyche as ‘*garrison state*’ where armed forces as ‘*specialist on violence*’ has a legitimate monopoly to suppress a least probability of dissent.⁷⁹⁵

Huntington identifies such society as a ‘*community without politics*’⁷⁹⁶ and Paul declares it a ‘*hybrid democracy in a garrison state*’, where civil society has a skeptical authority over administrative and governance issues.⁷⁹⁷ Since a perceived vulnerability of state’s existence in an anarchical international order and realpolitik, geographical military ventures, hostile neighborhood and internal polarization are likely justification of this ‘*garrison*’ model.⁷⁹⁸ However instead of international aggression, such states usually subjugate their own citizen to curb dissenting internal politics.⁷⁹⁹

⁷⁹⁴ Ibid., 72-74.

⁷⁹⁵ See Rizvi, *The Military & Politics*, 5-19: For him military in Pakistan is not a mere profession, rather it is an authoritarian mind set and a way of life of armed forces; Paul, *The Warrior State*, 72-73, 78.

⁷⁹⁶ See Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968), 244, quoted in Paul, *The Warrior State*, 83.

⁷⁹⁷ See Paul, *The Warrior State*, 74-78: he uses the term *electoral fallacy* amid allegedly sham elections, where through selection rather than election the pro- establishment parliamentarians come in to power. He further says that under such garrison cum hybrid democratic model, all other organs of state, like Legislator, Civil administration and Judiciary ought to conform to military under the influence of “garrison philosophy.”

⁷⁹⁸ Ibid., 79-92.

⁷⁹⁹ Ibid., 78.

Like Roy's 'hyper-nationalism' and Huber's 'total state' perspective, the main purpose of this domestic administrative pattern is to maintain a status quo in the national security paradigm.⁸⁰⁰ Resultantly Tilly narrates that states resort to extra military means and realpolitik to manage perceived insecurities, which transform them in to 'warrior states under an insecurity dilemma'.⁸⁰¹ Hence stringent administrative measures are taken in the name of national security, which are subsequently hazardous for personal and civil liberties. Tilly and Paul identify this trend as a vicious cycle of militarism, in which an obsession of security generates insecurities for deviants and nonconformists.⁸⁰² Paul further associates such patterns with Pakistan and declares it a 'warrior state' under 'garrison mindset'.⁸⁰³ It seems likewise from the following judgment where court observes, "---Accused being involved in anti-State and espionage activities cannot claim any right under inherent jurisdiction of High Court."⁸⁰⁴ Therefore to understand their impacts on human rights protections, the following portions of study discuss special laws relating to preventive and punitive measures for national security.

⁸⁰⁰ See Arundati Roy, *Listening to Grass-Hoppers: Field Notes on Democracy* (First Pakistani Reprint. Rawalpindi: Services Book Club, GHQ, 2011), 25-42; Ernst Rudolf Huber, "Constitution," in *Weimar: A Jurisprudence of Crisis*, eds. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, et al. (California: University of California Press, 2000), 328-330; Paul, *The Warrior State*, 80-82.

⁸⁰¹ See Charles Tilly, "War Making and State Making as Organized Crime," in *Bringing the State Back In*, ed. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: University Press, 1985), 171, quoted in Paul, *The Warrior State*, 184-185.

⁸⁰² See Charles Tilly, *Coercion, Capital and European State* (Oxford: Blackwell, 1992), 195; Charles Tilly, "Reflections on the History of European State-Making," in *The Formation of National States in Western Europe*, ed., Tilly (Princeton: Princeton University Press, 1975), 81, quoted in Paul, *The Warrior State*, 186-191.

⁸⁰³ See Paul, *The Warrior State*, 24-33, 92-93, 196-197.

⁸⁰⁴ See *Azhar Iqbal v. The State and 4 others*, 2014 P Cr. LJ 1387 Lahore.

Analytical Assessment of the West Pakistan Maintenance of Public Order, 1960 and the Prevention of Anti-National Activities Act, 1974

The W.P. Maintenance of Public Order, 1960 is a special law relating to police power and magistracy⁸⁰⁵ to arrest and detain suspected persons,⁸⁰⁶ yet it does not extinguish the operation of general law in this context.⁸⁰⁷ Since the question is that at what stage and when it is applied as well as against whom? Court says that its application is conditional to actual and perceived sense of fear at large as “even the presence of deadly and dangerous weapon is enough to cause fear in society.”⁸⁰⁸ Besides it is meant to create deterrence and to establish writ of law under preventive penology to deal such fear.⁸⁰⁹ Then as discussed above in the preceding portion of study, potentially dangerous, hardened and desperate criminals and persons with rigid or fundamentalist behavioral patterns are its core subjects.⁸¹⁰ Hussain argues in this regard that such a special law had been initially formulated to cope with the war related emergencies in Britain during two world wars. But then it had been given a status of special law in colonial India to deal with insurrectional movements and communal strife. Yet after the independence in 1947, the law of preventive detention has been given the constitutional protection in India and Pakistan respectively. It has been intended to deal with skeptical public order, communal fragmentation and

⁸⁰⁵ See *Messrs Azad Papers Ltd. v. Province of Sindh through Secretary Home Department, Karachi and another*, PLD 1974 Karachi 81; *Mst. Shazia Parveen v. District Magistrate, Okara*, PLD 1988 Lahore 611.

⁸⁰⁶ See *Syed Mubbashar Raza v. Government of Punjab*, PLD 2015 Lahore 20.

⁸⁰⁷ See *Khan Nabi Ahmad Khan and 10 others v. The State*, 1971 P Cr.LJ 875 Lahore.

⁸⁰⁸ See *Muhammad Boota v. The State*, 2008 P Cr. LJ 153 Lahore.

⁸⁰⁹ See *Nawabzada Nasrullah Khan v. The District Magistrate, Lahore and Government of West Pakistan*, PLD 1965 (W.P) Lahore 642; Paranjape, *Criminology*, 219-220.

⁸¹⁰ See *Bashir Ahmad v. The State*, PLD 2014 Lahore 567; *Malik Muhammad Ishaq v. The State*, 2014 P Cr.LJ 1084 Lahore.

political polarization present in both the countries since the time of partition related communal violence in 1947. As both the countries were sensitive to their national security and public order so authorized and empowered the district administration and police under this law to detain a suspected person prospectively whose liberty was considered hazardous to the above mentioned paradigm. He further elaborates the core elements of this law as it includes, detention, based on apprehension and satisfaction of authorities, prevention of a futuristic crime or danger and prior to a judicial trial.⁸¹¹

Resultantly Paranjape identifies this approach in the ambit of administrative penology,⁸¹² which is classified by Friedmann as '*fundamentalist perspective of public order*' to achieve optimal deterrence in society.⁸¹³ With regards to the rationale of the Maintenance of Public Order, 1960 [hereinafter written as M.P.O] Newberg illustrates that the Ayub's regime promulgated this order to cure the gaps in S.144 of the Cr.P.C.⁸¹⁴ Whereas the imposition of this section was unable to cope with the sociopolitical unrest of that time, thence to supplement this reactive precept a pre-emptive statute was evolved mainly to suppress anarchy.⁸¹⁵

⁸¹¹ See Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: University Foundation Press, University of Peshawar, 1989), 283-287.

⁸¹² See Paranjape, *Criminology*, 29.

⁸¹³ See W. Friedmann, *Law in a Changing Society* (London: Stevens & Sons Ltd, 1972), 191-192.

⁸¹⁴ See Newberg, *Judging The State*, 102.

⁸¹⁵ See Hussain, *Personal Liberty*, 284-285; Newberg, *Judging*, 103: While describes the unrest of Ayub's Era, quotes Justice Cornelius as "open conflict with the Government, as by Law established---politicians to play with fire in the hope that they will eventually be able to subdue the conflagration they cause"

While M.P.O. is futuristic in nature,⁸¹⁶ so could be applied on already arrested and detained criminals as well, if they are likely to be released from captivity either on bail or after completion of their sentence.⁸¹⁷ As court observes, “law of preventive detention as a special law is meant to deal with a criminal whose liberty is considered dangerous for public peace.”⁸¹⁸ Accordingly administration can resort to punitive and preventive tactics simultaneously to save a community from an anticipated disorder and anarchy. As it is evident from the following discussion in this case which illustrates that, “if the detenu were allowed to be at large there was every likelihood of his inciting innocent people to resort to violence [thus it] would be justified in restraining the activities of the man by order of detention.”⁸¹⁹ Yet the question is that whether a precise objectivity can be attained through such kind of preventive anticipation which has a direct impact on prevailing punitive measure? Even the court of law acknowledges that resort to subjectivity and application of mind on the information in hand is the only choice for authorities in such futuristic decisions.⁸²⁰

While as has been discussed earlier that administrative measures have statutory exceptions from prosecution as enshrined in Ss. 52, 76, 79 of PPC and S.197 of the Cr.P.C.⁸²¹ Subsequently an inappropriate use of this special law to restrain liberties and private rights

⁸¹⁶ See *Muhammad Nadeem v. Government of Punjab, through home secretary and another*, PLD 2010 Lahore 371.

⁸¹⁷ See *Begum Agha Abdul Karim Shorish Kashmiri v. Senior Superintendent of Police*, Lahore, 1973 P Cr. LJ 482 Lahore.

⁸¹⁸ See *Mairaj Muhammad Khan v. Government of West Pakistan and another*, PLD 1966 Karachi 282.

⁸¹⁹ *Ibid.*, 286-287.

⁸²⁰ *Ibid.*, 288-289; Also See in *Mrs. Nasreen Rao Abdul Rashid v. District Magistrate, Rawalpindi*, PLD 1979 Lahore 923.

⁸²¹ See *Khan Ghulam Muhi-ud-Din Khan v. Syed Mohd Hassan Shah*, PLD 1951 Baluchistan 61; *Crown v. Fateh Muhammad*, PLD 1951 Lahore 142.

of citizens is likely to occur with impunity.⁸²² Court observes in this regard, “can hardly convince of a case where the powers of preventive detention could properly be exercised.”⁸²³ Moreover an instrumentation of this law for political victimization of opponents and nonconformists by the ruling elites in Pakistan is also highly probable.⁸²⁴ Being conscious of a possible abuse of procedure regarding arrest and detention under S.3 of the M.P.O court gives the following observations. “It is a futuristic and authorities must apply their mind because of the punitive effect of detention----Since law is encroaching on the liberty of citizens so [such] “application of mind” must be construed strictly.”⁸²⁵

With regards to the intent of this Lex Specialis court observes; “Purpose and object of MPO is the preventive detention and control of persons and publication for reasons connected with public safety, interest and maintenance of public order. --- Act or activity complained of a person must be an act prejudicial to the public order and its outcome or result would directly affect the public at large.”⁸²⁶ Then as has been mentioned earlier, this law is given by the Martial law regime so is reactive to sociopolitical movements, maneuvering and agitations;⁸²⁷ hence the following circumstances also attract its application. These include “inciting students to

⁸²² See *Master Abdul Rashid v. Sub-Martial Law Administrator, Sector 2, Rawalpindi*, PLD 1980 Lahore 356.

⁸²³ See *Abdul Hamid Khan v. The District Magistrate*, PLD 1973 Karachi 344.

⁸²⁴ See *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 (W.P.) Lahore 112: As has been argued by Mr A.K. Brohi while he criticized the regime’s attempt to proscribe Jamat’at-i-Islami as a banned and criminal organization and a subsequent preventive detention and stigmatization of its top leadership including Syed Abul Ala Maudoodi, the then Amir of Jama’at-i- Islami in 1964; Also in Hussain, *Personal Liberty*, 284: “ This measure has been a favorite weapon of the regime in power to suppress political opposition.”

⁸²⁵ See *Muhammad Nadeem v. Government of Punjab, through Home Secretary*, PLD 2010 Lahore 371.

⁸²⁶ See *Hamayun v. District Coordinator Officer, Kohat and 6 others*, 2014 P Cr.LJ 173, Peshawar.

⁸²⁷ See Paula R. Nweberg, *Judging the state: Courts and constitutional Politics in Pakistan* (Trumpington Street, Cambridge: Cambridge University Press, 2002), 79-89, 101-106: identifies this era as “Extending the repressive state as potentially skeptical toward civil liberties”; Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Karachi: Oxford University Press, 1995), 170-182.

indulge in unlawful activities and commit acts of violence, fomenting troubles between workmen and employers and attempting to create a feeling of disloyalty and dissatisfaction amongst Government servants.”⁸²⁸ Subsequently to deal with such scenario the Federal and Provincial Governments have delegated their powers to District Magistrates to enforce this Federal law⁸²⁹ in their respective jurisdictions.⁸³⁰ Thus like the paternalistic model of the Punjab school of administration of colonial India in nineteenth century, M.P.O is concentrated on district administration to maintain status quo in society.⁸³¹

However a bare reading of S.3 of M.P.O. indicates that its scope has been enlarged and widen up to extent that even economic crime such as black marketing, hoarding, and smuggling along with trafficking of narcotics have incorporated in the ambit of public

⁸²⁸ See *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 Lahore 112.

⁸²⁹ See *Muhammad Nadeem v. Government of Punjab, through Home Secretary and another*, PLD 2010 Lahore 371.

⁸³⁰ See in Farani, comp., *Minor Acts, 1731-1742: West Pakistan Maintenance of Public Order*, 1960[Ordinance, XXXI of 1960], S.26 “Delegation of power to Deputy Commissioners”; *Mst. Shazia Parveen v. District Magistrate*, Okara, PLD 1988 Lahore 611.

⁸³¹ See Stokes, *The English Utilitarians*, 243-260: Under the patriarchal approach of John Lawrence in Punjab, Charles Napier in Sindh, George Campbell in North-Western Frontier Province during the middle of nineteenth century in colonial India. An exclusive emphasis was on district based executive magisterial power to maintain law and order with a despotic and military type rule---- “In the Punjab[the English colonial era started from 1849] all governmental powers, both administrative and judicial, were kept united in the hands of individual officers who were organized in to closely disciplined and graded hierarchy. The Punjab was divided in to divisions and districts, each under a single commissioner and deputy- commissioner (i.e. the officer) acted as collector, magistrate, and civil judge [simultaneously]. The system was justified on the grounds of economy and as a means of securing the maximum energy and unity of purpose. But it also realized the fondest hopes of the patriarchal-ists led by John Lawrence (the then Governor of Punjab), providing him full powers of govern. It appeared to guarantee a strong, simple, paternal rule, devoted to the welfare of a society of sturdy peasant proprietors.”; Also in Paul, *The Warrior State*, 80-85: Contextualizes the paternalist model of administration with the institutional psyche of Indian Armed forces and law enforcement agencies during colonial era. Accordingly the hardy peasants from Punjab were recruited in the Army and police to perform a ruthless enforcement and to sustain the colonial rule, he argues that such institutional psyche still prevails in Pakistan due to its fragile democratic traditions and history; Sayeed, *The Political System*, 102-105: identifies this approach as administrative aristocracy in Pakistan which ultimately engenders discretions.

disorder.⁸³² Its subsection (3) along with S.26 of the M.P.O empowers the district magistrate to give the order of arrest and detention if have satisfactory reasons to believe that such offence has or about to be committed. While court observes that the office of the Deputy Commissioner cannot further delegate such powers,⁸³³ but then what are the possible rationales of such satisfaction or reasoning? According to court's judgment mainly the police reports form the rationale in this regard.⁸³⁴ Yet state can claim privilege of such reports if are required to be examined in the court of law under the writs of quo warranto or certiorari as court declares; "The right of the state to claim privilege in respect of secret information can never be denied--- Police Officer cannot be compelled to say whence he has got any information as to the commission of an offence."⁸³⁵ Such immunity from judicial scrutiny has eventually transformed this law as an instrument of police power in Pakistan as S.23 of the MPO is ousting the jurisdiction of ordinary criminal courts.⁸³⁶

Under the ROCCIPI model and Fuller's perspective of formalism,⁸³⁷ this section is in violation of legality as on the one hand no special court has been established to adjudicate

⁸³² See Anil Kalhan, "Colonial Continuities: Human Rights, Terrorism, and Security Laws in India," *Columbia Journal of Asian Law* 20, no.1 (2006), 93-234: indicates that a wide scope of special laws relation to public order and security engender human rights violation because an enlarged application can empower implementing agencies to implicate ordinary citizens under such special legislation. A wide scope of security laws also empowers the ordinary police force to coerce with impunity in its ambit under a doctrine of necessity.

⁸³³ See *Mst. Shazia Parveen v. District Magistrate Okara*, PLD 1988 Lahore 611.

⁸³⁴ See *Hamayon v. District Coordinator Officer Kohat and 6 others*, 2014 P. Cr.LJ 173 Peshawar.

⁸³⁵ See *K. M. Obaidur Rahman v. Province of East Pakistan*, PLD 1969 Dacca 339.

⁸³⁶ See Farani, comp., *Minor Acts*, 1741: W.P. Maintenance of Public Order, 1960: Sec.23 "Except as provided in this Ordinance no proceeding or order taken or made under this Ordinance shall be called in question in any Court and no civil or criminal proceeding shall be instituted against any person for anything in good faith or intended to be done under this Ordinance."

⁸³⁷ See Phil Harris, *An Introduction to Law* (Cambridge: Cambridge University Press, 2007), 35: Discretions and uncertainty as enshrined in Ad-hoc judgments are contrary to the concept of rule of law and legalism.

accordingly under this Ordinance.⁸³⁸ And on the other hand the term “any person for anything done in good faith” constructs an absolute discretion with regard to the implantation process. Along with general exceptions of PPC under Ss. 52, 76,79, 99 and S.197 of Cr.P.C, this special law gives immunity from prosecution to the concerned district administration and police in case of any mistake of fact or law. This milieu seems identical to patriarchal model of administration in colonial India, which was in favor of summary trial through executive especially in isolation from the procedural requirement of courts.⁸³⁹ A subsequent formulation of ad-hoc tribunals to adjudicate the appeals against the given orders under subsection 5 of S.3 of MPO is not only against the independence of judiciary but also contrary to the right to fair trial. Since on the hand it consist of a serving senior officers nominated by the government along with a judge of high court. And on the other hand its proceedings remain partially confidential under clause (d) of subsection 5 of S.3. Even the court is unable to cure this lacuna as declaring the Legislature an appropriate forum for a correction of such law.⁸⁴⁰ Moreover it allows magisterial and board’s powers to keep proceedings confidential, except a communication of grounds of the respective order. As it observes, “State has claimed privilege on the ground of State security, in such a case in our view the detain authority is not bound to give the full detail.”⁸⁴¹ But at this point the question is that what is a constitutional position on this subject in Pakistan?

⁸³⁸ See *Khan Nabi Ahmad Khan v. The State*, 1971 P Cr. LJ 875 Lahore.

⁸³⁹ See Stokes, *The English Utilitarians*, 244-247, 254-255: quotes John Lawrence [the then Governor of Punjab and then the Viceroy of Colonial India “I want no such person as a session judge here---A regular civil Court plays the very devil. Its course of procedure is ruinous to the tenures of the country, for the agriculturists cannot fight their causes in that court.”

⁸⁴⁰ See *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 (W.P.) Lahore 112: “but the remedy against it [order of preventive detention] lies in the domain of Legislative and not Courts----the remedy is to bring the laws on the subject in to conformity with will of the people and their good sense but not by the will of the Courts.”

⁸⁴¹ See *Saad Ullah v. Secretary, Home Department*, PLD 1986 Quetta 270.

Interestingly the provisions relating to preventive detention has constitutional protection under clauses 3 to 8 of the Article 10 the Constitution of Pakistan 1973. Moreover it has been placed in the chapter of fundamental rights and lexically comes in between Article 10 and 10 A of the Constitution, which deal with safeguard to arbitrary arrest and right to fair trial respectively.⁸⁴² It seems that clause 4 of the Article 10 not only gives protection to M.P.O but also extends its protection to all such general and special laws relating to national security, terrorism and public order. Apparently this constitutional protection is contrary to the Kant's categorical imperative and imperfect obligation of judiciary to protect fundamental rights as incorporated in objective resolution and preamble of the Constitution.⁸⁴³ Since police is responsible to initiate reports for the concerned authorities to forms grounds of order, then logically the past record of the suspect is always under consideration for this purpose.⁸⁴⁴ In spite of the fact that court does not appreciate such analogy of the previous criminal records,⁸⁴⁵ yet considering the past action as sufficient

⁸⁴² See into M. Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973* (Lahore: Al-Qanoon Publishers, 2010), 238-246: for Article 10 " Safeguards as to arrest and detention", Article 10(3) " Nothing in clause (1) and (2) shall apply to any person who is arrested or detained under any law[Mainly The MPO,1960 along with other Security laws in Pakistan]", (4) "such law is focused on security and defense of Pakistan along with maintenance of Public order", (5) " relating to communication of the ground of detention order", (6) " relating to initiation of ad-hoc review tribunal[Board]", (7) " relating to probability of extension of such detention up to total period of eight to twelve months ", (8) " relating to powers of the Review Board to determine the place of detention and to fix a reasonable allowance for the family of deteneue," Article 10-A " Right to fair trial."

⁸⁴³ See Amartya Sen, *The Idea of Justice* (Rawalpindi: with Courtesy of Allen Lane London, Services Book Club GHQ, 2010), 372-376: Under Kant's rightful conditions of categorical imperative, personal and property rights of all egalitarians are sacred for each other, however in case of any transgression it is a perfect obligation of executive and legislature to protect such rights. However in case of failure in these perfect obligations, an independent judiciary has an imperfect obligation to protect and enforce these rights as an alternative course of action; Wilfrid E. Rumble, "James Madison on the Value of Bills of Rights," in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 122-161: Madison perceived the existence of an independent Judiciary as a guarantor of Federalism and Constitutionalism in Federalist Papers.

⁸⁴⁴ See *Mairaj Muhammad Khan v. Government of West Pakistan*, PLD 1966 (W.P.) Karachi 282.

⁸⁴⁵ See *Abdul Hamid Khan v. The District Magistrate*, PLD 1973 Karachi 344.

grounds of preventive order cannot be ruled out under M.P.O.⁸⁴⁶ This administrative trend is not only contrary to the constitutional protections against retrospective punishment and double punishment but also conflicting with Fuller's perspective of the rule of law.⁸⁴⁷ But then the question arises here that how fundamental rights as well as judiciary being their custodian respond to this legal antinomy?⁸⁴⁸

Since the court observes that the preliminary detention of initial three months is immune not only from the judicial review but also from the operation of fundamental rights, if the said order is valid and in accordance with the objectives of M.P.O.⁸⁴⁹ Thence the court declares," Embargo contained in Fundamental Rights of the Constitution--- operative only in case of detention beyond period of 3 months --- concurrence of appropriate Advisory Board [for quasi-judicial review] not necessary where detention does not exceed 3 months."⁸⁵⁰ It means that the only protection available in constitution against arbitrary detention is the institution of an ad-hoc review board, but not the ordinary criminal courts. Similarly the court observes, "If

⁸⁴⁶ See *Masood Ahmad v. Government of Sindh*, PLD 1976 Karachi 311, quoted in *Master Abdul Rashid v. Sub-Martial law Administrator, Sector 2, Rawalpindi*, PLD 1980 Lahore 356: "the executive authority may, on the basis of the past conduct of a person resulting in the commission of offences indicating an apprehension that such conduct would be repeated in the future, pass an order of detention. But it would be the onus of the detaining authority to show that past instances do really indicate along with other materials a probability that the detenu would indulge in prejudicial activities, if not detained."

⁸⁴⁷ See Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973*, 248-264: Article.12 "Protection against retrospective punishment", Article.13 "Protection against double punishment and self-incrimination."; Lon L. Fuller, *The Morality of Law* (Delhi: Fourth Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2006), 37-40: "abuse of retrospective legislation constitutes a bad system of law, rather an improper legal system."

⁸⁴⁸ See W. Friedmann, *Legal Theory* (Delhi: Fifth Indian edition, Universal Law Publishing Co. Pvt., Ltd, 2008), 82-92: A bias in the standards of justice, equity and fairness is likely to occur due to structural incompatibles among the theoretical concepts of collectivism and individualism, positivism and idealism, nationalism and universalism. Such bias is accordingly identified as legal antinomy by Friedmann. Hence due to such legal antinomies the fundamental rights along with other core constitutional norms become vulnerable under the doctrine of necessity. It is to achieve collectivism and nationalism associate with public order and national security respectively.

⁸⁴⁹ See *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 (W.P.) Lahore 112.

⁸⁵⁰ *Ibid.*, 117-120.

the order and its grounds are in accordance with all the provision and object of M.P.O then the power of court certainly does not exist.”⁸⁵¹ Moreover the language of provisos of clause 5 and 7 of the Article 10 indicates that constitutional provisions regarding preventive detention are obstructing the writ of habeas corpus, certiorari and quo warranto, if the matter is associated with national security.⁸⁵² Yet neither the M.P.O nor the Constitution explains that who is responsible to determine the national security concerns and its threshold when personal liberty of a citizen is at stake. However the expressions “such authority” in proviso of clause 5 and “an anti-national activity as defined in a Federal law” in proviso of clause 7 of the Article 10 give an answer to this query. Since ‘a Federal law’ means here the Prevention of Anti-National Activities Act, 1974 [hereinafter P.A.N.A.A].⁸⁵³

If the above mentioned constitutional provisos are read with clause (3) of the S.8 of this Act and S.26 of the MPO, then indicate that it is a delegated magisterial and police power to determine the national security concerns. Accordingly the connotation of nation security is defined in clause (a) of the S.2 of the P.A.N.A.A, 1974 as well as in Mumtaz Bhutto

⁸⁵¹ See *Ch. Muhammad Anwar v. Government of West Pakistan*, PLD 1963 (W.P.) Lahore 109.

⁸⁵² See Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973*, 238-239: Article 10 (5) ----“ Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest”, (7)----“ Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy[or who is acting or attempting to act in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof or who commits or attempts to commit any act which amount to an anti-national activity as defined in a federal law or is a member of any association which has for its object, or which indulge in any such anti-national activity].” It seems that in the context of national security paradigm neither the writ of habeas corpus nor certiorari can be maintained which not only leads to arbitrary detention without a due process of law but also leads to executive discretions to determine a potential danger to national security. Such scenario indicates systemic constitutional lacunas with regard to personal liberties and civil rights in Pakistan.

⁸⁵³ See Farani, comp., *Minor Acts, 1001-1009: Prevention of Anti-National Activities Act, 1974* (VII of 1974).

case.⁸⁵⁴ However the use of expression such as ‘Mahaz’ and an explicit denial of socio-political and ideological heterogeneity in this definition specify a typical mindset which has been earlier discussed by Paul. It implicitly elaborates a vulnerability of egalitarians to activate a movement for civil and political rights as well as socio-political change in Pakistan.⁸⁵⁵ Since any nonconformist movement can be construed as anti-national activity due to vague connotations used in S.2 of the Prevention of Anti-National Activities Act, 1974.

Since the subject matter of the MPO 1960 is suspected persons whereas the P.A.N.A.A, 1974 is focused on the suspected organizations and associations and their members. Yet both of these special laws relating to administrative penology can be applied jointly to supplement the general crime law of Pakistan to enhance the scope of deterrence.⁸⁵⁶ However A.K. Bhrohi argues that such kind of preventive laws are often used for political

⁸⁵⁴ See *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1*, Karachi, PLD 1979 Karachi 307; Clause (a) of S.2 of Prevention of Anti- National Activities Act, 1974: “ anti- national activity” in relation to an individual or association means anything by such individual or association, where by committing an act or word, either spoken or written, or by signs or by visible representation or otherwise: (i) which is intended, or supports any claim, to bring about, on any ground Pakistan from whatsoever the secession of a part of the territory of Pakistan from the federation, or which incites any individual or group of individual about secession; (ii) which disclaims, question disrupt or is intended to disrupt the sovereignty and territorial integrity of Pakistan; (iii) which in any manner encourages or incites, or is intended is likely or tends to encourage or incite, the public or any group thereof to create, open to continue any regional front on ‘Mahaz’ of any kind based on recoil, linguistic or similar ideologies and considerations with a view to disrupting the unity of people of Pakistan ; (iv) which in any manner propagate or advocates that the citizens of Pakistan comprise more than one nationality.”

⁸⁵⁵ See Paul, *The Warrior State*, 83-88.

⁸⁵⁶ See *Sultan Mahmood Chandio v. The State*, 1995 P Cr. LJ 874 Karachi: for clubbing of Ss. 153A ,153B of the PPC, S.16of the MPO along with Ss. 2 and 13 of the Prevention of Anti National Activities Act,1974; *Perviaz v. The State*, 1995 MLD 544 Karachi: for clubbing of Ss. 121, 121 A and 122 of the PPC with S.13 of the PANAA, 1974.

victimization of opponents in Pakistan.⁸⁵⁷ Consequently probabilities of the abuse of law also exist during the process of proscribing an organization as “Anti-National”.⁸⁵⁸

It seems in this regard that mere an expression of right to form local government, provincial autonomy, civil rights movements and ideological criticism on governance can be autocratically construed as anti- national activity.⁸⁵⁹ Even specified in the preamble of this Act that reasonable restrictions on the freedom of association guaranteed under Article 17 of the Constitution of Pakistan, 1973 are intended by the Legislator. This legislative intent is also evident from the language of the said Article, when it states, “---subject to any reasonable restrictions imposed by law in the interest of [sovereignty or integrity of Pakistan, public order or morality].” Therefore word “law” in the exception of this right connotes the Prevention of Anti-National Activities Act, 1974. It appears that an accumulative impact of both these special laws is not only stringent for freedom of association but also the same for freedoms of movement and assembly.⁸⁶⁰ Since exceptions of latter two rights stipulate

⁸⁵⁷ See *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 (W.P.) Lahore 112.

⁸⁵⁸ See *The State v. Allah Bachayo*, 1980 P Cr. LJ 1170 Karachi: By simply relaying upon a police report, sanction was given to prosecute a worker of a proscribed organization named as “Sindhu Desh movement”, who was alleged to instigate Sindhi Nationalists ideology. Since evidence did not support the police report and sanction was also issued without a proper application of mind under S.16 of the Prevention of Anti-National Activities Act, 1974.

⁸⁵⁹ See *Mirza Jawad Beg v. The State*, 1981 SCMR 341: an emphasis on the local government and provincial autonomy has been wrongly construed as succession under Ss. 2 and 13 of the Prevention of Anti- National Activities Act 1974 and S. 123 A of the Pakistan Penal Code, 1860, “ The appellant had a right to express himself freely and publically on matter of Public importance, e.g. the form, structure and power of local government”-----Such an in-depth analysis for the establishment of a city government had been wrongly construed as an camouflaged intention of succession.

⁸⁶⁰ See into Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973*, 271-288: for Art.15 “Freedom of movement---, subject to any reasonable restriction imposed by law in public interest,” Art16 “Freedom of assembly---, subject to any reasonable restrictions imposed by law in the interest of public order” Art.17 “Freedom of association.”. To derogate and restrain freedom of movement, assembly and association is under the same fundamentalist perspective of public order, which believe on maximum deterrence through administrative penology to avoid anarchy. Such administrative approach believe on the centrality of power under a chain of

enforcement of S.5 of the M.P.O,⁸⁶¹ and S.144 of the Cr.P.C., respectively.⁸⁶² Moreover an identical position exists in exceptions of freedom of expression and speech through Ss. 6, 7, 8, 16 and 17 of the M.P.O.⁸⁶³ It seems that pattern and barometer to derogate all these civil

command, resultantly concepts like pluralism, public participation and public voice are not compatible as such with it.

⁸⁶¹ See into Farani, comp., *Minor Acts, 1735-1736*: for Clause (1) of Sec.5“Power to control suspected person” of The West Pakistan Maintenance of Public Order, 1960 “Government or the District Magistrate, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to public safety or public interest, or the maintenance of public order, it is necessary so to do, may be order in writing, give any one or more of the following directions, namely, that such person:---(a) shall not enter, reside or remain in any area that may be specified on the order; (b) shall reside or remain in any area that may be specified in the order; (c) shall remove himself from, and shall not return to any area that may be specified in the order; (d) shall conduct himself in such manner, abstain from such acts, as may be specified in the order; and (e) shall enter in to a bond, with or without sureties for the due observance of the directions specified in the order.-----”

⁸⁶² See *Watan Party v. Chief Minister*, 1999 P Cr.LJ 2003 Lahore; *Shah Ahmad Noorani v. Government of Punjab*, 1983 P Cr. LJ 1799 Lahore; *Mamoona Saeed v. Government of Punjab*, PLD 2007 Lahore 128: “if the petitioner holds the meeting without the permission and in violation of section 144, Cr. P.C. he is liable to be prosecuted under section 188, P.P.C defying the enforcement of section 144, Cr. P.C.”

⁸⁶³ See e.g. into Mahmood, ed., *The Constitution of Islamic Republic of Pakistan, 1973*, 308-317: Article.19 “Freedom of speech, ---subject to any reasonable restrictions imposed by law in the interest of ---integrity, security or defense of Pakistan ---public order,--.”; Farani, comp., *Minor Acts, 1736-1740*: for The West Pakistan Maintenance of Public Order, 1960: Sec.6 “ (1) Government or any authority authorized by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of public order, may, by order in writing addressed to a printer, publisher or editor--- (a) prohibit the printing or publication in any document or class of document of any matter relating to a particular subject or class or subject for a specified period, or in a particular issues of a newspaper or periodical;--(c) require that any matter relating to a particular subject or class of subject shall before publication be submitted for scrutiny:---(d) prohibit for a specified period the publication of any newspaper, periodical, leaflet, or other publication, the or use of any press.” It seems that administrative power to ascertain and scrutinize the literature as alleged to be ‘anti-national’ is not only against the freedom of expression but also arbitrary in nature. Since any fictional, scientific research or analysis can be easily construed as anti-national if relates to socio-political activism or contains a non-conformist material. Sec.7 “Power to prohibit entry in to West Pakistan of newspaper etc.....” Both of these sections seem in accordance with a total state perspective, in which administrative means are used to form and then preserve a specific ideology. Sec.8 “Power to secure reports of public meetings,--- (1) The District Magistrate may, by order in writing depute on or more Police Officer not below the rank of Head Constable, or other person to attend any public meeting for the purpose of causing a report to made of the proceedings-----” Appears not only contrary to right of privacy but also indicate a coercive method of administration to form a report with regard to detention or other preventive actions. As under Ss. 76 and 79 of the PPC, the mistake of fact has immunity from prosecution along with the powers of the state to claim privilege with regard to confidential report. Hence a secret information gained in this way may has probability of biasness and prejudice because it lacks an accountability procedure to be reexamined in the court of law. Sec16 “Dissemination of rumors etc, whoever (a) makes any speech, or (b) by word whether spoken or written or by signs or by visible or audible representations or otherwise published any statement, rumor or report, shall be punished----- if such speech, statement, rumor, or report---(i) causes or is likely to cause fear or alarm to the public or to any section of the public; (ii) further or is likely to further any activity prejudicial to public safety or the maintenance of public order.” It not only supplements Ss. 123A [condemnation of the creation of the State and its sovereignty], 124A [Sedition], 132[abetment of mutiny], 153A [promoting enmity between different groups], 154A [inducing students to political activities and violence], 504 [intentional insult with spoken words], 505 [statement conducing to public mischief] of the PPC. But also empowers the regimes to manage political dissent and confrontation through administrative

rights is the same, as based upon administrative powers to determine potential dangers to public order and national security and then enforcement of relevant laws to restrict them accordingly.⁸⁶⁴ Such restraints are usually skeptical with regard to protection against retrospective and double punishment, non-discrimination in respect of access to public places, equality of citizens and safeguards to arbitrary arrest and detention.⁸⁶⁵ It is mainly due to jurisdictional restrictions on ordinary criminal courts to review these administrative powers especially in the context of S.23 of the M.P.O and Ss.15, 16 and 17 of the Prevention of Anti-National Activities Act, 1974.⁸⁶⁶ Meanwhile no appropriate forum except the ad-hoc review board has been established to adjudicate offences under these statutes.⁸⁶⁷ Resultantly these administrative trend especially magisterial powers in the

means. Sec.17: "Possession or conveyance of prescribed or prohibited document." Since any academic writings which contain critical analysis of governance and administration as well as well as the material which may be contrary to majoritarian ideology can be construed as anti- national.; Also see in "Anti-Pakistan Literature Seized from Turbat College," *The News*, January 14, 2014, national edition: " Frontier Constabulary has recovered a large quantity of ' anti-Pakistan' literature during a raid conducted at a hostel of the Atta-Shad Degree College in the Turbat District[Baluchistan]--- it include biographies of Nehru and Gandhi." Under this scenario a philosophical and analytical study can be construed as Anti-National Material. Hence Ss. 16 and 17 is not only contrary to civil liberties but also in conflict with liberal democracy, since such possession even in academic paradigm may be construed so.

⁸⁶⁴ See *Muhammad Anwar v. Administrator City District Government*, 2013 MLD 1277 Lahore.

⁸⁶⁵ See Freda Adler, Gerhard O. Mueller and William S. Laufer, *Criminology* (New York: McGraw-Hill, Inc. 1991), 177-196: for a negative impact of labeling and stigmatization on due process of law.

⁸⁶⁶ See Farani, comp., *Minor Acts*, 1008, 1741: W.P. Maintenance of Public Order, 1960: Sec.23 "Jurisdiction barred --- no proceeding or order taken or made under this Ordinance shall be called in question in any Court---"; Prevention of Anti-National Activities Act, 1974 (VII of 1974): Sec.15 " Bar of Jurisdiction- no proceeding taken under this Ordinance ----, shall be called in question in any Court----and no injunction shall be granted by any Court or other authority in respect of any action taken -----under this Ordinance", Sec.16 " Prosecution for offences under this Act.---No Court shall take cognizance of any offence punishable under this Act except with the previous sanction of the Federal Government or a Provincial Government or an officer authorized by either Government in his behalf.", Sec.17 "Protection of Action taken in good faith—(1) No suit or other legal proceedings shall lie against the Government in respect of any loss or damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act. (2) No Suit, prosecution or other legal proceeding shall lie against the District Magistrate or any officer authorized in his behalf by the Government or the District Magistrate in respect of anything which is in good faith done or intended to be done of this Act---."

⁸⁶⁷ See *Khan Nabi Ahmad Khan v. The State*, 1971 P Cr. LJ 875 Lahore.

background of judicial ouster are declared contrary to the due process of law by court.⁸⁶⁸ As it holds, “Since ‘law’ encroaching on the liberty of citizens must be construed strictly-----Ss. 23, 24[lex specialis derogate lex generalis], 25[operation of other general and special law is not barred as the application of M.P.O, thence an ultimate outcome of such joint application of laws would be hazardous for personal and civil liberties] of the Maintenance of Public Order, 1960 are not found in accordance with the touchstone of fundamental rights as guaranteed by the constitution.”⁸⁶⁹

If such is the milieu of civil liberties exists in Pakistan, then what is the scope of civil disobedience and other means of political protest like sit ins or blocking of the roads? Hence it can be inferred from S.20 of the MPO that this kind of protest is perceived as an extreme form of violence. It indicates that all kind of unrests in the form of strikes, go-slow, sit-ins, blocking and hindrance of governmental machinery, building or property is construed as ‘sabotage.’⁸⁷⁰ It indicates that let alone civil disobedience or mass movement, even a political mobilization through mild protests is alleged as an acute law and order crises by the patriarchal administrative mindset in India and Pakistan.⁸⁷¹ Accordingly satisfactions of concerned authorities to form grounds for preventive or punitive orders are

⁸⁶⁸ See *Farooq Ejaz v. District Police Officer Khanewal*, 2010 YLR 1394 Lahore; *Gulzar Ahmad v. District Magistrate*, 1998 P Cr. LJ 1790 Lahore; *Muhammad Khan v. State, through Deputy Commissioner Nasirabad At Dera Murad Jamal and 2 others*, PLD 1985 Quetta 217; *Ch. Muhammad Anwar v. Government of West Pakistan*, PLD 1963 (W.P.) Lahore 109.

⁸⁶⁹ See *Muhammad Nadeem v. Government of Punjab, through home secretary and another*, PLD 2010 Lahore 371.

⁸⁷⁰ See into Farani, comp., *Minor Acts*, 1740: W.P. Maintenance of Public Order, 1960: Sec.20 “Sabotage... (1) No person shall do any act with intent to impair the efficiency or impede the working of or to cause damage to--- (a) any building, vehicle, machinery, apparatus or other property used, or intended to be used, for the purpose of Government or any local authority;---(d) any building or other property used in connection with production, distribution or supply of any essential commodity, any sewage works, mine or factory....”

⁸⁷¹ See Paul, *The Warrior State*, 78.

not only prejudiced to pluralistic dialect but also sublime to state violence.⁸⁷² Such culture of violence, either through political violence or through state violence engenders a pattern of human rights violation, which further depreciates the accepted moral standards of tolerance and amicable solutions of conflicts in society.⁸⁷³ Therefore court declares such administrative attitude and discretions as “exercise of naked power” contrary to civil and political liberties.”⁸⁷⁴ It seems that even the Legislature in Pakistan is intended to sustain the colonial administrative legacies through these special laws, which are focused on an instrument of violence to maintain power.⁸⁷⁵ These legislative approaches in conjunction with juridical bars have plausibly nurtured an institutional psych of executive impunity particularly in context of national security and order.⁸⁷⁶ Accordingly Subramanian argues

⁸⁷² See Faqir Hussain, *Personal Liberty and Preventive Detention* (Peshawar: University Foundation Press, 1989), 147-149, 157-159, 161-162.

⁸⁷³ See H.L.A.Hart, *Law, Liberty and Morality* (Stanford, California: Stanford University Press, 1963), 5-7, 14-19.

⁸⁷⁴ See *Nawabzada Nasrullah Khan v. The District Magistrate, Lahore and Government of West Pakistan*, PLD 1965 (W.P.) Lahore 642: While evaluating Sec.8 of the MPO [Magisterial power to secure reports of public meeting through police or any other person] court observes, “The power conferred on the district magistrate under S.8 of MPO, are not subject to any restriction. The discretion vested in him to depute any person to attend any public meeting for the purpose of causing a report to be made of the proceedings, is absolute. He is free to act under any circumstances he likes, not necessarily in the interest of public order alone, and there is no check on his power in this behalf. There is no provision in S.8 to control and regulate the exercise of this naked power enjoyed by the District Magistrate and keep it under check within reasonable limits in the interest of Public Order. As such the section is ultra vires of the Fundamental rights of freedom of peaceful assembly and movement guaranteed by the Constitution.”

⁸⁷⁵ See in Paul, *Warrior*, 78: uses the term “hybrid democracy under national security paradigm.”; Also see in Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New Delhi: Foundation Books Pvt. Ltd. Cambridge House, 2005), 195-202: argues further that all kind of resistance offered to state, its policies, and developmental projects are construed as anti-national activities under colonial mindset.

⁸⁷⁶ See in Newberg, *Judging the State*, 104-105: “[Higher Judiciary with regards to its writ prerogative] reluctant to protect natural rights, was punctilious in protecting positive rights, judging the law by its letter rather than by independent doctrine or presumed intent-----in the face of a strong executive.”; *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 (W.P.) Lahore 112: “Central Legislature has exclusive power to make laws. One such matter is preventive detention’ for reasons connected with defense, external affairs or the security of Pakistan, and persons subjected to such detention.”

that such “*politics of violence*” in totality has directional negative impact on non-derogable rights as well.⁸⁷⁷

But then whether this context illustrates a vulnerability of human rights and constitutionalism in Pakistan? Since Brohi claims that an emergence of constitutional government means a government by judges,⁸⁷⁸ if so then whether limitations on their jurisdictions constitute a dubious constitutionalism? In a response of this quest he narrates that even an upright judge being a “*man of flesh and blood*” may surrender in the face of extra judicial factors.⁸⁷⁹ Jalal locates these factors as an instrumental use of religion to achieve nationhood, excessive reliance on civil bureaucracy to maintain centrality and legitimacy and hegemony of military establishment to define national security paradigm.⁸⁸⁰ Similarly Newberg says that judiciary as an institution remains always conscious to avoid confrontation with establishment particularly in case of detention and other preventive

⁸⁷⁷ See K.G. Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* (Hyderabad: Orient Longman, 2004), quoted in K.S. Subramanian, *Political Violence and the Police in India* (New Delhi: Sage Publications India Pvt. Ltd., 2007), 35-36: use of Police violence and State atrocities to suppress dissent and to gain maximum deterrence, also identifies as politics of violence; *Farid Ahmad v. Province of East Pakistan*, PLD 1969 Dacca 961; *Darwesh Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206.

⁸⁷⁸ See A.K. Brohi, *Fundamental Law of Pakistan* (Karachi: Din Muhammadi Press, 1958), 39.

⁸⁷⁹ *Ibid.*, 39.

⁸⁸⁰ See Ayesha Jalal, *The State of Martial Rule: The origin of Pakistan's political economy of defence* (Lahore: Sange-e-Meel Publications, 1999), 278-294: in the chapter of “Accommodating the state in Pakistani society: the use of Islam as ideology” she argues that due to polarized socio-political interests, linguistic and cultural heterogeneity and economic disparity the civil and military establishment used the instrument of religion to form a statehood and nationhood. Since in classic egalitarian philosophy and constitutionalism religion does not exist in this pattern to form civil society or to form commonwealth; Also into John Rawls, *A Theory of Justice* (Delhi: Third Indian Reprint under special arrangement with Harvard Universal Press, USA, Universal Law Publishers Co. Pvt. Ltd., 2008), 216: no dialectical argument is possible in face of religion and upon theological principles. Therefore enforcement of fundamental guarantees without any qualification and restriction especially on the touchstone theological principles is not possible in an ideological state; Also in Brohi, *Fundamental law of Pakistan*, 39: For such cardinal issues he explains a difference between constitution of state and constitution of human mind, where man of “flesh and blood” ought to take rational choice out of its own “constitution”, means a constitution of survival.

measures. As on the one hand it allows political dissenters to use its forum under writ prerogatives. And on the other hand it restrains itself to rely upon supra constitutional and abstract norms such as International bill of rights and sociological jurisprudence.⁸⁸¹ Thus in a suggestive rather than authoritative manner it intends to restrict administrative powers as enshrined in these special laws.⁸⁸² Though acknowledges these powers in the collective interest⁸⁸³ judiciary under its writ jurisdiction places a condition of objectivity in formulation of administrative satisfaction to issue directives of preventive measures.⁸⁸⁴ It is

⁸⁸¹ See Newberg, *Judging*, 105-106, 171-199: while discussing the revival of doctrine of necessity during Zia era writer portrays the restrained judicial business as “Silencing Courts, Muting Justice.”

⁸⁸² *Ibid.*, 101-104: argues that while confronting a legal antinomy between doctrine of public order and individual’s right, higher judiciary was itself in deep trouble. Being conscious not to confront military regime it gave a “mix bag” of conflicting judgments about these two paradigms; also see in *Nawabzada Nasrullah Khan v. The District Magistrate, Lahore and the Government of West Pakistan*, PLD 1965 (W.P.) Lahore 642: This judgment as a perfect example of Newberg’s “mix bag” while on one hand court admits the significance of collective public interest and order along with the notion of state sovereignty. And on other hand it also admits the sanctity of civil liberties. It seems that both of the paradigm are equally important for judiciary, resultantly it intends to strike a balance between both of them. For such presumed balance judiciary formulates a mechanism of due care, application of mind and reasonability of ground.

⁸⁸³ See W. Friedmann, *Legal Theory* (New Delhi: Fifth Indian edition by the arrangements with Sweet & Maxwell, Universal Law Publishing Co. Pvt. Ltd., 2008), 96-97: it seems that being a core “*problem of natural law*” a legal antinomy of collective interest and public order has a priority over personal liberty in Pakistan. Resultantly a priori of national security and order would always prevail while judiciary adjudicates an alleged prejudicial activity of a suspected person. “The growing supremacy of the nation State, on the one hand, and the growth of collective discipline on the other, has not favored natural law ideology.”; Also see in Sen, *The Idea of Justice*, 366-370, 376-377: for a relevancy of supremacy of national security interests and collective interests over personal liberty especially during crisis.; *Mumtaz Ali Bhutto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307: however court observes that during such kind of crisis, a relevancy of national security means a “strong and arbitrary Government”. Court further refers an Article “Crisis Legislation in Great Britain” by Cecil Carr which states that, “in the eternal dispute between Government and Liberty crisis means more Government and less liberty.”

⁸⁸⁴ See *Muhammad Nadeem v. Government of Punjab, through home secretary*, PLD 2010 Lahore 371: to achieve reasonability in administrative measures, court emphasizes on the objective satisfaction of authority in accordance with the rationales of statute, rather than subjective whims of administrative agency to form the grounds of directives. For such purpose court issues the following directions, “ (1): The court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention [along with other preventive measures]. (2): That satisfaction should be established with regard to each of the grounds of detention [and other preventive actions], and if one of the grounds is shown to be bad, non-existent or irrelevant, the whole order of detention would be rendered invalid. (3): initial burden lies on the authorities to show the legality of [action]. (4): The authorities must place the whole material upon which the [preventive] order is based before the court. Notwithstanding the claim of privilege with respect to any document, the validity of which claim shall be within the competence of the court to decide. (5): The Court has to be satisfied that the order of [preventive action] was made by the authority, prescribed in the law relating to preventive detention. (6): Each of requirements of law, relating to such actions should be strictly adhered to and complied. (7):

mainly to neutralize the punitive impact of these preventive measures,⁸⁸⁵ under a corrective process of the court of law.⁸⁸⁶ Since the ‘Austinian’ judiciary in Pakistan⁸⁸⁷ is align with objects and reasons of preventive laws,⁸⁸⁸ but whether such laws are intrinsically capable to accomplish their intended objects?⁸⁸⁹

The internal capacity of preventive laws to mold the behaviors of targeted group is recognized by judiciary and jurisprudence as ‘*locus penitentiae*.’⁸⁹⁰ As has been observed

‘Satisfaction’ in fact existed with regard to the necessity of preventive detention [and intended restrains] of the person. (8): Grounds of detention [along with other preventive measures] had been furnished within the period prescribed by law and if no such period is prescribed then ‘as soon as possible’. (9): Grounds of [orders] should not be vague and indefinite and should be comprehensive enough to enable the person to make representation against [them] to authority prescribed by law. (10): Grounds should not be irrelevant to the aim and objective of this law. Detention [along with other stringent actions] should not be for extraneous consideration or for purpose which may be attached on grounds of malice.”

⁸⁸⁵ See *Muhammad Amin v. Province of Sindh through the secretary, home department*, PLD 1976 Karachi 306: There is a quite contact between preventive and punitive detention, since the latter is about a futuristic probability the latter is about a wrong done in past. Therefore sentence of a suspected person must be based on solid legal evidence; it must not be based upon a presumed probability of a prejudicial act.

⁸⁸⁶ See *Gulzar Ahmad v. District Magistrate*, 1998 P Cr.LJ 1790 Lahore: “--- illegal orders of authority can be subjected to corrective process of a Court---.”

⁸⁸⁷ See *Muhammad Daud v. The State*, PLD 2006 Peshawar 74: implicitly indicates that especially the trial courts in Pakistan are only meant to apply the law correctly in accordance with its letter and spirit, without questioning its justness. Hence being a delegate of sovereign district judiciary acts identical to any other bureaucrat in Pakistan.

⁸⁸⁸ See Roger Cotterrel, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: LexisNexis Butterworths Tolley, U.K. Ltd., 2003), 25-31, 40-45, 70-72: Contrary to a theoretical concept of common law judiciary, under which it is a living oracle, represents the maturity of its respective community. The judicial organ of Pakistan being a mere delegate of sovereign under Austin’s perspective of sovereignty is only supposed to evaluate the application of a statutes according to its vires. Like any other bureaucrat judicial officers usually restrict themselves in accordance with the prescribed rules. Instead of relying upon an abstract notion of equity and justice, they prefer to apply the law in its literal and positivist sense. Hence in case of MPO, 1960 and Prevention of Anti-National Activities Act, 1974 court does not inquire about the constitutionality of its objects and reasoning rather it restrict itself to inquire about the application of law in accordance with its vires.

⁸⁸⁹ See Zaka, ed., *Drafting and Assessing Legislation*, 74-86: in accordance with the qualitative legislative theory of ROCCIP[Rule, Opportunity, Capacity, Communication, Interest, Process, Ideology of Bills and Acts] model, it is intended to find out the inherent capacity of law to mend the behaviors of the target group. Here capacity stands for the internal ability of laws and process stands for the internal ability of relevant implementing agency, which in these special laws are the delegated powers of District Magistrate and Superintendent of Police.

⁸⁹⁰ See *Inayatullah Khan Mashriqi v. The Crown*, PLD 1952 Lahore 331 and *Syed Sibte Hassan v. The Crown*, PLD 1954 Lahore 142, quoted in *Mumtaz Ali Bhatti v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307.

by court, “Therefore there is a need to afford to the detenu a ‘*locus penitentiae*,’ because the detention may have had the salutary effect of curbing his inclination to indulge in prejudicial activities.”⁸⁹¹ Yet an arbitrary and undue detention under clause (5-f) of the S.3 of the M.P.O and S.10 of the P.A.N.A.A. refutes such probability.⁸⁹²It seems that instead of a preventive or curative notion these laws carry a deterrent effect of retributive penology with an absolute reliance on executive arm. Hence court observes, “Before the executive can claim power to override the rights of the subject, it must show that the Legislature has empowered it to do so.”⁸⁹³ Therefore intent and wording of these statutes indicate that Legislature has fully empowered the executive with indemnity in this regard.⁸⁹⁴Such empowerment is indeed capable to bring deterrence, but not able to recognize or mold ideological deviance.⁸⁹⁵

⁸⁹¹ See *Mumtaz Ali Bhatto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307.

⁸⁹² See into Frani, comp., *Minor Acts*, 1003-1007, 1733-1734: Sec.10 of the Prevention of Anti-National Activities Act, 1974 “Penalty for being member of an anti-national association--- whosoever is and continues to be a member of an association declared anti-national by a notification issued under S.3[Declaration of an association as anti-national] -----shall be punishable with imprisonment for a term which may extend to two years” , S.3 (5-f): of the W.P. Maintenance of Public Order, 1960 “-- Government may, ---continue to detain him for such period as it may deem fit.”

⁸⁹³ See *P.K. Tare v. Emperor*, AIR 1943 Nag. 26, quoted in *Mumtaz Ali Bhatto v. The Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307.

⁸⁹⁴ See Julius Stone, *Human Law & Human Justice* (New Delhi: Second Indian Reprint by arrangement with Sweet & Maxwell Ltd., U.K., Universal Law Publishing Co. Pvt. Ltd., 2004), 245-247: “To meet the purpose conformity through administrative actions a probability of demise of justice usually exists. As according to Legislative intent in this paradigm, law must be applied to achieve the purpose even if it is unjust.”

⁸⁹⁵ See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New Delhi: Foundation Books Pvt. Ltd. Cambridge House, 2005), 177-182: argues that rhetoric of public order and security laws emerges mainly out of a fear of mass movement and resistance philosophy. Then laws drafted with such intent are usually unable to recognize or engage the sociopolitical unrests and ideological deviance; Roy, *Listening to Grass-hopper*, 36-37: “POTA [The Prevention of Terrorism Act, 2002, Act no 15 of 2002, of India] is the broad spectrum antibiotic for the disease of dissent.”; Jason Franks, *Rethinking the Roots of Terrorism* (Hampshire: Palgrave Macmillan, Ltd., 2006), 59: “The obsession with State security causes the State preoccupation with the pursuit of Power.”

However the question is that while Legislature enunciated special laws and subsequent qualifiers in fundamental guarantees, whether it was equally conscious to avoid confrontation with such a static and autocratic notion of national security? Sen in this regard says that natural rights always coincide with time and space. Consequently respective societies prioritize them in accordance with their own rational choice for existence, hence these abstract rights cannot be declared as absolute.⁸⁹⁶ Since the main criteria for such prioritization is the relevance and weightage of the liberty behind each of such right with a particular society.⁸⁹⁷

Such relativity and qualification has also been discussed by Sharma and Hussain who narrate that Legislatures of India and Pakistan were intended to draw equilibrium between personal liberty and national security. It was mainly due to the horrific experience of communal violence associated with the partition of both the countries in 1947. Thence they installed the qualifier of public order and national security in personal and civil liberties to avoid a probability of high threshold of anarchy and violence.⁸⁹⁸ Though it is evident that Legislature is intended to qualify personal and civil liberties, but then what about jus cogens norms such as right to life, protection against torture and inhuman treatment? Whether they can be compromised as well in the face of national security paradigm?

⁸⁹⁶ See into Sen, *The Idea of Justice*, 357-365.

⁸⁹⁷ *Ibid.*, 366-370.

⁸⁹⁸ See B.R. Sharma, *Constitutional Law and Judicial Activism* (New Delhi: Ashish Publishing House, 1990), 4-6, 23-24; Hussain, *Personal Liberty*, 284- 286.

Sen deals this issue in a different connotation; he links the protection of core human rights with procedure and capacity of State's substantial intuitions like executive and judiciary. Subsequently if an institution does not have a capacity or its procedure is inadequate with a prioritized right then such prioritization would prove to be a futile exercise. As institutional justice and procedural fairness are correlated to enforcement and protection of non-derogable rights, so their vulnerability engenders the vulnerability of later.⁸⁹⁹

This milieu indicates that on one hand Legislature has given a priority to national security and collective order over personal liberty and other civil rights. And on other hand neither the executive arm has prioritized nor did the judicial organ capitalize its judicial power to uphold a presumed absoluteness of the jus cogens norms in Pakistan.⁹⁰⁰ It is apparent from a writ petition about a controversial killing and wrongful confinement of few suspected persons. As they had been allegedly detained and then killed by law enforcement agencies including armed forces.⁹⁰¹ Since this operation was neither in aid of civil power nor in wake of counter- terrorism action. On the other hand police claimed that during a raid against suspected dacoits, deceased had received bullet injuries amid police encounter. However court was not only incapable to find out the factual position but was also unable to take cognizance against the alleged officers of the army. Since even the law itself gives

⁸⁹⁹ See into Sen, *The Idea of Justice*, 370- 371.

⁹⁰⁰ See Colm Campbell, "Beyond Radicalization: Towards an Integrated Anti- Violence Rule of Law Strategy," in *Counter-Terrorism: International Law and Practice*, eds., Ana Maria Salinas De Frias, et al. (Great Clarendon Street, Oxford: Oxford University Press, 2012), 260: "---Legislation was frequently drafted to be 'catch- all' and judge-proof.' It cast the net wide to include all possible suspects even if innocent people were also caught up; and it aimed to limit the potential for judicial interference, typically by excluding 'reasonableness' requirement in security powers."

⁹⁰¹ See *Mohabat v. The S.S.P Sukheer and others*, 2001 P Cr. LJ 465 Karachi.

them an immunity against such cognizance of the court under S.139 of the P.P.C in conjunction with clause (3) of the Article 199.⁹⁰² It seems that S.139 of the P.P.C has a potential to knockdown the operation of clause (1) and (2) of the Article 199 of the Constitution. This scenario depicts not only a vulnerability of core human rights protections but also portrays a skeptical constitutionalism in Pakistan, because often law enforcement and counter terrorism and counter insurgency operations contain same kind of controversial claims.⁹⁰³ Therefore court observes in this context, “The exercise of constitutional jurisdiction in the matter where factual controversies are involved between the parties would not be justified----- in this situation constitutional petition is not a suitable remedy.”⁹⁰⁴ Therefore on the one hand court acknowledges its inability to find out a factual position during law enforcement operations. And on the other does not even guide to an appropriate forum in this regard. This judicial position not only indicates a legal vacuum where core human right violations may occur but also indicates the occurrence of executive impunities during such operations.

Similarly another writ petition indicates the feebleness of judiciary to cure the stringent administrative measures taken in the wake of internal disturbances in the then East

⁹⁰² See Shaukat, eds., *The Pakistan Penal Code*, 415: “[Sec.139 “No Person subject to the Pakistan Army Act, 1952 (XXXIX of 1952), the Pakistan Air Force Act, 1953 (VI of 1953), or the Pakistan Navy Ordinance, 1961 (XXXV of 1961), is subject to punishment under this Code for any of the offences defined in this Chapter]”; Mahmood, ed. *The Constitution of Islamic Republic of Pakistan, 1973*, 733: Such confluence also gives a rationale of S.2 (d) of The Army Act 1952 to adjudicate civilians by military tribunals, who otherwise are not in the ambit of such tribunals. However this special law will be analyzed in Part: II of this chapter.

⁹⁰³ See Vijendra Singh Jafa, “*Insurgencies in North- East India: Dimensions of Discord and Containment*,” in *Responding to Terrorism in South Asia*, ed. S.D. Muni (New Delhi: Manohar Publishers & Distributers, 2006), 95-99, 102-104.

⁹⁰⁴ See *Mohabat v. The S.S.P Sukheer and others*, 2001 P Cr. LJ 465 Karachi.

Pakistan.⁹⁰⁵ Along with its incapacity to determine the intensity of the force used against protesters and violators of the curfew which had been imposed in accordance with magisterial directives under S.144 of the Cr.P.C.

Such judicial restraints and incapacities at lower and Apex level to probe out intensity and objectivity of the use of force provide a rationale of administrative discretions which make executive almost unaccountable. It is especially when disproportionally or non-compliance of doctrine of distinction occurs during siege, search, cordoning off, armed encounter and arrest. This study argues that even armed insurrection and secession of the then east wing could be avoided if judiciary had been able to examine the allegations of human rights abuses amid police and military operation. Since writ jurisdictions and original jurisdiction of Apex court to dispense complete justice in the matters of public importance could provide a forum to political dissenters, where they would had express their anguish against regime and seek human rights protections.⁹⁰⁶ Yet a restrained judiciary maintains the Hobbesian perspective of statehood in Pakistan and declares, “Absolute and unrestricted individual rights do not exist in any modern state and there is no such thing as absolute and uncontrolled liberty. The collective interests of the society, peace and security of the State and the maintenance of public order are of vital importance in any organized society. Fundamental rights

⁹⁰⁵ See *Farid Ahmad v. Province of East Pakistan*, PLD 1969 Dacca 961.

⁹⁰⁶ See Ronald Dworkin, *Taking Rights Seriously* (Delhi: Fourth Indian Reprint under special arrangement with Harvard University Press, Universal Law Publishing Co. Pvt. Ltd., 2008), 83, 210-212, 216; Yahya Bakhtiar, *In Re: Trial of Pakistani Prisoners of War: Pakistan v. India* (Lahore: All Pakistan Decisions, 1973), 2-106: A free and independent judiciary under its writ jurisdiction acts as a “strong box” to neutralize the anguish and resentment of dissenters. It is especially in hard cases where rules are unable to cater the agony; hence for such purpose core principles of natural law give validity to these novel judgments. Similarly this Strong Box under natural law paradigm could be used to avoid operation Searchlight, 1971 in the then East Pakistan, which had been alleged as a Genocide of the Bengalis by a separatist organization “Mukti Bahini”.

have no real meaning if the State itself is in danger and disorganized. If it is in danger the liberties of the subject are themselves in danger. It is for these reason of State that an equilibrium has to be maintained between the two contending interests and at stake: one the individual liberties and positive rights of the citizen which are declared by the constitution to be fundamental and other the need to impose social control and reasonable limitations on the enjoyment of those rights in the interest of the collective good of the society.”⁹⁰⁷

Such restrictions on fundamental rights and judicial review for common good, just cause and public order even in liberal democracy have also been advocated by Finnis.⁹⁰⁸ Yet like Rawlsian ‘*procedural fairness*’ this ‘*practical reasonableness*’ contains a barometer of equality and rule of law to avoid mass injustice or sense of relative deprivation in society.⁹⁰⁹ Finnes argues further that even rule of law and constitutionalism can be compromised momentarily to save the common good, but it too contains an insulator of trust based statesmanship to find out a collective way-forward.⁹¹⁰ However this kind of justification cannot be advocated in a totalitarian society which does not believe on a pluralistic or conflict model of social order.⁹¹¹ Neither such perspective of common good would be efficacious in under-governed areas, where socio-political and economic deprivations may transform in to political cum criminal violence.⁹¹² In this paradigm

⁹⁰⁷ See *Nawabzada Nasrullah Khan v. The District Magistrate, Lahore*, PLD 1965 (W.P.) Lahore 642.

⁹⁰⁸ See John Finnis, *Natural Law & Natural Rights* (New York: Oxford University Press, 2011), 213.

⁹⁰⁹ *Ibid.*, 100-127, 155-156; Also see in Rawls, *A Theory of Justice*, 504-505, 511, 565-566.

⁹¹⁰ See Finnis, *Natural law*, 273-275.

⁹¹¹ See Ayesha Siddiqa, “*Terrorism in South Asia*,” in *Responding to Terrorism in South Asia*, ed. S.D. Muni (New Delhi: Manohar Publishers & Distributers, 2006), 336, 341, 343; Rawls, *Justice*, 61-63, 336-337, 388; Schmallegger, *Criminology Today*, 360-369.

⁹¹² See Jennifer M. Hazen, “Understanding gangs as armed Groups,” *International Review of the Red Cross* 92, no. 878 (2010): 369-386: argues that in areas of “high poverty, discrimination and marginalization” are

masses are commonly skeptical about administration and administrative measures.⁹¹³ As Peters argues that establishments which lack the trust of public usually resort to high level of administrative means to establish its writ.⁹¹⁴

The above mentioned analysis of legislations and case laws indicates that the administrative satisfaction to measure practical reasonableness for common good lacks the core criteria of equality in Pakistan.⁹¹⁵ It is mainly due to administrative discretions and legally protected executive indemnity which transform all such measure as highly autocratic in Pakistan.⁹¹⁶ Especially in an absence of democratic practices and trust based statesmanship which has been identified by Sayeed as ‘*constitutional aristocracy*’.⁹¹⁷ It seems in this context that police and district administration enjoys a protection of law in the wake of a ‘purported exercise of their power’ especially during maintenance of public order.⁹¹⁸ Besides a public order and security domain, study also considers the Control of Narcotic Substance Act, 1997 to evaluate the stringency of administrative penology and

contributing factors to provoke deviance and resentment. And if these factors remain unaddressed then such indigenous deprivation transforms in to anti- social and anti-state unrest and violence.

⁹¹³ See B. Guy Peters, *The Politics of Bureaucracy* (New York: Longman Inc, 1984), 45.

⁹¹⁴ *Ibid.*, 51-59.

⁹¹⁵ See in Rawls, *Justice: Socio-political inequalities emerge*, “when society is regulated by principles favoring narrow class interest.”

⁹¹⁶ See Hamza Alavi, “*Authoritarianism and Legitimation of State Power*,” in *The Post- Colonial State in Asia: Dialectics of Politics and Culture*, ed. Surata Kumar Mitra (Lahore: Sange-e-Meel Publications, 1998), 42-43, 51-53: Establishment in Pakistan is based upon a Military- Bureaucratic Oligarchy; Kirpal Dhillon, *Police and Politics in India: Colonial Concepts, Democratic Compulsions: Indian Police 1947-2002* (New Delhi: Manohar Publishers & Distributers, 2005), 486-488, 495-498, 509, 513.

⁹¹⁷ See Sayeed, *The Political System of Pakistan*, 101-127.

⁹¹⁸ See *Malik Ghulam Sabir and another v. Qazi Rehmatullah*, 1991 SCMR 1261; *Muhammad Abbas v. The State*, PLD 1981 SC 642; *Mir Hazar v. The State*, 2002 P Cr. LJ 270; Quetta; *Ata Muhammad v. Crown*, PLD 1951 Lahore 279.

police powers in Pakistan.⁹¹⁹ This special law is highly concentrated on police power as even a complaint and witness of police is sufficient to frame charges under its ambit, which further places an embargo on judicial bail of the accused.⁹²⁰ Moreover a complete detachment from the doctrine of ‘innocent until proven guilty’ indicates a harshness of deterrent theory in Pakistan.⁹²¹ Such prospects of criminal laws of Pakistan are potentially hazardous for positive rights of citizens as guaranteed under constitution.⁹²²

This study indicates that general and special laws relating to public order and security not only represent a colonial continuity but also indicate an incompatibility with due process of law as enshrined in contractual scheme of constitution.⁹²³ Then owing to such incompatibility and static notion its corpus and relevant implementing agencies are also

⁹¹⁹ See into Farani, Comp., *Minor Acts*, 269-306: for Control of Narcotic Substances Act, 1997 (Act XXX of 1997), Sec. 21 “Power of Entry, search, seizure and arrest without warrant,” Sec.22 “Power to seizure and arrest in public places,” Sec.23 “Power to stop and search conveyance,” Sec.24 “undercover and controlled delivery operations,” Sec.28 “ Power to invest officers of law enforcement agencies with powers of an officer-in –charge of a police-station [SHO powers],” Sec.75 “indemnity.”

⁹²⁰ See e.g. into *Syed Riaz Hussain Shah and another v. The State*, 2015 P Cr. LJ 300 Sindh: “--the special law of Control of Narcotic Substance, 1997 would prevail over general law.”; *Gul Zaman v. The State*, 2014 P Cr. LJ 622 Sindh: “Police witnesses are as good and competent as of public to prove the guilt.”; *Dost Muhammad v. The State*, 2011 YLR 268 Karachi: “Police being a competent complainant under this Act.”; *Saiful haq v. The State*, 2012 YLR 413 Sindh: “ accused under this Act is not entitled for bail as in accordance with S.497 of the Cr.P.C.”; *The State v. Abdul Hameed*, 2015 YLR 568 Balochistan : “ CNS,1997 places an embargo on bail under Ss. 497 and 498 of the Cr.P.C.”; *Abdul Qadeer v. The State*, 2015 MLD 499 Balochistan.

⁹²¹ See into Farani, Comp., *Minor Acts*, 269-306: Sec.29 of the CNS Act, 1997 : “ Presumption from possession of illicit articles--- in trials under this Act, it may be presumed, unless and until the contrary is proved that the accused has committed an offence under this Act---”; *Ahmad Gul v. The State*, 2015 MLD 507 Peshawar; *Muhammad Daud v. The State*, PLD 2006 Peshawar 74: “arrest, seizure and recovery are sufficient to prove guilt.” It seems that Trial courts in Pakistan are only supposed to do a correct application of law, irrespective of its harshness or unjust effects; *Iqbal Khan v. The State*, 2006 P Cr. LJ 846 Peshawar: Study argues that such aberrancy from a settled common law norm of presumption of innocence lead to a harsh treatment of law. Since this Act empowers the police to coercive and manipulate the facts in an absences of judicial scrutiny. As seizure and recovery are sufficient to prove guilt, besides both of these factors are under the competence of police to manipulate. Therefore police has a virtual discretion in this regard especially in a presence of indemnity and absence of judicial scrutiny.

⁹²² See *Ismail Khan v. Kamran Ali Afzal*, 1998 MLD 1340 Peshawar.

⁹²³ See Mahmood, ed. *The Constitution of Islamic Republic of Pakistan, 1973*, 166-197: Article.4.

indifferent to vibrancy of civil society and civil liberties. Resultantly socio-political resentments of citizens are usually misperceived by government, when it attempts to manage them administratively.⁹²⁴ It seems evident from the case study of a contemporary yet contentious civil disobedience movement of two political parties under public order paradigm in Pakistan.⁹²⁵

⁹²⁴ See Pound, *The Ideal Element*, 90-102.

⁹²⁵ See e.g. into Zahir Shah Sherazi, "TTP Claims attack on Karachi Airport." *Dawn News*, June 9, 2014, national edition; ISPR, "Press Release: PR 124/2014-ISPR," last modified June 15, 2014, Inter Services Public Relations, [http://ispr.gov.pk/Press release/15/6/14/](http://ispr.gov.pk/Press%20release/15/6/14/); *Kal Tuk, Javeed Chaudhry Kay Sath*. Urdu. Produced, Express T.V. Network, August, 25, 2014 Performed, Javeed Chaudry; Ali Hazrat Bacha, "PML-N likely to protest PTI, PAT sit-ins." *Dawn News*, August 21, 2014, national edition; The Express Tribune, "Islamabad sit-in updates: Kaira not Khursheed acceptable for talks committee, says Imran." *The Express Tribune*, August 20, 2014, international edition; The Newspaper Staff Reporter, "Model Town Incident: Govt Seems to be protecting the guilty: LHC." *Dawn News*, February 19, 2015, national edition; Imran Gabol, "Model Town JIT gives clean chit to Shahbaz, Sanaullah." *Dawn News*, May 21, 2015, national edition; ISPR, "Notification," last modified August 28, 2014, Inter Services Public Relations, <http://ispr.gov.pk/notification/28/8/14/>; Wikipedia the free encyclopedia online, "Azadi March," accessed June 20, 2015, http://en.wikipedia.org/wiki/Azadi_March; *Gohar Nawaz Sindhu v. Province of Punjab*, 2014 CLC 1558 Lahore; *Muhammad Kamran v. Federation of Pakistan*, 2014 CLC 1549 Lahore; *Kamran Murtaza v. Federation of Pakistan*, 2014 SCMR 1667; *M/S Attock Petroleum Ltd Rawalpindi v. Additional Commissioner Inland Revenue*, W.P. NO. 3635 OF 2014, Islamabad High Court; *M/S Sh. Ahsan-ud-Din v. Ministry of Defence and others*, W.P. No. 3642 of 2014, Islamabad High Court:

"After general elections of 2013 in Pakistan, an emerging political party Pakistan Tehrike Insaf [hereinafter PTI] expressed serious reservations on the results of the polls and called for vote audit in 4 constituencies of Punjab. PTI chief contended that a systematic rigging took place in 2013 elections and the mandate of the people was stolen. Mr. Khan held the interim government responsible for the rigging. On **22 April 2014**, PTI officially started its anti-rigging movement, when they started to hold rallies and processions in various cities of Pakistan before announcing their plans for the long march. Likewise in the middle of April, 2014 another religious oriented political party Pakistan Awami Tehrike[hereinafter PAT] announced an antigovernment political move against inflation and maladministration by the name of green revolution on **23-6-2014**. This green revolution was aimed at constitutional reforms and a pragmatic enforcement of civil and political rights in Pakistan. In this political scenario, the government of Pakistan launched a military operation against the various militant groups on **15th June, 2014**, by the name of Zarb- e -Azab. It was aimed at destroying and dismantling the alleged network of militancy in the North Waziristan, mainly in retaliation of the atrocities committed by Tehrieke Taliban Pakistan[hereinafter TTP]. Since militants belonging to this banned outfit attacked Karachi Airport on **08-June-2014** as a part of their sporadic acts of terrorism in the settled areas of Pakistan. Resultantly the Federal government in consultation with all political parties and Armed forces decided to resort this massive counter insurgency operation. On 15 June, 2015, the government of Pakistan launched a military operation against the various militant groups, by the name of Zarb- e -Azb. It was aimed at destroying and dismantling the alleged network of militancy in the North Waziristan, mainly in retaliation of the atrocities committed by Tehrieke Taliban Pakistan[hereinafter TTP]. Since militants belonging to this banned outfit attacked Karachi Airport on **08-June-2014** as a part of their sporadic act of terrorism in the settled areas of Pakistan. Resultantly the Federal government in consultation with all political parties and Armed forces decided to resort this massive counter insurgency operation. Yet in this milieu of a national

consensus on counter terrorism, a pre-dawn police operation took place to remove public nuisance on of **17 June, 2014** in the secretariat of Minhaj-ul-Quran at Model Town Lahore. Subsequently 10 to 14 workers of Minhaj-ul-Qura including 2 women died due to tear gas shelling and straight firing. According to a news report 14 males and 2 females' workers of the Pakistan Awami Tehrike[hereinafter PAT] died and almost 90 others were injured, since all of them were unarmed. On a trivial issue of removing security barricades located outside of the residence of Dr. Tahir ul Qadri, leader of Pakistan Awami Tehrike[hereinafter PAT] and Minhaj University, the Punjab police raided the premises in the middle of the night. The police used baton charges, tear gas (assault, battery) and even resorted to the extreme action of straight firing. While the Punjab Assembly was in session on the same day, the Law Minister of the Punjab government Mr. Rana Sana ullah justified this law enforcement action on the floor of the house. Due to immense pressure from media and the PAT, the Chief Minister of Punjab Shehbaz Sharif removed his principal secretary dr. tauqir shah and Mr. Sanaullah from their offices on **20th June, 2014** and formed a judicial commission to inquire about the incident. While refusing to be the part of such inquiry, PAT did not recognize these official efforts and demanded the resignation of CM Punjab too. Since PAT leader Tahir ul Qadri alleged that Shehbaz Sharif and Nawaz Sharif (Prime Minister of Pakistan) were directly involved in the model town tragedy and should be held accountable. However both the Federal and Punjab governments refuted the allegations leveled by Mr. Qadri. On **July 24, 2014** Article 245 was invoked by the Interior Ministry on the request of the Commissioner Islamabad and the Commissioner issued official notification stating that army had been called in aid of the civil power under the Article 245 of the constitution. While addressing a public gathering at Minhaj ul Quran Secretariat Tahir ul Qadri decided to retaliate against the government on **05-08-2014**. Such announcement was in the background of a judicial and administrative failure to investigate the alleged police brutality and use of excessive force in Model town police operation. On **10-8-2014** mourning procession and gathering was held in the Minhaj Secretariat Lahore, which again met police highhandedness. Since police had virtually cordoned off the entire surrounding of the Minhaj Secretariat by containers and other barricades. The Punjab government placed containers on the entry and exit points of the province to curtail the movement of the protestors who were coming from different parts of the country. On **13.08.2014** the Lahore High Court ordered the government to remove the containers as the right to movement of citizens is violated through this measure. While court observed that peaceful protest is the right of every citizen under parliamentary democracy. On **14.08.2014**, PAT and PTI started their long march and gave sit inn in Islamabad on the midnight of 15.08.14 to 16.08.14. Although the two protests neither fully merged nor did the leaders of the two parties denied supporting each other. Yet it was an informal alliance between PAT and PTI during the journey of the long march. In the face of such mass protest a judicial commission was constituted on 16-08-2014 to investigate that whether P.M. Nawaz, C.M.Punjab Shabaz , Chief Secretary Punjab and other 22 high ups were involved in the Model Town. As the pressure created by the protests was immense and the government were trying to satisfy PAT regarding the investigation of the Model town incident. This Commission was entrusted with the duty to determine those officials who were responsible for the Model Town incident. In the meanwhile PAT went to court for the registration of FIR under 22-A of the Cr.P.C.[judicial power of justice of peace]. In this response Mr. Safdar Bhatti the Sessions Judge of Lahore ordered the police on **17.08.2014** to register an F.I.R. against the allegedly responsible officials, as nominated by PAT in the context of Model Town incident. On the evening of the same day at 9 pm, the leader of PAT Dr. Tahir ul Qadri demanded for constitutional reforms, a new social contract and an action against those responsible for the incident that took place in Model Town. On the other hand the chairman of PTI Imran Khan along with other leadership of the party announced a peaceful indirect civil disobedience movement on **17-08-2014**. He requested the people to become part of this civil disobedience campaign by refusing to pay utility bills like gas, electricity, water, tax and GST. He contended that the reason behind this civil disobedience was massive scale rigging in 2013 polls, poor governance, corruption and nepotism of the Nawaz regime. PTI announced a sit in protest as a part of its civil disobedience movement and demanded the resignation of the Prime Minister and ensuing electoral reforms. The call for civil disobedience was a political ploy but it had a technical defect which was that PTI did not resign from the Federal and Provincial Assemblies and yet were launching such a protest movement. The Federal Interior Minister Chaudary Nisar Ali Khan declared such political move as an offence against state and said in its response "the civil disobedience was not against government but it was against the State". Other federal ministers also reacted to

this movement by maintaining that civil disobedience was tantamount to treason. However to defuse the situation two separate committees were constituted by the government to negotiate with these two protesting parties. On **18.8.2014**, PTI announced resignations from the National Assembly and all Provincial Assemblies except the Khyber Pahtunkhawa Assembly where PTI was in government. On the same day PTI and PAT decided to shift their sit in from Kashmir highway to Constitutional Avenue in front of the Parliament house, in spite of the fact that government has invoked S.144 of the Cr.P.C to manage a probable danger to public order. Therefore the leadership and protestors of both the parties had disregarded the law which was in force at that time and subsequently became the participant of unlawful assembly. On **19-08-2014** an ISPR press release stated that on the direction of the government army had been deployed in the red zone for the protection of vital national assets like Parliament, Supreme Court, Presidency, Prime Minister Secretariat along with diplomatic Enclave and other strategic Buildings. Therefore Article 245 of the constitution along with Ss.129-131 provides the government a tool to protect the legitimacy and sovereignty of the State. On the same day government formed two separate committees to negotiate separately with PTI and PAT. However the talks with the committees did not prove to be fruitful as the two parties stuck to their demand of resignation of prime minister. As a result the negotiations could not move in a positive direction .On **20.08.14** at about 2-3pm PAT sit in reached the constitutional avenue and PAT leader Tahir ul Qadri demanded for a new social contract for social justice, for constitutional reforms and asked for the creation of a national government. In response to the PTI and PAT protests and sit ins, the ruling party PML (N) showed its street power and support by holding public rallies (with the name of Tehreek e Istihqam) in Faisalabad on **24.08.2014** and in Lahore on **25.08.14**. These rallies caused further polarization and the political temperature in Pakistan started simmering. On **25.08.14** in response to a writ petition of public importance under Article 184(3), the Supreme Court of Pakistan directed to invoke Article 190 of the Constitution. It also subsequently directed the civilian power to remove the protestors from the constitution Avenue as they were causing an obstruction to functioning of important state institutions. This order created confusion in an already tense and polarized atmosphere, and the law enforcement authorities were not in a comfortable position to decide how to remove the protestors from the constitution Avenue, as use of force could have disastrous consequences. As from fundamentalist perspective of public order State is an amoral, ruthless institution, whereas human rights are based on morality. On **28.08.2014** an F.I.R. was launched by PAT in Faisal Town police station in Lahore against 21 persons including the Prime Minister, Chief Minister Punjab, Provincial Ministers, senior police officers and other important officials, apparently it was under a pressure of PAT's sit in in Islamabad. Ss.302, 324,148,149,109, 427[mischief causing damage to property], 395[punishment for dacoits], 506[criminal intimidation], of the P.P.C. were included in this *FIR(No, 696/14)*. However PAT leader Tahir ul Qadri refused to acknowledge this FIR as it did not include section 7 of Anti-Terrorism Act, 1997. This FIR was lodged after the meeting of Prime Minister with the COAS General Raheel Sharif, as PAT's leader Tahir ul Qadri announced in public that the army Chief, General Raheel Sharif became a guarantor and mediator at the request of the Prime Minister to negotiate with the protestors of sit in in Islamabad. On the same day PTI leader Imran Khan also announced that General Raheel became a guarantor/mediator to negotiate with the protestors at the request of the Prime Minister. Whereas Federal Interior Minister announced that the Prime Minister has requested the army chief to act as a mediator to break the ongoing deadlock between government and the two protesting parties. Thus the political government failed to resolve the crisis and the army chief and army establishment yet again proved its worth in resolving the ongoing fiasco. Thus it showed that the army occupied a pivotal position in Pakistan's political paradigm. Thus it became quite clear that the solution of the crisis would not be a political one rather it would be a strategic solution. On **28.08.14** at 11 pm DG ISPR through a press release informed the public at large that PAT's leader Tahir ul Qadri and PTI's leader Imran Khan met with the army chief for the resolution of the ongoing crisis. According to the same ISPR press release the Army was not willing to fire at protestors in aid of civil power, if the unlawful assembly of PTI and PAT ever resorted to violence. On **29.08.14** PAT's leader Tahir ul Qadri publicly denounced the FIR as registered against the state violence of 17th June14. He did so after a detailed meeting with the army chief, in which he had told him that the government had played fraud and tampered with the FIR, government had not lodged an accurate FIR and that it also lacked procedural validity as well. On **29.08.2014** the Prime Minister told on the floor of the National Assembly that the government had not requested the army to become a facilitator between the government and the protestors, rather PAT and PTI

demanded such facilitative role from Army. However, DG ISPR publicly stated that the government had requested the army chief to facilitate the negotiations. This episode of controversy further exacerbated the political crisis. On the same day PTI chief Imran Khan extended his protest and sit inn in other parts of the country including Lahore, Karachi and Multan after a deadlock on the negotiations between PTI and the government. On **30.8.2014** PTI and PAT protestors marched towards the Prime Minister House to stage a peaceful sit in in front of the PM House in Islamabad. On **30.8.2014** at 10-11:59 pm the protestors tried to break the gate of the Presidency and Parliament, but they faced a sever police reaction. On **31.08.2014** at 12 am the police and paramilitary forces indiscriminately used tear gas and rubber and live bullet at the procession which consisted of women, elderly, and children along with other people. One woman was killed and many were injured as a result of this police action on Constitutional Avenue of Islamabad. Hence to save their lives the protestors of PAT and PTI broke into the Parliament House by breaking its fence House. Meanwhile clashes between PTI protestors and police erupted at Lalikjan and Liberty Chowk Lahore as a backlash of the events which took place on the constitutional avenue. Riots also broke out in Rawalpindi/Islamabad against the police action throughout the day on **31.8.2014** , in which 150 injured were admitted in PIMS and 130 were admitted in Poly Clinic Hospital. Two infants suffocated due to tear gas. The federal government tried to deal with the crisis by using administrative means in which 425 people were injured including children and policemen and approximately 3 protestors were dead. In this police action to disperse unlawful assembly, media personals were brutally beaten by the police. A 1.5 years female girl and 1.3 years infant boy suffocated as a result of tear gas as claimed by the parents of these infants. Therefore instead of political resolve, government tried to handle the matter by using administrative means which aggravated the situation. On the same day the PTI chief Mr. Khan claimed that the use of excessive tear gas by the government was a clear violation of international law. After a Corp. Commanders Conference held in GHQ Rawalpindi on **31.8.2014**, an ISPR press release stated that the use of force would further aggravate and exacerbate the situation so parties must resolve the conflict through dialogue and political negotiations, as negotiations are considered to be the best tool to avoid a clash and to defuse tensions between the parties to a conflict. On **1.9.2014** at 10-10:30 am the DIG, SSP and other officials of police were injured by the protestors, while they were trying to break into the Pak Secretariat and were advancing towards the PM House. The tear gas became ineffective due to rain on that very day, so due to man to man clashes between the law enforcement authorities and the rioters many protestors including law enforcement personals sustained injuries. This situation became severe when the protestors assumed the role of rioters and broke into the PTV (State Television) Headquarters and harassed the employees of PTV. The transmissions of the State Television were disrupted from 11:00 to 11:50 am on **1.09.2014**. The army and the paramilitary troops (Rangers) cleared the PTV building of these rioters and the transmissions of PTV resumed. It appeared that the option of using violence was exercised by the protestors to ruffle the feathers of the government, which was not seriously considering the option of having a meaningful dialogue with the sit in protestors prior to 31.08.14. Many news channels reported that the Rangers have cleared the PTV building and the disrupted transmissions of PTV had resumed. The storming on PTV building attracted the attention of international media too; it was an embarrassing predicament that the State television's transmissions were disrupted due to political chaos. At 3:00-3:15 pm on **1.09.2014** an FIR involving Ss.118 [Concealing design to commit offence punishable with death],186[Obstructing Public servant in discharge of public function],148[Rioting, armed with deadly weapon], 149[common object of offence and guilt],109[Punishment of abetment if the act abetted is committed], 324[Attempt to commit qatl-i-amd], 302[qatl-i-amd], 456[house trespass], 123A[Condemnation of the creation of the state], 124A[Assaulting President and Governor], 353[Assault or criminal force to deter public servant from discharge of his duty], 382[Theft after preparation made for causing death], 155[Liability of person for whose benefit riot is committed] of P.P.C and S.7[punishment for act of terrorism]ATA, 1997, was lodged in Margalla Police Station against the protestors and the leaders of PTI and PAT . This FIR was lodged in response to the lawlessness which was demonstrated by the supporters and workers of the two parties, but merely used as strategic instrument to neutralize the moral pressure of protesters. As the political temperature rose further at the afternoon of **1-09-2014**, the government decided to de-weaponized and disarm the police to avoid bloodshed which looked quite imminent. This de-weaponization and crisis of leadership demoralized the officials of the police and many of them refused to carry out their duties. One female DSP Khadija Naseem also resigned in protest against the police action on the sit in protestors. On the same day Court refused to

become arbitrators in the ongoing political crisis. Justice Jawad S. Khawaja observed, “Judges cannot become arbitrators, they just decide according to law.” This was yet again a non-proactive stance of the judiciary during an internal political disturbance. At 5:25 pm on 1.9.2014, Vice Chairman of PTI Shah Mehmood Qureshi lodged an FIR against senior police officials and sitting ministers in the secretariat police station, Islamabad, it was lodged in response to the police action on the activists of PTI. At 5:30 pm on the same day, the President of PTI, Javed Hashmi while talking to media said that the Peoples Party did not acknowledge and honor the mandate of the Awami League in 1970s elections which led to the separation of East Pakistan and same is happening again in Pakistan. On **02.09.2014**, the joint session of the Parliament was held in National Assembly. In this joint session of the Parliament, the ruling party and its coalitions declared the protestors of PAT and PTI as insurgents, terrorists who were waging war against the State. Instead of acknowledging the situation as a political crisis the majority of the parliamentarians declared it a law and order situation, which needed to be dealt with through administrative, means i.e. through use of force. Their reaction did not judge the gravity of situation and further complicated an already tense atmosphere. On **03.09.14** an FIR had been lodged by the supporters of ruling party and district administration against the protestors of PTI in Multan under sections 341, 351 and MPO 16, on account of clashes with government authorities. Nevertheless during this entire saga, PTI emerged as an urban social movement for reform while PAT emerged as a middle class educated political force in the power politics. A round of negotiations started between government and the PTI and PAT, resultantly after a turbulent and simmering week which included attack on PTV, blockade of the Constitution Avenue PTI announced to roll back to its original place of protest at D Chowk. PAT also followed this course, and vacated the premises of the National Assembly and Secretariat gate on **04-03-2014** to **05-06-2014**. The violence and disturbance caused by these protests were so significant that the Presidents of Maldives, Sri Lanka and China had to cancel their official visits to Pakistan. The post violence negotiations by a group of opposition parliamentary parties were not only meaningful but were aimed at achieving a win-win situation for both the parties (i.e. government and PAT and PTI). However despite the efforts of the mediating parties, the deadlock between the government and PAT and PTI could not reach an amicable solution. The reason for failure was the maximalist positions which were taken by the two conflicting parties during **6-06-2014** to **13-06-2014**. The violence and mass movement attracted the attention of mediation forces like analysts, army, and foreign powers like the ambassadors of USA and China to negotiate with the protesting parties. Some political ideologists also gained importance during this entire saga like Karachi centered political party MQM, which largely aimed at linguistic politics to gain recognition. And Jamat- e –Islami, being a middle class, educated, right-wing religious party aims for religious reforms. On **14.09.2014** one month of the protest sit inn had completed and mediations which took place through army and judiciary and other political forces to resolve the political impasse proved to be futile. Yet on the same day the police again initiated a crackdown on the protestors mainly in the wake of the violation of section 144 of the Cr. P.C and 188 of the PPC as a legal tool to arrest the protestors. The Islamabad High Court intervened and observed that the executive magistrates were violating the spirit of these sections and ordered the release of the detainees. Thus all those who were arrested on charge of violating section 144 Cr.PC were released from detention. On **14.09.2014**, the PAT leader Tahir ul Qadri started a civil disobedience move by writing the slogan of ‘go Nawaz go’ on currency notes. However this protest proved to be of a short duration as Mr. Qadri called it off on the very next day on **15.09. 2014** and directed his followers and workers to chant the slogan of go Nawaz go on social media. On **15.09.2014**, PTI chief Imran Khan and other PTI workers coerced the police officials to release their arrested party workers, from police custody. From **19.09.2014** to **19.10.2014** the joint sit inn of PAT and PTI had transformed into an electoral reforms movement. Moreover the scope of political processions and rallies, conventions and protest agitation started to be widen up throughout the major cities of Punjab and in Karachi by PAT and PTI. Resultantly on **21.9.2014** PTI held a big procession at Karachi to register its protest against the Nawaz government. This was a show of street power and political strength of PTI which confused the incumbent government of Nawaz Sharif. Then on **28.9.2014**, another big political gathering was held at Minar e Pakistan Lahore, where PTI displayed its strength. This created an alarming situation for PML (N) as PTI gathered a huge crowd in their stronghold. PTI chief undertook a firm stance to carry on his protest until the resignation of the Prime Minister. On **02.10.2014**, PTI again held a big gathering at Mianwali, this political convention was an important one as it was held in the hometown of PTI chief. Imran Khan was

It shows that an ethical dis-engagement and resort to brutal police power enhance a preexisting distrust among rulers and ruled, which only leads to a vicious cycle of violence and counter violence.⁹²⁶ Murshed argues that such mitigating circumstances are core factors behind the breakdown of social contract and initiation of civil war especially in authoritarian governance patterns.⁹²⁷ Yet he slightly deviates from purely resistance perspective and claims ahead that initial gains of predations motivate the stakeholders of

encouraged by the large numbers of people who attended this procession and made it clear that he would not end his protest until the resignation of the Prime Minister. On **21.10.2014** PAT leader Tahir ul Qadri called off his protest sit in by declaring that PAT had achieved its objectives and they were victorious in their agenda. These remarks were just to pack up the protest and call it off. In-fact PAT did not achieve any significant result from this entire episode of protest sit inn and violence. Dr. Qadri also announced to expand his protest in different cities of the country by holding protest rallies and sit inn all across the country. Thus the confrontational politics of Dr. Qadri which was full of conspiracy theory got subdued and ended in futility. On **22.10.2014** Dr. Qadri upheld the view that the facts of the model town incident were altered by government and this would not be acceptable to PAT. Thence he decided to launch symbolic sit inn, consist of two days in five major cities of Pakistan, followed by some political procession as well. Thus the 66-70 days long march and sit in with a lot of material and human losses ended up in socio-political mayhem. The only apparent outcome was an ideological rhetoric in the national media about constitutional reforms, consciousness of masses and reforms based social justice. On the other hand PTI chief Imran Khan decided to change his strategy and called for shutter down strikes in four major cities of Pakistan. PTI tried to shut down the businesses in Faisalabad on **08.12.2014**, yet situation got violent between PTI and PML (N) workers. The PTI supporters even attacked police personnel's, which again retaliated with severe force and resulted in death of one person and injuries to many others. On **16.12.2014**, seven gunmen belonging to TTP carried out a terrorist attack on Army Public School in Peshawar. This was one of the most brutal and inhumane attack as almost 200 innocent people lost their precious lives. Most of the victims were school going children. A rescue and counter-terrorism operation was launched by Army's Special Services Group (SSG) Special Forces, who killed all the militants and rescued almost 960 people. On **17.12.2014**, following the tragic incident which took place in Peshawar, PTI decided to call off its protest and sit inn in Islamabad. According to its leadership the gravity of the present circumstance requires a national consensus to fight with terrorism. Thus the mass movement which started on 14.08.14 ended after four months on 17.12.2014 with lot of controversies, and loss of precious human lives. Moreover the Joint investigation team which was formed by the Punjab government on **13-11-2014** to probe out the Model Town Incident. And which consisted of the officials from Inter-Services Intelligence, Intelligence Bureau, Crime Investigation Department and police, waved off all charges from the then Law Minister of Punjab Mr. Sanaullah and the C.M. Punjab Mr. Shahbaz on **20-5-2015**. The JIT declared in its findings that charges leveled by PAT administration were baseless and without any collaboration evidence, resultantly Mr. Sanaullah resumed his office on **29-5-2015**.”

⁹²⁶ See Mohammed M. Hafez, *Why Muslims Rebel: Repression and Resistance in the Islamic World* (New Delhi: Viva Books Private Limited, 2005), 157-163.

⁹²⁷ See Syed Mansoob Murshed, *Explaining Civil War: A Rational Choice Approach* (Cheltenham: Edward Elgar Publishing Limited, 2010), 24-29, 64, 136-140.

violence to continue such trends which ultimately lead to armed insurrections.⁹²⁸ If his empirical perspective is correct which has also been acknowledged by Weinstein, as he argues that wrangling over the control of territory and resources become a rational factor behind internal armed conflict.⁹²⁹ Then what about the rational choice of categorical imperative in a constitutional state like Pakistan? Whether doctrines like fundamental rights and due process of law are capable to offer some competitive advantage in contrast to predatory economy of terrorism? Whether the sanctity of human life, irrespective to its political and ideological affiliation contains any utility when the existence of state is at stake? What is a relevancy of this debate to contemporary incidents of violence in Pakistan and how the corpus of domestic laws visualizes them? Whether this scenario is perilous to jus cogens norms as well, especially for right to life and protection against torture and inhuman treatment in Pakistan? If yes, then whether executive impunities and jus cogens norms are two competing doctrines under a dogma of state sovereignty?⁹³⁰ Hence to satisfy these queries study leads to the subsequent chapter, as it mainly deals with the use of force in the ambit of laws relating to anti-terrorism, counter-insurgency and public emergencies.

⁹²⁸ Ibid., 65-70.

⁹²⁹ See Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge: Cambridge University Press, 2007), 16-22, 29-53, 198-210.

⁹³⁰ See Marc Weller, "View point: Breaking point for the ICC?," in *BBC News*, June 17, 2015 accessed on June 21, 2015, http://bbc.com/news/world-africa-33151419?SthisFB&fb_ref=Default.

Human Rights Concerns in the Laws and Practices Relating to National Security in Pakistan

Part: I: Theoretical Context of Security Laws

This comprehensive chapter is divided into two core parts, Part: I focus on theoretic viewpoints of offences against the state whereas Part: II deals with procedural context of the relevant general and special laws. Accordingly the first part analyzes causations and paradigms of the crimes of subversion, terrorism, raising arms, insurrections, waging of war and mutiny. These felonies are different and sever than spontaneous riots, protest campaigns or even systematic popular unrests which have been discussed in the preceding chapter of study. Almeida explains nomenclature of the latter's by declaring them localized phenomenon aiming towards policies, action and in actions of governments.⁹³¹ While for Scott et al., these are contests as caused by the subjectivity of rights.⁹³² Whereas Baxi divides them into politics 'of' and 'for' rights. Since the former is relied upon by governments to sustain and enlarge their legitimacy in the pretext of liberalism or social security. Later is adopted by masses, especially their marginalized segments to mobilize

⁹³¹ See Paul Almeida, *Mobilizing Democracy: Globalization and Citizen Protest* (Baltimore: Johns Hopkins University Press, 2014), 6-7, 10-13, 19-30: he identifies such mobilization as *moral politics*, where "mobilizing agents built up revolts[such as popular unrest and civil disobedience movements] from the local grassroots in to sustained, national level campaign." Such protest campaigns are highly dependent on variables such as uneven geographical distribution of resources, unrest in public universities and their students as agents of change, aggressive economic globalization especially in developing countries and a consequent rollback of social welfare schemes, overall political awareness in a respective society, presence of NGOs and activation of civil society. Writer argues further that administrative patterns of state become crucial and decisive at the time of such protests, as repressive state measures may transform such unrests in to armed resistance.

⁹³² See Scott Veitch, Emiliios Christodoulidis, and Lindsay Farmer, *Jurisprudence: Themes and Concept* (New York: Routledge, Taylor & Frances Group, 2012), 26-27, 29-30: "Rights represents a particular way of talking about law and politics."

dissent and protests for the propagation of their interests.⁹³³ Thompson categorizes such dissents into spontaneous riots, mob violence and street protests under the offences against public order. While Opp construes them as protest movements in a bit contrast to social movements. Since the former deals with collective, irregular and deviant socio-political behaviors to express anguish and resentment without the clarity of objectives and intended targets. Whereas the social movements besides criminal deviant behaviours and demonstration of violence has clear objectives to influence the target audience. Thus, social movements of “*challenged*” groups contain protest moves against the status quo and public order.⁹³⁴ Yet such offence though might be violent lack coherence, permanency, hierarchal organizational structure and ideological commitment. Along with regular patterns of resistance, covert operational tactics and anti-state objectives as are usually required to constitute terrorism, insurgency and internal armed conflict.⁹³⁵ After this brief classification of crimes against public order and crimes against state,⁹³⁶ the following

⁹³³ See UpendraBuxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2008), 252-264, quoted in Scott Veitch, EmiliiosChristodoulidis, and Lindsay Farmer, *Jurisprudence: Themes and Concept* (New York: Routledge, Taylor & Frances Group, 2012), 32: Being a critique of universal application of International Bill of Rights, his *politics of rights* is exclusive to the cold war scenario.

⁹³⁴ See Karl-Dieter Opp, *Theories of Political Protest and Social Movement: A Multidisciplinary Introduction, Critique and Synthesis* (New York: Routledge Taylor & Francis Group, 2009), 33-44; MianAfrasiab Mehdi, *1971: Fact and Fiction: Views and Perceptions in Pakistan, India and Bangladesh* (Lahore: Makhdoom Printing Press Pvt. Ltd., 2015), 33-93: A core argument which develops from this narrative study is that protests and protest movements have potential to transform in to insurrection, waging of war and lastly a full scale civil war; similarly in *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206: indicates that a protest movement against an alleged electoral rigging transforms in to violent riots, imposition of curfew and then subversion of the entire constitutional order.

⁹³⁵ See Peter G. Thompson, *Armed Groups: The 21st Century Threat* (London: Rowman & Littlefield Publishing Groups, Inc, 2014), 55-63: due to such prerequisites of categorizations of offences, writer exclude the revolutionary Arab Spring Movement of Middle East (2010-2011) from the ambit of insurgency or internal armed conflict in spite of its ideological thesis, organizational patterns and occurrence of violence.

⁹³⁶ See National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 154: Such differentiation between security of state and security of public has also been made in Art.260. Accordingly the former deals with defence of ideological and geographical boundaries of the state, its institutions, public officials and strategic

section of the study discusses the later in details under a notion of a high threshold of internal disturbances.⁹³⁷

Such course is adopted due the indeterminacy of intra state conflicts.⁹³⁸ As most states deny an existence of a full scale insurgency or civil war to avoid international interventions or application of humanitarian law and other international laws relating to belligerency. In this attempt to sustain their political legitimacy, ideological integrity and territorial sovereignty, they prefer to classify most of the crimes against state under a generalized definition of internal disturbance.⁹³⁹ Yet, simultaneously, such generalization is also relied upon to describe serious crimes against public order. As has been indicated in *Afzal Guru* case in India, “unlawful assemblies, riots, insurrections, rebellions, acts of terrorism and waging of war are basically offences against the tranquility of society which run into each other and not capable of being marked off by perfectly definite boundaries.”⁹⁴⁰ But then whether such indeterminacy is menacing for national and international peace as it also distorts resort and magnitude of statutory force which is required to restore order?⁹⁴¹ And whether the

interests. While the later deals with the defence of life and property of masses under the maintenance of public order.

⁹³⁷ See Eva La Haye, *War Crimes in Internal Armed Conflict* (Cambridge: Cambridge University Press, 2008), 6-13: a generalized term of internal disturbance is used for a situation, when a protracted or sporadic law and order crisis crosses a threshold of crimes against public order. However its classification in to acts of terrorism, raising arms, waging war and insurgency depends upon the intent and motives of its perpetrators, degree of violence and corresponding governmental response.

⁹³⁸ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 1002: Even J. Khosa blends internal disturbance, civil commotion, insurrection and insurgency with each other.

⁹³⁹ *Ibid.*, 5-6, 19-21, 32-51.

⁹⁴⁰ See *State v. Navjot Sandhu @ Afsan Guru*, Criminal Appeal Nos. 373-375, 376-378 of 2004, accessed October 30, 2015,

<http://Judis.nic.in/supremecourt/imgs1.aspx?filename=27092>, 86-87; <http://www.ibnlive.com/india/full-text-judgement-on-afzal-guru-589761.html>.

⁹⁴¹ See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New Delhi: First South Asian Edition, Foundation Books Pvt. Ltd., 2005), 181-182, 187:

international law also carried such indeterminacy? If so, then why and what are its implications as well as remedial measures? Therefore, the study attempts to satisfy such quires in the ensuing portions.

Causations and Dynamics of Internal Disturbances

Since, Kitson construes an extreme threshold of popular unrest as a *subversion* of government, which is a non- violent movement against a regime to ouster it from power.⁹⁴²

Yet the core determinant that transforms subversion into sabotage, terrorism and the insurgency is the use of violence according to him. Accordingly, campaigns of subversion as severe law and order crisis have three core dimensions; either strategically used to oppose regimes and their policies without resorting to sabotage or is employed in conjunction with terrorism to achieve objectives. Lastly is employed as a precondition for the full-scale insurgency in combination with protracted urban riots and other acts of terrorism.⁹⁴³

criticizes the ad-hoc responses of states, which attempt to deal and curb popular dissents and organized violence through irrational excessive force and generalized punitive laws; Ronald Dworkin, *Taking Rights Seriously* (Delhi: Fourth Indian Reprint, Universal Law Publishing Co. Pvt. LTD., 2006), 211-212, 219, 221-222; H. L. A. Hart, *The Concept of Law* (New Delhi: Oxford University Press, 2005), 252-254: Since Dworkin and Hart both indicate that an ad-hoc, generalized and vague criminal law not only creates controversies but also engender injustices if applied to implicate its subjects.

⁹⁴² See Frank Kitson, *Low Intensity Operations: Subversion, Insurgency and Peace Keeping* (London: Faber and Faber Limited, 1991), 82-86: it seems that crime of subversion is such a catalyst and determinant which not only demarcates the boundary between crime against public order and state. But also act as a buffer zone between these two categories, in which degree of violence determine the characteristics and nature of crime. Accordingly a less degree of violence is placed in crimes against public order and a high degree of violence is placed in crimes against state.

⁹⁴³ *Ibid.*, 82-83.

This classification of internal disturbance has also been illustrated by the court of law in Pakistan with by relying upon the Kitson's work as published in 1972. The court observers, " Subversion means all illegal measures short of the use of armed force taken by one section of the people of a country to overthrow those governing the country at the time, or to force them to do things which they do not want to do,--- whereas insurgency is covering the use of armed force by a section of the people against the government for the purposes mentioned under subversion,--according to this definition, " insurgency" and "subversion" can be both take place in the same country, at the same time ---combine actions political, economic, psychological and military all seem to aim at the overthrow of established authority in a country."944

Hence such violent challenges to the legitimacy of the order and sovereignty of the country are basically political in their nomenclature;⁹⁴⁵consequently Khilnani describes the political intent of "ism" in the crime of terrorism. Since the notion of "ism" indicates a forceful assertion of specific ideology, or policy through the employment of terror in a respective society.⁹⁴⁶But the question is that what kinds of impacts are expected by the perpetrators of terror in a particular society and whether such impacts are compatible with their power politics?⁹⁴⁷Forst responds accordingly that terror engenders fear in the minds of its audiences and that fear distorts their potential for rational thinking, it creates such a hysterical notion that instead of reasonability or morality communities and individuals

⁹⁴⁴ See *Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs Islamabad v. Abdul Wali Khan, MNA, Former President of Defunct National Awami Party*, PLD 1976 SC 57.

⁹⁴⁵ Ibid.

⁹⁴⁶ See Sunil Khilnani, "The Politics of Terrorism," *Political Quarterly* 64, no. 3 (1993), quoted in Brian Forst, *Terrorism, Crime and Public Policy* (Cambridge: Cambridge University Press, 2009), 5.

⁹⁴⁷ See Michael Freeman, "Order, Rights and Threats: Terrorism and Global Justice," in *Human Rights in the 'War on Terror'*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 46.

prefer their instinct for survival.⁹⁴⁸ Singer perceives the employment of fear as a tool to produce a sense of powerlessness in the mind of its addressees⁹⁴⁹ and Hassan considers it a manipulative tool to control the will of others.⁹⁵⁰ Gearson argues in this context that terror is politically used to break the will of opponents, however he further narrates that the fear of terror is in fact engendered by an irrational response of the state apparatus to the incidents of terrorism.⁹⁵¹ It means that magnification of such incidents through state agents creates a trickle-down effect on the masses; resultantly society at large becomes a psychological hostage of such propagations.⁹⁵²

Similarly, Thompson contextualizes the terminology of “*ism*” from terrorism with power politics for assertions of specific ideologies in particular areas during interstate conflicts.⁹⁵³ He associates it with minorities and other sub-state groups of a state and excludes majorities, ruling elites and other state agents from such violent wrangling as their ideologies have already embraced hegemony in society. These sub-state groups being

⁹⁴⁸ See in Brian Forst, *Terrorism, Crime and Public Policy* (Cambridge: Cambridge University Press, 2009), 299-337.

⁹⁴⁹ See Margaret Thaler Singer and Janja Lalich, *Cults in our Midst: The Hidden Menace in our Everyday Lives* (New Jersey: Jossey-Bass Publishers, 1996), 200-250.

⁹⁵⁰ See in Steven Hassan, *Releasing the Bonds: Empowering People to Think for Themselves* (Danbury CT: Aitan Publishing Company, 2000), 60-70: “Psychological impact of terror and correlative fears on human behaviors in three interdependent cycles such as **Unfreezing**: which breaks down the will and reasonability, **Changing**: an indoctrinate process, which transforms reality in to deception and **Refreezing**: which is a process of reinforcing the new identity and mindset.”

⁹⁵¹ See J. Gearson, “*The Nature of Modern Terrorism*,” in *Super terrorism: Policy Response*, ed. L. Freedman (Oxford: Blackwell publishing Ltd, 2002), 7-24, quoted in Michael Freeman, “*Order, Rights and Threats: Terrorism and Global Justice*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 44-45.

⁹⁵² See Brian Forst, *Terrorism, Crime and Public Policy* (Cambridge: Cambridge University Press, 2009), 307-317: discusses the negative impact of subjective assessments of objective risks, which indirectly augment ‘in terrorem populai.’

⁹⁵³ See Peter G. Thompson, *Armed Groups: The 21st Century Threat* (London: Rowman & Littlefield Publishing Groups, Inc, 2014), 17.

'principled evildoers' consist of such members of society, who deviate from the general will, as well as the *'categorical imperative: a commune for egalitarians'* out of their own convictions. Resultantly they not only challenge the legitimacy of the state and its regimes, but also the core social norms by possessing a deviated socio-political and economic mindset.⁹⁵⁴

Then a prolong isolation and exclusion of their approaches from the dialectical process aid them to build radical narratives which further augment as specific ideologies. An ideology in this context is a set of believing, based upon particular orientation of life and evolves a specific mindset to interpret the facts which justifies violent acts to protect and promote their self-acclaimed cause. It not only leads to fundamentalism, but also helps to formulate particular objectives and strategies to accomplish such causes.⁹⁵⁵

Hence severe acts of terrorism and associated indiscriminate violence are one of the forms of their strategy which transform sub-state groups into armed groups.⁹⁵⁶ Besides owing to

⁹⁵⁴ See Fernando R. Teson, *"Liberal Security,"* in *Human Rights in the 'War on Terror'*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 71-73: With Kant's perspective explains the moral convictions of the members of armed groups. It seems that due to their commitment and zeal toward a deviant philosophy, they cease to become egalitarians. It is mainly due to their opposition to the core social values of society as enshrined in "categorical imperative" which is also a foundation stone to further carve out core political values of the "general will" of a State.

⁹⁵⁵ See Thompson, *Groups*, 33-36, 44-45, 125-129.

⁹⁵⁶ See Gerard M C Hugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (New York: United Nations office for the Coordination of Humanitarian Affairs, 2006), 6, quoted in Thompson, *Armed Groups*, 5: "An Armed Group means a group that have the potential to employ in the use of force to achieve political, ideological or economic objectives: are not within the formal military structures of State, State-alliances or intergovernmental organization: and are not under the control of the State[s] in which they operate"; Thompson, *Groups*, 4, 59: "armed groups are coherent, autonomous, non-state actors that rely on the threat or use of force to achieve their objectives." It seems that terrorism is a strategic use of indiscriminate violence by non-conformists to convince coercively and to negotiate manipulatively with majority as well as to propagate their agenda or ideology. Often used by morally and politically disengaged groups who either do not believe

variations in objectives and accompanying strategies, armed groups are involved in transnational criminal activities, militia warfare, gang warfare, terrorism campaigns and insurgency.⁹⁵⁷ Though the element of terrorism remains constant in all the above kinds of conflicts, yet it could be bifurcated in to two core thresholds. While in the lower threshold the terrorist groups are involved in micro level conflict under the legal order paradigm. As they do not intend to destroy the entire structure of the state, rather just require a hegemonic role for their perspectives. Whereas in the upper threshold such groups being insurgents involve in macro level conflict by involving in revolutionary and separatist movements under a public emergency paradigm. They either intend to have fundamental changes in the established order or want to institute an entirely new order in accordance with their perspectives. Since acts of terrorism are relied upon as a tool both by hegemonic

in dialectical synthesis or are forced out to do so by a stringent legal system which does not assimilate pluralism and stigmatized them as enemy aliens, hardened criminals, traitors or terrorists. Resultantly two extremely polarized perspectives emerge, where violence is employed to initiate a dialogue, analogically prosecutions and trials are also considered as a dialogue under this scenario. Such contestation varies time to time and place to place such as hegemony over natural resources, propagation of a specific political and constitutional narrative, geostrategic control of territory and its population, advocacy for a particular socio-cultural norm, and an assumed superiority of theological perspectives of a sect.

⁹⁵⁷ See Thompson, *Groups*, 55, 80-92: Following are some common characteristics of armed groups, **1)** Autonomous Actors, **2)** Sub-state actors, means consist of small population s or membership as compared to large communities, **3)** small membership, **4)** lacks legitimacy and sovereignty, **5)** clandestine, **6)** believe in covert tactical moves, **7)** Transnational- though armed groups operate intra-state yet they have sanctuaries in neighboring countries to gain logistical and moral support. And According to the categorizations of armed groups, Insurgents contain a permanent hierarchal organizational structure, potentially control a territory with a de-facto control over population, and have a capacity to engage the armed forces of a state in armed conflict, capacity to enforce truce in case of any, possess sophisticated and fatal weapons. While terrorists neither have any interest to control a territory and its population nor contain hierarchal and permanent organizational structure. Moreover transnational criminal organization as armed groups involve in international predatory crimes such as narcotic trade, illegal smuggling of weapons, human trafficking and money laundering. Gangs being armed group also involve in predatory crimes yet at an intra-state level and usually remain clandestine with a potential threat for public order. Thompson uses the terminology of Hybrid *conflicts* for the internal conflicts cause by Transnational Criminal Organization and gangs. While militia being armed group usually involve in secessionist movements, where individuals voluntarily fight for a cause, it has neither hierarchical organizational order like insurgents nor has clandestine nature however in some areas militias are also used by war lords for their hegemonic wars. It seems that the element of the acts of terrorism is employed as a tool in all these categories of armed conflicts.

centric terrorists as well as revolution centric insurgents. It seems that military achievements through sabotage or mayhem are not the core purpose of these two thresholds; rather these tactics are primarily used as means to influence population by implanting fear or sympathies. Armed groups perceive this scenario as a political opportunity not only to gain momentum and propagation for their cause, but also to implant legitimacy for such cause in the targeted population.⁹⁵⁸

Resultantly a nexuses among ideology, politics and crime develops amid an internal armed conflict which distorts distinctions not only between criminals and political activists but also between combatants and civilians.⁹⁵⁹ Such amalgamations also engender difficulties to categorize an internal conflict objectively and authoritatively, resultantly a generalized term like ‘internal disturbance’ is relied upon to identify these conflicts.⁹⁶⁰ This complication of labeling has also been discussed by the court of law in Pakistan as it observes, “These definitions are wide enough to cover virtually every form of disturbance up to the threshold of conventional war.”⁹⁶¹ Reynolds argues that such a broad scope of internal disturbance has its traces in the colonial patterns of administration, which used to construct

⁹⁵⁸ Ibid., 34, 67.

⁹⁵⁹ See Amrith Rohan Perera, *International Terrorism* (New Delhi: Vikas Publishing House Pvt Ltd, 1997), 1-13, 113-131.

⁹⁶⁰ See in Thompson, *Groups*, 6, 35: The following labels of intra-state conflicts not only overlap each other but are used interchangeably in a sheer “confusion”, as the subjectivity of labeling leads to another problem which deals with the application of the relevant legal regime. Since internal armed conflicts as of the threshold of insurgency, low intensity conflicts and civil war attract the application of the laws of war and protection of humanitarian laws especially in the case of proclamation of emergency. While terrorism and other hybrid conflicts come under public order and human rights regime. Therefore the notion of internal disturbance covers civil war, low intensity conflict, armed conflicts, internationalized conflicts, interstate conflicts, hybrid conflicts, extra systematic conflicts, insurgency, small war, irregular war, and law and order crisis.

⁹⁶¹ See *Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs Islamabad v. Abdul Wali Khan, MNA, Former President of Defunct National Awami Party*, PLD 1976 SC 57.

even a less probability of dissent as “*in terrorem populae*” out of an exaggerated fear of mass resistance.⁹⁶² While Saul argues that the wide scope of internal disturbance and terrorism blurs a distinction between crimes and political resistance. As a corollary ordinary criminal justice misperceives the complexity of the intents and motives of acts of terrorism, which often “*lump*” in the middle of public order, national security and waging war against the state. Since, socio-political alienation, economic deprivation, theological misperception, ideological polarization, geographical context and international politics jointly form the intent for such acts. Hence, domestic criminal law proves ineffective to deter them punitively, which lead to stringent special legislations to curb such ill-defined and unexplored intents and motives. Resultantly minorities and other segments of society who raise their voices for socio-political empowerment are victimized under the *lexspecialis* of anti-terrorism.⁹⁶³ Saul further highlights another aspect of anti-terrorism legislations as he discusses their potential to deter the acts of terrorism. He believes that political violence through terrorism is a result of an ideological conviction for a cause which happens to be immune from punitive impacts of stringent administrative actions. Hence the utilitarian ethics of maximization of pain is often proved to be ineffective to deter such ‘*Principled*’ offenders, who perceive such stringency as a salvation for their

⁹⁶² See John Reynolds, “The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law,” *Comparative Research in Law & Political Economy* 6, no. 5 (2010): 15-20.

⁹⁶³ See Ben Saul, “*Criminality and Terrorism*,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Frias, Katja Lh Samuel and Nigel D White (New York: Oxford University Press, 2012), 133-135.

cause. Resultantly sever punitive measures without a counter narrative become counterproductive in the anti-terrorism campaigns.⁹⁶⁴

Likewise Perera discusses political violence through terrorism, yet under international horizons. As due to overlapping effects of crime and politics struggles for self-determination are usually construed as terrorism in many jurisdictions. Consequently a wide disagreement has emerged in the regional and global contexts to define the crime of terrorism and its core elements objectively.⁹⁶⁵ Since many states are accused to be involved in giving moral and logistic supports to such armed groups whom they have ideological, ethnic or theological ties. Due to such causation Perera believes that terrorism is not only a localized or national phenomena rather it has transnational dynamics and implications under international politics.⁹⁶⁶ Freeman identifies such transnational context of terrorism as “*super-terrorism*” which overshadows state sovereignties and has global implications.⁹⁶⁷ Yet this approach makes the subject of internal conflict more complex and wide, as beyond the capacity of an individual state to curb it completely without transgressing core human rights values.⁹⁶⁸ It mostly happens owing to following reasons; firstly, presence of foreign stimuluses increses the pace of political violence that jeopardizes the existence of state and may transforms an internal conflict in to international

⁹⁶⁴ Ibid., 138-139.

⁹⁶⁵ See Perera, *Terrorism*, 116-124.

⁹⁶⁶ Ibid., 9-13, 131-151.

⁹⁶⁷ See Michael Freeman, “*Order, Rights and Threats: Terrorism and Global Justice*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 38.

⁹⁶⁸ See Neil Hicks, “*The Impact of Counter-Terrorism on the Promotion and Protection of Human Rights*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 212-221.

conflict. Resultantly under the doctrine of self defence state resorts to indiscriminate counterinsurgency strikes, especially in the case of low intensity operations through its armed forces.⁹⁶⁹ Secondly, to curb the multiplicity of determinants in internal disturbance, the state adopts multifaceted strategies, and one of them is infringement of derogable rights. However Ignatieff's viewpoint is valuable in this regard, as indicates that rights are not fragmented rather through an integrated whole they provide civil and personal liberties. And for the validity of this argument he relies upon the freedoms of expression, association, assembly and information. Since apparently they are derogable rights, yet associated with protection against torture and inhuman treatment, as the only way to know and inform others about their occurrence.⁹⁷⁰

Another problem which emerges during intra-state conflicts is that, on the one hand radical mindsets distort rationality and reasonability of armed groups while, on the other hand the counter narratives of governing elites and state agents distort the regime of the rule of law as well as reasonability of administrative actions. Campbell believes that as physiological aftereffects of significant incidents of terrorism, society as a whole become a victim of irrationality especially against terror-suspects. He explains this irrationality through an illustration of '*seesaw balance*'. As owing to such incidents stringent anti-terrorism legislations attain their social efficacy and legitimacy since the balance of legitimacy leans towards discretionary executive power. He concludes after a

⁹⁶⁹ See Thompson, *Groups*, 173-174, 185-192.

⁹⁷⁰ See M. Ignatieff, *The Lesser Evil: Political Ethics in an age of Terror* (Princeton: Princeton University Press, 2004), 47, quoted in Michael Freeman, "*Order, Rights and Threats: Terrorism and Global Justice*," in *Human Rights in the 'War on Terror'*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 47.

comprehensive comparative analysis of anti-terrorism laws of multiple jurisdictions that rule of law suffers significantly through procedural lacunas as enshrined under the doctrine of necessity. These procedural lacunas include wide powers of arrest and detain on vague grounds, presumption of guilt under strict liability of accused, unlimited powers of siege and search and minimum judicial oversight through judicial review. It is, along with unlimited executive powers to proscribe suspected organizations and indefinite detention of their members, a general hold up on the basis of catch-all policy, establishment of unnecessary check posts and intrusion in privacy of person and home. As well as formation of executive tribunals to adjudicate suspects, constitutional and legal protection of preventive detention on vague grounds and indiscriminate use of force during exchange of fire. Yet the most fatal lacunas in these laws are implicit authorization of torture, forced disappearance and shot on sight on mere suspicion without fired upon or shot on sight disproportionately with a deadly weapon as self defence.⁹⁷¹O'Donnell believes in the context of protracted and unresolved socio-political conflicts that such procedural lacunas produce 'brown zones' even in liberal democracies. Consequently, civil and personal liberties become vulnerable in these zones not only during anti-terrorism and counter-insurgency campaigns but also during ordinary public order paradigm.⁹⁷²Dyzenhaus

⁹⁷¹ See Colm Campbell, "Beyond Radicalization: Towards an Integrated Anti-Violence Rule of Law Strategy" in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Frias, KatjaLh Samuel and Nigel D White (New York: Oxford University Press, 2012), 255-263.

⁹⁷² See G O'Donnell, 'On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Post-Communist Countries' (1993) 21 *World Development* 1355, quoted in Colm Campbell, "Beyond Radicalization: Towards an Integrated Anti-Violence Rule of Law Strategy" in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Frias, KatjaLh Samuel and Nigel D White (New York: Oxford University Press, 2012), 260.

identifies such zones as ‘lawless void’ of ‘legal black holes’.⁹⁷³ Whereas Poole illustrates that these zones mainly emerge from the political rhetoric of the authorities which consider human rights protections as major constraints to accomplish strategic gains during law and order operations and anti-terrorism campaigns.⁹⁷⁴ While Luban considers its fallacious approach of public order and national security and believes like Feinberg that human security as enshrined in international human rights instruments is in fact a national security. Since respect for the rights of all consequently lead to collective tranquility and order as desired by the national security paradigm.⁹⁷⁵

Hence, under this context the contemporary 21th constitutional amendment and subsequent amendments in the Pakistan Army Act, 1952 which has yielded the military tribunals to adjudicate terror suspects by restricting their fundamental rights indicate the social legitimacy of security laws in Pakistan.⁹⁷⁶ Such social efficacy and then its judicial validity had been achieved in the backdrop of 16th December, 2014 massacre in Army Public School Peshawar by the alleged terrorists of Tehrike Taliban Pakistan.⁹⁷⁷ This

⁹⁷³ See David Dyzenhaus, “*Schmitt v. Dicey: Are States of Emergency inside or outside the Legal Order?*,” *Cardozo Law Review* 27, no. 5 (2006): 2020-2030.

⁹⁷⁴ See Thomas Poole, “Sovereign Indignities: International Law as Public Law,” *European Journal of International Law* 22, no. 2 (2011): 351, quoted in Myriam Feinberg, International Counterterrorism-national security and human rights: conflicts of norms or checks and Balances?,” *The International Journal of Human Rights* 19, no. 4 (2015): 390.

⁹⁷⁵ See David Luban, “*Eight Fallacies about Liberty and Security*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 242-256; Myriam Feinberg, International Counterterrorism- national security and human rights: conflicts of norms or checks and Balances?,” *The International Journal of Human Rights* 19, no. 4 (2015): 390-391.

⁹⁷⁶ See Senate Secretariat, “The Constitution (Twenty-first Amendment) Act, 2015,” *The Gazette of Pakistan M-302, L-7646* (January 8, 2015):1-3; Senate Secretariat, “The Pakistan Army (Amendment) Act 2015,” *The Gazette of Pakistan M-302, L-7646* (January 8, 2015):1-4.

⁹⁷⁷ See *District Bar Association Rawalpindi and others v. Federation of Pakistan*, Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12 of 2010.pdf/.

indiscriminate attack ended up in to demises of more than 140 young students and their teachers while left more than 130 persons critically injured.⁹⁷⁸ Although such amendments has sunset clause, as only operative for two years from their inception and specifically meant for insurgents and terrorists in the milieu of the contemporary counter insurgency campaign in FATA by the name of Zareb-e-Azb, 2014.⁹⁷⁹

However a forthcoming Government Bill in the National Assembly stringently empowers the law enforcement agencies to detain and arrest. It incorporates the capital punishment in the offences relating to The Protection of Pakistan Act, 2014, which indicates that such zones also emerge in the public order paradigm of Pakistan.⁹⁸⁰ Likewise Forst and Falk

⁹⁷⁸ See Ismail Khan, "Taliban Massacre 131 School Children: Principal among 141 dead in attack on Army Public School, Peshawar" *Dawn News*, December 17, 2014, national edition.

⁹⁷⁹ See ISPR, "Press Release: PR 124/2014-ISPR," last modified June 15, 2014, Inter Services Public Relations, [http://ispr.gov.pk/Press release/15/6/14/](http://ispr.gov.pk/Press%20release/15/6/14/): "D.G. ISPR has said that on the directions of the Government, Armed Forces of Pakistan has launched a comprehensive operation against foreign and local terrorists, who are hiding in sanctuaries in North Waziristan Agency. The operation has been named 'Zareb-e-Azb'."; Preamble of The Constitution (Twenty-first Amendment) Act, 2015 and The Pakistan Army (Amendment) Act 2015: Not only acknowledges the presence of armed groups, ideologically non-conformists terrorists groups and militias but also admits the existence of internal armed conflict in the form of insurgency [a high threshold of internal disturbance] in Pakistan.

⁹⁸⁰ See e.g. into Criminal Laws Amendment Act, 2015, accessed August 31, 2015, http://www.na.gov.pk/uploads/documents/1426569551_414.pdf:

A Government Bill Introduced by Minister-in-charge for Ministry of Interior, which explicitly recognizes the existence of terrorist groups associated with sectarian and political violence in Pakistan. This Bill is about some intended amendments in certain substantive and adjective laws like as the Pakistan Penal Code, 1860, The Code of Criminal Procedure, 1898, Qanoon-e-Shahadit Ordinance, 1984, Arms Act, 1878, Anti-Terrorism Act, 1997, Police Act, 1861, Fair Trial Act, 2013, Protection of Pakistan Act, 2014. It intends to enhance the scope of deterrence with regards to public order offences by increasing custodial and pecuniary punishments, along with introducing new offences in the anti-terrorism law such as "Lynching" by mob with and without the context of riots. In **Pakistan Penal Code S.143**: enhancing the period of sentence and the amount of fine would deter general public as well as motivated agitator to avoid becoming the member of unlawful assembly; however it has a negative impact on the fundamental right of the right to assembly and association as enshrined in the Art.16 and 17 of the Constitution of Pakistan, 1973. **Ss. 182 & 295 C**: increasing the liability of the informer for the crime falls in Sec 295C, would decrease the probability of false accusation. The chorological events of false accusations which ended up gruesome events in Pakistan like persecution of minority would have been tried to manage through this criminal law amendment. However burden of liability has been increased on informer but not on police, which is core responsible to launch FIR, as a negative externality there are chances that offences of S295C would remain uninformed due

to the fear of repressions. **297 A:** It is an attempt to control hate speech and sectarian as well as ethnic segregation, however by incorporating and linking a wide and undefined term “Internal Disturbances” with this offence, the scope of criminal law has been expanded which is against the constitutional spirit of due process of law, as well as rule of law, because vicarious liability of speaker has been enlarged up to all kind of law and order crisis and civil commotion. **S.337 H :**It deals with offences against person and attempt has been made to improve a binding duty of care to others, such misdemeanor has been highlighted by enhancing the incarceration period and pecuniary limits. In **Criminal Procedure Code** Amendments in the procedure are mainly intended to rationalize police powers to prevent and handle unlawful assembly for a sustainable public order. Nevertheless such amendment may result in highhandedness of police which is already implicate in alleged torture and inhuman treatment In **Police Act, 1861S 23 :**Official obligation has been imposed on police officer to comply orders of competent authorities as well as on its own capacity to proactively prevent sectarian and ethnic hatred engendered from hate speech or a defamatory material in the ICT. It is an ICT specific amendment to empower police to tackle ethnic and sectarian crimes or any attempt to such crimes. It is a preventive measure rather a punitive action however such preventive action attracts the general protection of PPC S.52, 76 and 78 which may create an executive impunity or subjectivity regarding preventive measures. **S. 32 :**Police power has been enhanced to manage and control the occurrence of unlawful assembly in the Islamabad City. In **Qanoon-e-Shahadat 1984,Art.164:** This amendment intends to make QSO harmonious with Fair Trial Act 2013 for a plausible sentencing through indigenous intelligence network prevails in federal as well as provincial level. However Conviction on the sole basis of modern devices lacks the constitutional protection of due process because PEMRA rules and Cyber law prevailing in the country are yet in their formative phase and chances of fabrication in such kind of documentary evidence can easily be manipulated through cyber or media experts. Resultantly the validity and reliability of such sources in the court of law is a difficult task for the conventional judges and lawyers and requires amicus curia for to establish authenticity. In **Anti-Terrorism Act,1997, S.11WW:** By enlarging the scope of such a specific legislation may hinder counter terrorism measure because incorporating LYNCHING can implicate a large number of people in the ambit of ATA. In fact such insertion of new crime deals with public order and terrorism polpulai but the objective as stated in AT is to counter the prevailing menace of political terrorism. Nevertheless through the *Lex Generalis* scheme of law and order and by incorporating a large number of crimes in ATA can negative the real objective and spirit of *Lex Specialis* nature of Anti-terrorism legislation. Moreover mob violence is a probability of unlawful assembly, riots and affray and lynching as a possible occurrence of such crimes also attract Penal code and Criminal Procedure Code thus such insertion in ATA can refute the its rationale. In **Fair Trial Act 2013** Aligning with the QSO Amendment in Art 164 a grade 19 officer is empowered to manage the documentary evidence to ensure fair trial. The pre-amendment conditionality of BPS 20 grade for an authorization was incorporated to insure transparency and impartiality. Yet manipulation of evidence is probable by reducing such conditionality. More over the federation as well as provinces have been empowered to initiate prosecution it may result in to duality and complexity of procedure which may lead to double punishment which is protected in Art.13 of the constitution of Pakistan. It is because the major intelligence agencies like ISI, IB, MI, FIA and NCTA come in the ambit of federation though have provincial and divisional headquarter in respective provinces. In **Protection of Pakistan Act, 2014, S.6:** The federal as well as provincial government is empowered to administer preventive detention with regard to offences incorporated in this Act. As in the post 21th constitutional amendment scenario, the POPA is placed in the first schedule, resultantly immune from the operation of Art8 and 175 of the constitution. Thus there is probability of violation of Art4, 9, 14 and 25 of the constitution especially in the absence of the writ jurisdiction [Art.199 (1)&(2)] and writ of Amparo[Art 184(3)] of the constitution of Pakistan, 1973 in the context of habeas corpus. **S.16 :**Capital punishment has been inserted through this amendment, it had made this Act more stringent with maximum deterrent effect, because such punishment would be awarded through military tribunal in the context of Sec 2(d) of Army Act 1952 which deals with civilians come in the ambit of POPA. Nevertheless absence of judicial review in this situation has a detrimental impact on due process, right to fair trail and right to life. Hence this criminal law amendment 2015 has a negative impact on the fundamental rights as protected in the constitution of Pakistan, 1973. Moreover it had made the judicial review more vulnerable in the facade of strong executive and police power. Though prevailing law and order crisis demand pragmatic public order legislation, but this

indicate that the USA-Patriot Act of 2001, being stringent and contemptuous for civil liberties was too an outcome of reactionary and socially legitimized counter-narrative, as emerged in the backdrop of the 9-11 terrorist attacks in which civilian death toll rose up to 3000.⁹⁸¹ Similarly, Thompson identifies such irrationality as “*zones of impunity*” where core human rights are violated in the name of an evolved ideological cum political narrative and then its counter narrative. According to him it is a paradigm of sheer lawlessness which makes a state fragile and polarized with vulnerable legitimacy, rule of law and constitutionalism.⁹⁸² Besides the considerations of humanitarian interventions in the case of civil war or insurgency, not only expose the state’s internal political dynamics, but also place its sovereignty at the discretions of international power politics.⁹⁸³ Since Bassoni et al narrates that peremptory norms of human rights as well as humanitarian law are always vulnerable amid the real politik of anti-terrorism and counter insurgency

amendment is also not compatible as such with democratic norms of freedom of association, movement, public voice or protest. It has made police and order law enforcement agencies more immune from judicial scrutiny.

⁹⁸¹ See Brian Forst, *Terrorism, Crime and Public Policy* (Cambridge: Cambridge University Press, 2009), 430-434; Richard Falk, “*Human Rights: A Descending Spiral*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 232-234; for The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 of The United States of America.

⁹⁸² See Thompson, *Groups*, 9-10.

⁹⁸³ See Kenneth Roth, “*War in Iraq: Not a Humanitarian Intervention*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 145-156; Thompson, *Groups*, 40: If it is alleged that violations of core human rights norms such as prohibition against torture, inhuman treatment, slavery, persecutions and mass killing occurs during such period, it constitutes a violation of peremptory norms, yet up to the threshold of state’s sovereignty. But when their threshold reach to the level of international crimes such as crime against humanity, war crime, genocide or crime against humanity then such violation constitutes a violation of jus cogens norms and cast upon a duty on international community under obligation erga omnes to protect these jus cogens norms through humanitarian interventions of international community. However due to controversial and subjective claims about the occurrence of such international crimes and mass killings, especially in the absences of an authoritative mechanism to determine it objectively makes the issue of humanitarian interventions itself very controversial and political.

campaigns.⁹⁸⁴ He establishes a nexus among power politics, assertion of ideology, policy of terror and coercive use of criminal law. Then associates it with totalitarianism of regimes as well as armed groups and contextualizes it with crime against humanity, especially in conflict zones yet not affected by the armed conflict.⁹⁸⁵ Whereas Haye constitutes such violations as war crimes and contextualizes them with internal armed conflicts, besides associates them both with the armed forces as well as armed groups in proximity with insurgency.⁹⁸⁶ While Goldstone associates an overall deprecation of civil liberties with anti-terrorism and counter insurgency campaigns in different countries. According to his view point the Post 9/11 stringent anti-terrorism legislations in multiple jurisdictions have not only destroyed the essence of due process of law but also the rule of law. Since many among them cannot be considered even a valid legislation, as usually are contrary to constitutional guarantees and procedural fairness. He too relies upon the

⁹⁸⁴ See M. Cherif Bassiouni et al., "Human Rights v. New Initiative in the Control of Terrorism," *American Society of International Law* 79, (1985): 288-303.

⁹⁸⁵ See M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), 13-18: "Crime against humanity constitutes any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or organization or [armed] group: these acts includes Murder; Extermination; Torture; Enslavement; Persecution on political, racial, religious or ethnic grounds; Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; Arbitrary deportation or forcible transfer of population; Arbitrary imprisonment; Forced disappearance of persons; Rape, enforced prostitution and other forms of sexual abuse; Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and sever bodily harm. "It seems that crimes against humanity occur as a policy of government or group [if it has sufficient influence over a territory and population] during human rights regime amid gang warfare, militia warfare, warfare of transnational criminal organizations (in conjunction with human trafficking, smuggling, narcotics trade and extortion). Also include sporadic incidents of terrorism, sectarian violence as well as subversions and uprisings under public order paradigm

⁹⁸⁶ See Eva La Haye, *War Crimes in International Armed Conflicts* (Cambridge: Cambridge University Press, 2008), 322-328: Hostilities such as murder, cruel treatment with prisoners, torture, outrages upon personal dignity in particular rape, indiscriminate and disproportionate attack on civilians, malicious persecutions, slavery, pillage and destruction of civilian property, willful damage of religious and community institutions in conjunction with armed conflicts constitute as war crime. Therefore war crime are associated with insurgency and full scale civil war under the regimes of international humanitarian law, when armed groups have a de-facto control over a territory and population of a country and are in a direct conflict with armed forces of such country.

elements of fear and threat which bring stringency, biases and un-reasonability in security legislations as well as adjudications.⁹⁸⁷ Similarly Robertson identifies this legal vacuum as being hazardous for the right of fair trial of an accused of terrorism and insurgency.⁹⁸⁸ And for a reliability of such arguments Goldstone emphasizes on the *Korematsu* case from American jurisdiction. Accordingly, American citizens of Japan origins were declared prejudicial to public order and security just because of their hereditary origin, as US forces were at war with Japan in the wake of Pearl Harbor attack in II World War.⁹⁸⁹

Thenceforth Saul examines the security and anti-terrorism laws in a different context. As their wide scope, stigmatizing effects, discretionary powers, inherent strict liabilities and procedural complexities not only have negative externalities for the general public but also make them inefficient to deter terrorists and insurgents. So to avoid such externalities and inefficiencies he proposes to redefine with specificity the crime of terrorism along with other political crimes in domestic as well as international horizons.⁹⁹⁰ Since civil liberties in conflict paradigms are simultaneously attacked not only by armed groups, but also by armed forces due to their statutory powers.⁹⁹¹ These multifaceted attacks on liberties inevitably create a sense of deprivation, segregation and alienation that further leads to

⁹⁸⁷ See Richard Goldstone, “*The Tension Between Combating Terrorism and Protecting Civil Liberties*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 157-168.

⁹⁸⁸ See Geoffrey Robertson, “*Fair Trial for Terrorists?*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 169-183.

⁹⁸⁹ See *Korematsu v. United States*, 323 U.S. 214, 223-4 (1944), quoted in Richard Goldstone, “*The Tension Between Combating Terrorism and Protecting Civil Liberties*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (New York: Cambridge University Press, 2005), 160.

⁹⁹⁰ See Ben Saul, “*Criminality and Terrorism*,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Frias, KatjaLh Samuel and Nigel D White (New York: Oxford University Press, 2012), 137-140.

⁹⁹¹ *Ibid.*, 140-150.

formulation of socio-political movements. Such movements if have ideological ties in neighboring countries, attract their logistic and moral support and after attaining such vitalities these prototype resistances transform into insurgency or civil war.⁹⁹²

This cycle indicates three things, first that every armed conflict begins from socio-political movement based on an ideological dialect. Then it illustrates that all kinds of conflicts include acts of terrorism, meaning thereby that all insurrection movements or popular uprisings perform acts of terrorism and sabotage as their strategy. Lastly, it indicates that most of internal armed conflicts have their transnational ties and possess international agendas.⁹⁹³ Hence, due to such phenomenal characteristics internal conflicts of all thresholds are not only dangerous for domestic order, but also potentially dangerous for international peace. Consequently, Saul not only criticizes international anti-terrorism instruments but also domestic laws for their inability to comprehend such complexities. He further analysis the United Nations Security Council Resolutions which aim to address the issue of international-terrorism and indicates lacunas in them for all of them compel states to legislate and deter such eventuality. Yet ignore the fact that the public order paradigm is only meant for internal order and has a potential to deter for a specified jurisdiction. Resultantly stringent laws and procedural compromises emerge domestically due to these

⁹⁹² See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New Delhi: First Indian Edition by Penguin Books Pvt. Ltd., 1997), 272-291: Identifies the role of ideologically, ethnically, culturally and geographically neighboring countries in internal armed conflicts as “*Fault Line of Kin Countries Syndrome*.” Moreover perceives these proxy wars being potentially dangerous for international peace as well, since such intervention in internal disturbances may escalate it in to full scale civil war and then gradually transform in in international armed conflict.

⁹⁹³ See Daniel Byman, “Understanding Proto-insurgencies,” *The Journal of Strategic Studies* 31, no.2 (2008): 169-170.

international obligations and pressures. Moreover, these treaties not only lack coherence as themselves are associated to momentary counter-narratives and are usually drafted reactively in response to specific patterns of transnational violence. But also lack a forum in the international level where their legal validity, procedural fairness and compatibility with international human rights and humanitarian law can be scrutinized and evaluated.⁹⁹⁴ Samuel and Feinberg indicate rightly, that international court of justice has no jurisdiction or mechanism to review the United Nations Security Resolutions of counterterrorism in case of conflicts or duplicities among these resolutions or with international bill of rights.⁹⁹⁵ Such aspects not only blur objectives of international anti-terrorism treaties,⁹⁹⁶ but their horizontal, haphazard, fragmentally regional and sectorial forms also give vague and subjective definitions of terrorism and internal disturbances.⁹⁹⁷ Resultantly states acquire

⁹⁹⁴ See Soul, “*Criminality and Terrorism*”, 159-170.

⁹⁹⁵ See Katja Lh Samuel, “*The Rule of Law Framework and Its Lacunae: Normative, Interpretive, And/or Policy Created?*,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Frias, Katja Lh Samuel and Nigel D White (New York: Oxford University Press, 2012), 35-53; Myriam Feinberg, “*International Counterterrorism- national security and human rights: conflicts of norms or checks and Balances?*,” *The International Journal of Human Rights* 19, no. 4 (2015): 396-399.

⁹⁹⁶ See Samuel, “*The Rule of Law*”, 16-19.

⁹⁹⁷ See Soul, “*Criminality*”, 158; Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on the 16th December, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23rd September 1971; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (with resolution 3166 (XXVIII) of the General Assembly of the United Nations). Adopted by the General Assembly of the United Nations, at New York, on 14 December 1973; United Nations, International Convention for the suppression of Terrorist Bombings, 1995; International Convention against the taking of hostage, Adopted by the General Assembly of the United Nations on 17 December 1979; International Convention against the Taking of Hostage, adopted by the General Assembly of the United Nations on the 17th December, 1979; Protocol for Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on the 24th February, 1988; Convention for the suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on the 10th March, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on the 10th March, 1988; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations at New York on the 15th December 1997; United Nations, International Convention for the Suppression of the Financing of Terrorism, 1999; United Nations, International Convention For the Suppression of Acts of Nuclear Terrorism, 2005 ;United Nation Security Resolution 1269 on the

vide discretions to define political offences and their elements according to their own ideology and contexts.⁹⁹⁸ Hence, to avoid this scenario Campbell suggests a rule of law approach under the public order paradigm. Accordingly an ideological engagement and dialect with a potentially mobilized movement is viable prior to its transformation into an armed resistance.⁹⁹⁹

It appears from the above discussion that connotation of internal disturbance has a wide canvas which covers ordinary gang wars, sporadic acts of terrorism, subversion along with sabotage, militia wars and insurgency. It illustrates as well that act of terrorism is a common element in all kinds of internal disturbances and determines their categories and thresholds. Subsequently is used interchangeably with gang wars, militia wars, low intensity conflicts and insurgency. Also indicates that all kinds of internal conflicts mainly emerge from ideological differences, which not only put the sovereignty and legitimacy of a country in jeopardy but also compromise the rule of law and other constitutional guarantees.

Responsibility of the Security Council in the Maintenance of International Peace and Security, 1999; United Nations Security Resolution 1267 on the situation in Afghanistan, 1999; United Nations Security Council Resolution 1373, Threats to International Peace and Security caused by Terrorist Acts, 2001; United Nations Security Council Resolution 1368, Threats to International Peace and Security caused by Terrorist Acts, 2001; United Nations Security Council Resolution 1366 on the Role of the Security Council in the Prevention of Armed Conflicts, 2001; SAARC Regional Convention on Suppression of Terrorism, 1988: Since most of them has been ratified, respected and specifically adopted by Pakistan, especially in the subsection 3A of the Sec. 6 and the Fifth Schedule of The Anti-Terrorism Act, 1997, inserted by the Anti-terrorism (Amendment) Act, 2013 (XIII of 2013).

⁹⁹⁸ See Soul, 133-134.

⁹⁹⁹ See Campbell, "*Beyond Radicalization*", 263-266.

O'Neill illustrates that non-conformist's ideologies, not only determine the objectives of disturbances, but also ascertain their typology. Accordingly gives different types of ideologies behind internal disturbance which reach up to the threshold of insurgencies. Some of these revolutionary ideological cults include anarchism, egalitarianism, traditionalism, apocalyptic-annihilation-ism, utopianism and pluralism. Besides a commonality of "ism" indicates that all such perspectives require political power for their propagation, consequently form armed groups to accomplish their objectives. Then variations in objectives differentiate these groups from common vagabonds or criminal dacoits, and constitute them as secessionists, reformists, preservationists or commercialists.¹⁰⁰⁰It is a state centric political cum criminal approach of disturbance, but then what about transnational cults of terrorism? Rapoport satisfies this quest in a prospective way, accordingly he bifurcates international ideological terrorism into four major sequential paradigms. His first paradigm begins with anarchist's perspective of the use of violence for a greater cause; he believes that as an antithesis of aristocracy this trend evolved in Russia in late nineteenth century. He identifies this era as the '*inception of doctrine of modern terrorism*', which separated the demonstration of violence for a cause from ordinary crimes against person or public order. Though it seems to emerge from Marxian class conflict, yet Rapoport identifies it uniquely from this perspective. As such consequentialism justifies all means irrespective of their social and economic costs or ethical discrepancies to achieve a presumed noble cause, which is not limited by means of production only. This transnational approach justifies use of terror to challenge established

¹⁰⁰⁰ See Bard E O'Neil, *Insurgency and Terrorism: Revolution to Apocalypse* (Washington DC: Potomac Books, 2005), 20-29, quoted in Thompson, *Armed Groups*, 131.

norms by creating fear among the minds of their followers and aims to distort their efficacies. This pattern of political violence stretched up to the First World War, as diminished marginal utility of war's catastrophes brought an end to the revolutionary passion of terror.¹⁰⁰¹ The post war cult for transnational terrorism began as an antithesis to colonialism, owing to worldwide euphoria for self-determination, self-rule and nationalism in the early twentieth century. These freedom struggles in different continents were combination of civil disobedience and noncooperation movements, sabotage and terrorist acts, armed resistance and mutiny and lastly freedom fighting through militia wars. Yet the two phenomenal developments of that period gave ethical justifications and appreciation to the cause of self-determination even through armed struggle. These include the post Second World War inception of an international forum of the United Nations in 1945 along with a worldwide appreciation of natural law in the form of Universal Declaration of Human Rights, 1948. This apparently successful wave of ethical violence for a greater cause of independence lasted up to 1960, as till that, period many newly established nation states achieved their de-jure status, out of anti-colonialism movements or armed struggles.¹⁰⁰²

The third wave of transnational terrorism started with the boom of cold war era between Communist block led by Russia and Capitalist block led by America during the mid-60's and lasted till collapse of the Soviet Union in 1991. Rapoport identifies this era as

¹⁰⁰¹ See David C. Rapoport, "The Four Waves of Modern Terrorism," in *Attacking Terrorism: Elements of a Grand Strategy*, eds. Audrey Cronin and James Ludes (Washington DC: George-Town University Press, 2004), 46-52.

¹⁰⁰² *Ibid.*, 52-56.

'*excessive internationalism*' in which masses of newly created states violently tried to adopt either of the above mentioned socio-political and economic frameworks and agendas as their salvation. It was mainly due to their relative deprivations as associated with mal-administration, poor governance and un-relinquished democratic promises of their leaders. Along with realpolitik and propagations of these two competing blocks which strategically manipulated newly emerging states as their pawns to achieve international hegemony.¹⁰⁰³ Resultantly this state-oriented international terrorism revolved around a combination of strategic objectives like, "regime change, territorial change, policy change, social control and status quo maintenance."¹⁰⁰⁴

The last and contemporary wave in unipolar world is identified by some scholars as '*new-terrorism*' or '*super-terrorism*', since has specifically trans-border objectives with absolute annihilation intents against secular philosophy.¹⁰⁰⁵ According to Huntington the post-cold war, national and international paradigm revolves around confrontations of ideologies, which are identified as inter-civilization conflicts. These are further subdivided into micro and macro conflicts, while the former as '*fault line conflict*' deals with intra-state conflicts between different schools of thoughts as well as cover clashes between neighboring countries of conflicting ideologies. Whereas the later as '*core state conflict*' covers a global context in which clusters of states confront each other's core values. And the most discernable among them is an apparent clash between the secular European

¹⁰⁰³ Ibid., 56-61.

¹⁰⁰⁴ See Andrew Kydd and Barbara Walter, "The Strategies of Terrorism," *International Security* 31, no.1 (2006): 52-56, quoted in Thompson, *Groups*, 131.

¹⁰⁰⁵ See Freeman, "*Order, Rights and Threats*", 38.

thoughts of Christian dominated cluster and the theological perspectives of Islamic dominated cluster.¹⁰⁰⁶ Rapoport believes that fundamentalist, apocalyptic and utopian approach of Pan-Islamism against liberal democratic norms emerged as a reaction to European indifference to the plight of underdeveloped Islamic countries. Resultantly Al-Qaeda, a trans-border and non-state terrorist group has emerged from those Islamic states which have undemocratic, tyrannical, incompetent or corrupt regimes, yet are backed by the Europeans and especially Americans governments for their own vested interests. Therefore, its members demonstrate extremely apocalyptic tactics like suicide bombings, indiscriminate terrorist attacks and devastating pillages. It is purposely to expose sham democracies in their native countries as well as the alleged apathy of developed world to their perceived or actual miseries.¹⁰⁰⁷ Moreover, by keeping in view trends of last three waves of transnational terrorism, he envisages that the contemporary cult of terror would last up to 2025. However does not specify its fifth probable wave, yet explicitly narrates that the cult and potential of terror would remain constant in human civilization.¹⁰⁰⁸

¹⁰⁰⁶ See Huntington, *The Clash of Civilizations*, 207-218.

¹⁰⁰⁷ See Rapoport, *The Four Waves*, 61-70: According to his thesis terrorists acts not only express the anguish of segregated armed groups but also expose the vulnerabilities of regimes. Since one aspect of such vulnerabilities deals with governmental incapacity to establish its writ to protect lives and limbs of its citizens. While in the other aspect terrorist groups frustrate and embrace a government to such extent that it reacts irrationally out of repression and rage. Such repression as often indiscriminately and disproportionately violates civil and political liberties further expose the government inability to manage conflicts and crisis in an amicable way. Moreover he believes that the inception of the term '*terror*' was initially associated with such administrative actions which had been taken arbitrary in the form of punishment, as beyond the scope of settled rules and regulation. Thus arbitrary actions as well as indemnity of such actions through special legislation further stigmatize a government to be totalitarian and indifferent to human rights and humanitarian guarantees.

¹⁰⁰⁸ *Ibid.*, 47.

Thence it seems from the preceding debate that international and national paradigms of peace and conflicts are inter-related and have virtual tautological relationships. Since trans-border movements flange into national jurisdiction and similarly domestic conflicts spread internationally irrespective of their threshold and intensity. Resultantly internal disturbance cannot be evaluated or eradicated comprehensibly in isolation to its regional or global contexts. Moreover International instruments on conflicts and disorder, mostly address the phenomena of terrorism and the same is the case in domestic legislations. It seems that disturbances, both in international and national horizons not only have commonality of the element of terrorist acts, but also known as merely terrorism campaigns, mostly in context of crimes against public order. Accordingly, in both horizons political and ideological deviances are countered through deterrence and punitive methods of criminal law instead of being engaged dialectically to defuse their stanch narratives. Another ironical issue which arises in this context is that on the one hand States enthusiastically adopt international obligations on counter-terrorism measures to act arbitrary under their guise. On other hand mostly reluctant to cope with international obligations on human rights and humanitarian protections. Similar the UNSC resolutions 1267 and 1373 along with other horizontal conventions on counterterrorism are vigorously adopted in the Anti-Terrorism Act, 1997 in Pakistan. However the UNSC resolution 1265, which is dealing with humanitarian protections during armed conflicts along with its resolve to defuse them peacefully through conflict management techniques has been completely ignored in this special law.¹⁰⁰⁹ But then the question arises that what are the

¹⁰⁰⁹ See United Nations Security Resolution 1265 for Humanitarian Protection during Armed Conflicts, 1999

outcomes of these mix responses to internal disturbances under the criminal law paradigm. The answer to this query leads to formulations of special laws with special executive powers, as identified by Dicey a ‘*rule by law*’ to deal with probable and actual crises.¹⁰¹⁰ However, its rationales, likely justifications and implications for rule of law and due process of law are subject matters of the subsequent section of this comprehensive chapter. Yet it would initially analyze the probability of ideological and political armed contests in classic egalitarian society, to understand the occurrence of severe law and order crises under contractual paradigms.

Emergence of Crisis under Exceptionalism and Executive Prerogatives

While correlations of state with its citizens and civil society under different perspectives of sovereignty has already been discussed in the preceding chapters of study. Yet emergence of apocalyptic-ism especially under social contract philosophy is a core concern of this portion. Nevertheless ideological and political segregations, polarizations, contestations seem conceivable in an undemocratic, poorly governed or totalitarian state. But how could they nurture under the categorical imperative of egalitarian society and what factors contribute to such occurrence? This query leads to the anarchist’s perspective of state to

(S/Res/1265-1999):“Stressing the need to address the causes of armed conflict in a comprehensive manner in order to enhance the protection of civilians on a long-term basis,---Calls on States which have not already done so to consider ratifying the major instruments of International humanitarian,[and] human rights-law and to take appropriate legislative, judicial and administrative measures to implement these instruments domestically---Emphasizes the responsibility of States to end impunity.”

¹⁰¹⁰ See David Dyzenhaus, “*Schmitt v. Dicey: Are States of Emergency inside or outside the Legal Order?*,” *Cardozo Law Review* 27, no. 5 (2006): 2011, 2031-2032.

find out problematic arena, if any, in a social contract theory.¹⁰¹¹ Accordingly it indicates that though egalitarians form civil society to accomplish an ‘*egalitarian equality*,’¹⁰¹² yet the process which proceeds to attain political society and general will ultimately leads to elitism. Rendering to this thesis, only the influential among egalitarians would be able to come in to power as the transitional process of civil to political society is neither transparent nor has been comprehensibly elaborated by contractual philosophers. Subsequently it engenders power politics, coercion and ‘*violence of majority*’.¹⁰¹³

Though Madison in his *constitutionalism* as well as a contemporary Indian case law indicate that core principles of categorical imperative serves as basic doctrine to manage such coercion and binds the unbridled constituent power of republicans. But then for such restraint mechanism, constitutionalism as well as basic doctrine both concentrates on judicial review of legislative actions.¹⁰¹⁴ Yet utopian perspective of anarchism believes that centralized legal order which serves as rationale for apex judiciary is again a sign of undue unification of classic pluralism. Subsequently it emphasizes on local bodies system based

¹⁰¹¹ See Colin Ward, *Anarchy in Action* (London: Freedom Press, 1996), 7-9; Jonathan Crowe, “Natural Law Anarchism,” *Studies in Emergent Order* 7, (2014): 288-298: Anarchism as a socio-political ideology emerges from the classic liberalism and leads to socialism. While former gives permanency to rights in contractarian model whereas later emphasizes on cooperative management of means of production as an antithesis of capitalism. According to anarchist perspective state led capitalism even in a liberal democracy not only diminishes true egalitarianism but also produce uneven distribution of wealth and resources. Hence to attain absolute equality it focuses upon rights centric socialism which may lead s to community based system of conventions, instead of centralized body of laws and administration. In this ‘*thin*’ perception of State, order is supposed to maintain in a replica of international system, in which communities may give their consent to treaties and conventions according to their own contexts. Therefore state could have only positive morality to enforce mutually respected conventions, in fact this assumed model is based on a loose confederations of city states.

¹⁰¹² See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401.

¹⁰¹³ See Ward, *Anarchy in Action*, 21-30.

¹⁰¹⁴ See Wilfrid E. Rumble, “*James Madison on the Value of Bills of Rights*,” in *Constitutionalism*, eds. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1979), 122-146; *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1641.

upon city state model under center less confederation. Also stresses upon consensus based leaderless organizational setup at all levels and decentralized community based legal system at provincial as well as district levels.¹⁰¹⁵

This perspective emerges as an anti-thesis to a probability of manipulation that seems inevitable during the formative phase of political society. It indicates that the republican process, which helps to attain ‘general will’ in a connotation of ‘we the people’, does not necessarily represents the true egalitarian perceptive. Besides diminishes absolute pluralism which is a core objective of social contract as being ideologically conceived under the connotation of liberal democracy. Consequently the deception of ‘*will of the people*’ even in the form of welfare state leaves aside a priori yet heterogenic egalitarian manifestation, which further accumulates and takes a form of dissent.¹⁰¹⁶ But then whether communism has some solution to this republic’s dilemma? Bakunin being a critic of Marxist theory of state-ism believes that even proletarian’s revolution has no answer to it. Since their revolution against the means of production lead to transitory dictatorship for a redistribution of resources. Yet such socialist government relies upon the same state intuitions, bureaucratic setups and centralized laws, which ultimately lead to emergence of ‘*privileged elites*’.¹⁰¹⁷ Hence to avoid this subjugation he emphasizes on trans-border

¹⁰¹⁵ See Ward, *Anarchy*, 31-58.

¹⁰¹⁶ See Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (New York: Routledge, Taylor & Frances Group, 2012), 70-73; Gordon J. Schochet, “Introduction: Constitutionalism, Liberalism, and the Study of Politics” in *Constitutionalism*, eds. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1979), 1-12.

¹⁰¹⁷ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 757-758, 900: J. Saqib in his dictum explicitly indicates that, Art. 3 of the constitution of Pakistan, 1973 have been virtually copied from the Art.12 of the then USSR constitution in which the expression of exploitation has been used

‘*social revolution*’ of comrades to form worldwide consensus based communities. Though almost similar to contractual philosophy, yet only limited up to the accomplishment of civil society and is least concerned to form political society and state sovereignty through general will.¹⁰¹⁸

But then whether classic contractarians are also mindful to this republic dilemma of elitism? An ensuing critical appraisal of them indicates affirmatively that they have at least little apprehensions for it. Though Kant devises a mechanism of deontological ethics in accordance with his categorical imperative to maintain collective order, and attempts to achieve consequentialism through rightful means.¹⁰¹⁹ Yet such liberal democracy profoundly depends upon a hypothetical superiority of his categorical imperative, which itself is contingent on rights based laws and corresponding judiciary.¹⁰²⁰ But who formulates such laws, if legislatures, then whether categorical imperative can manage their powers to avoid a potential emergence of ‘*politically prevailed elites*’, especially their constituent powers in this regard? Similarly, who will ensure the accomplishment of

to express the exploitation of the capitalist class. However he further indicates that during the dictatorship of proletarians in Russia, judiciary was merely an instrument to accomplish the whims of the socialist government. Hence akin to Bakunin’s perspective he implicitly indicates that in an absence of socio-political equality and justice in society laws, institutions and judiciary can only serve the interests of powerful segments of society.

¹⁰¹⁸ See Sam Dolgoff, ed., *Bakunin on Anarchy: Selected Works by the Activist- Founder of World Anarchism*, trans. Sam Dolgoff (New York: Vintage Books, 1972), 321-350.

¹⁰¹⁹ See Teson, “*Liberal Security*,” 64-70.

¹⁰²⁰ See Scott et al., *Jurisprudence*, 65-66: Argues that Kant focuses on to attain a legal system to implement his right full conditions. In Kantian legal system core principles of categorical imperative function as rationales for legal precepts. Since every egalitarian who enters in to social commune knows prior to his contract about the presence and significance of categorical imperative, hence core objective of contractarian state is to accomplish the categorical imperative to be qualified as rights centric liberal democracy. Scott et al., identifies this aspect of liberalism as ‘*constitutional reasoning*’ in which neither members of political society, nor any egalitarian can act against such state’s *ratio*. However this theoretical perspective is silent about the reliability of the entire process, especially the attainment of foundational constitution and legal order in accordance with the categorical imperative.

foundational constitution in accordance with the Kantian ‘ratio’? If the entire political society deviates from categorical imperative in transitional process of ‘foundational’ constitution making, then what kind of remedies are available for egalitarians to enforce their will?

It is the same debate which has been unfolded in a recent case law in Pakistan which not only distinguishes legislative and constituent powers, but also contextualizes social contract theory to the constitutional paradigms of Pakistan.¹⁰²¹ As Jawwad S. Khawaja, J. declares in his dissenting opinion in this case, “It is in Pakistan, however, that the social contract theory was reduced into a well-defined document, the Preamble to our Constitution as--- in 1949 on the Objectives Resolution and---the Preamble [of constitution] as it exists since 1973.”¹⁰²² Though it has already been settled in Pakistan that, “subjects of the state, by virtue of the Constitution had executed a social contract.”¹⁰²³ Yet in the *District Bar Association Rawalpindi* case, dictum profoundly focuses on the utility of objective resolution as if a categorical imperative in an indigenous context of Pakistan. It is to appraise the probability to extract some basic doctrines for the constitution of Pakistan to bridle political whims of ruling elites.¹⁰²⁴ Since the transitional process to attain political society from civil society has not elaborated as such by contractarians, therefore the constitution making and

¹⁰²¹ See *District Bar Association, Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401.

¹⁰²² Ibid; Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12_of_2010.pdf, 91-92.

¹⁰²³ See *Malik Muhammad Mumtaz Qadri v. The State*, PLD 2015 Islamabad 85.

¹⁰²⁴ See *District Bar Association Rawalpindi and others v. Federation of Pakistan*, Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12_of_2010.pdf: 13-29, 114-118.

amendment process is usually skeptical for the alienated segments of civil society. Scott et al. indicates that such controversy begins from two different constitutional perspectives. As in the first perspective egalitarians in the contractual society believe that no constitutional amendment or legislation can exist contrary to categorical imperative as it is '*ratio*' or '*reasoning*' for which they have made a voluntary contract. Scott identifies this perspective as '*constitutional reasoning*' for rest of rights based laws and constitutional amendments especially in liberal democracy. While in the second perspective, identified as '*democratic will*' or '*representation*' the first perspective is highly criticized especially by republicans. As they believe that the stagnation of categorical imperative cannot be compatible with the vibrant socio-political and economic needs of society. Moreover they believe that the perspectives of ancestor should not restrain the political will of future generations. Hence Scott et al. classifies the presence of both as '*dualism*' in a democratic society.¹⁰²⁵ But under this context what are the prospects for the notion of '*we the people*', especially when politics under representation and law under rezoning are compartmentalized in two different domains? Does it represents the will of egalitarians in the formative phase of civil society or does it mean the general will as decided by the legislature after attainment of political society?

Loughlin and Walker comprehend and contextualize such arguments under the notion of '*paradox of constitutionalism*'.¹⁰²⁶ Resultantly under similar '*paradox*' court in another

¹⁰²⁵ See Scott et al., *Jurisprudence*, 65-68.

¹⁰²⁶ See Martin Loughlin and Neil Walker, "Introduction," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, eds., Martin Loughlin and Neil Walker (Clarendon Street: Oxford

occasion gives an absolute supremacy to legislature with regard to its constituent as well as legislative powers and declares the notion of ‘*we the people*’ a myth.¹⁰²⁷ Yet there is a probability that such unqualified constituent or legislative powers under charismas of majority or any other momentary tide of sentiments may override the core principles of categorical imperatives. It is not only hazardous to Kant’s deontological ethics but also to egalitarianism, since cause segregations, polarizations and class privileges among egalitarians of civil society. Likewise, if conflicts occur between will of people and basic doctrines of categorical imperative, especially when judiciary acknowledges absolute supremacy of parliament as in *Dewan* case.¹⁰²⁸ Then which of supra perspectives has an assumed superiority? If ‘*will of the people*’, then whether it is crafted in a preliminary or ‘*fundamental*’ constitution at the time of inception of a state or is dependent upon mandates of ruling parties and contingent upon different political perspectives?¹⁰²⁹ If premier will as it emerges at the formative phase of state has superiority over all other succeeding wills and mandates. Then it would be close to basic doctrine theory and has an authoritarian impact over rest of generation’s will. But if dependent upon momentary ‘*representation*’, then all succeeding political ruling mandates and other national and international stimulus may influence the core settled norms of society as identified by Scott et al. through the connotation of ‘*politicization of law*’.¹⁰³⁰ Resultantly Scott et al. relies upon Kelsen’s pure theory of law and basic norm to avoid negative externalities of

University Press, 2007), 1-3, quoted in Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (New York: Routledge, Taylor & Frances Group, 2012), 65.

¹⁰²⁷ See *Dewan Textile Mills Ltd v. Pakistan and others*, PLD 1976 Karachi 1368.

¹⁰²⁸ Ibid.

¹⁰²⁹ See Scott, 67-68.

¹⁰³⁰ Ibid., 29-30.

momentary socio-political and economic variables to identify valid norms of society.¹⁰³¹ But then what about “we the people” of a particular period, whether ‘representation of *people*’ means nothing but only a deception, as this “we the people” is a legacy of ancestors? Besides, does a written constitution personifies such legacy and also grapples constituent as well as legislative powers of the legislature? Especially when court observes in another case, “The Parliament in Pakistan is not as supreme as it is in England; it has only those powers which are given to it by the Constitution.”¹⁰³²

Hence to satisfy these queries study initially focuses on Ackerman’s theory of ‘*constitutional moments*’¹⁰³³ and then the dissenting opinions of J. Jawaad in the *District Bar Association* case. Since Scott et al. believes that ‘*moment*’ theory attempts to streamline and combine ‘*reason*’, ‘*representation*’ and ‘*will*’, not only the foundational but also the succeeding wills through ‘*constitutional monism*’.¹⁰³⁴ According to this theory people challenge the status quo to represent their ‘*self*’ and for such political purpose, they adopt constitutional means especially the core values of the constitution. Through judicial review of legislation, they not only dissent with established norms but also challenge the legitimacy of entire constitutional order. However it is neither a merely judicial review nor an entirely disobedience movement or revolt, rather it is a political struggle of left overs to incorporate their self in the general will of state. Yet interestingly in such ‘*judicialization*

¹⁰³¹ Ibid., 38-44, 118-126.

¹⁰³² See *The State v. Abdul Ghafar Khan*, PLD 1957 (W.P) Lahore 142.

¹⁰³³ See Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press, 1991), 240, 272-274, 295-296, quoted in Scott, *Jurisprudence*, 68-69.

¹⁰³⁴ See Scott, 68: “Constitutionalism is the name for an interaction of law and politics- under the Monist perspective.”

of politics',¹⁰³⁵ the dissenting representation movements rely upon the same foundational reasoning, which has been consented upon by egalitarians in a pre-state civil society. Consequently due process clauses, fundamental guaranties and principles of policy as extracted from the categorical imperative help them to assert their will and to establish popular sovereignty through the court of law. Ackerman believes that such trends of mass mobilization during 'exceptional political crisis' not only associates law with politics but also lead to 'constitutional creativity' to accomplish a 'democratic renaissance'.¹⁰³⁶

Similar debates are also occurring in the *District Bar Association Rawalpindi* case, in which establishment of military courts and bars on the judicial review of their verdicts. As well as qualification of core human rights protections in the 3rd schedule of the constitution in relation to civilians under the jurisdictions of such courts have been challenged in the Apex court of Pakistan. Although majority view declares in this case that there are no limitations on the constituent powers of the Legislature as incorporated in Art 238 and 239 of the Constitution of Pakistan, 1973, even when they are contrary to fundamental rights or objective resolution. Because, firstly the qualifier of Art. 8 of the Constitution according to which, "laws inconsistent with or in derogation of fundamental rights to be void" is only intended to its legislative powers. Even this qualifier has been exception under sub clause (a) of the clause 3 of this Article, when civil and armed forces are involved to maintain public order. Secondly, neither constitutional reasoning like basic doctrine theory exists as

¹⁰³⁵ See Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide," *Fordham Law Review* 75, (2006): 721-754; Barry Friedman, "The Politics of Judicial Review," *Texas Law Review* 84, no. 2 (2005): 257-337; Kashif Mahmood, "Politically Motivated Litigation," *Pakistan Law Journal* 7, (2013): 242-249.

¹⁰³⁶ See Ackerman, *We the People*, 240, 272-274, 295-296, 314, quoted in Scott, *Jurisprudence*, 68- 73.

such in Pakistan nor judiciary is empowered to examine unqualified constituent powers with regard to constitutional amendments as incorporated in clause 5 of the Art.239 of the Constitution.¹⁰³⁷ However by adopting a ‘*counter majoritarian*’ perspective under ‘*monist doctrine*’ of ‘*constitutional creativity*’ J. Jawwad in his dissenting opinion acknowledges the presence of ‘*foundational constitutional reasoning*’ in Pakistan. Yet in a novel way he differentiates objective resolution from the preamble of the Constitution, 1973 to uphold such egalitarian reasoning. Accordingly he declares that though objective resolution being a commune of egalitarians focuses on protection of fundamental rights and equality of citizens through independence of judiciary and deontological ethics, yet it is contingent upon the authority of state not the foundational general will. Since it indicates in its first paragraph, “--State of Pakistan, through its People--”, that state has an apparent supremacy over will of the people. Therefore under the state necessity doctrine during exceptional situations such will might be subject to some limitations. Yet expression in 2nd paragraph of objective resolution indicates ‘*resolve*’ of political society to frame foundational constitution in consonance of mandatory precepts of categorical imperative, as each of its precepts begins with connotation of ‘*shall*’. Owing to such resolution he observes ahead that it is in fact preamble of the constitution of 1973, which not only establishes [foundational] general will but also institutes ‘*representation*’ over and above the state. It is evident from the expression of its 2nd paragraph which narrates, “It is the will of the people of Pakistan to establish order.” But then what kind of order is intended? Here he believes

¹⁰³⁷ See National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 142: Art.238 “Constitution may be amended by Act of Parliament”; Art.239 “Constitution, amendment Bill----(5):No amendment of the Constitution shall be called in question in any court on any ground whatsoever”

that order is based on the 'ratio' of objective resolution, ought to consist on core values of liberal democracy under constitutionalism. Besides each Article of the constitution is harmoniously aligned with other Articles, subsequently the general will of the preamble is similarly aligned with substantive part of the constitution. Hence the constituent power either change the entire scheme of written constitution by implanting new will in preamble or craft amendments in consonance of the existing will. Therefore instead of depending upon the doctrine of basic theory, he emphasizes upon the foundational general will which represents the resolve of primer political society to establish order in accordance with Kant's categorical imperative.¹⁰³⁸ It is mainly to streamline constituent and legislative powers of the Legislature in case of crisis legislation during socio-political exceptionalism to upheld deontological ethics of fair trial even of a '*principled evil doer*'. Accordingly J. Jawwad discards an assumed unqualified sovereignty of Parliament even in the case of United Kingdom, especially in the wake of UK Human Rights Act, 1998.¹⁰³⁹

¹⁰³⁸ See Scott, 85; J. Jawwad's inference seems to be based on Kelsenian notion of grundnorm, in which the validity of every precept of law goes back to the core norms of first revolutionary constitution. Hence under this perspective future generations and representations may enforce their will through constituent and legislative power, yet their political will must be in consonance of the core principles of the primer constitution of a state. But then a question arises here that which institution has an apparent responsibility to apprise, evaluate and validate precepts in the line grundnorms of the primer constitution. The answer of this question indicates the judicial organ of state, under its power of judicial review of legislation has such burden of appraisal and validity.

¹⁰³⁹ See *District Bar Association Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401; Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12_of_2010.pdf: 70-88, 89-161; Scott, et al., *Jurisprudence*, 82-84; Discusses the validity of UK Anti-Terrorist Act, 2001 on the touchstone of UK Human Rights Act 1998, specifically in the light of *Rehman and A v. Secretary of State for the Home Dept*, 2002 EWCA Civ 1502. In the United Kingdom's case human rights have been given the protection under a positive law, the issue in this context was that how much derogation of such derogation of rights are possible in case of emergency legislations.

Nevertheless either ‘*constitutional moment*’ or the appraisal of constituent power at the time of constitutional amendment, it is in Bickel’s words the ‘*deviant institution of judicial review*’ which supposed to interpret ‘*reasoning*’ in accordance with Kantian imperatives under constitutionalism.¹⁰⁴⁰ But if such ‘*deviant institution*’ does not ‘*deviate*’ from majoritarian perspective or even when constitutionalism does not function properly in highly polarized and uneven societies, then whether the Kantian imperative and its deontological ethics are of any utility?¹⁰⁴¹ Similarly Rousseau being a critic of ‘*large towns*’, indicates that it is hard to sustain egalitarian spirit in outsized and polarized democracies. Resultantly considers the formulation of local governments as more conducive to contractual paradigm.¹⁰⁴² But then how the centrality of a federation, its general will or even Kantian legal order can be maintained in this situation? If anarchist diversity is endured in a non-consensual and heterogenic society, then it may lead to disorderly political mayhem, social deviance, militia wars or even civil wars. Moreover, if centrality, order and deterrence are intended through stringent laws in this society then it

¹⁰⁴⁰ See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court as the Bar of Politics* (Cambridge, MA: Harvard University Press, 1962), 18, quoted in Scott, Jurisprudence, 68.

¹⁰⁴¹ See Katharine Adeney, *Federalism and Ethnic Conflict in India and Pakistan* (New York: Palgrave Macmillan, 2007), 137-145, 163-181: Indicates the issue of ethnic divides and conflicts as core hinderences to achive pragmatic Federalism in India and Pakistan; Craig Baxter, *Bangladesh: A New Nation in an Old Setting* (Boulder: Westview Press, 1984), 29-46, 53-60: Identifies ethnic polarization and violence as core determinants for the civil war in 1970-71 which ended in to the separation of East wing from West Wing of Pakistan. Hence ethnic polarization has been empirically proven hazardous to egalitarianism in the case of Contractual Paradigms of Pakistan; Waltraud Ernst and Biswamoy Pati, “*People, Princes and Colonialism,*” In *India’s Princely States: People, Princes and Colonialism*, eds. Waltraud Ernst and Biswamoy Pati (New York: Routledge, Taylor & Frances Group, 2007), 1-14: Ackowleges the existance of an aristocractic class in South East Asian’s national poltics which diminishes the egalitarin perceptive of equality, accordingly not only the civil but also political socity suffers from an inbulit socio political divide and fragementation; The argument which develops from such secondary source analysis is that in the subcontinent’s constitutional paradigm “will of people” does not necessarily represents the true voice of common people. Moreover it seems that neither federalism nor constitutionalism has emerged as such in India and Pakistan in the presence of ethic, linguistic and cultural heterogeneities and divides along with other class segregations.

¹⁰⁴² See Ronald Grimsley, *The Philosophy of Rousseau* (London: Oxford University Press, 1973), 111-114.

may lead to absolutism as contrary to personal and civil liberties. Let alone liberties this context is even menacing to national security as Locke goes to the extent of revolt if government ever attempts to infringe rights of free men?¹⁰⁴³ Yet rather paradoxically, Locke himself relies upon sovereign for discretionary measures to protect order in case of exceptional crisis and pays little attention to the same rights during such times.¹⁰⁴⁴ Nevertheless, at this point few concepts are required to be elaborated to comprehend the ‘*state of exceptionalism*’.¹⁰⁴⁵ As firstly, what is crisis, secondly who is sovereign and has potential to cope with it, thirdly what kind of role a sovereign can play in this regard, fourthly what is the scope of discretionary measures and lastly against whom these are intended for?

Rossiter believes that crisis is a kind of turmoil, which is certainly beyond the judicial capacity for corresponding remedial measures. He narrates that what comes in the ambit of

¹⁰⁴³ See Alpheus Thomas Mason and Richard H. Leach, *In Quest of Freedom* (Englewood Cliffs, N.J: Prentice-Hall, Inc, 1981), 11-14; *Rehman and A v. Secretary of State for the Home Dept*, 2002 EWCA Civ 1502, quoted in Scott, et al., *Jurisprudence*, 83: Lord Hoffmann observes with regard to stringent UK Anti-Terrorist Act, 2001 that, “ the real threat to the life of the Nation---comes not from terrorism but from laws like this”; Scott, 83-84: Indicates that strong governments through stringent laws during crisis situation do not come under the ambit of rule of law, rather their rationales and justifications come from the political narratives of respective regimes and such narratives further originate from the realpolitik. Therefore stringent laws are in fact the rule of realpolitik, where legislature, executive and judiciary all the three branches complement each other to attain the objectives of such narratives, thereby this scenario leads to a ‘ *collapse of the division of power*’ and depreciates the mechanisms of checks and balances in case of the infringement of legal rights and human rights.

¹⁰⁴⁴ See Freeman, “*Order, Rights and Threats*”, 40.

¹⁰⁴⁵ See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, MA: MIT Press, 1985), 1, quoted in Scott, et al., *Jurisprudence*, 84-85: Exceptionalism connotes extreme political polarization and turmoil during internal disturbance in which occurrence of unforeseen and catastrophic events diminish the rule of law paradigm. Nevertheless it involves temporary yet tangible suspension of civil and political rights and other constitutional guarantees. It is an extreme threshold of “*constitutional moment*” where politics overshadows the laws and reasoning. Consequently special legislative and administrative measures are resorted by governments during exceptional periods to cope with power politics of those forces and stake holders who are behind violent or non-violent political wrangling.

rule of law cannot be categorized as crisis respectively.¹⁰⁴⁶ Subsequently Dyzenhaus identifies such occurrences as ‘*lawless void*’, in which ordinary legal system and laws are of no use to comprehend them.¹⁰⁴⁷ And Schmitt indicates that since ordinary legal system is prospectively crafted by keeping in mind the normal state of affairs therefore it is logical that rule of law paradigm fails to counter catastrophic turmoil.¹⁰⁴⁸ Nevertheless Rossiter further categorizes the occurrence of unusual crisis in to three core yet diverse domains. As the first deals with external aggressions and trans-border war, second deals with internal disturbances and insurrections. And the third deals with economic depressions either associated with governmental policies or link with natural calamities such as famines, draughts, and hurricanes, cyclones or earthquakes.¹⁰⁴⁹ Since the focus of study revolves around the Rossiter’s second category for which he describes that ‘*judicial injunctions*’ and ‘*dialectical debates*’ are futile to suppress them.¹⁰⁵⁰ Carr believes that to counter deviant repressions and atrocities governments resort to adopt counter repression even in liberal democracies, which is identified by Rossiter as ‘*constitutional dictatorship*’.¹⁰⁵¹ As it is a transitory combination of legislative, executive and judicial powers in the hands of a man or men to curb an eminent danger in a democratic country.¹⁰⁵²

¹⁰⁴⁶ See Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), 9.

¹⁰⁴⁷ See David Dyzenhaus, “*Schmitt v. Dicey: Are States of Emergency inside or outside the Legal Order?*,” *Cardozo Law Review* 27, no. 5 (2006): 2006.

¹⁰⁴⁸ See Scott, *Jurisprudence*, 85-86.

¹⁰⁴⁹ See Rossiter, *Constitutional Dictatorship*, 6.

¹⁰⁵⁰ *Ibid.*, 6-7.

¹⁰⁵¹ See Cecil T. Carr, “Crisis Legislation in Great Britain,” *Columbia Law Review* XL, (1940): 1324, quoted in Rossiter, *Constitutional Dictatorship*, 6.

¹⁰⁵² See Rossiter, 289.

Now the question is that if judiciary is kept out of the ambit during such exceptional yet ‘*transitory*’¹⁰⁵³ periods then which institution is empowered to adopt or directs to adopt these counter repressive means? And whether classic contractarians are also aware of such exceptional occurrence, if yes, then who is sovereign for them to decide during crisis? Since Schmitt indicates that it is only the emergence of crisis which helps to locate the sovereign during exceptional periods.¹⁰⁵⁴ And like Hart indicates that sovereign is not only an ultimate entity to decide about the preferable course of action to curb crisis but also unaccountable in this regard.¹⁰⁵⁵

With regards to contractarians, it is Locke who believes that prime obligation of political society is to protect and save civil society from non-state actors. And these actors are either theological deviants who strive to enforce their own perspective on egalitarians¹⁰⁵⁶ or the alien combatants who attempt to infringe the collective rights of society. But who are alien combatants? For Locke they are hostile foreigners who are not the members of contractarian ‘*commonwealth*’.¹⁰⁵⁷ For these two categories he emphasizes on sovereign’s prerogative to save the common good which is not necessarily supported by law or may even contrary to it.¹⁰⁵⁸ Hence his sovereign is the Legislature which is not only capable to comprehend such danger but also recognizes the real danger to public peace and

¹⁰⁵³ See Dyzenhaus, “States of Emergency”, 2013; Rossiter, 8.

¹⁰⁵⁴ See Schmitt, *Political Theology*, 1, quoted in Scott, 84-85.

¹⁰⁵⁵ Ibid.; H.L.A. Hart, “*Positivism and Separation of Law and Morals*,” in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 49, 59, quoted in Dyzenhaus, 2015.

¹⁰⁵⁶ See John Marshall, *John Locke: Resistance, Religion and Responsibility* (Cambridge: Cambridge University Press, 1994), quoted in Freeman, “*Order, Rights and Threats*,” 39.

¹⁰⁵⁷ See Freeman, “*Order*”, 39-41.

¹⁰⁵⁸ Ibid., 40-41; Dyzenhaus, 2007.

danger.¹⁰⁵⁹ But then whether he intends absolute discretionary and ad-hoc orders? Certainly not, as Dicey believes that during turmoil Legislature relies upon its optimal supremacy to legislate what Schmitt identifies as ‘*situational law*’ in accordance with political necessity of society.¹⁰⁶⁰ Rossiter illustrates accordingly that through a novel device of ‘*enabling act*’ crisis legislations temporarily delegate legislative powers to executive, called as ‘*executive law making during crises*’ by Rossi,¹⁰⁶¹ which give an absolute indemnity to executive actions to comprehend potential dangers.¹⁰⁶² Dicey identifies such crisis legislation as ‘*rule by law*’, though may contrary to natural justice yet is adopted by the Legislature as a last resort to save an entire legal order.¹⁰⁶³ He believes that in spite of its unavoidable illegality and rigor, a ‘*rule by law*’ is far better than ‘*total state*’ perspective of an absolute administrative state. As instead of the Schmitt’s ‘*politically necessary and motivated*’ autocratic dictator or a military commander, it is at least validly and legitimately given by the Legislature.¹⁰⁶⁴ However Dyzenhauser identifies such ‘*rule by law*’ paradigm as ‘*legal black hole*’, where civil and personal liberties are indiscriminately violated by executives with absolute impunity, as judicial organ has already been restrained to examine it under the doctrine of political question.¹⁰⁶⁵

¹⁰⁵⁹ See Dyzenhaus, 2028; Freeman, 39; Rossiter, 13.

¹⁰⁶⁰ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co, 1885), 412-413, quoted in Dyzenhaus, 2005-2006, 2031.

¹⁰⁶¹ See Jim Rossi, “State Executive Law Making In Crisis,” *Duke Law Journal* 56, (2006): 237-277.

¹⁰⁶² See Rossiter, 10.

¹⁰⁶³ See Dicey, *Introduction*, 229-237, 412-414, quoted in Dyzenhaus, 2033-2035.

¹⁰⁶⁴ See Dyzenhaus, 2029-2030, 2034.

¹⁰⁶⁵ *Ibid.*, 2032-2033.

Hence owing to such ratio of common law doctrine of necessity amid crisis management, Reynolds and Rajagopal criticizes the Article 4 of the International Covenant on Civil and Political Rights. Since both of them believe that permissible derogations of certain political rights by the state to comprehend grave emergencies, as incorporated in the said Article represents the Dicey's legacy of '*rule by law*' and its resultant '*lawless void*'. Both indicate that since United Kingdom actively negotiated in the drafting of the said Covenant. Subsequently her experience of handling law and order crisis through special legislations and stringent police measures especially in colonial territories creped in this instrument. Thence Reynolds identifies such state prerogative as '*the long shadow of colonialism*'. While Rajagopal declares this '*grim zone*' of international human rights incompatible for pragmatic pluralism. As almost discretionary and unaccountable administrative penology is attempted to be legitimized through public emergency under state necessity.¹⁰⁶⁶ But whether such prerogative possesses any neutralizer to delimit the scope of discretions in national and international domains?

For Schmitt the police measures under this arena of realpolitik are absolute until the accomplishment of objectives for which a public emergency has been declared or a '*state of siege*'¹⁰⁶⁷ has been imposed by the state authorities. He believes that laws yield to politics and politics yields to raw power under the doctrine of state necessity and national security. Subsequently the absolute sovereign who enjoys the raw power has not only the

¹⁰⁶⁶ See John Reynolds, "The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law," *Comparative Research in Law & Political Economy* 6, no. 5 (2010): 21-29; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New Delhi: Foundation Books Pvt. Ltd. Cambridge House, 2005), 165-170, 177-182.

¹⁰⁶⁷ See Rossiter, 96-109.

unqualified authority to appraise and declare the state of exceptions but is also empowered to command accordingly.¹⁰⁶⁸ However in a quite contrast to him, Rossiter formulates eleven principles which help to confine a crisis centered ‘*rule by law*’ paradigm under rule of law and constitutionalism. Crisis legislation under his ‘*constitutional dictatorship*’ is based on dire necessity, third party appraisal as well as oversight, sunset clauses, in consonance with due process, fair trial and procedural reliability. Moreover it contains temporary course of actions, pluralistic accountability of such actions, evaluation of chain of command, repeal by the same appraisal authority, prohibition on extension and post-operative normalcy of the rule of law.¹⁰⁶⁹ Similarly Ackerman formulates a novel constitutional device, recognized as ‘*supra-majoritarian escalator*’¹⁰⁷⁰ to apprise the powers of ‘*un-commanded commander*’¹⁰⁷¹ when acting in ‘*black hole*’ either of pre-

¹⁰⁶⁸ See Scott, 86, 88-89: Identifies such occurrence as the ‘*Dilemmas of the Rule of Law*’ under real politik

¹⁰⁶⁹ See e.g. into Rossiter, 288-306; Dyzenhaus, 2012-2014: “Rossiter’s first criterion is that constitutional dictatorship should not be initiated unless it is necessary or even indispensable to the preservation of the state and its constitutional order. Secondly, the decision to initiate a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator [this criterion does not give a clarity that what kind of mechanism is intended by him, either it is a form of national government which contains technocrats or a combination of experts from legislature, executive and judiciary]. Thirdly, no government should initiate a constitutional dictatorship without making specific provisions for its termination. Fourthly, no official action should ever be taken without a certain minimum constitutional or legal sanction [in the indigenous context, a combination of Art. 4, 9, 14, 25 of the constitution of Pakistan, 1973 gives such kind of minimum constitutional protection]. Fifthly, no dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis [similar to Julius Stone’s and W. Friedmann’s legal antinomy owing to purpose conformity]. Sixthly, measures adopted in this regard should never be permanent in character or effect. Seventhly, such dictatorship should be carried on by person representative of every part of the citizenry interested in the defence of the existing constitutional order [again this mechanism of pluralistic accountability is bit complex, whether he intends for public interest litigations? If yes, then how could it be possible in an absence of judicial review of legislative and administrative actions as has been intended by Schmitt and Rossiter in case of crisis legislation and actions?]. The eighth criterion is that ultimate responsibility should be maintained for every action taken under exceptionalism, it means that officials should be held responsible for what they have done during and even after such periods. Ninth, decision to terminate a constitutional dictatorship, like the decision to initiate one, should never be in the hands of man or men who constitute the dictator. The tenth is, no constitutional dictatorship (public emergency) should extend beyond the termination of the crisis for which it was instituted. And eleventh is, termination of the crisis must be followed by as a possible complete return to the political and governmental conditions, existing prior to the initiation of such constitutional dictatorship.”

¹⁰⁷⁰ See Bruce Ackerman, “The Emergency Constitution,” *Yale Law Journal* 113, (2004): 1029, quoted in Dyzenhaus, 2016.

¹⁰⁷¹ See Hart, *Jurisprudence and Philosophy*, 49, 59, quoted in Dyzenhaus, 2015.

emergency exceptional phase or of public emergency's.¹⁰⁷² Dyzenhaus believes that it is intended to convert the '*black hole*' of public emergencies in to a '*gray hole*', when minority of legislators deliberately file petitions in court to examine constitutionally validity of special crisis legislations.¹⁰⁷³ Under such unusual purview judiciary examines them in to two spheres, known as '*macro*' and '*micro*' respectively.¹⁰⁷⁴ Former deals with its '*maximalist*' locus of judicial review of legislation, whereas later deals with its '*minimalist*' locus of judicial review of administrative actions.¹⁰⁷⁵ Yet, Dyzenhaus indicates further that neither '*maximalist*' nor '*minimalist*' locus is capable to avoid human rights abuses either in *black hole* or '*grey hole*'. As the later with '*partial legality*' is even more perilous to civil liberties as governments are usually capable to incorporates indemnities and executive discretions in exceptional legislations and gives them constitutional protections as well. Moreover governments have extensive discretions to declare pre-emergency exceptional situation or to declare public emergency. Likewise it is always up to the subjective satisfaction of governments, first to determine scope and threshold of crisis and second to legislate accordingly. In this scenario judiciary can neither invalidate such special laws on the touchstone of the constitution nor scrutinize the vires of executive prerogatives, as the law itself gives them protection. Thus he believes that

¹⁰⁷² See Dyzenhaus, 2014-2016.

¹⁰⁷³ Ibid., 2018.

¹⁰⁷⁴ Ibid., 2019-2029: With such judicialization of politics, judiciary not only tilts away from the established norm of separation of powers but also leans in to a controversial domain of political question through public interest litigations

¹⁰⁷⁵ Ibid., 2038.

neither Rossiter's nor Ackerman's model can assert itself in the presence of legislative supremacy to declare 'rule by law' exceptionalism.¹⁰⁷⁶

In this scenario of majoritarian hegemony Feinberg relies upon the sociological jurisprudence to achieve a balance between norms of human rights and national security under judicial paradigm. Such exposition is not only proposed for national but also for international contexts through international court of justice, specifically in case of United Nations Security Resolutions on terrorism and armed conflicts. As has been discussed in the preceding portion, it is based upon an assumption that only collective human security can accomplish national security and international peace.¹⁰⁷⁷ But then whether such judicial interpretations of special legislations even beyond the domains of separation of power are susceptible to supremacy of parliament and democratic norm of majority rule? Dyzenhaus maintains that it is not as such, since 'rule by law', being a valid law may align with other general and special laws, yet it could be in conflict with human rights norms.¹⁰⁷⁸ So if judiciary ever attempts to balance conflicting norms then neither constituent nor legislative powers are at stake it is only intended to bring collective order through 'utilitarianism of rights'.¹⁰⁷⁹ Regardless to constitutionality, legal validity or even efficacy of exceptional laws, judiciary is only concerned with procedural fairness and interpretative clarity. As Feinberg indicates that even with precision of procedures gross human rights

¹⁰⁷⁶ Ibid., 2035-2040.

¹⁰⁷⁷ See Myriam Feinberg, "International counterterrorism-national security and human rights: conflicts of norms or checks and balances?" *The International Journal of Human Rights* 19, no. 4 (2015): 389, 391-392.

¹⁰⁷⁸ See Dyzenhaus, 2037-2038.

¹⁰⁷⁹ See Teson, "Liberal Security," 69: under the domain of public importance, collective rights attain supremacy over individual rights.

violations during exceptional periods can be avoided.¹⁰⁸⁰ Yet Campbell looks at this aspect in a bit different connotation by focusing on the rule of law domain to confront severe law and other crisis. Since regardless to actual or assumed severity and complexity of crisis and instead of situational or sometimes irrational crisis legislations, he relies upon an existing criminal law system to maintain legal certainty and predictability.¹⁰⁸¹ Accordingly, he emphasizes on correct application of general criminal law to uphold justice and to avoid a probability of administrative highhandedness as ancillary to maintenance of public order and security. For such purpose he classifies it in to ‘*thin*’ and ‘*thick*’ versions of rule of law. While the former deals with procedural fairness as emerges from strict adherence to prescribed rules, transparent application of delegated powers and a proper administrative as well as judicial accountability to avoid the misuse of power. Whereas the later deals with substance and essence of prescribed statutory commands which if contrary to a bare minimum of fundamental guaranties, then bound to be struck down by judicial review of legislation.¹⁰⁸²

But then a question arises here that whether the above mentioned discussion has some relevance to Pakistan? Whether Pakistan has experienced or experiencing mild or severe ‘*state of exceptionalism*’? If yes, then either is intended to comprehend through Schmitt’s administrative response under political necessity or Dicey’s doctrine of ‘*rule by law*’ or else is confronted with public order paradigm of ordinary rule of law? Therefore preambles

¹⁰⁸⁰ See Feinberg, 391, 395.

¹⁰⁸¹ See Campbell, *Beyond Radicalization*, 276-282.

¹⁰⁸² *Ibid.*, 259.

and statement of objects and reasoning of different special criminal laws indicate that Pakistan is not only facing crisis based exceptional circumstances but also has a ‘*rule by law*’ paradigm to confront them.¹⁰⁸³ If so, then does it contain a mechanism of procedural fairness to endure a bare minimum of constitutionally protected due process of law in Pakistan? As court observes, “*when a law visits a person with serious penal consequences, extra care must be taken to ensure that those whom the Legislature did not intend to be covered by*

¹⁰⁸³ See e.g. into The Anti-Terrorism, Act, 1997 (XXVII of 1997): “for the prevention of terrorism, sectarian violence and speedy trial of heinous offences and for matters connected therewith and incidental thereto”; The Pakistan Army (Amendment) Ordinance, 2007: “Statement of Objects and Reasons: 1- At Present, the entire nation is confronting with multiple challenges at the national/ International level. The reality of the terrorism threat that we are currently facing is so horrendous in terms of its implications that the whole society is in a state of utter shock and confusion. There is a serious and grave threat to high profile officials, army personnel and important installations of the defence forces and other important Govt. /private entities. In order to meet the challenges of this serious threat to the security of Pakistan and its citizens, a dire need is felt to formulate new legislation that ensures an apt and effective legal response. ---2- The terrorists have deliberately targeted law Enforcement Agencies, Police and Civil Armed Forces and the personal within the judicial system, by physical action and threats/intimidation. The aim and intent very clearly are to demoralize and derogate the Law Enforcement Agencies and the judicial system whereby the ability to ensure enforcement of law & order, writ of the State and holding to account perpetrators of terrorism through the country’s normal judicial system, are severely compromised. In certain areas the normal system in any case does not exist, such as in FATA and PATA. Here a near vacuum of law enforcement and judicial back up is prevalent. It is in the backdrop of such a dire situation that the armed forces, particularly the Army, have been called upon by the State to wrest the areas out of the control of terrorists and to re-establish the writ of the State. ---- However, a serious legal deficiency exists, whereby, unlike the Police, which is vested with legal coverage to undertake given tasks, the Armed Forces are not similarly legally supported. It is, therefore, imperative that appropriate and adequate legislation is enacted to provide this legal support to the Armed Forces.”; The Fair Trial Act, 2012: “In order to neutralize and prevent the threat or any attempt to carry out schedule offences [mainly terrorism centered] it is necessary the law enforcement and other agencies to be given specific authorizations to obtain evidence in time and only in accordance with law [however the law here means Anti-Terrorism Act, 1997, Protection of Pakistan Act, 2014 and Pakistan Army Act, 1952, specifically its S.2 (d) which deals with civilians]”; The Protection of Pakistan Act, 2014: “to provide for protection against waging of war or insurrection against Pakistan and the prevention of acts threatening the security of Pakistan, Whereas it is expedient to provide for protection against waging of war or insurrection against Pakistan, prevention of acts threatening the security of Pakistan and for speedy trial of offences falling in the Schedule and for matters connected therewith or incidental thereto”; The Pakistan Army (Amendment) Act, 2015: “Whereas extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by any terrorist group, armed group, wing and militia or their members using name of religion or a sect; And whereas there exists grave and unprecedented threat to the integrity of Pakistan by raising of arms and insurrection using name of religion or a sect by groups of foreign and locally funded elements; And Whereas it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect captures or to be captured in combat with the Armed Forces or other law enforcement agencies or otherwise are tried under this Act.”; The Constitution (Twenty-first Amendment) Act, 2015: “Whereas extraordinary situation and circumstances exist which demand special measures-----there exists grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble of the Constitution, from the terrorist groups by raising of arms and insurgency using name of religion or a sect or from the foreign and locally funded anti-state elements;-----And whereas the people of Pakistan have expressed their firm resolve through their chosen representatives in the all parties conference held in aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan, it is expedient to provide constitutional Protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan”.

*the express language of the statute are not roped in by stretching the language of the law.*¹⁰⁸⁴ Similarly it declares, “*unless a case falls squarely within special jurisdiction, the forum created under special jurisdiction cannot even touch those matters.*”¹⁰⁸⁵ Likewise, being aware of the extent statutory powers J. Isa acknowledges the emergence of ‘*dark holes*’ in legal systems during exceptional periods in *District Bar Association Rawalpindi Case*. But to sustain reasonability, fair play and justice he relies upon the due process clause as enshrined in the Article 4 of the constitution of Pakistan, 1973 to fill these ‘*dark holes*’. As he indicates, “The best response to terrorists - to isolate, thwart, and defeat them, is to uphold the principles and rights that terrorists trample underfoot. Those accused of terrorist acts must be subjected to legal due process, an independent court and evidence based convictions. If we sacrifice our principles and slip we shall come to face them in their swamp of infamy.”¹⁰⁸⁶ And to operationalize due process in indigenous exceptionalism J. Bandial relies upon some criterions of fair trial as discussed in *F.B. Ali case* in the same citation.¹⁰⁸⁷ Hence the ensuing part of this chapter is intending to analyze a threshold of procedural fairness and right to fair trial in special and general laws of Pakistan mainly through judicial perspective. It includes laws relating to

¹⁰⁸⁴ See *Usman Bhai Dawood Bhai Memon v. State of Gujarat*, AIR 1988 SC 922, quoted in *Muhammad Afzal and other v. S.H.O. and others*, 1999 P Cr. LJ 929 Lahore.

¹⁰⁸⁵ See *Muhammad Afzal and other v. S.H.O. and others*, 1999 P Cr. LJ 929 Lahore.

¹⁰⁸⁶ See *District Bar Association, Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401; Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12 of 2010.pdf, 897.

¹⁰⁸⁷ See *F.B Ali and another v. The State*, PLD 1975 SC 506, quoted in *Ibid.*, 848-849: “Include (1) the right to know before the trial the charge and the evidence against him; (2) the right to cross-examine the prosecution witnesses; (3) the right to produce evidence in defence; (4) the right to appeal or to apply for revision; (5) the right to be represented by counsel; (6) the right to have the case decided by the Judge who heard the evidence; (7) the right to trial by jury or with the aid of assessors[However observes that trial by jury is not applicable in Pakistan, as by construing the right to fair trial court in the *F.B Ali case* had riled upon foreign jurisprudence as applicable in Anglo-American Jurisdictions]; (8) the right to certain presumptions and defences; and (9) the right to apply for transfer of the case to another Court.”

anti-terrorism, national security and protection as well as proclamation of public emergency in relation to internal disturbances.

Part: II: Procedural Context of Security Laws

This part begins with a few queries that still require deliberations before touching upon the relevant laws. It stipulates that if Pakistan experiences crisis and having special ‘*rule by law*’ paradigm, then what about an executive prerogative as has been discussed in the later part of this chapter? Similarly, it ponders that whether such crisis centered executive prerogative has some relevancy in an ordinary rule by law paradigm? And whether it is as injurious for fundamental rights as J. Nisar indicates that they become ‘*least fundamental*’ during emergencies?¹⁰⁸⁸ And if it so exists in either or both of these paradigms then whether the judiciary is proficient enough to counter the resultant administrative arbitrariness?

J. Khosa observes in this regard that to maintain order is undoubtedly a prerogative of the executive, yet it is conditional to a proper application of the law. And to examine such application is under the domain of the judiciary because sometimes momentary situations

¹⁰⁸⁸ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 759: “Fundamental rights, as envisaged in the original Constitution, are unfortunately in at least one sense, the least fundamental part of the Constitution since, unlike other Articles of the Constitution they can be suspended by the President under the emergency provisions set out in Part-X”; National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 134-140: Emergency Provisions: Art.232 “Proclamation of emergency on account of war, internal disturbance, etc.,” Art.233 “Power to suspend Fundamental Rights during emergency,” Art.234 “Power to issue Proclamation in case of failure of constitutional machinery in a Province,” seem in accordance with Rossiterian constitutional dictatorship during crisis.

and gravities act as *hydraulic pressure* for reasonability and distort rational judgments.¹⁰⁸⁹ Likewise the court observes in another case that neither the executive prerogative as has been evolved in the U.K. exists in Pakistan nor the judiciary is barred to assert itself during crises. Since all special criminal laws must be for public interest and should contain a threshold of reasonableness.¹⁰⁹⁰ But then, what is that '*reasonableness*' of law? The Court construes it as natural justice, which should not be over ruled by legal technicalities or procedural lacunas.¹⁰⁹¹ It has been observed further that the judiciary has a power to examine the reasonableness of administrative actions if it has an error of law, breach of rules of natural justice, arbitrariness, illegality, irrationality or procedural disproportionality.¹⁰⁹² Similarly, it declares that the principles of reasonableness and rationality are mandatory to control colorful exercise of power and in the case of administrative arbitrariness or colorful exercise; it is open to correction in the constitutional jurisdiction of the superior judiciary.¹⁰⁹³

Therefore, to validate these judicial claims to ascertain the reasonableness especially in crisis legislations, study briefly recalls the Hart's and Dworkin's discourse of '*hard cases*'. It seems that such expression is used by them to discuss either a '*constitutional moment*' or a '*state of exceptionalism*', where ordinary rule of law paradigm is unable to respond effectively. However, their approach about the possibility of judicial response during such

¹⁰⁸⁹ See PLD 2015 SC 401, 992-993: examines the contours of the law and order situation and evaluates '*order*' and '*law*' separately.

¹⁰⁹⁰ See *Suleman v. Manager, Domestic Banking, Habib Bank Ltd*, CLD 2003 Karachi 1797.

¹⁰⁹¹ See *Tayyaba Kamal v. District Coordination officer, Sialkot*, 2014 PLC (C.S) LHC 378.

¹⁰⁹² See *Asaf Fasihuddin Khan Vardag v. Government of Pakistan*, 2014 SCMR 676.

¹⁰⁹³ See *Muhammad Idress v. Federation of Pakistan*, 2015 PLC (C.S.) LHC 183.

times differs significantly. Since Hart illustrates exceptionalism as an ‘*open texture*’ paradigm in which judicial discretions if not contrary to public morality or social policy fill the ‘*lawless void.*’ Whereas Dworkin emphasizes on ‘*seamless web*’ of a legal order in which core moral norms and principles help the judges not only to craft novel decisions but also to cater reasonability and fairness amid crisis.¹⁰⁹⁴ Yet quite interestingly Hart indicates a vulnerability of Dworkin’s judicial interpretive methods in an overall ‘*evil and wicked*’ system, in which no principle of natural justice exists all.¹⁰⁹⁵ It seems that such expressions are used to specify a totalitarian administration, which is mainly based on Schmitt’s political necessity and absoluteness. Consequently alike Rossiterian crisis, the judiciary is ineffective to assert or manage holistically in this situation, which inevitably lead to political contestations. But at the same time Hart believes that it is in fact an indeterminacy of natural law not the positive law. As under his soft positivism judiciary has quasi-legislative powers to fill the vacuum of a legal order especially in hard cases.¹⁰⁹⁶ And akin to Feinberg these powers are meant to weigh and balance the conflicting interest to bring justice in Society.¹⁰⁹⁷ However, if it does not do so or not all allowed by a dominated segment of society to do so, then such incompleteness of rule of law during exceptional periods may enhance internal strife and mayhem.¹⁰⁹⁸ But then the question is that from where such incompleteness of law may emerge which is contrary to reasonableness? Hart and Dworkin both indicate that it emerges mainly from the vagueness and wideness of

¹⁰⁹⁴ See Scott, 131-141.

¹⁰⁹⁵ See H.L.A. Hart, *The Concept of Law* (New Delhi: Second Indian Edition, Oxford University Press, 2005), 270-271.

¹⁰⁹⁶ *Ibid.*, 252-254, 272-273.

¹⁰⁹⁷ *Ibid.*, 204-205.

¹⁰⁹⁸ *Ibid.*, 200-202.

rules, terms and definitions as incorporated in enacted laws.¹⁰⁹⁹ Hence, along with procedural fairness the following sections would also examine the reasonableness of these special laws.

An Appraisal of the Anti-Terrorism Act, 1997:

Thence for ‘*thick*’ and ‘*thin*’ evaluation¹¹⁰⁰ of the Anti-Terrorism Act, 1997 [hereinafter ATA], study categorizes it into four core touchstones which are as follows. The pre and post *Mehram Ali* case,¹¹⁰¹ the *Jamate-i-Islami* case¹¹⁰² and contemporary paradigm of war against terrorism in Pakistan as discussed in the *Alrasheed Trust* and the *District Bar Association Rawalpindi*.¹¹⁰³ However, before deliberating upon these touchstones of ATA, it seems important to examine the offence of terrorism in the indigenous context of Pakistan through judicial perspective. Since the court perceives it as an ideological deviance of subgroups to violently assert a specific socio-political or religious agenda under an internal disturbance paradigm. Besides, acknowledging the occurrence of ‘*state-terrorism*’ in the form of retributive penology or majoritarian violence through ‘*hyper-nationalism*’ in this situation.¹¹⁰⁴ Nonetheless, upholds the ‘*utilitarianism of rights*’ by

¹⁰⁹⁹ Ibid., 252-253; Ronald Dworkin, *Taking Rights Seriously* (Delhi: Fourth Indian Reprint, Universal Publishing Co. Pvt. Ltd., 2008), 212, 219.

¹¹⁰⁰ See Campbell, 259.

¹¹⁰¹ See *Mehram Ali and others v. Federation of Pakistan and others*, PLD 1998 SC 1445.

¹¹⁰² See *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111.

¹¹⁰³ See *Suleman v. Manager, Domestic Banking, Habib Bank Ltd*, CLD 2003 Karachi 1797; *District Bar Association, Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401; Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015,

http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12of2010.pdf.

¹¹⁰⁴ See *Muhammad Afzal and other v. S.H.O. and others*, 1999 P Cr. LJ 929 Lahore: “Terrorism may be defined as use of violence or terror, or threat of violence against a section of population an established institution to attain

harmonizing the extreme parameters of security and freedom as it observes, “the need and desire to control, curb and eliminate terrorism and sectarianism is genuine but the methodology to be employed has to be rational and balanced.”¹¹⁰⁵

Resultantly Apex court with its ‘*maximalist*’ position in the *Mehram Ali v. Federation of Pakistan*,¹¹⁰⁶ has declared the S.5 (2) (i) of ATA as invalid “Because it disproportionately and indiscriminately permitted the use of firearms on a mere a subjective satisfaction of the authorities. This Section had authorized, the law enforcement authorities to order firing against a person who in their opinion was likely to commit a terrorist act even without being fired upon. Accordingly, it has been amended by government to address judicial reservations in the ensuing manner. I: “The order to open fire could only be given by a police officer not below the rank of BS-17 and an equivalent rank in case of member of Armed Forces or civil Armed Forces.”¹¹⁰⁷ II: “The decision to fire should be taken as an option of last resort and no more harm should be inflicted in any case than

objectives of that organization. These objectives could be political, socioeconomic, ethic, ideological or religious. The terrorist organizations are usual *micro-groups* but States and state-agencies have also been known to engage in acts of terrorism [such state terrorism emerges out of an absolute and total administration under Schmitt’s political necessity] Terrorism as a criminal activity is a tool of violence or as an anti-establishment activity [here again the term “terrorism” is used in its generalized and widest sense, which itself is hazardous to achieve procedural fairness. Since it’s wide and subjective interpretations and application can implicate common crimes and criminals as well]. It was generated by political or religious zeal. In medieval times, terrorism had religious colours but by the 18th Century, it acquired political and revolutionary overtones. [hence court is aligning with Rapoport’s perspectives] Terrorism grew enormously in its sweep and intensity during the twentieth century. Not only the minorities or micro groups are engaged in terrorism but majority groups are also using the weapon of terrorism for ethnic purging, elimination of religious minorities or for achievement of political hegemony. Terrorism is now considered to be greatest threat to societies, nation States, and civilization, so much so that certain scholars believe that the nations are now threatened more by internal terrorism[court is construing domestic terrorism as synonymous to internal disturbance] than by external aggression and it would be terrorism which would bring about changes in a nation’s geographic and political boundaries[here court is indicating that political violence of internal disturbance potentially leads to insurgency, civil war and lastly to internal armed conflict] In the subcontinent , which has a long tradition of political agitation, terrorism initiated as a form of political agitation. Terrorism initiated as a form of political and revolutionary activity, but due to growing religious intolerance and fanaticism the innocent minorities became its target.”

¹¹⁰⁵ Ibid.

¹¹⁰⁶ See into PLD 1998 SC 1445.

¹¹⁰⁷ See into Sec. 2 of the Anti-Terrorism (Amendment) Act, 2014 (VI of 2014).

was necessary to prevent the alleged terrorist act.”¹¹⁰⁸ III: “All cases of firing, which have resulted in death or grievous hurt, would be reviewed by an internal inquiry committee constituted by the head of law enforcement agency concerned.”¹¹⁰⁹ These provisos have been added to section 5 (2) (i) after the *Mehram Ali* case, however, till now the law enforcement agencies are authorized to open fire on the person who is likely to commit a terrorist act. Therefore, it is in violation of the right to life as enshrined in Article 9 of the Constitution.”¹¹¹⁰

Similarly court has observed in the said case that, “The S. 10 of the ATA should be suitably amended as it gave ample powers to enter and search any premises.” It has also observed that “the member of law enforcement agency should record his reasons, before entering upon suspected premises.” Accordingly S.10 has been amended, as a proviso has been added to this section. It expounds now that the concerned officer should record his reasons for suspecting that a particular premise has a material or recording in contravention of S.8 of the ATA, and is bound to serve a copy of such reasons either to the person or the premises.¹¹¹¹ The Court has further observed in the same case that “S. 14 of the ATA 1997 needed to be amended to provide security of tenure for judges in the special anti-terrorism courts [ATCs] to uphold the principle of independence of the judiciary.” Accordingly, This Section has been amended and the appointment and removal of judges of the ATCs have been made subject to the consultation with the Chief Justice of the High Court. Under this amendment a Judge of the ATC would now hold office for a period of two and a half years respectively.”¹¹¹² Similarly, the Court has held that, “sections 24, 25, 27, 28, 30 and 37 of

¹¹⁰⁸ Ibid.

¹¹⁰⁹ See *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111.

¹¹¹⁰ See Kashif Mahmood, “Anti-Terrorism Act 1997 in the Light of Provisions of the Constitution of Pakistan 1973,” *Parliamentary Research Digest* 3, no. 10 (2016): 15-16.

¹¹¹¹ See into Sec.9 of the Anti-Terrorism (Second Amendment) Ordinance, 1999 (XIII of 1999).

¹¹¹² See into Sec. 3 of the Anti-Terrorism (Second Amendment) Ordinance, 2002 (CXXXIV of 2002).

the ATA are in contravention to the concept of independence of the judiciary.” Resultantly court recommended that the above-mentioned provisions should be amended to vest appellate power to High Court instead of Appellate Tribunal. Accordingly S.24 has been repealed in the light of findings of the *Mehram Ali* case.¹¹¹³ The same has been observed for S.25 of ATA in which the appellate jurisdiction has been conferred to High Court instead of the Appellate Tribunal. Consequently, in the said section the word “Appellate Tribunal” has been replaced by “High Court”.¹¹¹⁴ Then again in S.27 authority to punish concerned officer for defective investigation has been given to the High Court instead of Appellate Tribunal.¹¹¹⁵

Similarly under Pre-*Mahram* scenario S.30 of ATA, 1997 had altered Ss.374 to 379 of the Cr. P.C.,¹¹¹⁶ to extent that ‘any reference’ was perceived to be directed to an administrative appellate tribunal rather than high court. Resultantly the expression of tribunal has been replaced by the word “High Court” in accordance with *Mehram Ali judgment*.¹¹¹⁷ Likewise, in S.37 of ATA, an ambiguous connotation “*special court*” has been substituted by “*anti-terrorism court*”, to punish any person who is guilty of contempt of said court.¹¹¹⁸ Nevertheless, substantial changes have been brought in these sections and the High Court is given ample powers to ensure that the principle of

¹¹¹³ See into Sec. 14 of the Anti-Terrorism (Second Amendment) Ordinance, 1999 (XIII of 1999).

¹¹¹⁴ See into Sec. 2 of the Anti-Terrorism (Second Amendment) Ordinance, 1999 (XIII of 1999).

¹¹¹⁵ See Kashif Mahmood, “Anti-Terrorism Act 1997 in the Light of Provisions of the Constitution of Pakistan 1973,” *Parliamentary Research Digest* 3, no. 10 (2016): 16-18.

¹¹¹⁶ See Shaukat Nadeem and Nadeem Shaukat, comp., *The Code of Criminal Procedure* (Lahore: Legal Research Center, 2003), 1743-1759: S. 374: “Sentence of death to be submitted by the Court of Session[ATC] When the court of session [ATC in case of ATA’s application] passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court”, S.375: “Power to direct further inquiry to be made or additional evidence to be taken,” S. 376: “Power of High Court to confirm sentence or annul conviction,” S.377: “Confirmation of new sentence to be signed by two judges,” S. 378: “Procedure in case of difference of opinion,” S. 379: “Procedure in cases submitted to High Court for confirmation.”

¹¹¹⁷ See Main Ghulam Hussain, ed., *Manual of Anti-Terrorism Laws in Pakistan* (Lahore: Civil & Criminal Publications, 2011), 185-187; also into Sec.2 of the Anti-Terrorism (Second Amendment) Ordinance, 1999 (XIII of 1999).

¹¹¹⁸ See into Sec.18 of the Anti-Terrorism (Second Amendment) Ordinance, 1999 (XIII of 1999).

independence of the judiciary as enshrined in the Constitution of Pakistan, 1973. Then Court held in the *Mehram Ali* case that S. 26 of the ATA 1997 was invalid as it made admissible the confession recorded by a police officer. Since it not only violated the constitutional protection against self-incrimination, but also contrary to the equality before the law, accordingly it has been omitted through an amendment in the ATA.¹¹¹⁹ The court likewise has declared S.35 as invalid because it violated the concept of independence of the judiciary. The Court has maintained that it should be amended to give the power to make rules of the High Court instead of Federal or Provincial Government. Yet no amendments have been made so far in this section as the power to make rules still vest in the Federal and Provincial Government.”¹¹²⁰

Hence the pre-*Mehram* scenario indicates that ATA from its inception in 1997 was incompatible with some constitutional guarantees. It includes security of person and right to life, protections against double jeopardy, self-incrimination, torture and inhuman treatment, equality before the law and fair trial along with the independence of the judiciary. Subsequently the post *Mehram* scenario up holds the independence of judiciary mainly through the substitution of the then executive appellate tribunal of ATCs by respective high courts to ensure a fair trial of terror accused. Yet it still has a significant role of administrative discretion, especially in the case of preventive detention, restrictions of movements and prohibition in specified areas as incorporated in the S.11EE of

¹¹¹⁹ See into Sec.16 of the Anti-Terrorism (Second Amendment) Ordinance, 1999 (XIII of 1999).

¹¹²⁰ See into *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111, 127-149: for a comparative analysis of Anti-Terrorism Act, XXVII of 1997 and *Mehram Ali v. Federation of Pakistan*, PLD 1998 SC 1445.

ATA.¹¹²¹ Likewise S.21H, which deals with “conditional admissibility of confession,” is even against the spirit of *Mehram* case as it still makes the confession admissible, as has been made in the police’s presence. Although qualifiers like the presence of the superintendent of police to rule out torture and coercion, along with court’s discretions to accept or rejects such confession have been incorporated. Moreover a counter-torture measure during police remand has been incorporated in S.21E (2), which illustrates, “Court is satisfied that no bodily harm has been or will be caused to the accused.” But even then S.21H seems a replica of the omitted S.26 of pre *Mehram* ATA. Besides the statutory indemnity on mistake of law and fact in good faith as incorporated in S.39 is still a core cause of executive impunity in post *Mehram* scenario, which makes it again inharmonious with right Article 9, 10 A and 14 of the constitution of Pakistan.¹¹²²

The *Jamat-i-Islami Pakistan v. Federation of Pakistan*¹¹²³ is crucial as it perceives domestic terrorism in an internal disturbance paradigm. Since in accordance with its preamble’s wording, “matters connected there with, and incidental thereto,” the S.6 of ATA has already incorporated general offences against person, property and public order in the domain of terrorism.¹¹²⁴ Besides subsection (f) of S.6 of ATA expounds terrorism as

¹¹²¹ See *AbdualRauf v. Chief Commissioner, Islamabad*, PLD 2006 Lahore 111; also in Sec.11 EE of the Anti-Terrorism Act, 1997: “Proscription of Person.”

¹¹²² See National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 7-10: Art.9: “Security of Person”, Art.10A: “right to fair trial”, Art.14: “Inviolability of dignity of man, etc.”

¹¹²³ See into PLD 2000 SC 111.

¹¹²⁴ See *Muhammad Rasool v. The State*, PLD 2012 Balochistan 122; *Muhammad Mushtaq v. Muhammad Ashiq*, PLD 2002 SC 841: “Anti-Terrorism Act is operative where a criminal act was designed to create a sense of fear or insecurity in the minds of general public, disturbing even tempo of life and tranquility of the society. What is to be seen is the psychological effect produced by the violent action or with the potential of producing such an effect on the society as a whole or a section thereof—the same may be treated to be a terrorist Act.”; *Fazal Dad v. Col.(Rtd)*

“incites hatred and contempt of religion, sectarians or ethnic basis to stir up violence or cause internal disturbance.” Thus S.6 of ATA has not only widened the scope of terrorism in a way that even general offences can be construed as terrorism virtually on the discretions of law enforcement agencies.¹¹²⁵ With this background Ss.7-A and 7-B has been incorporated in the Pre-*Jamat* context of ATA through an amendment in 1999, to cater civil commotions and internal disturbances mainly based upon political resistance and unrests.¹¹²⁶ Nonetheless, it has covered almost all kinds of political activism such as strikes, go-slow, lock-outs, publication and distribution of handbills and wall-chalking. Hence Ss.7-A and B seemed even beyond the ‘*rule by law*’ domain as firstly there was no such crisis at that time which required these extreme measures as last resorts.¹¹²⁷ Resultantly it has emerged as a Schmitt’s absolutism under a self-acclaimed political necessity. Moreover, it has not

Ghulam Muhammad Malik, PLD 2007 SC 571: “Preamble is always a key to interpret the statue, object of [ATA] was to control act of terrorism, sectarian violence and heinous offences as defined in S.6 of ATA and their speedy trial [to achieve a deterrent in society in this regard]. The occurrence of such offences must create terror, panic or sense of insecurity”

¹¹²⁵ See *Lory Vie Pimental v. Special Judge, Anti-Terrorism Court no. IV, Lahore*, 2014 P Cr. LJ 754 Lahore: discusses the misuse of ATA, 1997 virtually on the discretion of authorities, as even a maltreatment with house maid and an alleged cell phone snatching from her has been construed as terrorism in this case; Similarly in *Akhtar Hussain v. Special Judge, Anti-terrorism Court no. 3 Lahore*, 2005 YLR 2363, Lahore: observes that murder or attempt to murder does not come in the special ambit of terrorism, thereby declares that Anti-terrorism Act has been wrongly used to coerce common criminals; Same ratio has been observed in *Fazal Dad v. Col.(Rtd) Ghulam Muhammad Malik*, PLD 2007 SC 571.

¹¹²⁶ See into *Jamat-i- Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111, 129: for S.7A of ATA, 1997: “Creation of civil commotion: “Civil commotion” means creation of internal disturbances in violation of law or intended to violate law, commencement or continuation of illegal strike, go slow, lock-outs, vehicles snatching or lifting, damage to or destruction of State or private property, random firing to create panic, charging Bhatta, acts of criminal trespass (illegal qabza) [although the following wording was also the part of the ambit of civil commotion as originally inserted in ATA through Ordinance IV of 1999, yet it omitted after a subsequent amendment, through Ordinance XIII of 1999]---distributing, publishing or pasting of a handbill or making graffiti or wall- chalking intended to create unrest or fear or create a threat to the security of law and order or to incite the commission of an offence under Chapter VI of the Pakistan Penal Code(Act XLV of 1860.”; also into Sec. 7-A [Creation of civil commotion] and Sec. 7-B: [Punishment for creating civil commotion] of the Anti-Terrorism (Second Amendment) Ordinance, 1999 (XIII of 1999).

¹¹²⁷ See *Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan*, PLD 2000 SC 869: Though Musharraf’s coup took over the reign of power in the month of October in the same year. Yet at the time of said amendments as introduced by Nawaz government in August 1999 there was no such internal political crises except international controversy over Kargil issue between India and Pakistan.

only purportedly but also vaguely contextualized virtually all sorts of ‘*constitutional moments*’ under the notion of terrorism. Besides the vagueness of terms as used in this section, it also gave absolute discretions to executive to interpret subjectively in case of low or high threshold of violent or nonviolent political agitations. Since neither definitional section nor operative part of ATA has defined these terms properly.

Then again, with its ‘*maximalist*’ position, the court declares this section void by observing as follows. “Statutes must be intelligibly expressed and reasonably definite and certain.—the difficulty is that the words ‘internal disturbance’ used in S.7-A are vague. – connote temporary outbreak of unlawful violence [as well as] has the effect of the uprising among the masses which occasion a serious and prolonged disturbance and insurrection. [Moreover] civil disorder not attaining the situation of war or an armed insurrection is a wild and irregular action by many persons assembled together.”¹¹²⁸ Though court perceives the subjectivity of this section as contrary to natural justice, yet a query arises that what is meant by internal disturbance and how the judiciary has interpreted it in this case? Accordingly, the court observes, “Internal disturbance is a disturbance occurring in any part of the country which wrongly interferes with the general tranquility in social and ordinary life of the people under the constitution and the law.”¹¹²⁹ It indicates that though the generality of internal disturbance extends from mere a violent, unlawful assembly to a full scale insurgency. Yet the court construes it here as a severe law and order crisis under the domain of maintenance of public order in which constitution as well as an entire legal system remains intact.

¹¹²⁸ See *Jamat-i-Islami Pakistan v. Federation of Pakistan*, PLD 2000 SC 111, 156-161.

¹¹²⁹ *Ibid.*, 161.

Thus, regardless of threshold of internal disturbance or commotion the pre-*Jamat* scenario indicates that interpretive vagueness of statutes not only distorts their intents and objectives, but also engender administrative discretions in an already ‘*lawless void*’. However the post- *Jamat* context is also not immune from such procedural lacunas which are potentially hazardous to the right to a fair trial. While on the one hand Ss.7-A and B have been omitted in 2000 in accordance with the directions of the apex court.¹¹³⁰ Yet on other hand S.6 (f) of ATA still contains the expression of internal disturbance without being defined or elaborated. Let alone this in a quite contrast to *Jamat*’s directions S.11X has been incorporated in an operative part of ATA through an amendment in 2001 which deals with “responsibility for creating civil commotion.”¹¹³¹ Its subsection (1) illustrates that shutter down strikes, urban protests, and road blocking through wheel jam is construed as terrorism. And subsection 3 of S.11X of the ATA construes communal riots and religious intolerance as civil commotion. Apparently this insertion is causing a paradox in this special law because in the pre-*Jamat* scenario terminologies of internal disturbance and civil commotion have been used interchangeably and synonymously. So if the term internal disturbance has been omitted due to its vagueness, then the same is the case for civil commotion. Moreover, such insertions and amendments without proper contextualization blur the lines between crimes of public nuisance, rioting, sedition, terrorism, sabotage and commotion. Firstly the generality of S.6 (1) (a-c) and (2) (a-p) does not specify the offence of terrorism.¹¹³² Secondly, if an accused is implicated in the charges

¹¹³⁰ See into The Anti-Terrorism (Amendment) Ordinance, 2000 (XXIX of 2000)

¹¹³¹ See into Sec. 8 of The Anti-Terrorism (Amendment) Ordinance, 2001 (XXXIX of 2001).

¹¹³² See *Muhammad Sharif v. Sageer Ahmad alias Bhaya*, 2015 P Cr. LJ 611 Sindh: With regards to the elements as incorporated in S.6 of the ATA, court subjectively and widely defines terrorism as follows, “Not

of internal disturbance under S.6 (f) or civil commotion under S.11X of the ATA, then vagueness of terms gives wide discretions to implementing agencies to construe it subjectively. It seems that with Hartian perspective this aspect of ATA marks it ‘controversial’ and ‘indeterminate’ while under Dworkin’s view a likely punishment on such grounds¹¹³³ marks it unreasonable and extremely ‘stringent’.¹¹³⁴

Let alone the prevailing ‘indeterminacy’ and ‘stringent’ impacts of ATA, The *Alrasheed Trust*¹¹³⁵ and the *District Bar Association, Rawalpindi*¹¹³⁶ scenario indicate a ‘state of exceptionalism’ in the form of the contemporary wave of terrorism and counter terrorism campaigns in Pakistan. *Alrasheed* also affirms Pakistan’s obligations to comply with

only the physical harm but also the psychological harm and sense of fear constitute terrorism.”; Likewise extending the scope of terrorism up to sectarianism court declares about its jurisdiction under S.12 of the ATA in *Muhammad Raheel alias Shafique v. The State*, PLD 2015 SC 145: “Sectarian Killing was also included in the definition of terrorism, contained in S.6 of ATA, and thus an ATC was possessed of the requisite jurisdiction to try a case of sectarian killing.”; Similarly dealing with wideness and generality of the offence of terrorism as incorporated in S.6 court indicates about ensuing punishments under S.7 and prohibited acts under S.8 of the ATA, 1997 in *Shahid Zafer and others v. The State*, 2015 P Cr LJ 628 Sindh: “Where action would result in striking terror on creating fear, panic, sensation, helplessness and sense of insecurity among the people in the particular area, it would amount to terror.”

¹¹³³ See *Zafar Iqbal v. The State*, PLD 2015 SC 307: “S.7(a) of ATA, 1997 is attracted when an act of terrorism as defined in S.6 is committed”; Sec.7 (1) of the ATA, 1997 :“ whoever commits an act of terrorism under Section 6, whereby (g) the act of terrorism falls under section 6(2) (f)[incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance] ----shall be punishable with imprisonment-----” The argument which develops after a bare reading of these clauses and subclasses of the Ss.6 and 7 of the ATA is that let alone the definition or illustration of the offence of the Internal Disturbance a punishment on such a least defined crime is totally unjust and unreasonable.

¹¹³⁴ See Hart, *The Concept of Law*, 252: “law fails to determine an answer either way and so proves partially indeterminate----- controversial in the sense that reasonable and informed lawyers may disagree about which answer is legally correct, but the law in such cases is fundamentally incomplete.”; Dworkin, *Taking Rights Seriously*, 221: “Conviction under a vague criminal law offends the moral and political ideals of due process in two ways. First, it places a citizen in the unfair position of either acting at his at his peril [since he may construes it wrongly and act accordingly] or accepting a more stringent restriction on his life than the legislature may have authorized.”

¹¹³⁵ See *Suleman v. Manager, Domestic Banking, Habib Bank Ltd*, CLD 2003 Karachi 1797.

¹¹³⁶ See *District Bar Association, Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401; Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12_of_2010.pdf.

UNSC resolutions regarding counter-terrorism measures,¹¹³⁷ as have been recently incorporated in ATA through an amendment.¹¹³⁸ Though the constitutionality of an executive action to freeze the assets and accounts of a proscribed organization in compliance with the UNSC Resolution 1373 (2001) is examined in the said case. Yet unlike the *Kadi* case,¹¹³⁹ it does not evaluate reasonability and vires of the counter terrorism committee [CTC] of the UNSC, which has been established after this ‘core’ resolution.¹¹⁴⁰

¹¹³⁷ See CLD 2003 Karachi 1797: “ Terrorism is a fast going phenomena and it is in the wider public interest that all civilized States should make laws and take appropriate measures within their constitutional system to combat it---In this regard International obligations ought to be dully honored----”

¹¹³⁸ See The Fifth Schedule, as incorporated in S. 6(3A) of the Anti-terrorism (Amendment) Act, 2013: “ a):Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; b): Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; c): Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; d): Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; e): Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; f): International Convention for the Suppression of Terrorist Bombings, 1997”; also in *Muhammad Yousof v. The State*, PLD 2014 Lahore 644: “A schedule appended with a statute is as much important as the statute is. A schedule can be used in constructing provisions in body of the Act. It is for all purpose of constructions must be read together with the Act. The liability imposed in schedule is equally binding for all the concerned.” In this way even international terrorism has now become the subject matter of an already wide and vague S.6 of the ATA.

¹¹³⁹ See *Kadi v. Council* [2005] ECR II-3649, T-315/01, quoted in Myriam Feinberg, “International counterterrorism-national security and human rights: conflicts of norms or checks and balances?” *The International Journal of Human Rights* 19, no. 4 (2015): 392-401: Aligning with UNSC Resolution, 1267, 1373, 1377 and on the recommendation of the Counter-Terrorism Committee of the United Nations Security Council, Bank accounts of a Saudi national Mr. Kadi are forfeited. However European Court of Human Rights examines the justness and reasonability of the CTC and its powers. It declares that on the one had CTC arbitrarily proscribed suspected person either legal or natural and on other hand does not provide any forum for the review of its decisions. Moreover when CTC being an executive wing of UN asserts to the concerned state to proscribe the same individual or organization that has been already proscribed, then it is akin to double jeopardy. As under its international Obligations State ought to follow the intended measures but does not have any opportunity to review the CTC findings. This international rule by law paradigm indicates such a legal black hole where even International Court of Justice is unable to review not only the CTC decisions but also the treatise and conventions as given by UNSC. However this case study also unfolds a query that whether a national court can examines the vires of CTC actions and UNSC resolutions? The E Ct HR implicitly indicates that a regional or even national court can examine the vires if are contrary to natural justice, reasonability and human rights.

¹¹⁴⁰ See Walter Gehr, “*The Counter-Terrorism Committee and Security Council Resolution 1373 (2001)*,” in *Anti-Terrorist Measures and Human Rights*, eds. Alice Yotopoulos-Marangopoulos and Wolfgang Benedek (Leiden: Martinus Nijhoff Publishers, 2004), 41-44: “Core in a sense that it asserts and assist member states in their counter-terrorism campaigns to curb and criminalize terrorists, either individuals or groups and focuses on the prevention of terrorism, by curbing their finances and other material resources. Also attempts to enhance international cooperation and commitment to respect 12 UN conventions regarding international terrorism. These include, “1): Convention on Offences and Certain Other Acts Committed on Board of Aircraft, 1963;

Therefore, under international and national exceptionalism ATA is not only amended immensely till now, but its scope has also been enlarged up to the extent of the Maintenance of Public order and white collar crimes like money-laundering.¹¹⁴¹ Yet a

2): Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; 3): Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; 4): Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; 5): Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; 6): Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; 7): Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; 8): International Convention against the Taking of Hostages, 1979; 9): Convention on the Physical Protection of Nuclear Material, 1980; 10): Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991; 11): International Convention for the Suppression of Terrorist Bombings, 1997; 12): International Convention for the Prevention and Suppression of the Financing of Terrorism, 1999[also known as Resolution 1267].” Thus as a mega and ‘unique’ resolution it not only lead all these conventions but also strengthen the INTERPOL to counter the international acts of terrorism either of individuals or organizations. Moreover a subsequent UNSC Resolution 1377(2001), not only establishes a 15 members Counter- Terrorism Committee [CTC] in UNSC to monitor national and international implementation of the Resolution 1373, but also affirms its objectives and commitments. The CTC is mandated by both resolutions 1373 and 1377 to proscribe the suspected organizations and individual and resultantly asserts the concerned members states to freeze their assets and accounts nationally and internationally. The CTC is also empowered to make the list of suspected organizations and individual and inform the members States to arrest and hunch them accordingly if they are proved to be involved in promoting or perpetrating acts of terrorism. Besides it the Resolutions 1373 and 1377 along with CTC assist the Members State to enhance their legislative, executive, technical, and judicial capacity to counter internal disturbances as caused by sporadic or protracted acts of terrorism.” Thus even for UNSC internal disturbance and terrorism campaigns are two sides of same coin.

¹¹⁴¹ See S.11B: “Proscription of Organization”; S.11D: “Observation Order” [Both of these sections are mainly under the international obligations of UNSC Resolutions, 1267, 1333, 1373 and 1377 and causing the similar mechanism of double jeopardy as has been held in *Kadi* case[supra] as not only the CTC internationally but the Federal Government domestically is empowered to proscribe the suspected organizations; S.11EE: “Proscription of Person”; S.11EEE: “Powers to arrest and detain suspected persons”; S.11EEEE: “Preventive Detention for inquiry”; S.11L: “Disclosure of information”(imposing a strict liability on citizens to maintain order and to comply with authorities, apparently this section is an attempt to curb political and ideological terrorism as mainly it is focused to engender sympathies in general population, thereby ATA is attempting to deter citizens to detach from political or ideological violence); S.11M: “Cooperation with police” [mainly a replica of the MPO, 1960 as has been discussed in the previous part and focuses on the subjective satisfaction of the police authorities with an absolute reliance on police powers, mainly under public order paradigm]; S.11 H: “Fund raising”; S.11 J: “ Fund Arrangement ”; S.11 K “Money- Laundering”; S. 11 O: “Seizure, freeze and detention”[These section of the ATA mainly focuses on the terrorism financing, yet by incorporating white crimes like Money Laundering ATA is attempting to enlarge the horizon of implementing agencies as FIA, NAB, IB has also been incorporated to tackle technical financial crimes along with conventional police, civil armed forces and armed forces] of the ATA, 1997; also in *Mst. ShaheenaNargis v. District Police Officer, Bahawalnager and another*, 2006 P Cr. LJ 33 Lahore: court observes about S.11EE and S.11 EEE of the ATA, “ mere subjective satisfaction is not enough to deprive a person from liberty”; *AdualRaufv. Chief Commissioner, Islamabad*, PLD 2006 Lahore 111: as declaring S.11 EEE of the ATA as the replica of S.3 of the MPO 1960 court observes, “ The expression “ government if satisfied” appearing in S.11 EEE is synonymous to the word “satisfaction” appearing in S.3 of the MPO, 1960-----in this regard satisfaction is to objective in nature and not subjective of such nature as to allow the authorities to act on whims and caprices without there being material before them in support of ground of detention.”; Similar ration has been

query arises here, that's why so much importance has been given to UNSC resolutions by incorporating them in ATA through specific adoption theory, while many other international instruments are equally overlooked in the name of sovereignty?

Subsequently Hurd satisfies this query by using the connotation of legitimacy as have been developed within the Members State for this executive organ of the United Nations. Accordingly narrates that to avoid the coercive sanctions and to maintain the international balance of power, States prefers to abide by the UNSC resolutions, even if contrary to their popular will. Yet it is mainly due to their own coercive intents and self-interest to control subjects and to avoid internal strife for which they prefer to rely upon an international legitimacy of UNSC Resolutions. Resultantly states legislate in accordance with these resolutions and in case of stringency they attempt to place its entire responsibility on such global legitimacy to avoid popular resistance.¹¹⁴² Nevertheless state's coercive intent is apparent from different provisions of the ATA which are even contrary to

declared in *Abu Baker Muhammad Raza v. Secretary to Government of Punjab, Home Department*, PLD 2005 Lahore 370., with regards to S.11EE, S.11 EEE and S.16 of the MPO, 1960; Likewise court in its 'minimalist' position to examine the vires of administrative actions with regards to Ss.11EE and 11 EEE of the ATA observes in *Mulazim Hussain Shah v. Province of Punjab through Secretary, Home Department, Government of Punjab, Lahore*, PLD 2006 Lahore 108: " Though the petitioner is notified in the list of proscribed organization mentioned in the 4th Schedule under S.11-EE of the ATA, in this regard petitioner had already faced the agony of detention of 90 days---- in the absence of sufficient material or evidence petitioner's further detention was not justified under S.11EEE ."

¹¹⁴² See in Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (New Jersey: Princeton University Press, 2007), 5-19, 30-40, 173-193.

constitutionalism,¹¹⁴³ as their core objectives seem to establish maximum deterrence under administrative penology.¹¹⁴⁴ Another unique aspect of the ATA is that one hand it is a

¹¹⁴³ See e.g. into **S. 5 (2) (i)** authorizes the use of fire arm against a terror suspect while acting in this regard, though after giving a prior warning to such person. Yet such authorization in the wake of indemnity under “good faith” as incorporated in **S.39** violates the right to life as enshrined in Art .9 of the Constitution. Same has been observed in *Suo Motu Case No. 10 of 2011: In the matter of: [Brutal Killing of a Young man by Ranger]*, PLD 2011 SC 799. Consequently a qualifier of ‘*after forming reasonable apprehension*’ by the application mind has been inserted through an amendment [Substituted by the Anti-terrorism (Amendment) Act, 2014 (VI of 2014) w.e.f 18.6.2014, S.2] to make the concerned authorities responsible for their probable highhandedness. **S.5 (2) (iii)** empowers the law enforcement agencies to search, without warrant, any premises to make arrests and confiscate any property or article that might be used in a terrorist act. This provision violates the **Art.14** of the Constitution of Pakistan as deals with the dignity of man. **S.10: Power to enter or search-** accordingly if an officer of law enforcement agencies has reason to believe that a person has possession of written material or recording which can be used to stir up sectarian hatred as mentioned in section 8, then such officer may enter and search premises and impound such material or recording. This provision is in direct conflict with Article 14 of the constitution which provides for the inviolability of privacy of home. Any search conducted without a proper search warrant is against the spirit of Article 14 of the constitution. It is also important to follow the procedure as mentioned in S.103 of the Cr.P.C.[Search to be made in presence of witness] while conducting a search of premises. There is always a possibility of misuse of powers by the law enforcement agencies when they are vested with such powers. **S. 19(10): Trial in absentia-**This provision allows the anti-terrorism court to try an accused person in his absence if the court is satisfied that such absence is deliberate to impede the course of justice. This section deprives a person from his right to fair trial and is contrary to Art.10-A as enshrined in the Constitution. Similarly under Art.14(3) of the International Covenant on Civil and Political Rights [ICCPR], right to fair trial includes right to be tried in one’s presence. A person has right to defend himself personally or through legal assistance. Pakistan has ratified this Covenant and is a party to it. Thus section 19(10) is contrary to the spirit of the principle enshrined in Article 10-A of the constitution along with International bill of rights. Hence a person should be given a proper opportunity to defend himself in a court of law, and trial in absentia is against this basic right as has been discussed in *Arbab Khan v. The State*, 2010 SCMR 775.**S 21F: Remissions-**This provision provides that no remission in any sentence shall be allowed to any person who is convicted and sentenced under this Act, other than a child whose sentence may be remitted with approval of government. This violates the spirit of Art 25of the constitution. According this Art., all citizens are equal before law and entitled to equal protection of law. If the individuals who are not convicted under this Act are granted remissions in sentences, then those convicted under ATA should also be afforded same remissions. As otherwise this would violate the principle of equality as has been observed in *Superintendent Central Jail, Adyala Rawalpind v. Hammad Abbasi*, PLD 2010 Lahore 428.**S. 27A: Presumption of Proof against accused-**Accordingly if any person is found in possession of explosive materials without lawful justification then it shall be presumed that such material was for the purpose of terrorism unless proven otherwise. This is a departure from the well-established presumption of innocence, which provides that a person is presumed to be innocent unless proven guilty. Interestingly this Sec has been inserted through an amendment [the Anti-terrorism (Second Amendment) Act, 2013 (XX of 2013) w.e.f. 26.03.2013, S.3] in the aftermath of the international “war against terror” and the fulfillment of Pakistan’s obligation to comply with UNSC Resolution, 1373. It clearly indicates the coercive intent of state especially in the field of retributive criminology, which focuses on the maximization of deterrence. **S.38: Punishment for terrorist act committed before this Act--**This provision is contrary to national and international prohibitions against retrospectively and ex-post facto laws especially in criminal laws.This provision provides that where a person has committed an offence before commencement of this Act then such act would constitute a terrorist act and shall be tried under this Act but the punishment of that act would be as authorized by law at the time of commission of offence. It means that S. 38 allows for an ex post facto crime, it merely bars ex post facto

special crisis centered law to tackle special offences relating to sectarian violence, internal disturbance, civil commotions and terrorism, accordingly be categorized as Dicey's 'rule by law' paradigm. Yet on the other hand its permanency in the legal system of Pakistan along with other substantive criminal laws.¹¹⁴⁵ And the way court relies upon it in the *District Bar* case to counter law and order crisis in the settled areas of Pakistan as linked with the contemporary internal armed conflict in FATA, places it under the rule of law paradigm.¹¹⁴⁶ But then due to its procedural lacunas, frequent amendments and vagueness of the terms, it does not qualify the Fuller's criteria to be even qualified as valid law. The ad-hoc and recurrent amendments, strict liability, presumption of guilt, exclusion of remissions, retrospectively and non-voluntary confession contributes to depreciate its morality in Fuller's paradigm.¹¹⁴⁷ It also seems that owing to above mentioned factors ATA lacks the Rawls's perceptions of institutional justice as neither equality nor equity is given due weightage amid its retributive justice.¹¹⁴⁸ Though at the same time he believes that 'tolerant should curb intolerant,' yet only to save liberties under constitutionalism, but

punishment. It is in violation of the Art 12 of the constitution of Pakistan, as provides protection against retrospective punishment. Such unconstitutionality of this Section has also been discussed in *Mehram Ali* case (supra) along with *MukhtarAhmad v. The Province of Punjab*, PLD 1998 Lahore 203. and *MaqboolAhmad and another v. The State*, 2007 SCMR 116.

¹¹⁴⁴ See *Dadullah and other v. The State*, 2015 SCMR 856.

¹¹⁴⁵ See *Muhammad Yousof v. The State*, PLD 2014 Lahore 644: "Purpose of the Anti-Terrorism Act, 1997 is to prevent terrorism, sectarian violence and conducting speedy trial of heinous offences."

¹¹⁴⁶ See *District Bar Association Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401; Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12 of 2010.pdf, 660, 829-835, 894-896: "It is important to mention here that the offences relating to terrorism, waging of war or insurrection against Pakistan and acts threatening the security of Pakistan are offences recognized and catered for by the Pakistan Penal Code, Anti-Terrorism Act, 1997 and the Protection of Pakistan Act, 2014."

¹¹⁴⁷ See Lon L. Fuller, *The Morality of Law* (Delhi: Fourth Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2006), 9-10, 37-40.

¹¹⁴⁸ See John Rawls, *A Theory of Justice* (Delhi: Third Indian Reprint, Universal Law Publishers Co. Pvt. Ltd., 2008), 55-57, 62-63, 202-204.

not contrary to it to establish coercive deterrence.¹¹⁴⁹ However, regardless of such shortcomings of the ATA, court in *District Bar* case prefers it over Pakistan Army Act, 1952 to curtail ‘*intolerants*’ involve in terrorism and insurrection. It is especially when armed forces or civil armed forces are acting in aid of civil power under Ss.4 and 5 of the ATA in specified areas in which incidents of violence reach to a high threshold.¹¹⁵⁰ So let alone Ss. 144, 129, 130, 131 and 131A of the Cr. P.C, Ss. 4-5 of the ATA provides a second tier of the employment of armed and civil armed forces to restore order in a relatively severe law and order crisis.

Hence, to avoid arbitrary executive tribunals or summary trials amid such extraordinary circumstances J. Isa relies upon Ss.11B, 11G, 11W, 11K, 19(10), 27B of the ATA to maintain law and order under a rule of law paradigm.¹¹⁵¹ It mainly aims to sustain operations of Art.4, 8(3), 199 and 184(3) of the constitution to protect fundamental rights

¹¹⁴⁹ Ibid., 220: Rawlsian perspective of maintenance of public order and security under due process of law.

¹¹⁵⁰ See Imtiaz Ali, “Sindh govt extends Rangers stay in Karachi for a year,” *Dawn News*, July 17, 2015: A civil armed force (Sindh Rangers) have been called to act in aid of civil power to curb severe law and order crisis in Karachi under S. 4(3) (i) of the ATA, 1997; also in S.4: “Calling in of armed forces and civil armed forces in aid of civil power” and S.5: “use of armed forces and civil armed forces to prevent terrorism” of the ATA.

¹¹⁵¹ See in *District Bar Association, Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401; Constitution Petition NOS. 12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 of 2010, doc, 5-8-2015, http://www.supremecourt.gov.pk/2015/Judgments/Orders/web/user_file/File/Const.P.12 of 2010.pdf, 894-896,901: “There are important provisions in the Anti-Terrorism Act, 1997, which if implemented would help to stem terrorism and also ensure the conviction of terrorists.” Thence expresses his dissatisfaction for not using ATA at its optimal level and observes, “Inexplicably, the State is not utilizing the provisions of the ATA”. Subsequently directs government to proscribe suspected and anti-national organizations under S.11B of the ATA. Similarly observes that government should take tangible measures to deter armed groups for using flags which display QalmaTayeba for their own vested agendas under S.11G of the ATA. Likewise directs to curb anti-state propaganda and propagation of ideological and political violence under S.11W. Also focuses on the trial of absconders even in their absence, if clearly involved in acts of terrorism under S.19 (10). Moreover indicates that a newly inducted S.27 B of the ATA should be relied upon to establish the offence of terrorism, as it deals with electronic evidence in contemporary age of cyber and information technologies.

in Pakistan even during exceptional periods.¹¹⁵² Since irrespective of its procedural lacunas, ATA is still under the ‘*maximalist*’ as well as ‘*minimalist*’ paradigms of judiciary to avoid an absolute ‘*lawless void*’.¹¹⁵³ However S.6 and schedules of the ATA indicate a shortcoming to deal with a high threshold of conflict paradigm as has been discussed in the *District Bar* case. Since neither the elements of acts of terrorism under S.6 nor the scheduled offences explicitly cover the crimes of insurrection, waging war and mutiny. Consequently, it proves inadequate to curb them effectively in spite of its wide scope and gives rationale to Protection of Pakistan Act, 2014 as well as Pakistan Army Act, 1952 which would be discussed respectively in the ensuing sections.

An Appraisal of the Protection of Pakistan Act, 2014:

Being special and temporary law to curb crimes such as waging of war, insurrection, raising arms and armed conflicts, The Protection of Pakistan Act, 2014 [hereinafter POPA] is akin to Dicey’s ‘*rule by law*’ and Rossiterian ‘*impermanency*’ model.¹¹⁵⁴ However the wordings of the preamble which illustrate as follows, “for a speedy trial of offences falling in the Schedule and for matters connected therewith or incidental thereto” expand the horizon of POPA. Resultantly its Schedule covers crimes under Ss.121 to 140 of the PPC and

¹¹⁵² Ibid., 886-888.

¹¹⁵³ See in *Suo Motu Case No. 10 of 2011: In the matter of: [Brutal Killing of a Young man by Ranger]*, PLD 2011 SC 799: Since in this case court upholds the right to life and liberty of every citizen even during “Use of armed forces and civil armed forces to prevent terrorism” under S.5 of the ATA. It is when; such forces are using lethal armed force against a suspect, as in this case a brutal killing of a suspect by Ranger has been declared as a highhandedness of the civil armed force.

¹¹⁵⁴ See into National Assembly Secretariat, “The Protection of Pakistan Act, 2014 Act No. X of 2014,” *The Gazette of Pakistan* M-302/L-7646, no. F.22(30)/2013-Legis (July 15, 2014): 247-248: “ Provided that this Act shall remain inforce for a period of two years from the date it comes in to force.”

offences connecting to the UNSC Resolution 1373 and its subsidiary conventions relating to international and national security. Seemingly it is drafted to cope with a Hartian ‘*open texture*’ caused by the preconditions of state’s sanctions under S.196 of the Cr.P.C. As owing to this legal and judicial ‘*indeterminacy*’ neither adequate ratio nor patterns of sentencing under the rule of law have evolved as such in Pakistan to reasonably deter the crimes against state.¹¹⁵⁵ Since firstly it is up to state’s discretion to prosecute or not in a public interest,¹¹⁵⁶ secondly due to scarcity of evidence prosecution is often unable to prove guilt and thirdly owing to technicalities of law courts are inept to award sentences in such cases.¹¹⁵⁷ But, instead of focusing on capacity building of prosecutors to construct evidences in ‘*hard cases*’, under the ordinary rule of law,¹¹⁵⁸ Ss.5(5) and 15 of the POPA stringently enhance strict liability and presumption of guilt.¹¹⁵⁹ Then in the presence of in camera proceedings under S.10, severity of punishment under S.16 and non-availability of

¹¹⁵⁵ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401: “----such challenges would undoubtedly delay the trial of terrorists rather than achieving the professed objective of ensuring that the terrorists are brought to justice promptly----those convicted would wear the mantle of victimhood if not martyrdom; for closed trials create an aura of mystery and speculation, which some may endeavor to exploit and galvanize others to their cause. If we choose to learn anything from what has happened in our neighborhood, and continue to happen, it is that the sense of being wronged or persecuted is a significant motivator---”

¹¹⁵⁶ See *Sh. Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504: Criticizes the pick and choose policy of the federation to adjudicate the offences against state and declares it contrary even to the equality before the law.

¹¹⁵⁷ See e.g. into *Muhammad Gul v. The State*, 1991 SCMR 942: “Subversive acts of the nature which are committed generally---by trained persons, secretary and therefore to expect direct evidence of unimpeachable character will not be fair”; *Perwaiz v. The State*, 1995 MLD 544 Karachi; *State through Advocate General Sindh v. Muhammad Shafiq*, 2002 SCMR 620: “Court should avoid hyper technicalities in cases relating to Ss. 121, 121-A, 122 and 123 of the PPC.”; *Makhdum Javeed Hashmi v. The State*, 2010 P Cr. LJ 1809 Lahore; *Main Nawaz Sharif v. The State*, 2000 MLD 946 Karachi; *Main Yasin Wattoo v. Government of Punjab*, 1997 P Cr. LJ 836 Lahore; *Mulana Dost Muhammad v. The State*, 1976 P Cr LJ 184.

¹¹⁵⁸ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401; *Sh. Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504, 848-853.

¹¹⁵⁹ See National Assembly Secretariat, “The Protection of Pakistan Act, 2014 Act No. X of 2014,” *The Gazette of Pakistan, M-302/ L-7646*, no. F.22(30) /2013-Legis (July 15, 2014): 248-258: According to Sec. 5(5): “A person arrested or detained ----shall be considered an enemy alien and subject to provisions of S.15 presumed to have joined waging war or insurrection against Pakistan”; Sec.15. Burden of Proof.- “ An accused facing the charge of a scheduled offence on existence of reasonable evidence against him, shall be presumed to be engaged in waging war against Pakistan unless he establishes his non-involvement in the offence”

pre or post arrest parole under Ss.5 (1) and 18.¹¹⁶⁰ This stringency potentially leads to a ‘*legal black hole*’ with a susceptibility of core human rights protections.¹¹⁶¹ Such presumption seems true due to an extensive duration of partially secretive custody and physical remand of an accused in designated internment centers under Ss.5(4), 6(2) and 9(2) (a) and (b), especially in the absence of writ of habeas corpus under S.18 of the POPA.¹¹⁶²The custody under S.9 is also ambiguous in a sense that the terms *detainee*, *accused* and *intern* are not only used synonymously but have also been used without a proper definition in the entire statute. And the most debatable among them is the expression of ‘*intern*’, because it neither explains its contextualization nor elaborates its applications. As imprecise to indicate that whether *intern* means a person who is preventively detained under S.6

¹¹⁶⁰ Ibid: Sec.10: “Exclusion of public from proceeding of Special Court”; Sec.16: “--- a scheduled offence shall be punishable with imprisonment which may extend to twenty years, with fine and confiscation of property unless the scheduled offence already provides a higher punishment----”; Sec. 5(1): “All the schedule offences shall be cognizable and non-bail able”; Sec.18: “the provisions of Ss. 374[confirmation of death sentence by the high court], 426[suspension of sentence pending appeal], 435[Certiorari power of high courts with regard to lower courts], 439[High Court’s power of revision], 439-A[Sessions Judge’s power of revision], 491[High Court’s power to issue directions of the nature of a habeas corpus], 496[Grant of Bail], 497[Bail in case of non-bail able offences], 498[Bail Bond], 561A[Saving of inherent power of High Court] of the Cr. P.C. shall not be applied to the schedule offences.”

¹¹⁶¹ See *State v. Navjot Sandhu @ Afsan Guru*, Criminal Appeal Nos. 373-375, 376-378 of 2004, <http://Judis.nic.in/supremecourt/imgs1.aspx?filename=27092>, 24-25:Police [along with other law enforcement agencies] still resort to crude methods of investigation due to which *legal taboo* of human rights violations emerge during custody.

¹¹⁶² See The Protection of Pakistan Act, 2014: Sec.5(4): “--remand the accused-- for a term not exceeding sixty days”; Sec. 6: Preventive detention (2): “ ---may detain any enemy alien or militant, in a designated internment camps---”; Sec.9(2) (a): “---in the interest of the security of its personnel or for the safety of the detainee or accused or internee, -or for any other reasonable cause withhold the information except from a High Court or the Supreme Court regarding the location of the detainee or accused or internee or internment center established or information with respect to any detainee or internee or his ware about.” (b): “the Government may not in the interest of the security of Pakistan disclose the grounds for detention or divulge any information relating to a detainee, accused or internee who is an enemy alien or militant.” Though a bare reading of the S. 9(2) (a) indicates that such information can be disclosed in front of superior judiciary however its proviso qualifies this judicial power in the following manner, “Provided that the judge or judges to whom the discloser is made may decide to treat it as privileged information in the public interest.” Therefore the qualifier of “public interest” is used in such a vague manner that neither writ jurisdictions under Art.199 nor the protection of Fundamental rights under Art.184 (3) of the constitution are capable to bring accountability and transparency amid such detentions. Apparently Ss.6and 9 is an attempt to institutionalize the phenomena of missing persons, in which terror suspects are allegedly detained by law enforcement agencies without due warrants and authorization amid the contemporary war against terror in Pakistan; also see for such role of law enforcement agencies in Frederic Grare, *Reforming the Intelligence Agencies in Pakistan’s Transitional Democracy* (Washington, DC: Carnegie Endowment for Intl Peace, 2009), 31-39.

(1),¹¹⁶³ or is arrested under S.15 of the POPA on a presumption of guilt. Since the latter is also contrary to Art.14 (1) and (2) of the ICCPR.¹¹⁶⁴ So if *intern* is neither a detainee nor an accused then what is his legal status? Does it construe a person who is confined just because of a mere suspicion about his involvement in crimes against state? If it so in case of Enemy Alien under S.2(e),¹¹⁶⁵ who might be an illegal immigrant instead of a hostile combatant, then such connotation of an *intern* is contrary to right to life and liberty owing to a merely doubtful citizenship of a person. Then a query arises that how and from where such terminology creeps in to the legal system of Pakistan. A special legislation “The Actions (in Aid of Civil Power) Regulations, 2011,” in the aftermath of military engagements for the law enforcement operations in the tribal areas adjacent to the KPK helps to satisfy it.¹¹⁶⁶ Since a sustained presence of military to counter armed insurrections in these areas, engender some legal issues especially in the absence of an established mechanism of police and prisons. As it employs an expression of ‘*miscreants*’ for the members of armed groups,

¹¹⁶³ See Sec.6(1) of the POPA, 2014: Preventive detention “The Government may, by an order in writing, authorize the detention of a person for a period specified in the order that shall not exceed ninety day----”

¹¹⁶⁴ See H. Victor Conde, *A Handbook of International Human Rights Terminology* (Lincoln: University of Nebraska Press, 2004), 291-292: “International Covenant on Civil and Political Rights.”

¹¹⁶⁵ See Sec.2 (e) of the POPA, 2014: “Enemy Alien” means a person whose identity is unascertainable as a Pakistani whether by documentary or oral evidence or who has been deprived of his citizenship acquired by naturalization and is suspected to be involved in waging war or insurrection against Pakistan or depredation on its territory by virtue of involvement in offences specified in the Schedule.” Interestingly this definition in Act and Bill of the POPA differs significantly, as in the Act Enemy Alien is a militant, means an active combatant involves in waging war and insurrection against Pakistan. Though the terms militant and waging war are again not defined here, yet they help to construe an enemy alien as a person who is actively taking part in hostilities against Pakistan. But the above cited generalized definition can even extend up to an illegal immigrant for whom merely a subjective suspicion is enough to be qualified as enemy alien.

¹¹⁶⁶ See States and Frontier Division, “The Actions (in Aid of Civil Power) Regulations, 2011,” *The Gazette of Pakistan* M-302/ L-7646, no. F.11(5) P/L /2011 (June 27, 2011): 241-245: Preamble, enactment , extend clauses and definitions.

who upon their arrest during counter insurgency operations are labelled as intern in the military owned internment centers.¹¹⁶⁷

Similarly the entire statute of the POPA, 2014 lacks precise definitions and threshold of waging war, insurrection and raising arms. Apparently they can be construed as demonstrations of extreme violence against life and property but they ought to be classified in their entirety for construction of evidences and respective sentencing. As the court observes that a journalistic and political use of the term war creates hindrance for legal reasoning to evaluate the conducts of hostilities. Besides divides it in two domains as ‘*public war*’ and ‘*civil war*’, while the former connotes an external aggression whereas the later implies the insurgency.¹¹⁶⁸ Yet both of these forms and magnitude of violence do not exist as such in settled areas of Pakistan for which the POPA has been enacted. Except the later to some degree in FATA where The Actions (in Aid of Civil Power) Regulations, 2011 is already operating. Subsequently J. Khosa observes that it is the government not judiciary or any other institution to declare such kind of connotations in country. Since government has declared neither the later nor the former in Pakistan, so a reliance on the expression of war is not appropriate to cope with the crisis situation.¹¹⁶⁹

Similarly the expression of *militant* in the POPA, 2014 creates ambiguities because it does not explain that how a militant is different from a terrorist with regards to his alleged

¹¹⁶⁷ Ibid., 246-248: Ss.8-13: “Internment.”

¹¹⁶⁸ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 1002-1004.

¹¹⁶⁹ Ibid., 993, 1004-1005.

involvement in the scheduled offences.¹¹⁷⁰ As firstly the scheduled offences of the ATA, 1997 and the POPA, 2014 are similar by and large. And secondly when the expression of war or waging war is not clear as such then how a terminology of militant which also seems to be associated with the preceding under S. 2 (f) of the POPA lead to any certainty? Besides the question is that how could law and judiciary do away with these ‘indeterminacies’? But then *Nazir Khan, Afzal Guru and Ajmal Kasab* cases of the Indian jurisdiction help to comprehend the terminologies of waging war and insurrections especially through general criminal law. These cases elaborate that term of waging war has emerged from the terminology of ‘levying war’ as incorporated in the “English Statute of High Treason of 1351,” in which this offence had two connotations. First covers an assault on the King and his allies in person which is currently come under the domain of the S.124 of PPC and second covers attack on King’s peace and his regal power. The offence of waging war as contemporarily incorporated in the S.121 of PPC comes under the later connotation of *levying war*.¹¹⁷¹

¹¹⁷⁰ See National Assembly Secretariat, “The Protection of Pakistan Act, 2014 Act No. X of 2014,” *The Gazette of Pakistan* M-302/ L-7646, no. F.22(30)/2013-Legis (July 15, 2014): 248: “ Sec.2 (f): “militant” means any person who: (a) wages war or insurrection against Pakistan, or (b) raises arms against Pakistan , its citizens, the armed forces or civil armed forces; or (c) takes up, advocates or encourages or aids or abets[interestingly statute does not elaborates the difference between advocates and encourages] the raising of arms or waging of war or a violent struggle against Pakistan; or (d) threatens or acts or attempts to act in a manner prejudicial to security, integrity or defence of Pakistan; or (c) commits or threatens to commit any scheduled offence; and includes: (a) a person who commits any act outside the territory of Pakistan for which he has used the soil of Pakistan for preparing to commit such act that constitutes scheduled offence under this Act and the laws of the State where such offences has been committed, including an act of aiding or abetting such offence; or (ii) any person against whom there are reasonable grounds that he acts under the directions or in concert or conspiracy with or in furtherance of the designs of an enemy alien.” Hence a wide canvas of the expression of *militant* covers not only the crime against state and public order but also crimes relating to international terrorism.

¹¹⁷¹ See e.g. into *Nazir Khan v. State of Delhi*, 2003 (8) SCC 461; *State v. Navjot Sandhu @ Afsan Guru*, Criminal Appeal Nos. 373-375, 376-378 of 2004, <http://Judis.nic.in/supremecourt/imgs1.aspx?filename=27092>, 82-85; *The State of Maharashtra v. Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid*, Confirmation Case No. 2 of 2010 in the High Court of Judicature at Bombay, Criminal Appellate Jurisdiction, <http://dspace.judis.nic.in/bitstream/123456789/35017/1/CRCONF210.pdf>;

However it does not necessarily mean an escalation of extreme violence against the legitimacy of the sovereign. In fact pre-existing preparedness, systematic plan of actions and design to overawe an established government with or without aggression and analogous political agenda are core elements of waging war. Consequently the *Mir Hassan* case indicates that spontaneous and unplanned armed resistance does not constitute waging a war, even sporadic mutiny without a pre-planned political objectives and design does not constitute waging war.¹¹⁷² Although *Maganlal Radha* case qualifies the offence of waging war with unlawful gathering which has a common objective to overawe the sovereign's legitimacy through a chain of criminal events. And regardless to the number of people or means of violence, waging war is mainly concerned with intent, design and ends in which principal and his accomplices are equally responsible.¹¹⁷³ Yet *Afzal Guru* and *Ajmal Kasab* cases indicate that even an individual's act of terrorism or an isolated attack on public institution if has a design of aversion of state constitutes a waging of war. And owing to extraordinary emphasis on planning and design these cases focus on the expression of waging prior to war. It has been observed accordingly that criminal conspiracy under S.120-A PPC, and conspiracy to subdue the authority of the state under S.121-A of the P.P.C is mandatory to constitute War under S.121 of the PPC. And

<http://www.nia.gov.in/acts/AjmalKasab-MumbaiHighCourtJudgment.pdf>, 847-850.

¹¹⁷² See *Mir Hasan Khan v. The State*, AIR 1951 Patna 60.

¹¹⁷³ See *Maganlal Radha Krishan v. The State*, AIR 1946 Nagpur 173, 176: "following principles help to constitute the offence of waging war (i) No specific number of persons is necessary to constitute an offence under S.121, Penal Code (ii) The number concerned and the manner in which they are equipped or armed is not material. (iii) The true criterion is *quo animo*[the core and common objective] did the gathering assemble? (iv)The object of the gathering must be to attain by force and violence an object of a general public nature, thereby striking directly against the King's authority. (v) There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt."

collection of arms with such intent constitutes raising arms under S.122 of the PPC. It has been further observed in this regard that insurrection is a part of designs of war. Thus different acts of insurrections or use of criminal force as a part of a common and generalized objective and designs to overawe government constitute waging a war. So even an isolated act of terrorism and insurrection if are part of a design against the legitimacy and sovereignty of state then constitute waging a war against the state.¹¹⁷⁴ But if such act or acts are of a particular nature, directed toward a particle set of persons and have a personal agenda then constitute terrorism under the pretext of ATA, 1997.¹¹⁷⁵

Likewise insurrection though consist of almost same nature of criminal force which come under terrorism yet different from it if deals with a generalized objective to subdue a state and its functions. The *Afzal Guru* case also differentiates belligerency and insurgency through the help of *Pan American* case. While the former deals with a civil war in which dissident armed groups fight almost symmetrically with governmental forces for their political dominancy whereas the later deals with an asymmetrical warfare.¹¹⁷⁶The *Guru* and *Kasab* both cases indicate that if regular armed forces of state are engaged to curb irregular, asymmetrical and scattered groups who are involved in warlike activities then it

¹¹⁷⁴ See *State v. Navjot Sandhu @ Afsan Guru*, Criminal Appeal Nos. 373-375, 376-378 of 2004, <http://Judis.nic.in/supremecourt/imgs1.aspx?filename=27092>, 85-87; *The State of Maharashtra v. Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid*, Confirmation Case No. 2 of 2010 in the High Court of Judicature at Bombay, Criminal Appellate Jurisdiction, <http://dspace.judis.nic.in/bitstream/123456789/35017/1/CRCONF210.pdf>; <http://www.nia.gov.in/acts/AjmalKasab-MumbaiHighCourtJudgment.pdf>, 850-854.

¹¹⁷⁵ See *Muhammad Rasool v. The State*, PLD 2012 Balochistan 122: “it would be necessary to examine the ingredient, motivation, object, design and purpose behind the offence for making its nexuses with terrorism.”

¹¹⁷⁶ See *Pan American World Air Inc. v. Actna Cas & Sur Co.*, 505, FR. 2d, 989, quoted in *State v. Navjot Sandhu @ Afsan Guru*, Criminal Appeal Nos. 373-375, 376-378 of 2004, <http://Judis.nic.in/supremecourt/imgs1.aspx?filename=27092>, 86-87.

constitutes as insurrectional warfare.¹¹⁷⁷ They also clarify that the expression whosoever wages war indicates that such offence can be attributed to the non-state actors or enemy aliens as well. Since the phraseology of ‘whosoever’ in this context, does not restrict only up to a citizen of the state but also covers all kind of natural and legal persons.¹¹⁷⁸

Nevertheless these cases of Indian jurisdiction indicate two aspects. Firstly, that the general criminal law of Pakistan is sufficient to handle the crimes against the state such as waging war, insurrection and raising arms for which the POPA has been enacted duplicity instead of empowering ordinary criminal courts and prosecution. Secondly, that waging of war as incorporated in the POPA 2014 deals with isolated and sporadic acts of extreme devastation and annihilation. Mainly comprises of suicidal or hit and run attacks on the strategic public installations situated in the settled areas of Pakistan.¹¹⁷⁹ In this context POPA being a law of conflict attempts to cover the gap, as left by the ATA, 1997 which does not cover crimes against the state as such. But then questions arise here that whether the procedural fairness as required in an ordinary rule of law paradigm during peace time is also mandatory during ‘warlike’¹¹⁸⁰ conflicts situations? And whether the human rights regime is capable to extend its protections during such volatile situations?

¹¹⁷⁷ See *State v. Navjot Sandhu @ Afsan Guru*, 86-88: Court observes that declaration of war can be categorized in to technical and material context. While the former is a formal declaration of war with a hostile country whereas the later deals with an actual resorts to armed forces irrespective to any formal declaration; *The State of Maharashtra v. Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid*, 854-856.

¹¹⁷⁸ See *Afsan Guru*, 91; *Amir Kasab*, 852-853.

¹¹⁷⁹ See *Amir Kasab*, 855-856.

¹¹⁸⁰ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 727.

At this juncture J. Azmat in the *Rawalpindi Bar* case seems to follow Indian perspective of waging war and relies upon Article 245 of the constitution of Pakistan, 1973 for his argumentation.¹¹⁸¹ Accordingly he divides it in to two core domains, the first deals with its clause (1) as present in the constitution since its inception in 1973. And the second domain contains clause (2), (3) and (4) which are respectively incorporated in it through later amendments. However to discuss the subject matter of waging war he restricts himself up the clause (1) of this Article. Yet he further splits this clause in to two spheres, as the first deals with the engagement of armed forces in “*external aggression or threat of war*” and the second deals with *subject to law*, act in aid of civil power.

As per the expression of *subject to law*, he concedes with *Darwesh Arbey* and *Sh. Liaquat* cases. Since both of them discuss such engagement in accordance with the relevant sections of general or special laws like Cr.P.C, PPC, ATA or POPA to assist and not to derogate civil administration.¹¹⁸² And if courts find any procedural lacunas such as excess

¹¹⁸¹ See into National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 6-7, 105-107, 145: for Article.245: “Functions of the Armed Forces. (1) The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so. (2) The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any Court. (3) A high Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245. –Provided that this shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power. (4) Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court remain suspended for the period during which the Armed Forces are so acting,” Art.199 (3) “An order shall not be made under clause (1) [---a High Court may, if it is satisfied that no other adequate remedy is provided by law] on application made by or in relation to a person who is a member of the Armed Forces, or who is for the time being subject to any law relating to any of these Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service---,” Art.8 “ Laws inconsistent with or in derogation of Fundamental Rights to be void.”

¹¹⁸² See *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206, 229, 274, 289; *Sh. Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504, 588-590, 626-627: indicate that the exiting general law on the subject is Ss. 128, 129, 130, 131 and 131 A of the Cr. P.C; *District Bar Association*,

of power, mala fide intentions, inappropriate forum or lack of jurisdiction, then in spite of the bar of Art.199 (3), they can enforce their writ jurisdiction. It is mainly to protect core human rights values including right to fair trial in consonance with *subject to law*. However his treatment to conducts and high magnitude of hostilities against the state is akin to the Indian perspective, which cannot be aligned with subject to law. Therefore J. Azmat indicates that the expression of *threat of war* as incorporated in Art.245 (1) is not meant for international armed conflict, which has already been mentioned in the preceding expression of *external aggression*. In fact the connotation of ‘war’ in the clause (1) of the Art.245 construes as waging war against the state in form of armed rebellion or insurgency. He further indicates that such magnitude of conflict which is identified by J. Bandial in the same case as an ongoing internal armed conflict in FATA¹¹⁸³ cannot be dealt with ordinary criminal laws. Subsequently it attracts special and stringent administrative measures even beyond the scope of Art.8 of the constitution. However to avoid the grave violations of core human rights values he along with majority of judges maintains the forum of judicial review of administrative actions in this regard.¹¹⁸⁴ Now the question is that if human rights regime is ineffective in this conflict paradigm then on what legal grounds judiciary is capable to review counter insurgency measures?

Rawalpindi v. Federation of Pakistan, PLD 2015 SC 401, 1181-1183, : indicates that [Ss.4 and 5] of the ATA, 1997 and [S.3] of the POPA, 2014 are the relevant laws on the subject. These cases also elaborates that in aid of civil power amid the internal disturbance has three core thresholds, rioting, mob violence and violent protests attract the provisions of Cr. P.C and PPC, whereas national or international terrorism attract the provisions of ATA while waging war, insurrection attracts the provisions of POPA along with the relevant provisions of the Pakistan Army Act, 1952.

¹¹⁸³ See PLD 2015 SC 401, 1154-1157.

¹¹⁸⁴ See PLD 2015 SC 401, 721-746.

J. Bandial indicates accordingly that the above mentioned scenario attracts the application of international humanitarian law, which can act as a law of armed conflict in Pakistan. He indicates further that contemporary scale of violence in tribal as well as urban areas, quantity of suicide blasts in the wake of perfidy and magnitude of sabotage require an urgent military response under the Art.245 of the constitution. However such military necessity must be coupled with principles of proportionality as enshrined in the four Geneva Conventions to avoid undue collateral damage. And to avoid the miscarriage of justice in the case of detained militants he focuses on the Common Article 3, which is common in all the four Geneva Conventions of 1949.¹¹⁸⁵ Hence to accomplish such purpose and to extend judicial guaranties to the interns he relies upon Article 4 along with Articles 184(3), 187 and 190 of the constitution of Pakistan.¹¹⁸⁶ There is another aspect of J. Bandial's dictum which needs to be discussed here, as he synonymously employs the expressions of terrorists and militants in context of waging war against the state. Subsequently two aspects of waging war can be inferred from this perspective. Firstly, that acts of national and international terrorism as incorporated in S.6 of the ATA are one of the

¹¹⁸⁵ See Jelena Pejic, "The Protective Scope of Common Article 3: the eye," *Selected Articles on International Humanitarian Law* 93, no. 881 (2011): 189-225: "The Common Article.3: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for."

¹¹⁸⁶ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 1144-1147: "-- the persons engaged in waging war against Pakistan through armed conflict, insurrection, terrorism and militancy--- captured by the Armed Forces of Pakistan may be considered for protection under the 4th Geneva Convention dealing with civilians in the captivity of a party to the conflict of which they are not nationals. Article 3 of the said Convention enumerates the essential human rights restraints imposed in this respect on a detaining power."

elements of the grand strategy of militancy and insurgency. And secondly, that the expression of *terrorists* is employed for those offenders who wage war against the state in settled areas under rule of law paradigm. Therefore either alike Indian context they are supposed to be tried under Ss. 121, 121A, 122 and 123 of the PPC or if ordinary courts lacks jurisdiction on technical grounds then under Ss.6 and 7 of the ATA. But as the later does not contains offence of waging war then ultimately POPA as a special law extends its jurisdiction for such trials in specially constituted courts. Similarly it can be inferred that the expression of *militant* is employed for those offenders who wage war against the state in federally administrated tribal areas.

Here instead of the POPA, S.2 (1) (d) of the Pakistan Army Act, 1952 and especially its sub clause (iv) extends its jurisdiction after a prior sanction from the federal government. Since before the enactment of POPA, clause (d) of subsection (1) of S.2 and S.59 of this Act has already constituted a special jurisdiction through military tribunals to try civilian for the civil offence of waging war.¹¹⁸⁷ Though such jurisdiction will be duly discussed ahead, yet it is pertinent here to discuss a definition of '*enemy*' as given in this Act and its impact on S.16 of the POPA. The clause (8) of S.8 of the Pakistan Army Act, 1952 states that, "enemy includes all armed mutineers, armed rebels, armed rioters, -- and any person in arms." It appears from this definition especially from the connotation of '*in arms*' that person who wages war is a hostile combatant and supposed to be treated and tried under the law of armed conflict as expounded by J. Bandial. Similarly the expression of *person*

¹¹⁸⁷ See *Brig. (Retd) F. B. Ali and another v. The State*, PLD 1975 SC 506, 543.

indicates he could be a non-state actor and may belong to a hostile country. Thence the expression of enemy alien as incorporated in the POPA, 2014 seems to be contingent upon the Pakistan Army Act, 1952. However such application on rest of the scheduled offences of the POPA other than waging war or insurrection may cause a serious harm to legal certainty and determinacy. Like the S.16 of POPA which extinguishes the citizenship of an offender upon his proven guilt in the court of law. Here the question arises that if such citizen is declared as non-citizen then what would be his legal status in the prisons? Whether the offender would be a non-state actor in this case? If so then whether he is entitled for the minimum human protections? If yes then how these protections could be extended to such a non-state actor in a human rights paradigm as in this scenario state extends such protection only to its own citizens? Then whether S.16 of the POPA implicitly applies International Humanitarian Law especially with regards to its internment camps where such non-state offender would be confined? Yet except J. Bandial's minority stance¹¹⁸⁸ the enforcement clauses of POPA, 2014 are silent in this regard with a potential '*lawless void.*'¹¹⁸⁹

The extend clause of the POPA, 2014 operationalizes it to whole of Pakistan at once with an overriding effects under S.24 (1) and (2) to curb warlike situations, as beyond the

¹¹⁸⁸ See PLD 2015 SC 401: "The treatment of belligerent citizen and unlawful combatants in custody who have waged war against the State is not just a matter of municipal law. The subject also attracts the principles of public international law on armed conflict and war."

¹¹⁸⁹ See in *Sh. Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504, 705-707: "Violence is the child of violence and that useless punishment produces in the offender, not a spirit of meek contribution but one of implacable hostility which, by making his reformation more difficult injures not only him but the whole community ----Punishments were made severer in order to cover up weakness in the detective machinery. In a system where the agency for detection and machinery for prosecution is weak, the chances of offending with impunity are many---- [nevertheless] severity of punishment has strictly limited effect."

threshold of acts of terrorism. And like ATA, 1997 its S.21 empowers federal government instead of respective high courts to make rules in accordance with its stated objectives. Then Ss.23 and 24 indicate that federal government is empowered to enforce POPA to curb insurrection and waging war in specified and notified areas with overriding effects on Cr. P.C., MPO, 1960 and ATA, 1997. Moreover language of the S.23 is also contrary to spirit of federalism as depicts the colonial legacy of strong center and unitary form of government in which provinces are merely considered as administrative units.¹¹⁹⁰ Nevertheless in specified areas, the S.3 (2) (a) of POPA empowers the law enforcement agencies including civil and armed forces to shoot at a suspect even without being fired upon. Similarly S.3 (2) (b) empowers them to arrest a suspect without warrant merely on an apprehension and S.3 (2) (c) empowers them to enter any premises without due warrants. Then Ss.3(3) and 4 of the POPA extend the general indemnity as incorporated in S.132 of the Cr. P.C. to all the mistakes of facts and law done under the good faith of these law enforcement agencies. This statutory impunity under S.20 of the POPA gives such a grim scenario of human rights at least in the prescribed areas where even Apex court is susceptible to protect right to life, liberty, privacy and dignity of man. This situation becomes bad to worse in an implicit absence of the judicial review of administrative action

¹¹⁹⁰ See Craig Baxter, "Constitution Making: The Development of Federalism in Pakistan," *Asian Survey* 14, no.12 (1974): 1075-1076; Khan, Maryam S. "Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity and Group Conflict," *Harvard Journal on Racial and Ethnic Justice* 30 (2014): 111-114; Iram Khalid, "Politics of Federalism in Pakistan: Problems and Prospects," *South Asian Studies* 28, no. 1 (2013): 199-213; According to language of the S.23 of POPA "*as the Federal Government may deem fit*" indicates that provinces are not supposed to be consented upon prior to such notifications. And Federation is arbitrarily empowered to delegate respective powers to Provinces under this section.

as incorporated in the proviso of S.3 (2) (a) in case of abuse of power and error of judgment in relation to the firing upon suspects.¹¹⁹¹

With regards to punishment under S.16, government has established special courts in all provincial headquarters along with ICT under S.8 of the POPA.¹¹⁹² Recently the Federal Investigating Agency has also been given mandate under POPA to probe out the offences relating to terror financing and cyber terrorism.¹¹⁹³ Yet owing to the exclusion of ordinary rules of evidence and privilege of investigation report to be cross examined under the proviso of the S.7. As well as retrospective effect of the POPA under S.6 (5) makes its entire proceedings contrary to the right to fair trial. Besides it proposed capital punishment for the offences relating to POPA in the Criminal Laws Amendment Act, 2015. And with regards to appeals against POPA's actions and judgments, it is interesting to note that though S.19 gives an opportunity to appeal against the final judgment of special courts in respective high courts. Yet a general indemnity of all such proceedings and actions under S.20 neutralizes this monitoring mechanism. Specifically in case of deployment of civil armed forces or armed forces in aid of civil power under this act. Meanwhile a recent the 21th constitutional amendment has temporarily placed fundamental rights in first schedule

¹¹⁹¹ See Sec.3 (2) (a) of the POPA, 2014: "Provided further that all cases of firing which have resulted in death or grievous hurt shall be reviewed by an internal inquiry committee constituted by the concerned law enforcement agency." It seems that implementing agency would be a judge in its own case which is even contrary to the natural justice under the doctrine of '*Nemo iudex in causa sua.*'

¹¹⁹² See *Ministry of Law, Justice and Human Rights*, "Special Courts (Protection of Pakistan Act, 2014)," last updated February 27, 2015, accessed on October 22, 2015, <http://www.molaw.gov.pk/gop/index.php?q/>.

¹¹⁹³ See Ministry of Interior, Government of Pakistan, "Notification: S.R.O (1) /2015," *Gazette of Pakistan Extra Ordinary (Part-II)* No. 1/5/2015-(FIA) (2015): "Offences punishable under the protection of Pakistan Act, 2014 (X of 2014)."

of the constitution.¹¹⁹⁴ So let alone the inherent constitutional immunity of policing of armed forces in aid of civil powers under Art.8 (3), 199(3) and 245(3) of the Constitution. An enforcement of Articles 8, 199(1) and (2) and 184(3) seems impractical against administrative actions taken under the POPA, 2014.

Another thing as being pertinent with regards to procedural fairness is about the S.22 of POPA. Although this section empowers federal government to add or modify this act, yet in a short span of time and without any judicial scrutiny a lot of ad hoc and arbitrary amendment have been insurrected in this temporary law.¹¹⁹⁵ Subsequently the replacement of high courts by Supreme Court in case of an appeal against judgment of special courts under S.19 of the POPA Bill, 2015 customizes this law as more stringent. Moreover clause (5) of S.8 of the POPA, Bill 2015 is even against the concept of independence of judiciary, as empowers government to appoint an executive officer as special judicial magistrate.¹¹⁹⁶

¹¹⁹⁴ See Senate Secretariat, “The Constitution (Twenty-first Amendment) Act, 2015: Act No. X of 2014,” *The Gazette of Pakistan* M-302/ L-7646, no. F. 9(2)/2015-Legis (January 8, 2015): 1-4.

¹¹⁹⁵ See Senate Secretariat, “The Protection of Pakistan Act, 2014,” accessed November 11, 2015, http://www.senate.gov.pk/en/billsDetails.php?type=1&id=1&catid=186&subcatid=276&cattitle=Bills/uploads/documents/1397743692_249.pdf :The reason of double citation of the POPA, 2014 is that like ATA, 1997 it carries sizeable amendments in short period of time since its inception. Then owing to the prevalence of the law which is later longitudinally as has been held in *R.S. Raghunath v. State of Karnataka*, 1992 AIR 81, study also considers this government bill, as lay down in Senate after getting assent from the National Assembly. It is important that the Act extends the jurisdiction of POPA to whole of the Pakistan at once for a period of two years. However the Bill in Senate extends its jurisdiction in areas as specified by the notification of Federal government for a period of three years. So as per its enacting and extend clause, “Provided that this Act shall remain in force for a period of three years-----.” Similarly administrative, substantive, enforcement and miscellaneous portions of the both vary significantly. Such aspect is contrary to the Fuller’s perspective of certainty of the rule of law and depicts arbitrariness and ad hocism.

¹¹⁹⁶ *Ibid.*, 5-9.

Therefore it seems that all such measures are not only contrary to procedural reasonableness but also opposing to sustainable order.¹¹⁹⁷

An Appraisal of the Pakistan Army Act, 1952:

The Pakistan Army Act, 1952[herein after PAA] is an ordinary federal law to manage conducts of persons relating to the active service of army under a rule of law paradigm. As court observes, “Provisions were made for maintain the discipline in the Army, including by way of awarding punishments and sentences through Forums referred to as Court Martial”¹¹⁹⁸ Similarly it has been observed in another case that the PAA, 1952 mainly relates to general behavior and conduct of an army officer in relation to their active service.¹¹⁹⁹ However through an amendment in 1967 its scope has been extended to civilians who are alleged to be involved in offences relating to the army, navy and air force under Ss. 131 to 140 of the PPC.¹²⁰⁰ Accordingly the focus of study revolves around the S.2 (1) (d) of the PAA, 1952 which deals with trial of civilians who otherwise have no nexuses with it, but if are involved in

¹¹⁹⁷ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401: “any dose or measure of injustice for the sake of order is nothing but counterproductive as it feeds disorder rather than curing it.”

¹¹⁹⁸ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 718.

¹¹⁹⁹ See *Federal Government M/O Defence, Rawalpindi v. Lt Col Munir Ahmad Gill*, 2014 SCMR 1530.

¹²⁰⁰ See *Brig. (Retd). F.B. Ali and another v. The State*, PLD 1975 SC 506, 519; also in Ministry of Law, Justice and Human Rights, “Pakistan Army Act, 1952 (XXXIX of 1952),” accessed November 2, 2015, <http://www.molw.gov.pk/laws/>; Sec.2 “Persons subject to the Act-(d) “persons not otherwise subject to this Act who are accused of--” [Substituted and added by the Defence Services Laws Amendment Ordinance, 1967 (3 of 1967), S.2.]; Muhammad Mazhar Hassan Niazi, ed., *The Pakistan Penal Code: with Cometary* (Lahore: PLD Publishers, 1998), 122-125: S.131 “Abetting mutiny, or attempting to seduce a soldier or airman from his duty--”, S.132: “Abetment of mutiny, if mutiny is committed in consequence thereof”, S.133: “Abetment of assault by soldier – on his superior--”, S. 134: “Abetment of such assault, if committed”, S.135: “Abetment of desertion of soldier--”, S.136: “Harboring deserter”, S.137: “Concealment of such Deserter,” S.138: “Abetment of act of insubordination by soldier,” S. 140: “Wearing garb of soldier--.”

anti-state activities, espionage activities or seduction of military officers.¹²⁰¹ So, by such milieu this general law becomes a special law under the rule by law paradigm.¹²⁰²

But then in 1977 its horizon has been further enlarged by incorporating general and special offences against public order and national security. Consequently jurisdictions of special military tribunal have been extended under clause (3), (8) and (11) of S.8 and S.59 of PAA to adjudicate civil offences.¹²⁰³ These include offences against public justice, tranquility, safety, lawful authority, person, property and mischief as enumerated in substantive parts of the PPC.¹²⁰⁴ Yet, it has been contested in *Darwesh* case that such mala fide wideness of

¹²⁰¹ See *Azhar Iqbal v. The State*, 2014 P Cr. L J 1387 Lahore; *Government of Pakistan through ministry of Defence, Rawalpindi v. S.H.T. Leelan and others*, 2004 SCMR 1761: “whereas interpretation of sub clauses (i), (ii) and (iii) of clause (d) of subsection (1) of Sec. 2 of PAA, 1952 is concerned, its disjunctive paragraph (i) and (ii) elaborates the circumstances where a civilian can be tried under Army Act, Para(i) deals with seducing while para (ii) deals with an offence in relation to any work of defence---or an offence under official Secret Act, 1923---Consequently Scope of S.2 (1)(d) as a whole has been enlarged.”

¹²⁰² See *Azhar Iqbal v. The State*, 2014 P Cr. L J 1387 Lahore: “Pakistan Army Act, 1952 is a special law, has its own policy and scheme of punishment.”; *Asif Mahmood v. Federation of Pakistan*, PLD 2005 Lahore 721: The Sec.2 (1) (d) of PAA, 1952 is an appropriate law to curb offences against the State; *Madani v. Algeria*, Communication No. 1170/003 (28 March 2007) UN Doc CCPR/89/D/1172/2003, quoted in Claudia Martin, “*The Role of Military Courts in a Counter- Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice*,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Faias, Katja Lh Samuel and Nigel D White (Clarendon Street: Oxford University Press, 2012), 692-693: under the doctrine of necessity, if regular or special civilian courts are unable to adjudicate terrorists and insurgents. Then such conflict stricken countries are allowed to establish special military tribunals under human rights jurisprudence to try high profile terrorists and insurgents. Yet these tribunals ought to maintain a minimum threshold of fair trial as enshrined under Article 14 of the International Covenant on Civil and Political Rights.

¹²⁰³ See *Mrs. Naheed Maqsood v. Federation of Pakistan*, 1997 CLC 13 Karachi: “forums established under the PAA, 1952 are called tribunals rather than courts; *The State v. Mst. Shazia Mubashir*, 2008 P Cr. LJ 1774 Lahore: offences under Ss. 120 B, 121, 121 A, 124, 302, 324, 440, 435, 436 of the PPC, Ss. 3, 4, 5 of the Explosive Substance Act, 1908, S.7 of the ATA, 1997, and S.31 (d) of PAA, 1952 are jointly tried by Field General Court Martial.

¹²⁰⁴ See *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 SC 206, 219; also in Sec.2 of The Pakistan Army (Amendment) Act, X of 1977: Ss. 143, 144, 147, 148, 152, 153-A, 188, 193, 224, 225, 283, 302, 304, 307, 325, 326, 332, 342, 353, 364, 366, 376, 392, 395, 396, 397, 431, 435 and 506 of the PPC. Moreover offences in relation to Explosive Substance Act, 1908 (VI of 1908), Defence of Pakistan Ordinance, 1971 (XXX of 1971), Prevention of Anti- National Activities Act, 1974 (VII of 1974), Telegraph Act, 1885 (XIII of 1885), Railways Act, 1890 (IX of 1890), Official Secret Act, 1932 and High Treason (Punishment) Act, 1973 (LX VIII of 1973) had also been incorporated in clause (d) and (dd) of S.2 of PAA, 1952; S. 8-Definitions-(3)

the PAA, 1952 is a deliberate attempt to involve armed forces to coerce political opponents.¹²⁰⁵ As this amendment had overruled the general criminal law and procedure, consequently an arbitrary trail of civilians through military courts seems contrary to natural justice and constitutional guarantees.¹²⁰⁶ It seems so because in the pre Army Act Amendment 1992 scenario no remedy of appeal was available under the then S.133 of PAA against a decree of court martial.¹²⁰⁷

Afterwards during Zia era in 1984 its scope has been enlarged even up to the offences relating to Hudood laws.¹²⁰⁸ Newberg indicates accordingly that Zia's *Islamization* through security laws was primarily intended to achieve political legitimization. Yet such manipulation of laws proved to be an '*instrument of state oppression*' which not only enhanced polarization but also deplored civil liberties in Pakistan.¹²⁰⁹ Maluka elaborates in this context that Zia not only attempted to establish a theocracy but also revived diarchy by

"Civil offence, means an offence which, if committed in Pakistan, would be triable by a criminal court.", (6): "Court martial, means a Court martial held under this Act", (11): "Offence, means any act or omission punishable under this Act and includes a civil offence as hereinbefore defined", S.59: "Civil offences. (1) Subject to the provisions of -- this Act— any person-- who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act--" of the PAA, 1952.

¹²⁰⁵ See PLD 1980 SC 206, 232-233, 270.

¹²⁰⁶ Ibid., 289-291.

¹²⁰⁷ See S.133 of the PAA, 1952: "Bar of appeals. No remedy shall lie against any decision of a Court martial save as provided in this Act, and for the removal of doubt it is hereby declared that no appeal or application shall lie in respect of any proceeding or decision of a Court martial to any Court exercising any jurisdiction whatever"; Senate Secretariat, "The Pakistan Army (Amendment) Act, 1992: Act No. XXVIII of 1992," *The Gazette of Pakistan M-302/L-7646*, (December 24, 1992): 653-655: Through this amendment Subsection (A) "appeal against the punishments relating to Hudd" and (B) "Appeal against punishments other than Hudd" has been inserted, yet both of these insertions are meant to either Commander In Chief or his delegated form. No appeal still lies against such internal mechanism of appeals in any court whatsoever.

¹²⁰⁸ See e.g. in *Ex. Assistant Warrant Officer Mohammad Yousuf v. Federation of Pakistan*, 2004 MLD 67 Karachi; The Pakistan Army (Amendment) Ordinance, 1984 (36 of 1984), Sec 2; S.8 (8a) and (17) of the PAA, 1952.

¹²⁰⁹ See Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995), 182-185.

enabling military in governance and administration of justice.¹²¹⁰ Arendt believes in this sphere that criminal laws and punishments are deliberately employed by totalitarian regimes to augment specific ideologies. Consequently inconsistencies occur between legality and justice as laws are not enforced out of social needs rather are intended to institutionalize a desired course of actions and mindset through the intimidation of terror. Then owing to such administrative patterns and ideological centric legal order these societies dialectically isolate themselves and gradually become more fundamental and polarized. Since public at large in these countries tends to conform to such precepts to avoid punishments and proscriptions.¹²¹¹ Yet an inference can be drawn here from Arendt's arguments that the religious intolerance and militancy which is contemporarily menacing Pakistan¹²¹² is traced back to Zia's regime. As the then establishment was alleged to rely upon the instruments of religion and law to enhance its political legitimacy. Since the resultant efficacy of Sharia as backed by security laws engendered such *external obligations* in masses¹²¹³ which later transcended in to a polarized conformity with regime's patronized ideology. Yet it later transformed in to political cum ideological

¹²¹⁰ See Zulfiqar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Karachi: Oxford University Press, 1995), 265-275; Sheikh Ebrahim, comp., *The Constituion of Islamic Republic of Pakistan, 1973* (Lahore: PLD Publishers, 1999), 121-122: Article 212-A "Establishment of Milirty Courts or Tribunal", added in 1979 and then omiited in 1985 in which high courts were barred to grants injuctions against the decrees of the then milirty tribunals in case of the adjudications of civil offences. Therefore Maluka's arguments seems true in the light of the then insertion of Article 212- A in the constituion of Pakistan, 1973.

¹²¹¹ See Hannah Arendt, "Ideology and Terror: A Novel Form of Government," *The Review of Politics* 15, no. 3 (1953): 303-327.

¹²¹² See The Pakistan Army (Amendment) Act, 2015 (Act II of 2015), 2: "Statement of Objects and Reasons."

¹²¹³ See H.L.A. Hart, *The Concept of Law* (New Delhi: Indian Reprint, Oxford University Press, 2005), 87-91: Obedience to stringent laws mainly out of fear of punishments.

violence owing to an alleged patronization of regime to the then armed resistance against Soviet invasion in Afghanistan.¹²¹⁴

Then in 2007 in the wake of above mentioned wave of militancy and proclamation of emergency under Article 232 of the Constitution of Pakistan, the ambit of S.2(1) (d) has been further extended up the offences relating to terrorism and maintenance of public order.¹²¹⁵ This amendment which contains legal fiction as deemed to be retrospectively effective from 2003 seems to be extremely stringent owing to following reasons. Firstly, the operation of fundamental rights has already been suspended under Art.233 and clause (2) of Art.232 of the Constitution, on account of high magnitude of threat of war or internal disturbance. Since ‘war’ in this Rossiterian scenario¹²¹⁶ is again tantamount to ‘waging war’ as has been held in *Rawalpindi Bar* case.¹²¹⁷ Secondly, due to the expressed restrictions on high courts to review administrative actions under Art.199 (3) as well as exclusion of the fundamental rights under Art.8 (3) of the constitution. So akin to Rossiterian model, even the Apex court affirms a restraint to review administrative measures during crises.¹²¹⁸ It merely observes, “Legislature contains legislative as well as

¹²¹⁴ See Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (London: Yale University Press, 2000), viii-ix, 17-30; Farzana Shaikh, *Making Sense of Pakistan* (London: Foundation Books, C. Hurst & Co.(Publishers) Ltd., 2009), 107-115, 158-179, 200-208.

¹²¹⁵ See into The President of Pakistan, “Pakistan Army (Amendment) Ordinance, 2007: Ordinance No. LXVI OF 2007,” *Gazette of Pakistan, Extraordinary Part-I* M-302/L-7646, (November 10, 2007): 1: Along with the earlier mentioned offences, offences relating to Security of Pakistan Act, 1952 (XXXV OF 1952), the Pakistan Arms Ordinance, 1965, (W.P. Ord. XX of 1965), the Prevention of Anti- national Activities Act, 1974 (VII of 1974), the Explosive Substance Act, 1908 (VI of 1908) the Official Secret Act, 1923 and Ss. 109, 117 of the PPC have been included in the ambit of S. 2(d) of PAA, 1952.

¹²¹⁶ See in Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), 288-306.

¹²¹⁷ See PLD 2015 SC 401, 724-728.

¹²¹⁸ *Ibid.*, 1143.

executive functions during proclamation of emergency, thus measures taken must be proportionate to the actual danger and be strictly acted upon.”¹²¹⁹

Resultantly court in *Darwesh* case detects the stringency of military tribunals in relation to the trial of civilians either during military operations connecting in aid of civil power or during public emergencies. And emphasizes to resort to ordinary criminal courts even if they are alleged to be involved in civil offences as defined in PAA, 1952 or have nexus with it. While interpreting ‘*subject to law*’ as enshrined in the Art.245, court emphasizes to adopt the course of Cr. P.C even during the imposition of curfew and declares that ‘*law*’ means ordinary criminal law especially Ss. 129, 130 and 131 of the Cr. P.C., rather than S.2(1)(d) of the PAA,1952. It also overrules the apparent bar on high courts to review administrative actions as enshrined in clause (3) of the Art.245. It declares in this regard that since civil power is intact and functions under the law, so high courts are empowered under their writ jurisdictions to examine the vires of administrative measures. It further upholds the operation of Art.8 and subsequent enforcement of Fundamental Rights through Ar.199 of the constitution. As the language of Ar.233 while elaborating the power of state to make any law or take any executive in relation to emergency does not include the temporary infringement of Article 8 of the Constitution. So if the latter is operative then incidentally the Art.199 is also operative. Likewise, if writ jurisdictions of high court are

¹²¹⁹ See *Sardar Farooq Ahmad Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57: An infringement of fundamental rights as contained in Articles 10, 15, 16, 17, 18, 19, 23, 24 and 25 of the constitution, is perceived as a necessary evil and legal antinomy to tackle crisis under the Proclamation of emergency as enshrined in Art.232 (1) and 233 (1) and (2) of the constitution of Pakistan, 1973.

operative even in grave dangers then consequently enforcement of the entire scheme of fundamental rights is functional regardless of the magnitude of conflicts.¹²²⁰

Then similar view is adopted by the Apex court in *Sh. Liaquat* case. Since denounces the formation of military tribunals to try civilian either under S.2(1) (d) of the PAA, 1952 or under an impugned special law the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 in virtue of Art.245 of the constitution.¹²²¹ Court deplores a utility of military tribunals as attributed to their efficient dispensation and award of stringent punishments to deter terrorism, sabotage or insurrection. And observes, “No doubt, that when a terrorist takes the life of an innocent person, he is violating right to life, but if the terrorist, as a retaliation, is deprived of his life by a mechanism other than through due process of law within the framework of the Constitution, it will also be violative of Article 9.” But the question is that why court believes so, even if such tribunals have force of law and especially constituted to curb terrorism? Accordingly it is observed in this judgment that inception of tribunals to adjudicate civilians contravenes the doctrine of separation of power, as they belong to executive not the judiciary. Besides, owing to be a core stakeholder in the maintenance of order and security, it is hard for them to demonstrate impartiality and independence. And lastly, due to statutory restrains on higher judiciary to review their decisions as well as presumption of guilt and strict liability for accused make them contrary to right to equality

¹²²⁰ See *Darwesh M. Arbey, Advocate v. Federation of Pakistan*, PLD 1980 Lahore 206, 229, 231, 233, 251-266, 271, 274, 289, 286, 290.

¹²²¹ See Main Ghulam Hussain, ed., *Manual of Anti-Terrorism Laws in Pakistan* (Lahore: Civil & Criminal Publications, 2012), 630-636: S.6: “Creating Civil Commotion” and Scheduled offences of the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 (XII of 1998) indicate that this Law was duplicity enforced to adjudicate the offences which were already covered under S.6 of the ATA, 1997.

of citizens and equal treatment of law. Thence court enhances the scope of *Darwesh's* ratio and incorporates Article 2A and 4 in addition to Art. 8 to maintain right to fair trial and declares the supra Ordinance as void to constitutional scheme of Pakistan. And observes that, "right to have access to justice through independent Courts is a fundamental right and, therefore, any law [special emphasis on S.2 (d) of PAA] which makes a civilian tri-able for a civil offence, which has no nexus with the Armed Forces or defence of the country, by a forum which does not qualify as a Court will be violative of the Constitutional guarantees."

Hence court renders the Art.190 of the Constitution in a way to maintain judicial review on decrees of non-judicial fora's such as Court Martials of PAA, 1952, if relied upon to try civilians who alleged to have nexus with it. In this context, it is mandatory for all executive to act in aid of Supreme Court, and the armed forces being part of executive branch also come under such obligation. Resultantly the executive decrees which lacks jurisdiction or profess its excesses and are alleged to be mala fide are under the ambit of Apex court for their judicial scrutiny.¹²²² The later connotation has also been relied upon in number of other judgments even for the ambit of High Courts on the same ratio of the judicial review of administrative actions including the most recent *Rawalpindi Bar* case.¹²²³

¹²²² See *Sh. Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504, 565-567, 581, 588, 596, 613, 628, 633, 680.

¹²²³ See *The State v. Zia-ur- Rehman and others*, PLD 1973 SC 49; *Federation of Pakistan and other v. Malik Ghulam Mustafa Khar*, PLD 1989 SC 26; *Federation of Pakistan and others v. Raja Muhammad Ishaq Qamer*, PLD 2007 SC 498; *Ghulam Abbas Niazi v. Federation of Pakistan and others*, PLD 2009 SC 866; *Federation of Pakistan through Secretary Defence and others v. Abdul Basit*, 2012 SCMR 1229; *Rana Muhammad Naveed and other v. Federation of Pakistan through Secretary M/O Defence*, 2013 SCMR 596; *Ex. P J O-162510 Risaldar Ghulam Abbas v. Federation of Pakistan through Secretary, Ministry of Defence, Government of Pakistan and others*, 2014 SCMR 849; *District Bar Association, Rawalpindi and others v. Federation of Pakistan and others*, PLD 2015 SC 401, 738-741.

But then a question arises here that why there is so much apprehension and skepticism about the summery proceedings of military tribunals? Subsequently it is answered in contentions of *Sh. Liaquat* case in the following words, “Military Courts do not record reasons for conviction or acquittal, and their orders are not susceptible to judicial review by any of the superior court.”¹²²⁴ Such non availability of precedents and judicial reasoning has also been discussed by Martin¹²²⁵ as well as J. Isa in *Rawalpindi Bar* case.¹²²⁶ However majority in this judgment concedes with a recent yet temporary amendment in the S.2 (1) (d) of PAA, 1952, in pretext of ‘warlike’ conflict situations in Pakistan.¹²²⁷ Resultantly this special rule by law paradigm enables trial of civilians by military tribunals even in contravention with constitutional guarantees owing to an incidental temporary constitutional amendment.¹²²⁸ These two amendments not only acknowledge the presence of organized armed groups but also recognize the armed conflict in FATA and subsidiary insurrectional activities in the settled areas of Pakistan. Resultantly the amendment in S.2 (1) (d) and (4) of PAA, 1952 indicate that to establish maximum deterrence the Federal Government shall transfer a

¹²²⁴ See PLD 1999 SC 504, 554: Arguments of M. Akram Sheikh, Sr. ASC.

¹²²⁵ See Claudia Martin, “*The Role of Military Courts in a Counter- Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice*,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Faias, Katja Lh Samuel and Nigel D White (Clarendon Street: Oxford University Press, 2012), 689-691, 697-721.

¹²²⁶ See *District Bar Association, Rawalpindi and others v. Federation of Pakistan and others*, PLD 2015 SC 401, 1183-1208.

¹²²⁷ *Ibid.*, 718, 746: By relying upon the constitutional rationale of the formation of administrative courts under Article 212 of the constitution of Pakistan and bar contained in clause (2) to review their decrees except under clause (3) of this Article where an appeal lie in Supreme Court only on the question of public importance or the malice of the law. Similarly the Apex Court relies upon the Article 225 of the Constitution of Pakistan, 1973 which forms the executive forum of election tribunal to adjudicate the dispute in relation to electoral process. These two Articles give the Court a reasoning to justify the formation of an executive forum military tribunal to adjudicate terrorists, militants and insurrectionists.

¹²²⁸ See Senate Secretariat, “The Pakistan Army Amendment Act, 2015: Act No.II of 2015,” *The Gazette of Pakistan M-302/ L-7646*, no. F.9 (3)/2015-Legis (January 7, 2015): 5-8; Senate Secretariat, “The Constitution (Twenty-first Amendment) Act, 2015: Act No.I of 2015,” *The Gazette of Pakistan M-302/ L-7646*, no. F.9(2)/2015-Legis (January 7, 2015): 1-3; *District Bar Association, Rawalpindi and others v. Federation of Pakistan and others*, PLD 2015 SC 401, 726-727, 745-746.

trail of alleged terrorist or militant to military tribunals as constituted under S.80 of the PAA. If, such trial falls under the domains of MPO, 1960, ATA, 1997, POPA, 2014, Ss. 121 to 160 of the PPC and prohibitory clause of S.497 of the Cr. P.C.¹²²⁹ By this virtue the Act No.II mainly emerges from the Art.245 of the constitution in which resort to armed forces in aid of civil power is enshrined to respond to internal disturbances and waging of war.¹²³⁰ Therefore clause (5) of S.2 indicates that all such offences would be constitute as civil offences under S.59 of the PAA, if transferred by federal government under clause (4) of S.2 of PAA. Though S.133 of PAA restrains the ordinary criminal courts to review military proceedings in relation to civil offences, yet neither the said amendment nor the subsequent *Rawalpindi Bar* case elaborate that whether the powers of federal government under clause (4) of the S.2 are also immune from judicial scrutiny? Since its language and expression indicates that such powers are absolute and discretionary and if read in conjunction with S.2 of the 21th constitutional amendment Act then it construes that even Apex courts do not have jurisdictions to review these arbitrary powers.¹²³¹ However in this

¹²²⁹ See *Force Commander, Airport Security Force, Karachi v. Haji Muhammad Rashid*, 1996 SCMR 1614; *The State v. Mst. Shazia Mubashir*, 2008 P Cr. LJ 1774 Lahore;

¹²³⁰ See Senate Secretariat, "The Pakistan Army Amendment Act, 2015: Act No.II of 2015," *The Gazette of Pakistan* M-302/ L-7646, no. F.9 (3)/2015-Legis (January 7, 2015): 6: "Whereas Article 245 of the Constitution of the Islamic Republic of Pakistan enjoins upon the Armed Forces to act in consonance with the provisions of the said Article."; PLD 2015 SC 401, 726-727: as has been discussed above the expression of war in Art.245 connotes waging of war in an absence of an authoritative declaration of international cross border aggression; *Combined Military Hospital, Bahawalpur v. Presiding Officer, Punjab Labor Court, Bahawalpur*, 2015 PLC 286 Lahore.

¹²³¹ See into the clause (4) of the Section 2 of the Pakistan Army Act, 1952, 4: "The Federal Government shall have the power to transfer any proceedings in respect of any person who is accused of any offence falling under sub-clause (iii) or sub-clause (iv) of clause (d) of sub-section (1), pending in any court for a trial under this Act."; Senate Secretariat, "The Constitution (Twenty-first Amendment) Act, 2015: Act No.I of 2015," *The Gazette of Pakistan* M-302/ L-7646, no. F.9(2)/2015-Legis (January 7, 2015): 1-3: Ss.2 and 3; Sheikh Ebrahim, comp., *The Constitution of Islamic Republic of Pakistan*, 1973 (Lahore: PLD Publishers, 1999), 122-123: In the similar conotation of 21th constitutionnal amendment , Article 212- B "Establishment of Special Courts for trial of henous offences" was inseted in the Constitution in 1991 through the Constitution (Twelfth Amendment) Act (Xiv of 1991). Instrestingly The Insurtion of Art.212-B to curb socalled 'henious' offences

retributive context¹²³² the ratio of *Rawalpindi Bar*¹²³³ seems ineffective to maintain right to fair trial for alleged militants. Similarly the ratio of *Sh. Liaquat* case that jurisdiction of Apex Court cannot be curtailed and executive are under obligation to comply with it appears ineffectual for the trial of terror accused and insurrectionists.¹²³⁴ Because let alone an inaccessibility of fundamental rights through writ petitions for them, the Apex Court cannot even assert itself through Articles 2A, 4, 184(3), 187 and 190 of the constitution as owing to the Act No.I of 2015. Since all these Articles are means to enforce fundamental rights as enshrined in Articles 8-28 of the constitution, but if such end has been placed out of the ambit of courts, then how could they rely upon them? More or less same is the case

was also a special rule by law paradigm as it had sunset clause and repealed after the expiration of three years. Yet it proves the argument which was later raised in *Sh. Liaquat* case that stringent laws are not the best remedy to cure violence and terrorism. Hence the narrative that stringent laws are capable to bring deterrance and detrence is capable to cure political and ideological violence proved to be wrong owing to the ineffectiveness of the then Article 212A. Since the post Art. 212-B had exprinced the extreme threshold of violence inspite of the strigency of this Article which oustered the writ jurisdiction of high courts in case of the trial of henious offence through special courts.

¹²³² See Mathew J. Nelson, Pakistan in 2009: Tackling the Taliban?," *Asian Survey* 50, no.1 (2010): 112-126: argues that the nature of security laws of Pakistan is dependent upon the perceptions and actual response of political clouts towards Taliban insurgency. While a resort to administrative engagement will bring stringent retributive laws whereas a political engagement can end up to reformative or corrective laws amid counter insurgency campaigns; Colm Campbell, "Beyond Radicalization: Towards An Integrated Anti-Violence Rule of Law Strategy," in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Faias, Katja Lh Samuel and Nigel D White (Clarendon Street: Oxford University Press, 2012), 255-259: argues that owing to experience a high threshold of violence, societies at large become indifferent to the basic rights of perpetrates of unlawful force. In this scenario Schmitt's political necessity over rules the rule of law and even Dicey's rule by law paradigm and the balance of society tends toward retribution and reprisal. The 16th December, 2014 attacks on APS Peshawar along with other suicidal attacks in the settled areas of Pakistan depict the same scenario in which even judiciary is under the impact of retribution and reprisal against the armed groups fighting in FATA and their sanctuaries demonstrating acts of terrorism, insurrection and waging war against the state in urban areas of Pakistan. Thence Act No. I and II of 2015 seem emotional and reactionary step to establish military courts for speedy trials even in the contravention of Apex Court's judgment in *Sh. Liaquat* case in which the probability of military courts has been ruled out to try civilians in civil offences.

¹²³³ See PLD 2015 SC 401, 746: The ratio is that superior court can examine to review the decrees of military tribunal in case of jurisdictional issues, mala fide intentions or excesses.

¹²³⁴ See PLD 1999 SC 504, 625-629.

even for clause (3) of the Art.212 of the constitution to determine a ‘substantial question of law of public importance’ amid the proceedings of military tribunals?¹²³⁵

Then most recently another amendment has been incorporated in clause (d) of sub-section (1) of S.2 of PAA, 1975 to legitimize the military custody as defined in S.8 (9a) under S.73 of PAA. As well as to validate an internment of miscreants through armed forces under Ss.8 and 9 of the Actions (in Aid of Civil Power) Regulation, 2011[hereafter Regulation 2011].¹²³⁶ Then due to its retrospective effects it is presumed to legalize prolong detentions of suspects of terrorism if armed forces are deployed under Ss.4 and 5 of the ATA, 1997 or of insurrection under Ss.3 and 6 of the POPA, 2014.¹²³⁷ Likewise of suspects of waging war under subsection (3) of S.9 of the Regulation, 2011 from settled areas of Pakistan or internments of miscreants during counter insurgency campaigns in PATA and FATA under subsections (1), (2), (4), (5), (6), (7) and (8) of S.9 of the Regulation. Yet it unfolds two aspects which are important to discuss here. First is that PAA, 1952 in its entirety has nexuses with Regulations, 2011,¹²³⁸ due to which later would be discussed in the subsequent portion of study. Whereas second aspect deals with a principle laid down by the court of law in relation to military custody and detention, according to which a

¹²³⁵ See National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 4, 6-16, 99-101, 105-107, 121-122.

¹²³⁶ See in States and Frontier Regions Davion, Government of Pakistan, “The Actions (in Aid of Civil Power) Regulation, 2011: Regulation,” *The Gazette of Pakistan* M-302/ L-7646, no. 566(2011)/- Ex.Gaz (June 27, 2011): “to provide for actions in aid of civil power in the Provincially Administrated Tribal Areas[PATA]”

¹²³⁷ See the sub-clause (iv) of clause (d) of subsection (1) of Sec.2 of PAA, 1952: in the proviso “ whenever he may have committed that offence” if read with the proviso of the amendment in Act No.II of 2015 which illustrate “any person arrested, detained or held in custody by the armed forces, civil armed forces and law enforcement agencies and kept under arrest, custody or detention” indicates that S.2 of PAA, operates in conjunction with ATA, POPA and even PPC in case of offences as enumerated in it.

¹²³⁸ See *Gazette*: 265: Schedule –III of the Actions (in aid of Civil Power) Regulation, 2011: (9): “Offences punishable under the Pakistan Army Act, 1952 (XXXIX OF 1952).”

detention period ought to include in the award of sentences.¹²³⁹ Accordingly it can be inferred in the light of this principle that a likely punishment of imprisonment under clause (b) and (c) of S. 60 of PAA will include the term spent under detention or internment. Similarly can be inferred that after this amendment a pretrial detention of civilian under S.2 (1) (d) (iv) of PAA is evolved akin to preventive detentions under the ambit of Art.10 (3) and (4) of the constitution, 1973. If it is so then such utilitarian approach ultimately attracts principles of reasonableness and rationality to counter colorful exercise of power as laid down for laws of preventive detentions in Pakistan.¹²⁴⁰

Moreover alike S.132 (c) of the Cr. P.C. a general indemnity has been extended to all acts, proceedings and function of armed forces done in good faith under S.2 (1) (d) of PAA, 1952. Furthermore a Peru's experience of faceless judges and in camera proceedings¹²⁴¹ is resorted to protect presiding officers of ad-hoc military tribunals,¹²⁴² prosecutor as well as

¹²³⁹ See *Nizamuddin v. The State*, PLD 2014 Sindh 248.

¹²⁴⁰ See *Mrs. Amatul Jalil Khawaja v. Federation of Pakistan*, PLD 2003 Lahore 310; *Muhammad Idrees v. Federation of Pakistan*, PLC (C.S) 2015 Lahore 183.

¹²⁴¹ See *Campos v. Peru*, Communication No 577/1994 (6 November 1997) UN Doc CCPR/C/61/D/57/1994, 8, quoted in Claudia Martin, "The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice," in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Faias, Katja Lh Samuel and Nigel D White (Clarendon Street: Oxford University Press, 2012), 692.

¹²⁴² See into the Pakistan Army Act, 1952: S.75 indicates that after the arrest and military custody under S.73 a court martial is constituted within eight days to try such person. Then S.80 illustrates four kinds of Court Martials such as (1) general courts martial, (2): district Court Martial, (3): field general Court Martial, (4): Summery Court Martial. Under S.81 Court Martial is convened by commander in chief or by an officer on his behalf. [the word convene illustrates a temporary nature of such forum]. Then under S.82 a district Court Martial is again convene by the same authority as has been mentioned in S.81 or with his consent, and S.86 indicates that it should not consist less than 3 serving officers. Then clause (a) of S.84 indicates that Army chief or the Federal government can order to constitute a field general Court Martial, subsequently it would consist of not less than 5 serving officers presided over by an officer not less than a serving brigadier under clause (b) of S.84 and S.85. However S.88 illustrates that summery Court Martial is convened even by a sole officer not less than the rank of a colonial. Yet S.89 indicates that such forum can be dissolved even during the trail, and if so happens then a fresh forum is convened accordingly. This Section along with clause (4) of

eyewitness.¹²⁴³ Although these measures appear in consonance with magnitude of threat perceptions and actual loss to life and limbs as has been observed in *Rawalpindi Bar Case*.¹²⁴⁴ But when scrutinized under the findings of the International Human Rights Committee then some serious doubts engender about the effectiveness of ordinary and special civilian courts in Pakistan. Martin observes through these findings that though states are allowed to establish military tribunals to try the perpetrators of extreme violence. Yet these are conditional to the partial or total collapse of the ordinary criminal justice

S. 110 explicitly infers the ad-hoc nature of such military tribunals. Another thing which can be inferred that if these tribunals can be dissolved or convened by the competent authority then how can they demonstrate independence and impartiality? Likewise it is irrational to believe that such tribunals can deviate from their institutional stance in case of a civil offence of civilians in relation to S. 2 (1) (d)? In this scenario it is hard to imagine a probability of fair trial in the absence of independence, impartiality and biasness.

¹²⁴³ See National Assembly Secretariat, "The Pakistan Army (Amendment) Act, 2015," accessed November 19, 2015, http://www.na.gov.pk/uploads/documents/1447235398_637.pdf : 1-2: Passed in NA on 11/11/2015 after being passed in the Senate accordingly its Sec.2 "Amendment of section 2, Act XXXIX of 1952" indicates, "Provided further that notwithstanding anything contained in this Act or any other law for the time being in force, any person arrested, detained or held in custody by the armed forces, civil armed forces or law enforcement agencies and kept under arrest, custody or detention before the coming in to force of the Pakistan Army (Amendment) Act, 2015 (Act II of 2015) shall be deemed to have been arrested or detained pursuant to the provisions of this Act as amended by the Pakistan Army (Amendment) Act, 2015 (Act II of 2015) if the offence in respect of which such arrest or detention was made also constitutes an offence referred to sub-clause (iii) or sub-clause(iv) [and it has been discussed earlier that both of these clauses covers the offences under MPO, 1960, Ss.121-160 of the PPC, Prohibitory clause of S.497 of the Cr. P.C, ATA, 1997, POPA, 2014]---Provided further that no suit, prosecution or other legal proceedings shall lie against any person in respect of anything which is in good faith done or intended to be done under sub-clause (iii) or sub-clause (iv) [thence a general indemnity as primarily emerges from Ss. 52, 76, 79 of the PPC covers military proceedings and actions taken for civil offence under S.2 (1) (d) of PAA, 1952], 2C: "Protection of witness, President, Members of the Court, Defending Officers, Prosecutors and persons concerned with Court Proceedings" and its Statement of Objects and Reasons indicates: "---in order to sure proper conduct of trials, special measures for protection and indemnity---are required." Moreover it is not clear from this amendment that whether like Act No.II of 2015, it is temporary in nature or is permanent ; Sec.8 (9a): "military custody means the arrest or confinement of a person according to the usage of the service and includes naval or air force custody," Sec.73: "Custody of offenders: (1) Any person subject to this Act who is charged with any offence may be taken into military custody--," Sec.88 " Summery Court Martial,--" Sec.103: "Judge Advocate. Every general Court martial shall, and every district or field general Court martial may, be attended by a judge advocate, who shall be an officer belonging to the department of the Judge Advocate-General, Pakistan Army or, if no such Officer is available, a person appointed by the convening officer" of the PAA, 1952. Whereas Sec.110 (4) of PAA, 1952 indicates the dissolution of the ad-hoc court martial on the pleasure of the commander in chief or the completion of the assigned task. It reflects the arbitrariness and impermanent nature of these military tribunals which is quite contrary to Fuller's perspective of legal certainty and morality of law.

¹²⁴⁴ See PLD 2015 SC 401, 726-727, 1138-1141.

system in such areas.¹²⁴⁵ If so, as has also been observed in *Sh. Liaquat* case then whether substantive criminal laws along with special laws and their respective courts are ineffective to achieve their objectives in Pakistan?¹²⁴⁶ If not, then why duplicity of laws and jurisdictions has been created in Pakistan which seems to be skeptical to the right to fair trial?¹²⁴⁷ Though in *Sh. Liaquat* case pendency in adjudication and incompetence of investigating agencies have been identified as core causes to such inefficiency.¹²⁴⁸ Yet no tangible remedial measure has been taken till now in this regard, expect drafting of extremely stringent laws and formation of special jurisdictions. In spite of the facts that even the omitted Articles 212-A and 212-B of the constitution, 1973 remained ineffective to deter crimes against the state and order in Pakistan through special measures.¹²⁴⁹ But the question is that makes a military trial special irrespective to nonexistence of precedents and public hearings?

¹²⁴⁵ See Claudia Martin, “*The Role of Military Courts in a Counter- Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice*,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Faias, Katja Lh Samuel and Nigel D White (Clarendon Street: Oxford University Press, 2012), 689-693.

¹²⁴⁶ See PLD 1999 SC 504, 846.

¹²⁴⁷ See Emmanuel Decaux, “Issue of the Administration of Justice Through Military Tribunals,” *United Nations Commission on Human Rights UN Doc, E/CN.4 (2006): 58*, quoted in Claudia Martin, “*The Role of Military Courts in a Counter- Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice*,” in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas De Faias, Katja Lh Samuel and Nigel D White (Clarendon Street: Oxford University Press, 2012), 694: “-- everyone has a right to be tried by ordinary courts using established legal procedure, which jurisdiction should not be displaced through the creation of any tribunal that do not use these fully established procedures.”

¹²⁴⁸ See PLD 1999 SC 504, 847-852.

¹²⁴⁹ See Sheikh Ebrahim, comp., *The Constitution of Islamic Republic of Pakistan* (Lahore: PLD Publishers, 2009), 121-123; PLD 2015 SC 401, 1182-1184: As the Art. 212-A was incorporated by Zia regime in 1979 to provide constitutional validity to military tribunals to try civilians, but then was omitted in 1985. Whereas the Art. 212-B with sunset clause of three years like Act No.I of 2015 was meant to establish special courts for trial of heinous offences. The argument which develops from insertion and then omission of both these Articles is that such special measures were not able to deter probability and occurrence of political violence and internal disturbance which is still menacing Pakistan. Since the current law and order crisis of Pakistan is structurally based upon the chronology of the events as then happened amid the enforcement of these Articles.

Subsequently it is observed alike the Rossiterian perceptive of crisis,¹²⁵⁰ “Court Martials administering statutory military laws are courts of special jurisdiction. Not amenable to supervision or control by any judicial body or court of justice administering the general law, except where they may be found to have acted without jurisdiction or in excess of it. Court Martial while acting within their proper scope and sphere are supreme and their decisions, subject to revision by confirming authority [intra institutional mechanism of appeals and confirmation of sentences under Ss.119-132 of the PAA, 1952] are absolute and final. [Yet] it may be pertinent to observe that--- martial laws which in a strictly legal sense are no laws at all [in relation to civilians] are merely exceptional methods adopted by the military for preserving order--during war[aligning with *Rawalpindi Bar* and *Afzal Guru* cases ‘war’ means waging war] or insurrection.¹²⁵¹ Then in spite of the fact that under S.112 of PAA, ordinary rules of evidence and procedures are adopted for military trials. The following is observed about judicial scrutiny of such evidences, “a high Court cannot inquire in to sufficiency of the evidence on which a conviction can be based by the Court Martial.”¹²⁵² Likewise it is observed about the immunity of military tribunals from writ jurisdictions of high courts that “under 199(3) and (5) the ouster of jurisdiction is absolute.”¹²⁵³ However before proceeding further it is pertinent here to understand legal dynamics of military forums established under Ss. 80-89 of the PAA in context of clause (5) of the Article 199 of Constitution. If later is analyzed in the light of Art.175 of the constitution as prior to Act No.I of 2015, then it indicates that such military forums are

¹²⁵⁰ See Rossiter, *Constitutional Dictatorship*, 9: severe crisis is a phenomenal occurrence mostly away from legal and judicial domains and attracts martial rules or state of siege to be dealt administratively.

¹²⁵¹ See *Muhammad Nawaz v. The Crown*, PLD 1951 FC 73.

¹²⁵² See *Capt. A.W Meads v. Importer*, AIR 1946 Lahore 112, quoted in *Shahida Zahir Abbasi v. President of Pakistan*, PLD 1996 SC 632.

¹²⁵³ See *Mrs. Naheed Maqsood V. Federation of Pakistan*, CLC 1997 Karachi 13.

neither court of law nor a legal person.¹²⁵⁴ Rather are special quasi-judicial administrative tribunals away from the ambit of judicial review of administrative actions.¹²⁵⁵ For which even Apex court shows partial restraint to enforce Art.187 and 190 of the Constitution, 1973. Consequently amid the contestation that military custody under S.73 of the PAA is not in conformity with Art.10 (2) and (3) of the constitution, 1973 to establish protection against arbitrary detention and arrest. The apex court declares that firstly it is protected under Art.8 (3) of the same constitution. And secondly as military tribunals are not legal persons under 199(5), so a writ of habeas corpus cannot be entertained against them especially in high courts. While to attract the protection of 184(3), it lacks the locus of the question of public importance.¹²⁵⁶ Whereas the post 21th constitutional amendment scenario indicates that military tribunals have evolved as special trial courts to adjudicate special kind of offenders relating to insurrection and waging war with a sunset clause of two years.¹²⁵⁷

¹²⁵⁴ See National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 104, 116-118; Peter J. Smith, "New Legal Fictions," *The Georgetown Law Journal* 95 (2007): 1435-1495; Nancy J. Knauer, "Legal Fictions And Juristic Truth," *St. Thomas Law Review* 23 (2010): 70-120: A legal person is perceived as a de jure entity, which emerges legally with rights, duties and obligations. Consequently judicial review of administrative actions as well as enforcement of fundamental rights not only cover natural person but also a juristic or legal person.

¹²⁵⁵ See *Ex Sepoy Muhammad Alam v. Federation of Pakistan*, MLD 2014 Lahore 1532: Discusses the accumulate impact of Art.199 (3) and (5) and declares that military tribunals are not 'persons' [de jure entities with rights and obligations which can sue or can be sued by other natural or legal persons] against whom injunctions under 199(1) and (2) can be issued.

¹²⁵⁶ See *Mrs. Shahida Zahir Abbasi v. President of Pakistan*, PLD 1996 SC 632.

¹²⁵⁷ See Senate Secretariat, "The Constitution (Twenty-first Amendment) Act, 2015: Act No.I of 2015," *The Gazette of Pakistan M-302/ L-7646*, no. F.9 (2)/2015-Legis (January 7, 2015): 1-3: for the amendment in Article 175 of the Constitution, 1973. Since after such amendment all four kinds of military court martials under S. 80 of the PAA, 1952 [Kinds of Courts Martial] have evolved as the first trial courts against which the appeal lies in Supreme Court only if it lack jurisdiction or exceed from it or has mala fide intentions.

A special jurisdiction of PAA, 1952 under S.2 (1) (d) further relies upon clause (1) of S.59 which states, “--any person subject to this Act who at any place in or beyond Pakistan commits any civil offence--” and indicates a broad application. While for award of punishments under S.60, military tribunals as assembled and dissolved under Ss.80-89 rely upon the entire corpus of other criminal laws of Pakistan. It is mainly under clause (a) of subsection (1) of S.59, which reflects the width and severity of this special jurisdiction.¹²⁵⁸ Whereas S.31 of PPA, 1952 which deals with the offence of ‘*any person*’ attempting or causing mutiny and seduction of armed forces in the ambit of civil offences illustrates its over riding effects on Ss.131 to 140 of the PPC. Therefore it seems appropriate to understand the dynamics of civil offences, for which court observes as follows. “Civil offence is not an offence that is peculiar to armed forces; it is an offence that can be committed by any person whether civilian or member of armed forces. Civil offence is part of ordinary law of land is not specific to or specially enacted for armed forces-----provision of S.59 (1) of PAA, 1952 is deeming clause¹²⁵⁹ the object of which is to shift forum of trial of person accused of civil offence from criminal courts to court martial.”¹²⁶⁰

¹²⁵⁸ See Sec. 60 of the PPA, 1952 which contains some severe punishment such as (a): stoning to death [in relation to the Haddood matters], (aa): death, (aaa): amputation of hand, foot or both, (b): Imprisonment for life, (c): imprisonment for any term not exceeding twenty five years, (cc): whipping not exceeding one hundred strips, (d): dismissal from the service. Along with some other severe departmental disincentives indicate that for purpose conformity and to establish absolute deterrence the PAA, 1952 contains retributive penology. And if such retribution is analyzed under the Ss.119-124 of PAA, 1952: “Confirmation and Revision of Findings and Sentences.” Along with the restrains on ordinary civilian courts to review such awards as incorporated under S.133, 133(A), 133(B) of the PAA, then an absolute administrative penology emerges in Pakistan as contrary to reformative or corrective penology.

¹²⁵⁹ See Nancy J. Knauer, “Legal Fictions and Juristic Truth,” *St. Thomas Law Review* 23 (2010): 86-108-118; Peter J. Smith, “New Legal Fictions,” *The Georgetown Law Journal* 95 (2007): 1460-1464: under statutory interpretation ‘*deeming*’ is a kind of legal fiction which enables a probability of jurisdiction. It not only related to the kind of court but also determine the subject matter on which a particular court is empowered to take cognizance through such deeming effect.

¹²⁶⁰ See *Nizamuddin v. The State*, PLD 2014 Sindh 248.

However court in this case boldly deviates from the preceding ratio and indicates that since Ss.59 and 94 of the PAA complement each other in case of civil offence. As the later deals with discretions of prescribed officer of the military tribunal either to initiate proceedings under S.59 of PAA or to shift it to ordinary courts if the offence also relates to the ordinary law. Court observes that such discretions are ‘*abuse of the process*’ under S.561-A of the Cr.P.C and also contrary to fundamental rights especially right to liberty and equality. Resultantly ‘*to secure the ends of justice*’ under S. 561-A of the Cr. P.C high court has inherent power to review the proceeding of court martial. And for such purpose there is no restriction on it under either under Article 8(3) or 199(3) of the Constitution, 1973. Since the former restrict the operation of fundamental right only to the extent of maintenance of public order or internal discipline for a proper discharge of duties. But if a civil offence neither relates to *public order* nor *discharge of duties* then such proviso of Art. 8 will not affect the application of its clause (1) and (2). In this context, Ss. 59 and 94 along with entire statute of PAA can be construed as ‘*any law,*’ and if inconsistent with fundamental right then bound to be declared as void. In this context, it relies upon on *Meah* case that indicates, “Statute should be interpreted and applied conformably and consistently with fundamental rights and not in a manner that derogate the same.”¹²⁶¹ Moreover under the stated paradigm there is no restriction on high court to apply its writ prerogative over the civil offence proceedings of military tribunal if not relevant to conditions as enumerated in clause (3) of Art.8. For this purpose it denounces the settled principle that the powers of writ prerogative can only be attracted on excess or absence of jurisdiction, mala fide-ness

¹²⁶¹ See *Waris Meah v. The State and other*, PLD 1957 SC 157, quoted in *Nizamuddin v. The State*, PLD 2014 Sindh 248.

or coram non judge. Such broad and expensive interpretation is undoubtedly akin to a dictum of Shariat appellate bench which indicates; “right to justice and fair trial as most fundamental human rights in Islam cannot at all be abridged.”¹²⁶²

Yet in a deep contrast to its own findings the *Nizamuddin*, case observes as follows, “--derogation from the fundamental rights is only possible if the Constitution expressly so permits to attain a purpose.”¹²⁶³ If such ‘*utilitarian antinomy*’¹²⁶⁴ is read with Act No.I and II along with the majority view of *Rawalpindi Bar* case then it illustrates the following scenario. As when Ss.59 and 94 of PAA deal with civil offences of ATA, POPA and PPC,¹²⁶⁵ then it may rebut the *Nizamuddin*’s dictum in case of an ‘*abuse of the process of any court*’.¹²⁶⁶

¹²⁶² See *Federation of Pakistan v. The General Public*, PLD 1988 SC 645[Shariat Appellate Bench]

¹²⁶³ See PLD 2014 Sindh 248.

¹²⁶⁴ See Gustav Radbruch, “Anglo-American Jurisprudence Through Continental Eyes,” *Law Quarterly Review* 52 (1936): 530, 543-544, quoted in Julius Stone, *Human Law and Human Justice* (New Delhi: Second Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2004), 238, 245-247; W. Friedmann, *Legal Theory* (New Delhi: Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2008), 82-92, 336-342, 500, 513-514: As has been discussed earlier Radbruch has identified three elements of law namely, justice, propose conformity and legal certainty. Yet all these three elements conflict with each other during the application of law. Since justice tends to focus on natural law and emphasizes on the enforcement of fundamental right and indicates that means to achieve ends must not be unjust or harsh. Whereas purpose conformity simply focuses on to achieve ends for maximization of public good. If in this conflict of justice and purpose conformity legal certainty in the form of statutes align with the later then the legal system become unjust. Stone along with Friedmann identify such injustices as legal antinomies, however during such conflicts of interests judiciary ought to balance the sociopolitical frictions on the touch stone of fair play, equality and human rights. Such judicial obligation is identified by Pound as social engineering under the connotation of sociological jurisprudence. Accordingly Radbruch indicates in his principle of justice that the value of equality among other values of justice should be upheld at all cost during such legal antinomies. However Friedmann indicates that in totalitarian societies administrative and legislative intents complement each other for purpose conformity whereas judiciaries are usually under political pressure to conform to such intents. Thence an accumulative effect of the exception of *Nizamuddin*, majority views of *Rawalpindi Bar*, Act No.I and II of 2015 indicates that for the purpose conformity of counter terrorism and insurgency all three organs of state tend to complement each other by engendering legal antinomy for public good in which a right to fair trial of the special class of terrorists and insurgents has become vulnerable. Such legal antinomy seemingly diminishes right to equality of citizens which is a core value of justice for Radbruch.

¹²⁶⁵ See *Nabi Dad v. Registrar Court of Appeal, Judge Advocate General’s Department, GHQ Rawalpindi*, PLD 2009 Quetta 27; *Ex Sepoy Muhammad Alam v. Federation of Pakistan*, MLD 2014 Lahore 1532.

¹²⁶⁶ See Muhammad Mazhar Hassan Nizami, comp., *The Code of Criminal Procedure: with commentary* (Lahore: PLD Publishers, 1999), 608-616: Sec. 561-A: “Saving of inherent power of High Court.—Nothing in this

But the question is that let alone the above mentioned absolute discretions to determine the forum of adjudication under S.94,¹²⁶⁷ what else may cause an abuse of the process in military proceedings? Therefore apart from the above mentioned discretions of federal government under subsection (4) of S.2 of PAA to arbitrarily transfer and initiate proceedings against militants and insurgents in military courts. And for which J.J. Bandial and Isa have reservations in *Rawalpindi Bar* case because they perceive it contrary to the principles of fair trial as settled in *F.B. Ali* case.¹²⁶⁸ The arbitrary annulment of proceedings either by federal government or by army chief or a prescribed officer on his behalf on the grounds of illegality or unjustness seems rather more autocratic. Since this section neither defines expressions of ‘*illegal or unjust*’ nor elaborates the touchstone on which such illegality or unjustness can be measured. It is hard to determine that for an ascertainment of *illegality* in relation to legality the scope of S.132 extends to entire criminal laws of Pakistan or is only restricted up to the corpus of PAA. If extends to other laws of land as well then how a forum other than the court of law can determine the vires and legality of proceedings? If at all executive does so then it contradicts the separation of power theory and engenders unjustness. As Friedmann indicates that even in totalitarian systems all three organs of state work separately.¹²⁶⁹ Similarly does the ascertainment of *unjust* covers fundamental rights as incorporated in the constitution of Pakistan, 1973 along with

Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”; PLD 2015 SC 401, 715-746.

¹²⁶⁷ See *The State v. Mst. Shazia Mubashir*, 2008 P Cr. LJ 1774 Lahore.

¹²⁶⁸ See *Brig (Rtd) F.B. Ali v. State*, PLD 1975 SC 506, quoted in PLD 2015 SC 401, 1153-1156, 1183-1201: “According to ninth category of the principles of fair trial as laid down in F.B case, “the right[a right of the accused if the forum is presumed to be biased, excess of jurisdiction, lacks jurisdiction or legality or is presumed to be mala fide] to apply for transfer of the case to another court.”

¹²⁶⁹ See W. Friedmann, *Legal Theory* (New Delhi: Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2008), 500, 513-514.

international bill of rights or only limited to political whims of respective governments? And whether such powers can be invoked after an intra- institutional appeal under Ss.133, 133A and 133B of PAA or prior to it? In both circumstances how a federal government can direct an annulment of such proceedings in presence of bar on appeals in ‘*any court*’ under S.133 of PAA,¹²⁷⁰ and if any way it does so then through which modus operandi? However S. 132 is unable to satisfy these queries and vaguely discusses the procedure of annulment.

Likewise an abuse of the process can be inferred from the procedure as laid down in S.104 of PAA which deals with the right of accused to challenge an impartially or competence of any officer of the court martial. Such challenge is supposed to present in the same forum under subsections (2) and (3) of the S.104, which is assembled for trial of an offender. But the issue is that how transparency or impartiality can be established in this process when the tribunal in its entirety seems a judge in its own cause? Such context appears skeptical to fair play and justice mainly during a trial of civilians under S.2 (1) (d) and subsection (4) of S.59. As the later explicitly ousters the jurisdiction of any court or forum to review military proceeding and indicates that nothing contains in any law whatsoever if a civilian is tried for a civil offence.¹²⁷¹ Besides, it is hard to expect from colleagues of the *challenged* officer to decide or vote against the said officer especially in same forum that is

¹²⁷⁰ See *Ex. Lt. Col Anwar Aziz v. Federation of Pakistan*, PLD 2001 SC 549: “According to S.133 (3) B of the Act, a decision of the court of appeal is final and cannot be called in question before any court or authority whatsoever.”

¹²⁷¹ See *Ex Sepoy Muhammad Alam v. Federation of Pakistan*, MLD 2014 Lahore 1532: Even the court of law acknowledges the immunity of an accumulative impact of Ss.2 (1) (d), 59(4) and 133-B of PAA, 1952 to be inquired or reviewed under any law except PAA itself. It observes civilian petitioners were involved in anti- State terrorist activities for seducing army personals, thus liable to be tried and dealt in accordance with Ss.2(1) (d) (iii), 59(4) and 133-B of PAA.

convened to try militants, insurgents, or mutineers. As these classes of offenders have already been categorized as ‘*enemy*’ under subsection (8) of S.8 of the PAA, so to provide an opportunity of ‘*audi alteram partem*’ to an ‘*enemy*’ is hard to imagine.¹²⁷² Such connotation of ‘*enemy*’ in PAA also contradicts a contemporary perspective of human rights in United Nations which emphasizes to treat a militant or terrorist as ‘*civilian*’ instead of ‘*enemy*’ for a proper dispensation of right to fair trial.¹²⁷³ Seemingly, the above mentioned probabilities of abuse of process in PAA diminish a Feinberg’s perspective of procedural fairness in security laws to maintain human securities during counter insurgency campaigns.¹²⁷⁴ It indicates that such course of action that clogs the protection of fundamental rights even for the special class of terrorists and insurgents is not conducive to achieve a durable peace. As it enlarges the horizon of the earlier mentioned ‘*spirals of encapsulation*’,¹²⁷⁵ from which these ideologically motivated perpetrators of extreme violence belong. Subsequently generalized proscriptions and stigmatizations of ideologically deviated groups as terrorists, insurgents or miscreants further their ethical convictions.¹²⁷⁶ It is also pertinent to indicate here that similar resorts to administrative

¹²⁷² See *Asif Mahmood v. Federation of Pakistan*, PLD 2005 Lahore 721: “loyalty to State-- is first duty of the citizen—if commits any offence against the State, then is not entitled to protection of rights.”

¹²⁷³ See Martin, *The Role of Military Courts in a Counter- Terrorism Framework*, 694.

¹²⁷⁴ See Myriam Feinberg, “International counterterrorism-national security and human rights: conflicts of norms or checks and balances?” *The International Journal of Human Rights* 19, no. 4 (2015): 389-392.

¹²⁷⁵ See Mohammed M. Hafez, *Why Muslims Rebels: Repression and Resistance in the Islamic World* (New Delhi: First Indian Edition, Viva Books Pvt. Ltd, 2005), 199-210.

¹²⁷⁶ *Ibid.*, 109-113; Michael Levi, “*Organized Crime and Terrorism*,” in *The Oxford Handbook of Criminology*, eds., Mike Maguire, Rod Morgan and Robert Reiner (Clarendon Street Oxford: Oxford University Press, 2007), 799; Freda Adler, Gerhard O.W. Mueller, and William S. Laufer, *Criminology* (New York: McGraw- Hill, Inc., 1991), 177-189; Matthew Lippman, *Law and Society* (California: Sage Publications, Inc., 2015), 307-313: the argument which has been discussed earlier is that ideological or political violence is usually an outcome of conviction, faith and determination. In this context a utilitarian theory of deterrence seems ineffective because this theory is based on an assumption that man is a rational being and determines its cost and benefit, so if cost of a crime will be increased then ultimately it depreciates a will or intent for crime. However in case of determination, pain of punishment is considered as a price to be on

penology instead of dialectical engagements had already diminished an ideological integrity and territorial sovereignty of Pakistan. When a sustained clog on fundamental rights during Ayub Era potentially led to constitutional crisis of early 70's which ended in civil war and then demise of east wing of Pakistan.¹²⁷⁷ Even in recent past Pakistan suffered drastically on international diplomatic fronts apparently owing to its alleged apathy for human rights protections during counter insurgency campaigns. Due to which it lost a contested election in October 2015 for the vacant seat of Asia-Pacific group membership in the UN Human Rights Council.¹²⁷⁸ Hence, to scrutinize such allegations the next portion of study focuses on legal framework and administrative patterns of counter insurgency campaigns in Pakistan. And for this purpose it deals with a special law of armed conflict which is contemporarily enforced in provincially and Federally Administrated Tribal Areas of Pakistan.

the right direction. Moreover maximum deterrence or an absolute deterrence is an optimal point from where a marginal negative utility of fear of punishment begins, hence maximum punishments outweigh a fear of punishment especially in case of principle wrong doer who perceives it as a sacrifice for a cause.

¹²⁷⁷ See PLD 2015 SC 401, 1114-1115.

¹²⁷⁸ See Baqir Sajjad Syed, "Defeat in UN body prompts introspection," *Dawn News*, November 1, 2015, national edition; Syeda Mamoona Rubab, "A big one to lose: why did Pakistan lose the UN Human Rights Council elections?," *The Friday Times*, November 6, 2015, national weekly edition; Special Correspondent, "Pakistan loses UN Human Rights Council re-election," *The Nation*, October 29, 2015, national edition: though it has been officially stated that Pakistan's defeat was an outcome of Indian lobbyist propaganda against an alleged involvement of Pakistan in occupied Kashmir [as has also been observed in *Afzal Guru* and *Ajmal Kasab* cases]. However allegations of executive impunities and human rights violations have also been leveled against Pakistan in relation to its counter-insurgency and anti-terrorism measures.

An Appraisal of the Actions (in Aid of Civil Power) Regulations, 2011:

The preamble and objects and reasons of Regulations, 2011[hereafter Reg11] indicates that its constitutional base emerges from Articles 232-234, 245, 247, 256 and 260 of the constitution of Pakistan, 1973.¹²⁷⁹ Hence is an emergency law to deal with internal armed conflict and conduct of hostilities. As being the only law of Pakistan which explicitly employs expressions like ‘*actual fighting*,’ ‘*military engagement*’ and ‘*combat*,’ not only through military but also relies upon air and naval forces along with civil armed forces.¹²⁸⁰ And mainly focuses upon counter insurgency operations out of military necessity not only through small arms but also through sophisticated lethal arms.¹²⁸¹ These two parameters of engagements not only differentiate employment of armed forces under Ss. 129-131 and

¹²⁷⁹ See into States and Frontier Regions Davion, Government of Pakistan, “The Actions (in Aid of Civil Power) Regulation, 2011: Regulation,” *The Gazette of Pakistan* M-302/ L-7646, no. 566(2011)/- Ex.Gaz (June 27, 2011): 241-257: “Whereas there exists grave danger and unprecedented threat to the territorial integrity of Pakistan by miscreants and foreign elements-----”; National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 135-139, 145-147, 152-153: Arts.232-234: “Emergency Provisions,” Art.245: “functions of Armed Forces,” Art.247 “Administration of Tribal Areas,” Art.256 “Private armies forbidden—No private organization capable of functioning as a military organization shall be formed, and any such organization shall be illegal,” Art.260 “security of Pakistan.”; Sec.1 (2) of Regulation 2011, as a commencement clause indicates, “it shall be applicable to the Provincially Administrated Tribal Areas of KPK”. If read with fourth paragraph of preamble which states, “the Federal government have directed Armed Forces---to counter this threat---” If further read with clause (c) of S.2 of Reg 11 which elaborates requisition of Armed Forces under Art 245 of the constitution, 1973. Then it indicate that under Art 234 of the constitution Federal government is empowered to proclaim emergency if a constitutional machinery of a province in unable to function. Whereas the subsection (4) of S. 16 in the chapter of offences in Reg 11 indicates the following, “whosoever joins or is part of or linked with any private army and an armed group or an insurrectional movement” subsequently takes its constitutional validity from Art. 256 of constitution, 1973, as it forbid a formation of private army.

¹²⁸⁰ See the clause (b) of Sec. 2 of Regulation, 2011: “Armed Action- means instances of actual fighting or military engagement or hostilities or combat of the Armed Forces against the miscreants during the actions in aid of civil forces.” Similarly clause (a) of this sections says: “Armed Forces- means the Pakistan Army, Pakistan Air Force and Pakistan Navy and includes civil armed forces”

¹²⁸¹ See into the subsection (3) of Sec.4 of Chapter-III: “Conduct of Armed Action---the Armed Forces are authorized to use force, arms and ammunition, including but not limited to firearms, weapon and air power etc., to achieve the objective during any armed action----”

131-A of Cr. P.C or Ss.4 and 5 of ATA or S.3 of POPA from this law.¹²⁸² But also indicates a magnitude of conflict up to internal armed conflict beyond the threshold of internal disturbance in specified areas of Pakistan under humanitarian law paradigm.¹²⁸³ The application of humanitarian law and conduct of hostilities are not only explicit in clause (a) to (e) of subsection (1) of S.4 as well as in subsection (2) of same section of the statute but also mentioned judicially for such context.¹²⁸⁴ Yet on the one hand, these

¹²⁸² Such inference indicates that military engagement in aid of civil power depends upon the threshold of violence and disorder. First with moderate violence and disorder comes under the substantive criminal law as incorporated in PPC and Cr. P.C especially amid unlawful assembly or public nuisance under S.144 of the Cr. P.C. Second category of such engagement deals with internal or international acts of terrorism in which civil commotion is also a kind of violent disorder under ATA. Third category of such engagements deals with insurrection, waging war and raising of arms under POPA. All these three categories cover a pre emergency scenario under an internal disturbance paradigm and human rights regime, though some restrictions are imposed on constitutional courts to assert their writ jurisdictions but by and large constitutional parameters are not compromised as such. However the last category under Regulations, 2011 comes under public emergency paradigm in neither which neither constitutional guarantee are intact as such nor is the use of force conditional to self defence. Rather conducts of hostilities are linked with military necessities and combat strategies under which combatant are allowed to be killed in all circumstances under non international armed conflict paradigm.

¹²⁸³ See Eva La Haye, *War Crimes in International Armed Conflicts* (Cambridge: Cambridge University Press, 2008), 8: the elements which distinguishes an internal armed conflict from internal disturbance are, the organized character of rebels groups, their control over part of territory, the use of regular military forces against them, duration and intensity of the conflict and seriousness of hostilities.” And when these elements are evaluated in the light of Regulations, 2011 scenario which indicates as follows; clause (d) of S.2 of Reg: “actions in aid of civil power—means series of measures that involve the mobilization of Armed forces— armed action[as have been discussed earlier means actual fighting and combat situation], mobilization and stationing[these connotation infer not only the continuity of action but also a sufficient duration of actions]” . Whereas the first paragraph of the preamble pf Regulation, 2011 indicates, “miscreants—who intend to assert unlawful control over territories of Pakistan.” Likewise subsection (3) of S.3 of Reg. indicates the duration of actions in following words, “The Armed Forces requisition once issued shall deem to continue unless specifically reviewed or withdraw partially or fully.” If these conditions are compared with elements as have by mentioned by Haye then it appears that a non-international armed conflict is occurring in specified areas of PATA and FATA as adjacent to the settled areas of KPK.

¹²⁸⁴ See in Sec. 4 of the Regulation, 2011: “Precaution before using force—(1) The Armed Forces may undertake, where possible, the following minimum preventive measures—(a): warn the civilians to vacate the area[however the entire statute does not elaborate the procedure to handle these internally displaced people], (b): send out warning to the residents to withdraw support for the miscreants, (c): take special measures in respect of the life and safety of children, women and elderly persons; and (e): take feasible precautions in the choice of means and methods of attack with a view to avoiding and minimizing collateral loss of civilian life and object.” And in subsection (2): “The commander of Armed Forces shall issue instructions to troops under their control that Armed Forces shall adhere to the principles of proportionality and necessity and shall ensure that collateral damage to life and property shall be minimum.”; also in H. Victor Conde, *A Handbook of International Human Rights Terminology* (Lincoln: University of Nebraska Press, 2004), xvi, 36, 78-79, 142-143:elaborates a difference between *jus ad bellum*[right to resort to war] and *jus in bello* [conduct of hostilities]. While the preamble and object and reason of Regulation, 2011 elaborate *jus ad bellum* of government of Pakistan to resort to combat against miscreants and foreign

provisions of law are mentioning humanitarian protections but on other hand the subsequent subsection along with other sections neutralize these guarantees. Firstly, the expression of 'may' in subsection (1) of S.4 indicates that these precautions are not binding and can be compromised to achieve military objectives under subsection (3) of the same section. Secondly, the process that is laid down in S.5 of this statute in case of a misuse of force during armed action is also ambiguous and impractical. As it states that if an officer from armed forces, civil armed forces or law enforcement agencies is alleged to misuse or abuse force then it would be investigated within the hierarchy of armed forces or the respective organization. But the question is that how such allegation can be leveled and probed out in an absence of a judicial review of administrative action and in presence of statutory indemnity as given in S.23 of Reg 11? And even in any case these allegations are brought in to the notice of respective authorities then being contrary to natural justice it construes as judge in its own case.

However, it is pertinent here to satisfy some queries about the dynamics of this law before proceeding further. Firstly, if it is only applicable to specified areas of PATA adjacent to the KPK then what is its relevance to rest of the legal corpus of Pakistan? Secondly, as it is in aid of civil power, so which was the relevant law before its inception? Thirdly, what went wrong with the prior legal order of the area due to which the phenomena of

elements which are causing waging war against state and insurrection in specified areas of PATA and FATA. Whereas the S.4 of Regulation, 2011 elaborate jus in bello and elaborate principle of proportionality, distinction and necessity to kill and attack military targets and combatants; also in *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 1144-1145: J. Bandial observes, “---The treatment of belligerent citizen and unlawful combatant in custody who have waged war against the State is not just a matter of municipal law. The subject also attracts the principles of international law on armed conflict and war.”

miscreants and non-state actors had emerged? Subsequently subsection (3) of S.9 and S.18 along with schedule-III of this law attempt to answer the first query. Since the former deals with detention of persons who may not reside in specified areas and live anywhere in Pakistan yet have nexuses with insurrectional activities and offences under this law. Then prosecution under S.18 indicates that detainees would also be prosecuted for other offences as enumerated in schedule-III in addition to waging war and insurrection. Such prosecution and investigation may be held anywhere in province under subsection (2) of S.18 in the courts of relevant jurisdictions. If this aspect is analyzed under the earlier mentioned Act No. I and II of 2015 then it indicates that S.2 (1) (d) of PAA, 1952 seems most applicable forum for the trial of offences under this law. Moreover as armed actions and military campaigns remained fluid in the entire tribal area of KP irrespective to its provincial or federal administrative domains. Accordingly the Regulation 2011 not only covers the military campaigns in PATA but also gives a legal cover in FATA with retrospective effect from 2008 till now.¹²⁸⁵

¹²⁸⁵ See Jeremie Lanche, “Special Paper- Pakistan and Suicide Terrorism: A Never Ending Story,” in *Armed Conflicts in South Asia 2010: Growing Left-Wing Extremism and Religious Violence*, eds. D. Suba Chandran and P. R. Chari (New Delhi: Institute of Peace and Conflict Studies, Routledge, Taylor and Frances Group, 2011), 199-216; military campaign in SWAT (PATA) in 2007 named as *Operation Rah-e-Haq*, then its second sequel in the same area by the name of *Operation Ra-e-Rast* in 2009 while identical campaign launched in FATA by the name of *Rah-e-Nijat* in 2009 mainly against Uzbek elements and factions of Al Qaida and Pakistan Tehrik-e-Taliban [TTP]; Lubna Abid Ali and Naveed Iqbal Khan, “The Rise of Tehreek-e-Nafaz-e-Shariat-e-Mohammadi in Malakand Division, NWFP: A Case Study of the Process of “State Inversion”,” *Journal of Pakistan Vision* 11, no.1 (2010): 89-103; for an authoritative demarcation of tribal areas in to PATA and FATA see in National Assembly of Pakistan, *The Constitution of Islamic Republic of Pakistan: As modified up to 28 February 2012* (Islamabad: National Assembly Secretariat, 2012), 145: “ in sub clause (i) of clause (b) of Article 246, the Provincially Administrated Tribal Areas [of KPK] means- the districts of Chitral, Dir and Swat (which include Kalama), the Tribal Areas in Kohistan district, Malakand Protected Area, the tribal Area adjoining Mansehara district and former State of Amb. Whereas clause (c) of this Article states that Federally Administrated Tribal Areas includes—(i): Tribal Areas, adjoining Peshawar District. (ii): Tribal Areas, Adjoining Kohat District, (iii): Tribal Areas adjoining Bannu District, (iv): Tribal Areas, Adjoining Dera Ismail Khan district, (v): Bajaur Agency, (va): Orkzai Agency, (vi): Mohmand Agency, (vii): Khyber Agency, (viii): Kurram Agency, (ix): North Waziristan Agency, and (x): South Waziristan Agency.”; *The superintendent, Land*

Subsequently it is observed with regards to second query that ‘Frontier Crimes Regulations, 1901’ [FCR] served as applicable law in the entire tribal areas till 1975. Then in the same year FCR was replaced by ‘Provincially Administrated Tribal Areas Criminal law (special provisions) Regulation, Regulation No.1 of 1975’ only for PATA. The later was repelled in 1994 by ‘(Nifaz-e-Shariah), NWFP Regulation No.II of 1994’, which was further repealed by ‘Nizam-e-Adal (Shariah) Regulation, 2009’ in PATA.¹²⁸⁶ Moreover approximately all substantive and special criminal laws as applicable in the settled area of Pakistan have been extended to PATA and FATA through the above mentioned regulations. Yet neither writ of amparo nor the writ prerogatives of high courts are available over these administrative and magisterial powers under Article 247 (7) of the constitution, 1973.¹²⁸⁷ Then to comprehend the third query Shinwari observes that tribal administration is in fact an arbitrary rule of a triangle of political agent, ‘*Sarkari Jirga*’ and levies in FATA. While in PATA this iron triangle consists of deputy commissioner or any government official on his behalf, pro-government *Jirga* and police. He indicates further that these administrative patterns lacks legitimacy in tribal areas where masses have rather more confidence on non-patronized ‘*Olasi Jirga*’, which is not legalized as such either under FCR or under PATA

Customs Torkham (Khyber Agency) v. Zewar Khan, PLD 1969 SC 485: for components and definition of tribal areas; Sec.1 (3) of Regulation, 2011: “ it shall come in to force at once and shall be deemed to have taken effect from the 1st February, 2008.”; *Mst. Rohifa Through her sons and others v. Federation of Pakistan*, PLD 2014 SC 174.

¹²⁸⁶ See *Balochistan Bar Association v. Government of Balochistan*, PLD 1991 Quetta 7; *Abdual Samad v. Painda Muhammad*, PLD 1997 Peshawar 35; Lubna Abid Ali and Naveed Iqbal Khan, “The Rise of Tehreek-e-Nafaz-e-Shariat-e-Mohammadi in Malakand Division, NWFP: A Case Study of the Process of “State Inversion”,” *Journal of Pakistan Vision* 11, no.1 (2010): 104-112.

¹²⁸⁷ See Naveed Ahmad Shinwari, *Understanding Jirga: Legality and Legitimacy in Pakistan’s Federally Administrated Tribal Areas* (Islamabad: Community Appraisal & Motivation Programme, 2011), 42-49, 53-79, 144-163.

Regulations.¹²⁸⁸ Even courts observe in this regard that both of autocratic administrative patterns and respective regulations not only lack constitutional validity but are also contrary to reasonableness and fair play.¹²⁸⁹ Accordingly, Ali and Khan along with Shinwari illustrate that common masses of tribal areas tried to look at fundamentalist perceptive of Taliban to gain speedy and efficacious justice. Such vacuum for a valid and legitimate order¹²⁹⁰ was subsequently exploited by local clerics who were also patronized by a radical narrative of *Al-Qaida*, which was an Afghanistan based terrorist organization.¹²⁹¹ But then the question is that why did such vacuum exist there?

Lippman attempts to comprehend this issue through Durkheim's perspective of '*mechanical and organic solidarity*'. Here former deals with social control in preindustrial traditional societies whereas later covers legal control in postindustrial societies. He indicates that social norms, customs, and family ties function as social control force in these societies and establishes the "*mechanical solidarity*." However when positive laws as product of modern societies are forcefully imposed to achieve '*organic solidarity*' and

¹²⁸⁸ See Shinwari, *Understanding Jirga*, 35-41; States and Frontier Regions Davion, Government of Pakistan, "The Frontier Crimes (Amendment) Regulation, 2011," *The Gazette of Pakistan* M-302/ L-7646, no. 744(2011)/- Ex.Gaz (June 27, 2011): 391-414.

¹²⁸⁹ See *Abdual Samad v. Painsa Muhammad*, PLD 1997 Peshawar 35: PATA Criminal Laws (Special Prvisions) Regulations, 1975 were contrary to Article 9, 25, 175 and 203 of the constitution of Pakistan, 1973 and same is the case is with Shariah Regulation, 1994 in which deputy commissioner has similar kind of arbitrary powers; *Balochistan Bar Association v. Government of Balochistan*, PLD 1991 Quetta 7: "[though] High Court under its Constitutional jurisdiction is hardly concerned with good or bad aspect of a statute if the same has been validly enacted by a competent Legislature, provided any of its provisions is not violative of the constitutional provisions. Therefore declares provisions of FCR, 1901 contrary to Article 4 and 25 of the Constitution."

¹²⁹⁰ See Kashif Mahmood, "Governance and Reforming of FATA," *Research Digest: Pakistan Institute for Parliamentary Services* 2, issue. 11 (2015): 15-21.

¹²⁹¹ See Lubna Abid Ali and Naveed Iqbal Khan, "The Rise of Tehreek-e-Nafaz-e-Shariat-e-Mohammadi in Malakand Division, NWFP: A Case Study of the Process of "State Inversion"," *Journal of Pakistan Vision* 11, no.1 (2010): 90-106; Shinwari, *Understanding Jirga*, 37.

legal control, then such traditional communities react to retain their indigenous norms.¹²⁹² But if neither norms nor laws are capable to establish social legitimacy then ultimately external forces attempt to grasp the vacuum by their vested agendas as happened in case of Taliban's narrative in PATA and FATA.¹²⁹³ Resultantly court observes, "--under the war against terror army is called by government in aid of civil power under Article. 245 & Action in aid of civil Power Regulation, 2011 to fight with fundamentalist terror elements who had destroyed the tier of social control in FATA naming as *Maliks*, PA and Levies."¹²⁹⁴ But even then amid such scenario of ideological irrationality use of extreme force under administrative penology of Regulation 2011 seems counterproductive.¹²⁹⁵ As indiscriminate retributive measures like internment under its S.9 have potentials to enhance the vengeance of an already deprived population which is identified by Forrest as "*inversion of state*."¹²⁹⁶ Since internment defined in clause (f) of S.2 as connecting to 'ongoing counter-insurgency operations,' is

¹²⁹² See Matthew Lippman, *Law and Society* (California: Sage Publishers, Inc., 2015), 305-307: to support his argument he also mentions an American case, *Wisconsin v. Yoder*, 406 U.S. 205 [1972], in which court upholds the religious norms of a traditional community against a statute.

¹²⁹³ See Aqeel Yusufzai, *Talibanisation: Afganistan si FATA, Swat aur Pakistan Tak* (Lahore: Nigarshat Publishers, 2009), 204, quoted in Ali and Khan, *The Rise of Tehreek*, 97.

¹²⁹⁴ See *Bazar Gul Afridi v. Federation of Pakistan*, PLD 2015 Peshawar 169.

¹²⁹⁵ See J. Thomas Moriarty, "The vanguard's dilemma: understanding and exploiting insurgent strategies," *Small Wars & Insurgencies* 21, no.3 (2010): 476-497: discusses two different paradigms of insurgent's course of action. As one deals with Mao's perceptive according to which revolutionary movements become successful only because of popular participation, and for such mass involvement revolutionaries must wait for a right time and must propagate peacefully until a popular uprising. Moreover such revolutionary propagation should be clandestine for which countryside and rural areas are more compatible. Whereas Guevara's perspective does not believe on clandestine propagations and relies upon direct violent action though simultaneously acknowledges the significance of popular uprising and strategic location of terrains of countryside for hit and run operations. Moriarty identifies Guevara's perspective as vanguard strategy of insurgency which prevails in Afghanistan and its suburbs. However he indicates further that such vanguards also spread in urban areas and demonstrate extreme violence to intimidate governments to do the same which ultimately diminishes civil liberties. He indicates further that though use of absolute force in rural areas has a potential to curb insurgencies yet such indiscriminate measures subdue human rights and humanitarian guarantees of a large number of people who may not be involved in insurrectional activities. The expression of military necessity and collateral damage in Regulation 2011 implicitly illustrate an occurrence of indiscriminate use of force as potentially hazardous for human security.

¹²⁹⁶ See John Forrest, "*State Inversion and Non-State Politics*," in *The African State at a Critical Juncture Between Disintegration and Reconfiguration*, eds. L.A. Villalon and P.A. Huxtable (Boulder: Lynne Rienner, 1998), 46, quoted in Ali and Khan, *The Rise*, 89, 112-113.

primarily a byproduct of conflict. If its scope is enlarged on mere suspicion under S.6 which deals with siege and search and cordoning off the spotted areas then probabilities of mistake of fact and law would enhance. And if such probabilities are examined on the touchstone of Indemnity of actions under S.23 of Reg then construe as absolute impunities during military operations.¹²⁹⁷

Nevertheless a critical analysis of internment under S.9 of Reg. indicates that it has basically emerged from the law of preventive detention as enumerated in S.3 of the Security of Pakistan Act, 1952.¹²⁹⁸ Specifically the language of subsection (2) of S.9 infers the same as it illustrates, “if, in the opinion of the interning authority, the interment of any person is expedient for peace---.” However unlike the settled areas courts are not able ascertain the reasonable of such opinion owing to constitutional limitations under Articles 199(3), 247(7) and 245(3). Yet it may lead to ‘*impropriety*’ of administrative actions in the name ‘*strategy*’.¹²⁹⁹ As court observes in this regard, “--imposing curfew is a military strategy under Article 245, so High Court under Article 199 neither can direct to quash it nor can direct to probe

¹²⁹⁷ See Niaz A Shah, "War Crimes in the Armed Conflict in Pakistan," *Studies in Conflict & Terrorism*, 2010: 291-299: contextualizes arbitrary detention, phenomena of missing persons and occurrence of torture with internments however acknowledges that TTP and armed forces both perpetrate war crimes during internal armed conflict of FATA. The subsection (6) of S.16 of Regulation, 2011 which deals with offences like perfidy, espionage treacherous use of emblem and attacks on civilians validate Shah's argument because all of these offence constitute as war crimes[indiscriminate and disproportionate infliction of torture, inhuman treatment, mass killings, and other serious violations of jus in bello/ humanitarian guarantees during armed conflicts of serious nature] at least on the part of miscreants.

¹²⁹⁸ See M. Farani, *Minor Acts: Criminal Local & Special Laws* (Lahore: Lahore Law Times Publications, 2004), 1424-1434: Section .3 of Security of Pakistan Act, 1952 (Act of XXXV of 1952): “Restriction on the movements of suspected persons and their detention---”; *Mrs. Amatul Jalil Khawaja v. Federation of Pakistan*, PLD 2003 Lahore 310.

¹²⁹⁹ See *Asif Fasihuddin Khan Vardag v. Government of Pakistan*, 2014 SCMR 676

out collateral damage of civilian in FATA due to Articles 247(7) and 145(3).¹³⁰⁰ This ‘*legal black hole*’¹³⁰¹ either in case of internments or in case of actual combat becomes more stringent under subsection (1) and clause (a) to (c) of subsection (3) of S.10 as well as under S.11 of Reg. Since the former provisions of the law deal with discretionary powers of interning authorities to turn down a request on its own to release an internee from internment centers. Especially when he is interned even before the inception of this law as all the detentions either under FCR, 1901 or S.73 of PAA, 1952 deemed to be under Reg.11 owing to retrospective effects of its S.11. This section also indicates that actions in aid of civil power are continuous processes until the accomplishment of objectives, so owing to such continuity a detainee lacks the protection of fundamental guarantees. Similarly clause (b) of sub section (3) of S.10 indicates that if an interned is also an offender then after the conclusion of armed action he would be handed over to respective law enforcement agency for a trial. Therefore it indicates that internment period is not incorporated in the punishment period, as not only contrary to above mentioned *Nizamuddin*’s ratio,¹³⁰² but also construes as double jeopardy. Then even in case of release from internment center a strict liability is imposed on respective family or tribe under clause (c) of subsection (3) of S.10 with regards to the conduct of the detainee. Consequently as being contrary to natural justice it construes as collective punishment of respective guarantors.

¹³⁰⁰ See *Bazar Gul Afridi v. Federation of Pakistan*, PLD 2015 Peshawar 169.

¹³⁰¹ See David Dyzenhaus, “*Schmitt v. Dacey: Are States of Emergency Inside or Outside the Legal Order?*,” *Cardozo Law Review* 27, no. 5 (2006): 2005-2010: “A state of emergency [like the one in PATA/FATA during counter insurgency operation under Regulation 2011] is a lawless void, a legal black hole, in which the state acts unconstrained by law owing to political necessity and administrative strategies.”

¹³⁰² See in PLD 2014 Sindh 248.

Similarly a procedural indeterminacy exists in this statute about a detention of non-state actors during actual combat. Although this terminology is employed in clause (k) of S. 2 of Reg, yet it is not mentioned in it that whether he would be a prisoner of war under the ambit of IHL or an illegal immigrant under the ambit of IHR.¹³⁰³ As in firstly in case of later, internment centers of FATA do not come under the pretext of fundamental guarantees. And in case of former no impartial mechanism like judiciary is empowered to monitor its application except an executive board under S.14 to oversight human rights standards in internment centers. Yet the question is not about the application of relevant law, rather it is about the legal status of non-state actor. Then, whether provisions of Regulations 2011 allow them to claim a status of lawful combatant or prisoners of war accordingly? Even in case of the application of humanitarian, law particularly the Common Article 3 of all the four Geneva conventions of 1949 as has been professed by J. Bandial and Shah for this context.¹³⁰⁴ If not, then whether non-state actor is a person who wages war against state under the pretext of Article 245? If so, and the language of all the subsections of S.16 infer the same as they carry the expression of ‘*whosoever*’ then whether he can claim a right of self defence during armed actions? But then in the foregoing scenario how the ordinary law could respond to collateral damage owing to the

¹³⁰³ See H. Victor Conde, *A Handbook of International Human Rights Terminology* (Lincoln: University of Nebraska Press, 2004), 78-79; clause (k) of S.2 of Reg.11 indicates-“miscreant means any person who may or may not be a citizen of Pakistan –includes a terrorist, a foreigner, a non-state actor or a group of such person.” It also seems that definition of enemy alien in POPA, 2015 is synonymous to such definition of miscreants in Regulation, 2011. However one thing is pertinent here, as the term enemy combatant has emerged after the American discourse of “war against terror.” According to which a terrorist is such an illegal enemy combatant which neither has any right to fight under the category of combatant nor has a right of fair trial being a criminal under the law of state. Hence an ‘*enemy combatant*’ if held is neither a POW nor an arrested offender or criminal. Accordingly neither *Jus in bello* apply on him because he does not come under the ambit of jus ad bellum as not able to declare a resort to arms nor has right to fair trial because he does not come under the ambit of constitutional guarantees.

¹³⁰⁴ See PLD 2015 SC 401, 1144-1145; Shah, "War Crimes in the Armed Conflict in Pakistan," 289-290.

use of lethal weapons or killings out of a military necessity? However it is feared that these queries would remain unanswered until a proper judicial scrutiny which does not seem achievable at least up to the internment period of miscreants. Although in *Mst. Rohaiifa* case apex court has attempted to enlarge and uphold its jurisdiction up the internment centers of FATA established under Regulation 2011.¹³⁰⁵ Yet limited to an internment of citizens detained from the settled areas of Pakistan under subsection (3) of S.9 of Reg. As owing to *Manzoor Elahi* ratio jurisdiction of Apex court could be enlarged up to FATA, only if, a cause of action has emerged within its territorial jurisdiction and crept in to tribal areas. Only then the limitations of Article 247(7) could to ignore to establish right to fair trial and due process of law.¹³⁰⁶ However under the post Act No. I and II of 2015 scenario this ratio appears to be susceptible again at least for the special class of offenders who are alleged to be involved in insurrectional activities.

Another procedural issue exists in this law with regard to counselling under S.20, prohibition of torture under S.15 and oversight of internment centers to ensure a compliance with human rights under S.14. Though all of these measures represent connotation for reformative justice yet lack authoritative appraisal through independent judiciary due to which merely seem positive moralities on the pleasure of authorities. Resultantly court can only issue directions to executives to adopt the safeguards in accordance with these provisions of law but not able to inquire in case of noncompliance.

¹³⁰⁵ See *Mst. Rohifa Through her sons and others v. Federation of Pakistan*, PLD 2014 SC 174.

¹³⁰⁶ See *Ch. Manzoor Elahi v. Federation of Pakistan etc*, PLD 1975 SC 66, quoted in *Mst. Rohifa Through her sons and others v. Federation of Pakistan*, PLD 2014 SC 174.

As it observes, “court directs SAFRON [ministry of state and frontier regions] to adopt a mechanism to probe out the allegation of human rights abuse and indiscriminate use of force during such army actions in FATA, If Regulation 2011 is not effective to provide remedies in case of wrongful confinement in internment centers.”¹³⁰⁷ Nonetheless, S.20 of the Reg at least acknowledges the existence of ideological irrationality behind the occurrence of insurrections and focuses on psychological as well as religious counseling of internees. Yet firstly, the expression of ‘*may*’ indicates that it is not binding upon authorities to comply with and secondly the retributive aspect of preceding sections neutralize this reformative connotation. Likewise, if it is not clear that either IHL or IHR is an applicable law in these internment centers then how can prohibitions against torture as is laid down in S.15 be ensured? Even if analyzed on the touchstone of Common Article 3 of GCs that explicitly refers to judicial guarantees for the protection of jus cogens norms like protection against torture. Then an absence of judicial oversight at least during internments neutralizes such safeguards. Similarly S.14 of Reg lacks a proper compliant mechanism and merely rely upon departmental inquires in case of any human rights violation. These aspects of Regulation 2011 seemingly coincide with Dyzenhaus’s perceptive according to which a security law that possess procedural lacunas and judicial bar is even more dangerous than a lawless void with no law. As in the absence of a specific positive law, a ‘*black hole*’ of conflicts and crisis might be cured by international humanitarian law but if a specific law of land exists and possesses procedural

¹³⁰⁷ See *Bazar Gul Afridi v. Federation of Pakistan*, PLD 2015 Peshawar 169.

complexities then it construes as ‘*gray hole*.’ As later is more perilous to right to fair trial and judicial guarantees that are core of human rights and humanitarian law.¹³⁰⁸

If a judicial connotation for protection of rights during grave crises in Pakistan is analyzed under Dyzenhaus’s perspective then it illustrates that judiciary is merely bound to follow the enacted law. As the court observes, “during martial law when fundamental rights stood suspended, Article 4 of the constitution, 1973 furnished the only guarantee or assurance to the citizens that no action detrimental to the life, liberty, reputation, or property of any person would be taken except in accordance with law.”¹³⁰⁹ Then the question is which law? If the law itself infringes rights or even infringes the powers of judiciary or through constitutional amendments an act of parliament even alter the constitutional course of action then what kind of remedial powers judiciary have to protect fundamental rights? The entire supra debate of this chapter indicates that security laws of Pakistan uphold executive prerogative in face of crisis and the executive professes purpose conformity not the justice. Then in this scenario what is left for judiciary to enlarge its scope to ensure complete justice under Article 187 of the Constitution, 1973? How it can assert itself to uphold the positive morality of due process of law in Pakistan in which ‘*due process*’ and ‘*law*’ complement each other at least to achieve right to fair trial? Accordingly, these queries would be addressed in the subsequent chapter as focuses on prospects of judicial protection of core human rights values to ensure ‘*human security*’ in all kinds of conflicts.

¹³⁰⁸ See David Dyzenhaus, “*Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?,” *Cardozo Law Review* 27, no. 5 (2006): 2034-2040.

¹³⁰⁹ See *Federation of Pakistan and another v. Malik Ghulam Mustafa Khar*, PLD 1989 SC 26.

Judicial Protection of Core Human Rights Values during Conflicts

Analysis of general and special criminal laws in the preceding chapters of study indicates that utilitarian crime control model prevails in Pakistan to establish maximum deterrence in society.¹³¹⁰ It is focused to establish writ of the state with a least concern to fundamental human rights values,¹³¹¹ owing to which the following characteristics are enshrined in the indigenous criminal laws, especially when confronting extraordinary situations. These include administrative detentions [preventive internments],¹³¹² strict liabilities upon citizens and presumptions of guilt as well as extraction of evidence through all means irrespective of their justness. It becomes more rigorous in presence of general exemptions on mistakes of fact or law under a pretext of ‘good intentions’ along with summary trials with least concern to procedural modalities and in-camera proceedings. This ‘*crime control*’ approach is also evident from expressed restrictions on superior courts to review decrees of military tribunals and executive indemnities not only during law enforcement operations but also amid public emergencies. Moreover, an implicit authorization of intimidation in form of discretionary use of force with least concerns to proportionality and distinctions are conspicuous in this regard.¹³¹³ Hence, this rigor of general or special criminal laws has

¹³¹⁰ See Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 153, 159, quoted in Farkhanda Zia Mansoor, "Reassessing Packer in the Light of International Human Rights Norms," *Connecticut Public Interest Law Journal* 4, no. 2 (2005): 289.

¹³¹¹ See Andrew Ashworth, *The criminal process: an evaluative study* (Oxford: Clarendon Press, 1994), 22, quoted in Mansoor, "Reassessing Packer": 292.

¹³¹² See Jelena Pejic, "The Protective Scope of Common Article 3: more than meets the eye," *International Review of the Red Cross* 93, no. 881 (2011): 206-210.

¹³¹³ See Mansoor, "Reassessing": 289-290: indicates that some times extra judicial administrative measures are tolerated to enhance the scope of crime control model even in democratic countries; also in Private

three core negative impacts on liberties and procedural fairness. Firstly, as Packer identifies, it requires hierarchically disciplined and to some extent an extra judicial law enforcement mechanism to establish an optimal deterrence.¹³¹⁴ Yet this ‘*crime control model*’ is susceptible to constitutionalism in two regards. One, it entirely depends upon law enforcement agencies which if disintegrated, would lead to the disintegration of entire social order. Resultantly states focus extraordinarily on the existence of its law enforcement agencies and legislate accordingly to prevent them from excessive judicial review of administrative actions.¹³¹⁵ Second, it highly depends upon autocratic rules which may not compatible with right to fair trial and other fundamental guarantees as such. Dworkin identifies such society as a “*rule book community*,” which diminishes pluralism from its citizens and engenders a constant fear of repression in them. He further indicates that “*non-egalitarian*” societies are usually vulnerable to inequalities, discriminations, and autocratic rule.¹³¹⁶ This latter aspect leads to the second core negative impact identified by Siddique as “*diminished citizenship*,” not only in the tribal areas but also in settled areas of

Member’s Bills Introduced, “Custodial Death and Custodial Rape (Prevention & Punishment) Act, 2014: A Bill,” *National Assembly of Pakistan* 2nd Parliamentary Year, Sr. 55 (2014-2015): 1-8, [http:// www.na.gov.pk/uploads/documents/1415360249_881.pdf](http://www.na.gov.pk/uploads/documents/1415360249_881.pdf) : “it has been mentioned in this draft that in the pretext of statutory cover against prosecution of public servants under S.197 of the Cr. P.C 1898 especially in the context of administrative custodies or physical remand amid state of war, threat of war, public emergencies, internal political instability lead to an environment of custodial torture with absolute impunities. Similarly it has been mentioned that under the pretext of “superior’s order” especially the lower echelon of the law enforcement agencies perform highhandedness against the dignity of citizens as well as non-state actors upon their detention or arrests. Resultantly custodial torture with impunity occurs in Pakistan in the name of investigation and extracting evidence in spite of the Pakistan’s ratification of The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 on 23 June 2010.”

¹³¹⁴ Ibid., 289: identifies as extra judicial process to establish absolute deterrence.

¹³¹⁵ Ibid., 290, 296.

¹³¹⁶ See Ronald Dworkin, *Law’s Empire* (Massachusetts: The Belknap Press of Harvard University Press, 1986), 209-216; R.P. Peerenboom, “A Coup d’État in Law’s Empire: Dworkin’s Hercules Meets Atlas,” *Law and Philosophy* 9, no. 1 (1990): 103, 106: “arbitrary and policy centric contents of rules exhaust the obligations of citizens.”

Pakistan.¹³¹⁷ For Dworkin it is “*laws without rights and principles*” which may surpass to “*wicked laws*” if they constantly serve the interests of dominant classes of society and augment the policy decisions of regimes.¹³¹⁸ While Siddique indicates further that the legal system of Pakistan and especially its subordinate judiciary is still under the influence of colonial era owing to which it is unable to dispense rights based justice in society.¹³¹⁹ Whereas for Cohen such legacy is not limited to the laws only but also transcends into the administrative patterns. Resultantly under the influence of paternalist’s Punjab model the Pakistan Army is still resorting to “*rule by sword*” connotation especially in its ‘aid in civil power’ paradigm of internal security.¹³²⁰

Such externalities of stringent laws and administrative patterns lead to a third category of the core negative impacts. Mansoor along with Siddique indicates accordingly that not only the due process of law, procedural fairness and right to fair trial become the victim of legal stringency, but it also diminishes the overall rule of law in a country. Since the

¹³¹⁷ See Osama Siddique, “*The Other Pakistan: Special Laws, Diminished Citizenship and the Gathering Storm*,” in *Interests and Values: Conflict and Consent in the Constitutional Basic Order*, ed. Glaser Henning (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 2015), 249-263: mainly criticizes the FCR, 1901 and administrative patterns in FATA/PATA which had not only created a relative deprivation among the inhabitants for the legal order but also have motivated them to resist against the perceived unjust draconian laws in the form of TTP armed struggle for the enforcement of Sharia laws in the tribal areas.

¹³¹⁸ See Dworkin, *Empire*, 101-102, 160-164.

¹³¹⁹ See Osama Siddique, *Pakistan’s Experience with Formal Law: An Alien Justice* (Cambridge: Cambridge University Press, 2013), 7-9, 145-251.

¹³²⁰ See Stephen P. Cohen, “Pakistan: Army, Society, and Security,” *Asian Affairs* 10, no. 2 (1983): 1-5; also in John Kaye, *The History of the Indian Mutiny: A detailed account of the synchronous incidents at Mirath, Delhi, Calcutta, Banarus, Allahabad, Kanpur, Punjab, N.W.F.P. and Kashmir* (Lahore: The Pakistani Reprint, Sang-E-Meel Publications, 2005), 491-529: mentions the highly retributive measures to crush local dissents, Cohen indicates that such administrative psychology sustained in the institution of Army especially when it is called upon to suppress unlawful assemblies and riots or any other internal disturbance; also in Brain Cloughley, *A History of the Pakistan Army: Wars and Insurrections* (Clarendon Street, Oxford: Oxford University Press, 1999), 167-178: indicates that the massacre of operation searchlight in the East Wing of Pakistan was a ‘*reminiscent*’ of the 1947 massacre. Such connotation indicates that military involvement in the internal affairs leads to even unintended violations of core human rights values.

citizens out of their marginal diminishing utility gradually discard the efficacy and legitimacy of retributive legal system.¹³²¹ Lombardi too concedes with them and mentions that sustainable ‘*rule of law*’ in Pakistan mean nothing more than autocracy especially when laws themselves represent the whims of totalitarian regimes.¹³²² But then the questions are that if a criminal justice system impliedly tolerates the abuse of process to find the guilt and to expand the deterrence then how much room is left for judiciary to dispense justice? And even if peace is achieved by any mean out of retributive measures then how long is it sustainable without a right based justice? Likewise if judiciary intends to enforce ‘*complete justice*’¹³²³ and upholds due process of law through its writ prerogative then how can it do so in the presence of retributive laws? Especially when it confronts the decrees of military and other administrative tribunals as it observes, “under Article 212 an enclave has been carved out in which the constitutional courts have a highly restricted role.”¹³²⁴ Similarly the queries are that when state is resorting to ‘*absolute reprisal to regain its writ*’¹³²⁵ in the “*contested areas*” during internal armed conflict¹³²⁶ and

¹³²¹ See Mansoor, Reassessing, 288; Siddique, *The Other Pakistan*, 250-251; Siddique, *Pakistan’s Experience*, 250-252.

¹³²² See Clark Lombardi, "Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan," *University of St. Thomas Law Journal* 7, Issue. 3 (2010): 678.

¹³²³ See National Assembly of Pakistan, comp., *The Constitution of the Islamic Republic of Pakistan: as modified up to 28 February, 2012* (Islamabad: National Assembly Secretariat, 2012), 100: Art.187: “Supreme Court Shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it-----”

¹³²⁴ See *District Bar Association, Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401, 763-764.

¹³²⁵ See Niccolo Machiavelli, *The Prince*, tans. C. E. Detmold (Hertfordshire: Wordsworth Editions Limited, 1997), 18-19, 47, 64-65: to ruin and to administer absolute cruelty is devised to maintain administrative control over hostile territory and population. Similarly he prefers to have regular, hierarchically organized, and strong armies rather to have just laws to sustain an administrative rule over territories, as indicates that ‘*good armies precede good laws*’.

¹³²⁶ See Oskar N.T. Thoms and James Ron, “Do Human Rights Violations Cause Internal Conflict?,” *Human Rights Quarterly* 29, no. 3 (2007): 676: defines the internal armed conflict and bifercates it from internal disturbances accordinf to which internal armed conflict is a ‘*contested incompatilby*’ over a control on a

authorizing “*executive prerogative*”¹³²⁷ to maintain order then how can ‘*law break it silence to control arms*’¹³²⁸? And if law itself authorizes such resort to arms and reprisal then how can constitutional norms and principles of fundamental guarantees assert themselves? But if constitution itself is a victim of “*embedded mistakes*”¹³²⁹ and is restrained by the general will,¹³³⁰ then how can customary human rights norms prevail

disputed territory, administrative and legal patterns or resources between state ruling forces and armed opposition. The core parameter which bifurcates internal armed conflict from internal disturbance is the threshold of violence and violence related casualties of armed forces as well as armed groups. For the objectivity of the threshold it is indicated that at least ‘25 battle related casualties per year’ are sufficient to constitute a conflict as an internal armed conflict. Hence it is pertinent to discuss the TTP conflict related casualties as mentioned in the PLD 2015 SC 401, 727: according to which more than 56,000 civilians and armed personnel have been killed since 2002 in Pakistan. If these numbers are analysed to the supra mentioned objective threshold of armed conflict then it indicates that not only the tribal areas but also the settled areas of Pakistan are facing a protracted wave of internal armed conflict.

¹³²⁷ See Lee Epstein, Daneil E. Ho, Gary King, and Jeffrey A. Segal, “The Supreme Court during Crisis: How War Affects only Non-War Cases,” *New York University Law Review* 80, no.1 (2005): 97: indicates that John Locke extends the Machiavelli’s perception of stringent administrative measures during the time of crisis and has a firm believe on ‘*administrative prerogative*’ which might be contrary to ‘*right full conditions of categorical imperative*.’ Locke justifies his ‘*extraordinary and extra-legal prerogative power*’ under the doctrine of necessity to save a collective common wealth of a country during crisis.

¹³²⁸ See Marcus Tullius Cicero, *Pro T. Annio Milone; In L. Calpurnium Pisonem; Pro M. Aemilio Scauro; Pro M. Fonteio; Pro C. Rabirio Postumo; Pro M. Marcello; Pro Q. Ligario; Pro Rege Deiotaro*, trans. N. H. Watts (Cambridge: Harvard University Press, 1979), 16-17, quoted in Epstein, et al., “The Supreme Court during Crisis”: 3-15, 96-98: quotes the Cicero’s maxim “*inter arma silent leges*” means during war law has nothing to do to control the conducts of adversaries as due to military strategies vices of law become susceptible. However writers indicate that such commutation can lead to a vicious cycle of violence and atrocities. Resultantly natural law ought to extend its protections to protect core human rights during armed crisis. Because contrary to it not only escalates violence but if courts also follow the Cicero’s maxim and perform restrains during armed conflicts then their decisions effects even peace time cases owing to ‘*lingering effects*’ of doctrine of stare decisis. Accordingly indicates that in spite of constitutional norms and international bill of rights courts are usually restrained if not due to the doctrine of political question then due to the legacy of precedents under their ‘*institutional processes*’.

¹³²⁹ See Ronald Dworkin, “Hard Cases,” *Harvard Law Review* 88, no. 6 (1975): 1099-1101: formulates a connotation of embedded mistakes to identify such constitutional and legal restraints which restrict judiciary in its constructive interpretation to uphold justice amid the adjudication of hard cases. The latter are such cases whose answers are either not present in the corpus of law or whose adjudication requires a slightly different perspectives from the existing body of precedents. Nevertheless doctrine of political question, restriction of separation of power, doctrine of necessity, rights subject to law and public order, liberty subject to the national security are few examples of such embedded constitutional mistakes which restrict judiciary to uphold a contested right or principle. Hence study analogizes from this perspective that Articles 8(3), 10 (3-6), 199(3), 212(3)[up to the question of fact], 233, 237, 245(3), 247(7) of the constitution of Pakistan, 1973 are supposed to be considered as Dworkin’s embedded mistakes in case of enforcement of fundamental rights during severe law and order crises.

¹³³⁰ See Epstein, et al., “Crisis”: 11-15: indicates that owing to majoritarian perception of insecurity legislature and executive tend to restrict liberties and by this milieu both of these political branches come

amid armed conflicts¹³³¹ and through which forum?¹³³² Accordingly, the following section of this chapter is intended to satisfy the above-mentioned queries of study.

under the influence of public perception. Accordingly the impact of crisis legislation lingers in to the peace time as crisis jurisprudence forms executive indemnity to achieve the intended purpose. However it usually takes a form of executive impunity in case of any infringement of civil and political liberties yet interestingly such institutional patterns remain intact even when crisis is over.

¹³³¹ See Pejic, “The Protective Scope of Common Article 3”: 191-205, 219-225: argues that core human rights guarantees as envisaged in the common Article 3 of the all the four Geneva Conventions, 1949 extends its protections to every one irrespective to the kind and threshold of the conflict. States further that such protections are available even to the non-state actors which involve in the internal armed conflict due to its spill over character due to which citizens of neighboring countries creep in to a specific state’s jurisdiction with or without the consent of their respective governments. Argues ahead that the terminology of ‘*each party to the conflicts*’ in the Common Article 3 widens its scope due to which it is immaterial that that such parties are signatories to the Geneva Conventions and their additional protocols or not. Subsequently Common Article has been as customary law of armed conflict. Moreover it is inferred from this study that Pakistan has four core paradigms of high intensity conflicts and their corresponding legal framework in which its armed forces and civil armed forces can be engaged under in aid of civil power context. As writer believes that threshold of violence, intensity and duration of conflict and organizational structure of the armed groups are core determinants to ascertain a nomenclature of disturbance. First is the riots and civil commotion with moderate violence under Ss. 129 to 131 and 144 of the Cr. P.C. Second is the mass riots and gang war with extreme violence under Ss. 4 and 5 of the ATA, 1997. Third is the isolated acts of waging war and insurrection with sever and unprecedented violence under S.3 of the POPA, 2014. And fourth is the internal armed conflict owing to TTP related armed groups in FATA/PATA under Regulations 2011. However the question is that in all these four kinds of conflicts how can the core human rights guarantees be ensured. Apparently the first three categories come under the human rights regime and attract fundamental guarantees as enshrined in the Art-9 to 29 of the constitution of Pakistan, 1973 but then the respective laws themselves neutralize such guarantees. As most of the rights are subject to law and public order except protection against torture and inhuman treatment as enshrined in the Art.14, which is again dependent upon Art.4 and 199 and 184(3) but then clause (3) of the Art.199 and connotation of “rights to be dealt in accordance with law” in Art.4 neutralizes the fundamental guaranties because “law” means the same provisos of the Cr. P.C. P.P.C., ATA, POPA and Regulation 2011. Whereas the last category seems to be covered by the exigency of the Common Article 3, but again the question is that which institution is authorized to implement it, if judiciary as the Article itself mentions judicial guarantees then whether indigenous laws or even constitutional parameters permits it? Due to these imperfections writer indicates that Common Article 3 is not comprehensive or exhaustive to protect core human rights guarantees.

¹³³² See PLD 2015 SC 401, 1144-1148: Although J. Bandial mentions the possible application of Geneva conventions, 1949 as law of armed conflict in Pakistan but does not elaborate the modus operandi for such probability. Does he impliedly focus on the Apex court under Art.184 (3) for such application? If so then it requires a relevant positive law on this subject which is not as such in Pakistan till now.

Prospects of Judicial Law Making for Human Rights Protections in Pakistan

Before proceeding further to understand the dynamics of judicial law making under constitutionalism, it seems appropriate to analyze the correlation of human rights with armed conflicts. As Thoms and Ron indicate that the threshold of human right violations has direct relationship with the emergence of an armed conflict.¹³³³ Subsequently they split human rights in to two core categories. First deals with subsistence rights mainly derived from International covenant of economic, social, and cultural rights and covers the protection against extreme poverty, hunger, malnutrition and overall socio economic equality. They indicate that deprivation of these rights has directional impact on socio-political unrest but lacks the capacity to engender full-scale belligerency. To validate this argument they mention the racial discrimination and incidents of poverty in America, which undoubtedly had caused episodes of political unrest but had not caused belligerency as such. They believe that socio economic injustice can be cured through democratization process and public participation and their gradual increase may comprehend the relative deprivation to augment into armed resistance.¹³³⁴

However when political participation is denied and regimes attempt to segregate to an extent where the second category of core human rights such as right to life, liberty, dignity of person and home and protection against torture are infringed then masses retaliate and

¹³³³ See Thoms and Ron, “Internal Conflict”: 674-675, 679-686.

¹³³⁴ Ibid., 686-696.

resort to armed resistance. Yet they further indicate that right to life and liberty without the subsistence rights also engender the violation of integrity rights. Thus in a way economic social and cultural rights supplant civil and political right. At this juncture they indicate that on one had violation of these rights and apathy of regimes to take remedial measures has causal direct relationship with internal disturbances which may transform in to internal armed conflict if sustain over a reasonable period. And on other had occurrence of armed conflict has also a causal relationship with human rights violation as indiscriminate and disproportionate administrative reprisal not only infringes civil and political rights but also socio economic rights. Here they indicate that reprisals also instigate the relative deprivations and masses that are already facing ordeals prefer to resort to indiscriminate violence. Usually it happens in countries which have crisis of administration or governance because their quantitative study indicates that neither a liberal nor absolute totalitarian states experience internal conflict. Though it seems plausible in the case of former as these states have potential to engage dissent through their political and judicial dialectical process, but why is it so in the case of later? Thoms and Ron narrate that experience of extreme punitive measures for protracted periods engender such an internal fear in masses that they do not dare to revolt against regime.¹³³⁵ While it is the same administrative strategy, which was preferred, by Machiavelli who advocated to rule through fear,¹³³⁶ but whether it constitutes justness in society? For Dworkin it cannot and for Peerenboom it not only diminishes the “*political integrity*” of a nation but also reduces the “*life of the*

¹³³⁵ Ibid., 699-703.

¹³³⁶ See Machiavelli, *Prince*, 64-66.

laws.”¹³³⁷ As legal systems of these states gradually face scarcity of the core principles of justness such as “*justice, fairness and due process*” and follow the autocratic policy directives of ruling elites.¹³³⁸ Whereas the states which have political crisis of governance such as tumult episodes of transfer of power from one regime to another regime or contestation over the legitimacy of ruling elites. The ruling forces of such states with a feeble legitimacy often resort to repressive measures to suppress their political opponents.¹³³⁹ However, in this process of “*contested legitimacy*” the criminal justice system of these states gradually loses its “*integrity*” and efficacy that furthers an environment of lawlessness and chaos.¹³⁴⁰

Dworkin describes the above-mentioned context as “*complex social situations*” and concentrates on the role of courts to ‘*construct*’ a way forward through ‘*novel decisions*’.¹³⁴¹ But then the question is why only courts? Why not legislature or executive? For Madison it is because of the counter majoritarian power of judicial review owing to which judiciary has a popular legitimacy to protect rights.¹³⁴² For Radbruch, while the legislature is associated with formulation of policy decisions through positive law whereas

¹³³⁷ See Dworkin, *Empire*, 35, 101: “in some nations or circumstance there is no law [in spite of the presence of the core organs of the state like legislature, executive and judiciary] because practices of these institutions are too ‘*wicked*’ to be called as legal”; Peerenboom, “A Coup d’État in Law’s Empire”: 97-99.

¹³³⁸ See Peerenboom, “Coup”: 100-102: such laws are arbitrary as they do not rely on fundamental moral principles rather rely on the fair distribution and allocation of power among the power brokers.” Hence in case of the military coups of Pakistan the security centric laws can be conceived as the Dworkin’s ‘*checkerboard laws*’ as contrary to his ‘*law as integrity*’ which focuses on justice, fairness and procedural due process.

¹³³⁹ See Thoms and Ron, “Conflict”: 701-703.

¹³⁴⁰ *Ibid.*, 676; Mansoor, “Reassessing”: 301-307: “it mainly happens due to the frequent incidents of miscarriage of justice due to which masses lose their confidence over the entire legal system.”

¹³⁴¹ See Dworkin, “Hard Cases,”: 1063, 1070, 1088-1089.

¹³⁴² See Wilfrid E. Rumble, “*James Madison on the Value of Bills of Rights*,” in *Constitutionalism*, eds. John W. Chapman and J. Roland Pennock (New York: New York Press, 1979), 141-144.

executive is linked with the “*purpose conformity*.” Thence dispensation of justice is specially rest with judiciary.¹³⁴³ For Sadurski institution of judicial review has a potential to effect legislative behaviors due to which it can assert itself for a pragmatic protection of constitutional rights irrespective to majority opinion.¹³⁴⁴ For Eylon and Harel judicial review is a political right of citizens to express their grievances. Subsequently through the right of hearing a pluralistic society can be accomplished through public participation.¹³⁴⁵ For Sathe it is because judiciary and especially its writ prerogative enjoy a popular legitimacy among masses. Due to which it is efficacious for judiciary to transcend the confines of separation of power to protect core constitutional values and to enforce socio economic justice in society.¹³⁴⁶ Resultantly in the *Arshad Mahmmod* case court observes that it is a constitutional right to access the court to attain a ‘*political justice*’.¹³⁴⁷ For such purpose court declares in the *Cowasjee* case that it is a fundamental right to be heard and adjudicated in an unbiased judicial forum.¹³⁴⁸ And as per the *Zaidi* case it is possible only through an independence of judiciary.¹³⁴⁹ Then for Pound and Dworkin it is because judiciary minimizes social friction through weighing and balancing of conflicting

¹³⁴³ See Julius Stone, *Human Law & Human Justice* (New Delhi: Universal Law Publishing Co Pvt Ltd, 2004), 245-247.

¹³⁴⁴ See Wojciech Sadurski, “Judicial Review and the Protection of Constitutional Rights,” *Oxford Journal of Legal Studies* 22, no. 2 (2002): 292-296, 298-299.

¹³⁴⁵ See Yuval Eylon and Alon Harel, “The Right to Judicial Review,” *Virginia Law Review* 92, no.5 (2006): 997-1007, 1017-1021.

¹³⁴⁶ See S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2004), 253-254, 258-259, 280-311.

¹³⁴⁷ See *Arshad Mahmood v. Commissioner/ Delimitation Authority, Gujranwala*, PLD 2014 Lahore 221.

¹³⁴⁸ See *Ardeshir Cowasjee v. K.B. C. A. and others*, CLC 2000 Karachi 606.

¹³⁴⁹ See *Syed Riaz Ali Zaidi v. Government of Punjab, through chief Secretary*, PLC 2015 (C.S.) SC 831.

interests.¹³⁵⁰ Specifically later believes that it weighs the policy directives of legislature on the touchstone of political morality of a society and harness them with it, if ever finds contrary to it. By this virtue judiciary is supposed to be considered as the custodian of societal values and its political theory.¹³⁵¹ Here the latter is such a bond which binds a free society together as has been named by Kant the “*categorical imperative*.”¹³⁵² For Dworkin such adherence not only minimizes the probability of arbitrary legislative precepts which he identifies as “*checkerboard laws*” but also restricts the judiciary to interpret discretionarily in a “*checkerboard*” manner.¹³⁵³ In other words Dworkin’s “*jural postulates of social engineering*” must align with such political theory to be qualified as “*comprehensive*” rather than to be ‘*checkerboard*.’¹³⁵⁴ He further indicates that legislature and judiciary complements each other as the former ought to legislate in accordance with the core principles of the “*categorical imperative*” and later also interpret accordingly. Therefore judiciary functions as “*deputy legislature*,” but not of its delegate or “*deputy*” up to an extent of “*concrete rights*” which emerges from the “*categorical imperative*.”¹³⁵⁵ The difference between both of these connotations is that in the former judiciary performs the same functions as of the legislature and assists it accordingly to protect rights. Whereas

¹³⁵⁰ See E.M. Morgan, "Justice According to Law, by Roscoe Pound," *Louisiana Law Review* 12, no.3 (1952): 328-330; Dworkin, “Hard”: 1068: Seemingly Pound and Dworkin both complement each other on the subject of social engineering through sociological jurisprudence under the domain of legal realism.

¹³⁵¹ See Dworkin, “Hard”: 1064-1065: “Judges, like all political officials, are subject to the doctrine of political responsibility---judicial decisions are political, at least in the broad sense that attracts the doctrine of political responsibility.”

¹³⁵² See Dworkin, *Law's Empire*, 201; Peerenboom, “Coups”: 103, 106.

¹³⁵³ See Dworkin, *Law's*, 434-435: the terminology of ‘*Checkerboard*’ denotes haphazard, arbitrary and ad-hoc decisions out of situational stimulus.

¹³⁵⁴ See into Ibid., 217-219; Dworkin, “Hard”: 1062-1064: Under such constitutionalism neither the legislature can resort to undue political compromises and unjust policy directives nor can judiciary passively restrict itself under the doctrine of political question.

¹³⁵⁵ See Dworkin, “Hard”: 1070-1071: According to him concrete rights are the universally recognized civil and political liberties which lead to a comprehensive socio economic justice.

in the later it only functions in an authorized manner without touching upon the doctrine of political questions and restrict itself in accordance with the parameters of separation of power. The problem with later connotation is that in absence of particular statutes on particular issues it may interpret arbitrarily if not allowed to cater political questions in accordance with the Kantian perspective. This is the reason behind Dworkin's opposition to Hartian judicial power amid the "*open texture*."¹³⁵⁶ Though has been discussed earlier that it is not discretionary as such and ought to be aligned with core societal norms, especially the "*bare minimum of natural law*" under Hart's "*primary rule of recognition*."¹³⁵⁷ But what if Locke's "*extralegal prerogative*"¹³⁵⁸ ever attempts to override even the "*bare minimum*"? Dworkin devices an instrument of "*constructive interpretation*"¹³⁵⁹ to counter such anomaly as he illustrates that wicked laws and actions are so only up the interpretive stage.¹³⁶⁰

Amid above mentioned anomalous situation Dworkin's proactive judge "*Hercules*" with immense compassion for the respective political theory adjudicates to protect "*rightful conditions of categorical imperative*". It is especially when statutes either contradict them or unable to give a solution or if facts are too anomalous to be judged through literal interpretation of the entire legal corpus. While for Dworkin such context of adjudication is

¹³⁵⁶ See Dworkin, *Law's*, 34-35; Muhammad Munir, "How Right is Dworkin's "Right Answer Thesis" and His "Law as Integrity Theory" ?," *Journal of social Science* 2 (2006): 4-5; Dworkin, "Hard": 1080.

¹³⁵⁷ See H L A Hart, *The Concept of Law* (New Delhi: Second Indian Reprint, 2005), 192-202; also in Roger Cotterrell *The Politics of Jurisprudence* (London: LexisNexis Butterworths Tolley, Ltd, 2003), 92-95: for Hart's analytical process and his pedigree of rules.

¹³⁵⁸ See Epstein, et al., "Crisis": 97.

¹³⁵⁹ See Ronald Dworkin, *Taking Rights Seriously* (Delhi: Fourth Indian Reprint, Universal Law Publishing Co. Pvt., 2008), 105-106.

¹³⁶⁰ See Dworkin, *Law's*, 101-104.

identified as the “*hard case*.”¹³⁶¹ Whereas this study perceives the protection of right to fair trial amid sporadic incidents of terrorism, waging war and insurrection in the settled areas of the Pakistan and armed conflict in the FATA/ PATA as the “*hard case*” scenario. The purpose of such contextualization is to sustain the life of the criminal laws in Pakistan as Dworkin indicates that “*life of the law*” is dependent upon “*vertical*” as well as “*horizontal*” continuity of the categorical principles. And for such continuity he devises a formula according to which there must be a compatibility between political integrity and legal integrity the latter is identified by him as “*law as integrity*.” Such continuity requires that laws either in form of statutes or in the form of judicial decisions must contain the component of justice, fairness and procedural due process along with the core premises of the Kant’s categorical imperative.¹³⁶² Now if policy decisions like Act No I and II of 2015 or stringent provisions of POPA, 2014 Pakistan are preferred for collective interests. And due to which the right to fair trial is perceived to be jeopardized then in this scenario the above mentioned compatibility seems to be a preferred course of action. However before proceeding further it is pertinent to understand the above mentioned connotations of “*vertical and horizontal continuity*” and its causal relationship with the “*life of the law*.”¹³⁶³ Subsequently for such purpose study focuses on the core three categories of Dworkin’s adjudication process which consist of “*pre-interpretive, interpretive and post-interpretive*” stage.¹³⁶⁴

¹³⁶¹ Ibid., 337-354; Dworkin, “Hard”: 1080.

¹³⁶² See Dworkin, “Hard”: 1064-1065.

¹³⁶³ Ibid., 1092-1995.

¹³⁶⁴ See Jonathan Crowe. “Dworkin on the Value of Integrity,” *Deakin Law Review* 12, no. 1 (2007): 168-170; Munir, “Integrity Theory,” 7.

In the first stage controversies are entertained by the court of law in accordance with its locus and available legal frame work without questioning the justness or injustice of the relevant laws or actions. In the second stage court attempts to analyze that which kind of the concrete right is at stake as a result of a policy decision. And if court finds that either statute themselves are contrary to “*law as integrity*” or the administrative actions are contrary to political integrity. Then Dworkin’s “*Hercules*” in the first phase of the ‘*vertical*’ order looks in to the respective constitutional theory to find out a remedial principle. If finds it there then he formulates a constitutional scheme to provide a complete justice in accordance with the due process. As this study has already formulates an interpretive hypothesis in the earlier chapters to protect core human rights values which is as follows, Articles 2A+4+9+ 10A+14+25+199(1) and (2) or 184(3)+187+190 of the constitution of Pakistan, 1973. For Peerenboom it is a Dworkin’s “*weak thesis*” in which he incorporates the political integrity in to the constitutional order.¹³⁶⁵ Since in supra hypothesis the Article 2A being a categorical imperative of Pakistan and an operative part of the constitution depicts the same “*weak thesis*” if is relied upon to adjudicate the “*hard cases*’. But the question is that why is it described as “*weak*”?

Peerenboom indicates that it is so because the entire political integrity of a state is merely taken as a value among other values such as justice, fairness and procedural fairness. Nonetheless if constitution is unable to dispense such a formulation either because of the “*embedded mistakes*” like Articles 8(3), 199(3), 233 and 245(3) of the Constitution of

¹³⁶⁵ See Peerenboom, “Coup”: 100-101: “Dworkin’s Weak Thesis: *Law as integrity= Justice+ Fairness+ Due Process+ Political Integrity.*”

Pakistan, 1973. Besides has conditional application of “*concrete rights*” as declaring them subject to law, public order, security of the state and morality or dealing with an abstract right like application of the Common Article 3 in the national jurisdiction. Then court proceeds to the next phase of the vertical order in which judge ought to craft a decision from the political theory of a country. Peerenboom identifies it as a Dworkin’s “*strong thesis*” in which “*categorical imperative*” precedes and neutralizes all “*checkerboard*” laws, political compromises and constitutional theories.¹³⁶⁶ Even for Dworkin such activism is often “*controversial*” because firstly judge ought to counter a majoritarian charisma and secondly he relies upon his own understanding of the respective political theory.¹³⁶⁷ Resultantly Dworkin devises the “*novel chain scheme*” to avoid an arbitrary judicial law making, according to which the core Kantian perspective must transcend in to judicial reasoning.¹³⁶⁸ And the principle which is selected from the political theory must align with the principle behind ‘*concrete*’ yet restrained rights, which further ought to align with “*collective conception of justice*” to achieve “*cohesiveness*.”¹³⁶⁹

Hence under such “*strong thesis*” the interpretive formulation for Pakistan supposed be as follows to protect rights, Preamble of the Constitution, 1973[being almost identical to the objective resolution with regards to contents and spirit] /Article 2A= Articles 4+ 9+ 10A+ 25+

¹³⁶⁶ Ibid., 101-102: “Dworkin’s Strong Thesis: Law as Integrity = Political Integrity (Justice+ Fairness+ Due Process).”

¹³⁶⁷ See Dworkin, “Hard”: 1104-1105.

¹³⁶⁸ See Dworkin, *Law’s*, 228-246: He relies on such connotation to explain the process through which a judge can bring law as integrity through its decisions. Here *Novel* connotes the core of the categorical imperative whereas judges as political officials write down different chapters of this novel through their decision. Now the discussion of the chapter may vary from one chapter to another but the theme of the novel remains the same as long a contractarian society remain intact. Thence the continuity of the core principles through numerous judicial dictums is identified as the “*Chain of the Novel*.”

¹³⁶⁹ Ibid., 188-190, 201-202.

199(1) and (2) or 184(3)+187+190 of the constitution. Interestingly it is the same formulation which is relied upon in the *Rawalpindi Bar* case to align a constituent power of the legislature with core premises of the objective resolution.¹³⁷⁰ Yet Dworkin further indicates that such a formulation should also establish its own “*justification*” among the egalitarians.¹³⁷¹ It is because all “*jural postulates*” either in legislative or in judicial domains must possess such a justification. Mainly to get validation from respective “*political theory*” as subsequently qualifies the ‘*general will*’ and then “*political integrity*” in “*post- constitutional convention*” scenario.¹³⁷² Accordingly for Peerenboom the absolute reliance on “*categorical imperative/ political integrity*” either during uncertainty or stringency of laws or complexity of situations enhances not only a threshold of justice but also the “*law as integrity.*”¹³⁷³ And Dworkin goes up the extent that if a judicial dictum seems contrary to the “*political integrity*” then citizens may resort to conscious objections and civil disobedience by rejecting it entirely.¹³⁷⁴

Since Pakistan’s *political theory* is a normative one and based upon socio-economic justice.¹³⁷⁵ As enshrined in the directives of principles of policy under Article 29-40, as well as civil liberties as enshrined in the fundamental rights under Article 8-28 of the

¹³⁷⁰ See *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401, 561-570, 679-680, 683-684.

¹³⁷¹ See Dworkin, “Hard”: 1059, 1097-1098: It is identical to the viewpoint as expounded in *Rawalpindi Bar* case and has been discussed comprehensibly in the preceding chapters that the ‘Will of the people’ precedes all statutory powers and such will command to establish justice accordance with the objective resolution.

¹³⁷² See Dworkin, *Law’s*, 189-192; Ronald Moore, “*Rawls on Constitution –Making,*” in *Constitutionalism*, eds. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1979), 239-249.

¹³⁷³ See Peerenboom, “Coup”: 104-105.

¹³⁷⁴ See Dworkin, *Taking Rights Seriously*, 211.

¹³⁷⁵ See Leonard Binder, *Religion and Politics in Pakistan* (California: University of California Press, 1963), 181, 186-187, 379-380.

constitution 1973. Besides its criminal justice system under such normative philosophy is based upon the principle of independence of judiciary to accomplish right to fair trial.¹³⁷⁶ Accordingly to establish ‘*political justification*’ under the Dworkin’s “*novel chain mechanism*” a judicial decision must be ‘*vertically*’ aligned with objective resolution in its “*fit*” category.¹³⁷⁷ As well as must be harmonized “*horizontally*” not only with legislative policy decisions but also with other judicial pronouncements only if both of them are themselves align with the categorical imperative. Therefore such vertical and horizontal continuity of core principles maintain the “*life of the law*” through which “*corrigible mistakes*” of stringent criminal laws such as strict liability, presumption of guilt, undue administrative detentions and executive impunities can be cured. While the “*fit*” categorization is specific to the ‘*interpretive*’ stage whereas the “*horizontal*” harmony is specific to the post interpretive stage in which the ratio of the case determines the institutional behavior in conjunction with the doctrine of stare decisis.¹³⁷⁸ Fuller and Sarathi identify such continuity of liberal formulation as “*legal fictions*” to expand the scope of positive law for protection of rights and comprehension of obligations.¹³⁷⁹ And to

¹³⁷⁶ See PLD 2015 SC 401, 1154-1155,

¹³⁷⁷ See Dworkin, “Hard”: 1094, 1098-1099; Munir, “Integrity Theory,” 11-12, 16-20.

¹³⁷⁸ See Dworkin, “Hard”: 1082-1085, 1094-1097.

¹³⁷⁹ See Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967), 23-30, 93-112: indicates that constructive and liberal interpretation of statutes though in consonance with their intent and objectives not only transform abstract positive morality in to pragmatic legal rights, but also help to develop the law itself; Vepa P. Sarathi, *Legal Fictions* (Lucknow: Eastern Book Company, 2012), 30-31: “Legal fictions have served as a bridge to reach a desired result from a given situation. Invariably, the desire [is] to render justice in an ‘*uncovered*’ [Dworkin’s *Hard*] case. All constructive---assumptions should be employed to achieve a lawful result”; also in Rafia Zakaria, “*The Myth of Precision: Human Rights, Drones, and the Case of Pakistan,*” in *Drones and Future of Armed Conflict: Ethical, Legal, and Strategic Implications*, eds. David Cortright, Rachel Fairhurst and Kristen Wall (Chicago: The University of Chicago Press, 2015), 210-212: construct the term human causalities in a way which not only includes the loss of human life but also the loss of property, home and livestock’s. Subsequently indicates that right to home is also susceptible owing to indiscriminate Drone strikes due to which state is obliged not only to protect human lives but also their homes. In this way she expands not only the legal rights but also obligations to protect them accordingly.

some extent ensues in Pakistan specifically in the *Shehla Zia* case in which “*abstract*”¹³⁸⁰ rights to human integrity, equality, social justice are coupled with a “*concrete*” right to life.¹³⁸¹ Subsequently the above-mentioned “*weak thesis*” is relied upon for an intended continuity of socio economic and political justice through good governance in number of cases.¹³⁸² In all these cases the “*vertical fit*” thresholds have been achieved from the objective resolution which also espouses the enforcement of socio economic and political justice in Pakistan.¹³⁸³ Whereas horizontal “*political justifications*” have been achieved from Art.37 and 38 of the constitution, 1973 which espouse parameters of good governance in Pakistan.¹³⁸⁴ Similarly in a classic “*hard case*” where in the wordings of Hart the legal corpus ends up into an absolute “*open texture*” court relies upon the “*weak thesis to give*

¹³⁸⁰ See Dworkin, “Hard”: 1068-1069: For Dworkin abstract rights are such rights which although link with Kantian’s rightful conditions but either are too subjective to be achieved objectively like elimination of exploitation or integrity or are political rhetoric to achieve an ideal society.

¹³⁸¹ See *Ms. Shehla Zia and others v. WAPDA*, PLD 1994 SC 693, 712-715: “a constitutional theory is formulated through Article 9+14+184(3) of the Constitution of Pakistan, 1973[hereinafter const.]”

¹³⁸² See for such formulation and its continuity into the followings; *Watan Party and another v. Federation of Pakistan*, PLD 2011 SC 997: “Combination of Art.2A+9+184(3) of the Const.”; *Watan Party and others v. Federation of Pakistan*, PLD 2012 SC 292: “ Art.9+14+19+184(3)+187 of the const.”; *Suo Motu Case No.12 of 2011; in the Matter [Suo Mou Action Taken upon the application of Memona Parveen regarding enhancement of Salary/Stipend of Industrial Home Teachers]*, CLC 2013 (C.S.) SC 1163: “Art.3+9+184(3) of the const.”; *Lahore Development Authority through D-G. and others v. Ms. Imrana Tiwana and others*, 2015 SCMR 1739, 1758-60, 1771: “Art.2A+4+9+14+25+199/184(3) of the const.”; *Jhangir Mehmood Cheema v. Government of Pakistan, Ministry of Interior through Secretary*, PLD 2015 Lahore 301: “Art.2A+4+9+15+25+199 of the const.”; *Arshad Mahmood v. Commissioner/ Delimitation Authority, Gujranwala*, PLD 2014 Lahore 221: “Art.2A+4+9+17+17+25+199 of the const. 1973.”

¹³⁸³ See *Ardeshir Cowasjee v. K. B. C. A. and others*, CLC 2000 Karachi 606: “Combination of Art.2A + 3 (Elimination of [socioeconomic] exploitation) + 4+ 37+ 199 of the Constitution is formulated in the interpretive stage to maintain free and fair judicial forum for the right of fair trial.”; *Arshad Mahmood v. Commissioner/ Delimitation Authority, Gujranwala*, PLD 2014 Lahore 221: Right to due process of law and elimination of exploitation are liberally interpreted in the light of objective resolution and right to life with dignity for the accomplishment of political justice in Pakistan through a formulation of Articles 2A+3+4+9+17+25+199 of the Constitution; Similar formulation is resorted in context of public interest litigations in the *Suo Motu Case No. 12 of 2011*, PLC 2013 (C.S.) 1163: through a combination of Articles 3+ 9+ 184(3) of the Constitution of Pakistan, 1973.

¹³⁸⁴ See National Assembly of Pakistan, comp., *The Constitution of the Islamic Republic of Pakistan: as modified up to 28 February, 2012* (Islamabad: National Assembly Secretariat, 2012), 4, 16-20: Art.3: “The State Shall ensure the elimination of all forms of exploitation and gradual fulfillment of the fundamental principles-----” and according to the chapter of Principles of Policy: Art.37: “Promotion of social justice and eradication of social evils,” and Art. 38: “Promotion of social and economic wellbeing of the people.”

the law a life” and to protect rights of a segregated class. Akin to the *Shehla* case court expands rights to life and dignity to give equal citizenship rights to Eunuchs in Pakistan.¹³⁸⁵ It seems as well that in spite of its apparent divergence from doctrine of separation of power, judicial activism is not “*unrestrained*” as such. Rather, it is bound to follow the “*political theory*” and “*gravitational force of adjudicated principles*” to dispense “*complete justice*” under Article 187 of the constitution of Pakistan, 1973. It also appears that Dworkin’s realism is consistent with Hart’s “*pedigree of primary rules*” and Kelsen’s “*pure theory of law*” because all of them focus on the core legal norms through one way or the other.¹³⁸⁶ Even Pound’s judicial pragmatism under the wake of social engineering follows same patterns. As he indicates that the core principles of common law not only validate “*jural postulates*” but also align them to avoid arbitrariness and “*political tyranny*” of any generation. And for such purpose judiciary is a most appropriate forum to analyze ‘*precepts for social change*’ on the touchstone of “*organic values*” such as justice, fairness and due process to accomplish the “*ends of law*” which are socioeconomic and political justice.¹³⁸⁷

However it seems appropriate at this juncture to understand the connotation of judicial activism and its contours to protect core human rights values in the Indo-Pak context. For

¹³⁸⁵ See *Dr. Muhammad Aslam Khaki and others v. Senior Superintendent of Police (Operation), Rawalpindi and others*, 2013 SCMR 187: “Formulation is based upon the core components of the ‘law as integrity’ such as justice, fairness and due process and consist of a combination of Art.9+ 14+24(1)+ 25 +184(3) of the Constitution of Pakistan, 1973.”

¹³⁸⁶ See Cotterrell, *Jurisprudence*, 92-95, 104-111.

¹³⁸⁷ *Ibid.*, 157-161: “in this way judiciary is a custodian of the “*organic*” principles such as justice, fairness, due process to validate an “*is*” of the time through the “*ought*” of common law. Thus Pound’s law for social change emerges only from the law itself to cater the new social dynamics for which Judges are “*heroic defenders*” of legal reasoning.”

this purpose study exhaustively relies upon J. Bhagwati due to his commitment to utilize instruments of laws and judicial review for social change in India. Accordingly he subdues restraints of ‘*formalism*’ and separation of power and relies upon judicial law making to augment legal covers for the vulnerable segment of society.¹³⁸⁸ Since his sociological jurisprudence of constructive interpretations concentrates on the “*massification*” of “*alien laws*”¹³⁸⁹ for distributive justice in a stratified society of India.¹³⁹⁰ Resultantly he combines personal and civil liberties for “*meta-individual rights*”¹³⁹¹ through Baxi’s “*social action litigations*” for which social and judicial activism conform each other.¹³⁹² While former deals with reformative approach of individuals and NGO’s to identify human rights concerns in society and bring them in the judicial arena through public interest litigation. Whereas later deals with proactive approach of superior judiciary under which it not only softens touchstone of locus standi to entertain such adjudications but also relies upon constructive interpretation of statutes¹³⁹³ for the stipulation of natural rights.¹³⁹⁴

¹³⁸⁸ See P. N. Bhagwati, *My Tryst with Justice* (Delhi: Universal Law Publishing, 2015), 55-57, 63, 114-115: here ‘*formalism*’ connotes a literal interpretations of laws by divorcing sociopolitical paradigms.

¹³⁸⁹ See Osama Siddique, *Pakistan’s Experience with Formal Law: An Alien Justice* (Cambridge: Cambridge University Press, 2013), 69-74: “argues that swift intelligible and economical dispensation of justice by the village Panchayat in colonial India was “*radically displaced*” by complex, unfamiliar and expansive western laws which were not only ‘*alien*’ for the natives but incapable to comprehend indigenous sociopolitical concerns.”

¹³⁹⁰ See Mauro Cappelletti and Bryant Garth, Access to Justice: The Newest Wave in the Worldwide Movement to make rights effective,” *Buffalo Law Review* 27, (1978): 181-292, quoted in Bhagwati, *My Tryst with Justice*, 69: “the strategy of Public Interest Litigations[under legal realism and sociological jurisprudence] is considered to metalize the international human rights effective in national jurisdictions.”

¹³⁹¹ See Bhagwati, *Justice*, 70-71: “Personal liberties are meaningless unless accompanied by the social and economic rights.” Hence his distributive justice is a workable confluence of the ICCPR and ICESCR or in other words Fundamental Rights and Principles of Policy ought to combine to bring his ‘*meta-individual*’ rights.

¹³⁹² See Upendra Baxi, “*Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*,” in *Social Action Through Law: Partnership for Social Justice*, ed. P. K. Gandhi (New Delhi: Concept Publishing Company, 1985), 61-74, quoted in Bhagwati, *Justice*, 72-73.

¹³⁹³ See Bhagwati, *Justice*, 74-82.

¹³⁹⁴ See e.g. into *Maneka Ghandi v. Union of India*, AIR 1978 SC 597: “for the protection of right to life and personal liberty.”; *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360: “for the right of speedy trial”; *Khatri v. State of Bihar*, AIR 1981 SC 1068: “for the protection of torture and inhuman treatment

Subsequently J. Bhagwati categorizes such activism in to “*technical*” and “*juristic*” paradigms.¹³⁹⁵ The former is also identified by him as a form of judicial independence under which court liberally deviates from doctrine of stare decisis and other statutory limitations such as locus standi, times bars, court fee or stamps fee. Likewise for the marshaling of concrete evidences amid highly complex socioeconomic paradigms it deviates from its adversarial and laissez faire system and forms judicial or quasi-judicial fact finding commissions.¹³⁹⁶ While the later form of activism specifically deals with unconventional and liberal interpretations of statutes and rules to craft novel principles for protection of rights.¹³⁹⁷ For both of these categories writ jurisdictions of superior courts are attracted to entertain human rights complaints even through letters or news clips under their “*epistolary jurisdiction*” as mainly emerge from the rationales of justice of peace.¹³⁹⁸ Accordingly the apex court of India has constituted quasi-judicial vigilance committees and ombudsman offices for appraisal of its directions given in the wake of human rights protection.¹³⁹⁹ Such “*legal pluralism*” is an outcome of the judicial dictum according to which state and its entire instrumentalities are strictly liable to uphold the right to access to

during custody”; *M. H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548: “for the protection of right to legal aid in criminal proceedings”; *Francis Coralie Mullin v. Union Territory of Delhi*, AIR 1981 SC 746: “for the protection of right to live with dignity.”; *Bandhua Mukti Morcha v. Union of India*, AIR 1992 SC 38: “ for the formulation of socio-legal commission for the formulation of evidences to ascertain the threshold of human rights standards in society”, quoted in Bhagwati, *Justice*, 65-66, 83.

¹³⁹⁵ See Bhagwati, *Justice*, 62.

¹³⁹⁶ *Ibid.*, 82-85.

¹³⁹⁷ *Ibid.*, 61-64.

¹³⁹⁸ *Ibid.*, 74-80.

¹³⁹⁹ See *People’s Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473: “to examine laborer’s working environment”; *Sheela Barse (II) v. Union of India*, 1986 (2) SCALE 230: “to monitor women’s police lock ups to curb custodial rape and torture”; *Neeraga Chaudhary v. State of M. P.*, AIR 1984 SC 1099: “to analyze the threshold of bonded labor”, quoted in Bhagwati, *Justice*, 85-91.

justice in all circumstances.¹⁴⁰⁰ Yet the question is that how has such “*legal pluralism*” accomplished its legitimacy in a formalist legal system of India? J. Bhagwati indicates that it is only due to its potential to protect core human rights values of a large segment of society as he observes, “*public interest litigation cannot function and sustain in isolation without the realization of liberties.*”¹⁴⁰¹

Interestingly J. Iftikhar in Pakistan has also attempted to follow the footprint of J. Bhagwati in the *pre* and *post-lawyer* movement scenario.¹⁴⁰² Especially the *post-lawyer* paradigm of “*judicial expansionism*” that lasted until his retirement has contributed positively to boost the political legitimacy for such activism.¹⁴⁰³ However, Siddique indicates that owing to domestic environment of “*unstable constitutionalism*” and overindulgence in “*mega politics*” along with public policy domains his activism has transformed in to “*judicialization of politics.*”¹⁴⁰⁴ And according to Lau such expansionism rather than activism has proved precarious to the rule of law in an already polarized

¹⁴⁰⁰ See *M. C. Metha v. Union of India*, AIR 1987 SC 982, quoted in Bhagwati, *Justice*, 114-119; P. M. Bakshi, comp., *The Constitution of India* (New Delhi: Universal Law Publishing Co., 2014), 13-19: “Article 12- ‘the State’ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”

¹⁴⁰¹ See Bhagwati, *Justice*, 91-113.

¹⁴⁰² See Shoaib A. Ghias, “Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharaf,” *Law & Social Policy: Journal of the American Bar Foundation* 35, no. 4 (2010): 985- 990, 992-1020.

¹⁴⁰³ See Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan: The legal and socio-political aspects* (New York: Routledge, Taylor & Francis Group, 2015), 216-217: “implies the connotation of ‘*judicial expansion*’ to indicate an unprecedented growth of public interest litigations and suo motu actions not only by the J. Iftikhar’s court room but by the Apex court as a whole as well as high courts in the matters which were otherwise meant to be specific for legislative or executive domains in Pakistan.”

¹⁴⁰⁴ See Osama Siddique, “*The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers’ Movement*,” in *Unstable Constitutionalism: Law and Politics in South Asia*, eds. Mark Tushnet and Madhav Khosla (New York: Cambridge University Press, 2015), 168-190: “The terminology of “*mega politics*” is devised owing to an overemphasis of the court on political questions rather than legal questions amid the adjudications of political controversies.”

country.¹⁴⁰⁵ Hence the apparent crisis of legitimacy for J. Iftikhar's activism in Pakistan seems to be grounded on the following core reasons. As unlike J. Bhagwati he has been more concerned to public policy issues than human rights concerns of the vulnerable segment of society.¹⁴⁰⁶ Then owing to Musharaf's marginalization of main stream political parties from national politics the forum of public interest litigation has been relied for political wrangling by core political actors of the country.¹⁴⁰⁷ And lastly in a deep contrast to Indian experience the apex court in Pakistan has ignored the instrument of legal pluralism for monitoring of its directions either in public policy or in human right domains. Therefore an absence of third party vigilance and monitoring mechanism has diminished the essence of rights centric public interest litigations in Pakistan. As J. Bhagwati illustrates, "*modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice.*"¹⁴⁰⁸ Resultantly the post Iftikhar Era is again centering towards the doctrine of separation of power and judicial restrains especially for political questions in Pakistan.¹⁴⁰⁹

¹⁴⁰⁵ See Martin Lau, "*Judicial Politics of the Chaudhry Court: The Chaudhry Court: A Rule of Law or Judicialization of Politics,*" in *The Politics and Jurisprudence of the Chaudhry Court: 2005-2013*, eds. Moeen H. Cheema and Ijaz Shafi Gilani (Karachi: Oxford University Press, 2015): 170-190: "argues that due to transitory impacts of the lawyer's movement the apex judiciary tried to involve in political questions which not only distorted apolitical context of the pure law but also instigated other branches to resist against such judicial expansions."

¹⁴⁰⁶ See Siddique, *Pakistan's Experience with Formal Law*, 23-25: employs a connotation of "*judging democracy*" for J. Iftikhar's activism.

¹⁴⁰⁷ See Barry Friedman, "The Politics of Judicial Review," *Texas Law Review* 84, no. 2 (2005): 260, 271-274, 292-295, 308-311: "argues that extra-legal political influence or indulgence in political controversies may distort the journey of Dworkin's Hercules to find out the right principle his adjudication process.;" Kashif Mahmood, "Politically Motivated Litigation," *Pakistan Law Journal* 7, (2013): 244-247.

¹⁴⁰⁸ See Bhagwati, *Justice*, 64.

¹⁴⁰⁹ See Zafer Iqbal Hafiz, Naeema Sadaf, Zarina Iqbal, and Farkhanda Zia Mansoor, "Contours of the Supreme Court Judgement in 21st Constitutional Amendment and Pakistan Army (Amendment) Act 2015 Case: Implication for Criminal Justice System in Pakistan," *Journal of Law and Society* 46, no. 66 (2015): 70-80; *District Bar Association, Rawalpindi and others v. Federation of Pakistan*, PLD 2015 SC 401, 500-700: As majority's views explicitly tending towards the scheme of separation of power.

Hence to avoid the controversies like “*judicialization of politics*” study yields to another aspect of Dworkin’s “*constructive process*” which requires to be elaborated amid his journey of the “*vertical continuity*.” As his entire judicial law making process is focused on a contrarian society in which “*collective conception of justice*” and popular legitimacy of a unanimous “*political integrity*” is conditional to achieve constitutional cohesiveness. However if in any case such “*collective conception of justice*” is divided or distorted in an egalitarian or merely “*de facto*” yet polarized society which just happens together due to geopolitical reasons.¹⁴¹⁰ Similarly if it is a “*rule book*” society with least popular legitimacy for legal system as its “*gravitational pull*” of ratios only expounds stringent obligations. Likewise if a constitution of the state regardless to nomenclature of society is either full of “*embedded mistakes*” or “*extra-legal prerogatives*.” Then, Dworkin’s judge resort to last phase of the interpretive process in which he focuses on the common law and international law to extract “*law as integrity*” for the “*life of law*” in his country.¹⁴¹¹ Since Dworkin employs the term “*any adequate theory*” which denotes that this last resort is devised for a universal application to protect rights.¹⁴¹² Moreover this method is also conducive to materialize an “*abstract*” yet a “*crucial*” right such as the application of humanitarian law protections during internal armed conflicts regardless to the kinds of respective judicial systems.¹⁴¹³ Because even the Common Article 3 seems to depend upon

¹⁴¹⁰ See e.g. into Dworkin, “Hard”: 1104-1109; Peerenboom, “Coup”: 103, 105-111; Crowe, “Value of Integrity”: 170-178.

¹⁴¹¹ See Peerenboom, “Coup”: 112.

¹⁴¹² See Dworkin, “Hard”: 1070.

¹⁴¹³ See Jelena Pejic, “The Protective Scope of Common Article 3: more than meets the eye,” *International Review of the Red Cross* 93, no. 881 (2011): 211-214; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2004), 203-208; Crow, “Value of Integrity”: 178-179; Dworkin, *Taking Rights Seriously*, 221-222; Dworkin, “Hard”: 1098-1101.

institution of the state's judiciary not only to provide right to fair trial but also to ensure protection of core human rights values during administrative detentions.¹⁴¹⁴ Yet on thing is pertinent about such application as Moir indicates that humanitarian law especially during internal conflicts is only a partial morality. As it requires either compatible statutes or requires the modus operandi of constitutional fundamental guarantees under human rights regime to be able to dispense protections to '*protected*' persons.¹⁴¹⁵ Resultantly the emptiness and gaps of humanitarian law are dependent upon judicial organ of the respective states to achieve completeness.¹⁴¹⁶ And for Pound these moralities constitute merely "*raw materials for change*" until are taken in to consideration either by the legislature or judiciary to be qualified as "*legal rights.*"¹⁴¹⁷ Hence on the one hand abstractness of humanitarian law requires human rights which further require liberal and expanded judicial interpretations especially for enemy aliens and unlawful combatants. And on the other hand the abstractness of the right to fair trial of these classes requires an adoption of core humanitarian principles in national jurisdictions.¹⁴¹⁸

¹⁴¹⁴ See Jelena Pejic, "Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence," *International Review of the Red Cross* 87, no. 858 (2005): 380-391.

¹⁴¹⁵ See Moir, *Internal Armed Conflict*, 232, 243-250; Pejic, "Common Article 3": 222-223; also in Jean S. Pictet, comp., *The Geneva Conventions of 12 August, 1949 Commentary: IV Geneva Convention Relative to the Protection of Civilian Person in Time of War* (Geneva: International Committee of the Red Cross, 1958), 45-50: Article 4 for a definition of protected persons which includes, "women, children, noncombatant neutral civilians who have no direct participation in the armed conflict [here the direct participation means the active combat in relation to internal armed conflict], Prisoner of War, Administratively interned/ detained civilians and other Sick, wounded and shipwrecked combatants in the hand of adversary party to the conflict and humanitarian workers." Yet interestingly the hors de combat of the armed group are not entitled as protected person under this article as it illustrates, "Nationals of a State which is not bound by the Convention are not protected by it." Since neither the belligerent of the state nor the non-state enemy aliens are bound by this convention thence they upon their arrest as POWs or being sick or wounded they are not entitled for such protections."

¹⁴¹⁶ See Pejic, "Common Article 3": 203-207.

¹⁴¹⁷ See Cotterrell, *Jurisprudence*, 154-155.

¹⁴¹⁸ See Moir, *Internal Armed Conflict*, 193-197.

But then the question is that what are the touchstones of this ‘*specific adoption*’,¹⁴¹⁹ and whether it has some relevance to Pakistan? As J. Jawwad indicates that in spite of the academic and practical significance of foreign theories and jurisprudences in their respective jurisdictions, indigenous popular conception of justice is more prudent than rest of them.¹⁴²⁰ However instantaneously he indicates that instead of the partial relevance of the social contract theory in USA and India only in Pakistan it is truly applied through the virtues of the objective resolution. If it is true then, it forms the political theory of Pakistan, yet Binder indicates that it is not as such.¹⁴²¹ As he claims that objective resolution was not a consensual document, rather it had encountered many conflicting views during its drafting process. It was mainly among the approaches of, “*traditionalist ulamas, modernist approach of political class [disciples of Allama Iqbal for whom parliament was an institution for Ijma, Qiyas and Ijtehad], fundamentalist Jamat-e-Islami and secular westerns.*”¹⁴²² They had differences over conception of sovereignty, nomenclature of representation and parliament and style of governance. Likewise they had conflicting views over the citizenship especially for minorities in a perceived Islamic state, adoption of sharia laws and gradual transformation of domestic laws in consonance with Islamic laws. However Binder argues ahead that all of them were unanimous over the issue of protection of fundamental grantees, socio economic justice and independence of judiciary to dispense impartial

¹⁴¹⁹ See *Union of India v. J. N. Sinha*, AIR 1971 SC 40, quoted in *Smt. Maneka Ghandi v. Union of India* and another, AIR 1978 SC 597, 689: “ Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental Rights. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it.” Hence incorporation of the International law in to territorial jurisdictions of the State to expand constitutional guarantees is conducive to natural justice.

¹⁴²⁰ See PLD 2015 SC 401, 540-541: “the limited usefulness of foreign theories and theories of political philosophy”

¹⁴²¹ *Ibid.*, 541.

¹⁴²² See in Binder, *Religion and Politics in Pakistan*, 10-25, 34-44, 70-80, 142-152.

justice.¹⁴²³ Cornelius identifies such connotation as the “*liberal interpretation of Islamic laws*” and advocates for a strict adherence to rule of law through courts to protect basic rights of all citizens.¹⁴²⁴

But then the issue is that law and especially criminal law of Pakistan is itself stringent under its colonial legacy.¹⁴²⁵ Owing to which Cornelius’s connotation of the rule of law has been perceived as the tyranny of law and hegemony of an “*Anglophone*” class by some rights centered lawyers.¹⁴²⁶ However at this juncture Khadduri’s conception of Islamic justice seems to resolve this dilemma of the rule of law and its negative externalities on personal and civil liberties.¹⁴²⁷ Since his connotation of “*nomocracy*” as being different from theocracy offers a kind of universal protection to all human through judicial guarantees. Such universality is based upon an adherence to Divine injunctions of the Quran for the protection of entire humanity in all circumstance regardless of war or peace.¹⁴²⁸ Besides it is compatible with the phraseology of the Common Article 3 which states, “*shall in all circumstance be treated humanely.*”¹⁴²⁹ If Khadduri’s inference is

¹⁴²³ Ibid., 153-154, 181, 219-231: The most debatable among many is the difference upon an incorporation of enabling clause in the draft of Objective Resolution. As it states in its preambular, “*Wherein the Muslim shall be enabled to order their lives in the in the individual and collective spheres-----*.” While the seculars have pleaded that it is a deliberate attempt to impose religion on an egalitarian contractual society, whereas others three core groups have judged this clause inconformity with the doctrine of two nation theory.

¹⁴²⁴ See in Clark Lombardi, "Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan," *University of St. Thomas Law Journal* 7, Issue. 3 (2010): 652, 669-675: “Discusses the role of a non-Muslim judge, J. A.R. Cornelius for an augmentation of the rule of law and protection of rights in Pakistan.”

¹⁴²⁵ Ibid., 678.

¹⁴²⁶ Ibid., 654.

¹⁴²⁷ See Majid Khadduri, *The Islamic Concept of Justice* (Baltimore: Johns Hopkins University Press, 1984), 1-6, 811, 97-101.

¹⁴²⁸ See Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), 14-18.

¹⁴²⁹ See Pejic, “Common Article 3”: 197-198, 205-206; Moir, *Internal Armed Conflict*, 30, 58-63.

analyzed in the light of first preambular of Objective Resolution and Preamble of the Constitution of Pakistan, 1973, and further judged through J. Jawwad's dictum and Binder's view then the following seems appropriate.¹⁴³⁰ Since dispensation of justice through independent judiciary for protection of core human right guarantees appears as unanimous "*political integrity/ theory*" of Pakistan.

Such connotation in conjunction with Moir's opinion that humanitarian and human rights laws complement each other during internal armed conflict¹⁴³¹ leads the higher judiciary of Pakistan to Dworkin's last vertical order of "*interpretive*" stage. As the later asserts that in case of an adoption of principles from common law judges should construct such a constitutional theory which not only gives the local laws a life but also get justification from the political integrity of the state. In this scenario judicial dictums to sustain the right to fair trial for every class of offenders¹⁴³² along with the probability of judicial oversight over military tribunals¹⁴³³ would contemplates Dworkin's thesis. Similar can be accomplished in case of administrative detentions if the writ prerogatives would be extended up to the internment centers established under Actions (in Aid of Civil Power)

¹⁴³⁰ See National Assembly of Pakistan, comp., *The Constitution of the Islamic Republic of Pakistan: as modified up to 28 February, 2012* (Islamabad: National Assembly Secretariat, 2012), 1-3: "—sovereignty over the entire Universe belongs to Almighty Allah alone---authority to be exercised --within the limits prescribed by Him--."

¹⁴³¹ See Moir, *Armed Conflict*, 193-210, 276.

¹⁴³² See Pejic, "Common ": 214: has given procedural safeguards for internments as well as parameters of the right to fair trial which are common not only in human rights but also in humanitarian law . Hence the terminology of "*judicial guarantees*" as employed in the Common Article 3 of all the four GCs is synonymous to right to fair trial and becomes a contingency point between IHR and IHL.

¹⁴³³ See Richard M. Pious, *The War on Terrorism and the Rule of Law* (Los Angeles: Roxbury Publishing Company, 2006), 224, 233-236: analysis the *Hamadan v. Rumsfeld*, 344 F. Supp. 2d 152 2004-Dist. and indicates that judicial oversight of military tribunals in relation to trials of civilians is mandatory to establish rule of law. Because such proceedings are mainly based upon classified materials and lack an opportunity of cross examination of witness.

Regulation, 2011 in FATA/PATA. Such probability also seemingly align with Hart's judicial discretions amid the "open texture" of armed conflict in FATA/ PATA and waging war and insurrections in the settled areas of Pakistan. Since the Khadduri's thesis of "nomocracy" may serves as a primary norm in Pakistan to protect the 'bare minimum.' Accordingly Dworkin's last category of interpretive stage with his "weak thesis" can be visualized in the *Haji Lal* case in which court has extensively relied upon the dictums of common law along with the international bill of rights. It is to protect fundamental rights and to explain the abstractness of public nuisance amid this "hard case." As deals with a novel occurrence of blockage of road to disrupt NATO supplies to Afghanistan owing to a sit in protest of the *Pakistan Tehrik-e- Insaf* against indiscriminate US Drones strikes in tribal areas of Pakistan.¹⁴³⁴ Then minority views in the *Rawalpindi Bar* case formulate yet a "strong thesis" in the "interpretive stage" to assert judicial oversight over the proceedings of military tribunals in Pakistan especially during trial of insurrectionists and terrorists.¹⁴³⁵

¹⁴³⁴ See *Haji Lal Muhammad v. Federation of Pakistan*, PLD 2014 Peshawar 199: "combination of Art. 4, 9, 16, 17, 18, 19, 23, 24, 25, 199 of the constitution of Pakistan, 1973 is coupled with Art. 20" right to freedom of peaceful assembly and association " and 29 (2) "In the exercise of his rights and freedoms, everyone shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others of morality, public order and the general welfare in a democratic society" of the UDHR, 1948 along with dictums of *Harrison v. Duke of Rutland*, 1893 QB CA 142, 154; *Lowden's v. Keaveney*, 2 IR 82 1903; *Hubbard v. Pitt's*, 1976 QB 142; *Nagy v. Weston*, 1 All ER 78 IWR 1965, 280; *De Jonge v. Oregon*, 1937 299 US 353; *Yates v. US*, 1956 354 US 298."

¹⁴³⁵ See PLD 2014 SC 401: "A combination of the Preamble, Art. 2A, 4, 9, 14, 25 and 184(3) is coupled with all the Four Geneva Conventions, 1949 and core guarantees of UDHR, 1948 along with dictums of *Ex Parte Milligan*, 71 US 281 (1866), 71-122, 131: "Since identifies three core types of military proceeding as one relates to the disciplinary measures of armed personal in relation to their active services irrespective to war or peace situation. The second deals with the trial of POWs during international war and the third deals with the trials of belligerents/ insurrectionists during civil war. It has been observed in this case the amid the last category of military proceedings authorities had cross its constitutional limits to suppress dissents"; *Ex Parte Quirin*, 317 US 1, (1942); *Hamdi v. Rumsfeld*, 542 US 507 2004: "Though acknowledges the executive prerogative to detain a person under administrative/ preventive detentions however it has been observed that procedural fairness must be ascertained by all means."

A similar formulation is resorted in the *Foundation for Fundamental Rights* case in which court has extensively relied upon international human rights, humanitarian and criminal law to protect fundamental guarantees in a novel situation of conflict. In such a hard case court enters in to highly controversial domain and discusses the legal contours of indiscriminate Drone strikes in FATA especially in North and South Waziristan. Court considers such strikes as an external aggression on Pakistan owing to which it resorts to Geneva Conventions Additional Protocol, 1 of 1977 of which Pakistan and US both are signatories. Through the help of UN Resolutions, Common Article 3 of GCs, International Bill of Rights, and Constitution it declares that the signature Drone strikes cause impressions which results in to grave breaches of human and humanitarian law.¹⁴³⁶ The court even perceives the non- state actors as “*person*” and declares that state is obliged to protect lives of all ‘*persons*’ under its territorial jurisdiction. For such connotation it combines international humanitarian and human rights law with constitutional guarantees for the right to life of protected persons in FATA. Further it coincides with Zakaria that Drones centered causalities do not only mean the loss of human lives but also cover the destruction of homes, livestock’s and other means of subsistence of the residents.¹⁴³⁷ Resultantly perceives these dazing strikes as genocide in the peacetime and war crimes during conflict. Yet the court’s formulation amid the “*interpretive stage*” is interesting in two different contexts. As firstly it attempts to protect core human rights during high

¹⁴³⁶ See Shah, *International Law and Drone Strikes in Pakistan*, 211, 215.

¹⁴³⁷ See Rafia Zakaria, “*The Myth of Precision: Human Rights, Drones, and the Case of Pakistan*,” in *Drones and Future of Armed Conflict: Ethical, Legal, and Strategic Implications*, eds. David Cortright, Rachel Fairhurst and Kristen Wall (Chicago: The University of Chicago Press, 2015), 209-214.

intensity conflict and intervenes even in to political question like foreign affairs.¹⁴³⁸ It not only transgresses its conventional bar as incorporated in Article 247(7) and extends writ jurisdiction of high courts in to FATA. But also directs armed forces through federal government to take remedial measures to curb the international aggression of drone's strikes under Article 245(1) of the Constitution, 1973.¹⁴³⁹ Shah indicates that for such directives court relies upon the concept of state's tortious obligation to protect its citizens. He further indicates that the court under criminal law paradigms perceives drones strikes as felonies by the alien forces. Accordingly it declares the state responsible under the tortious principles of duty to care and strict liability to guard its airspace.¹⁴⁴⁰ Then as per the second context, court relies upon the Art.4 (2) (a) in such a manner that drone attacks come under the ambit of domestic laws, owing to which a high court could take notice of these strikes.¹⁴⁴¹ Thence indicates a continuity of the "*concrete rights*" like right to life with dignity in Pakistan in all situations irrespective to peace or conflict. Besides affirmatively satisfies a Munir's quest as inquires "*how right is Dworkin's right answer?*" in a manner

¹⁴³⁸ See Shah, *Drone Strikes*, 215-216.

¹⁴³⁹ See National Assembly of Pakistan, comp., *The Constitution of the Islamic Republic of Pakistan: as modified up to 28 February, 2012* (Islamabad: National Assembly Secretariat, 2012), 145-147: Art. 245 Functions of Armed Forces- (1)" The Armed forces shall, under the directions of the federal Government, defend Pakistan against external aggression and threat of war" and Art.247: Administration of Tribal Areas---(7): "Neither the Supreme Court nor High Court shall exercise jurisdiction under the Constitution in relation to a Tribal Area-----."

¹⁴⁴⁰ See Shah, *Drone Strikes*, 211-214, 217-218: Akin to the *M.C. Metha* case, court declares the State absolutely and strictly liable not only to its citizens but also to all legal and natural persons which happen to be under its territorial jurisdictions.

¹⁴⁴¹ See Assembly, comp., *Constitution*, 4: Art.4 (2) (a): "no action detrimental to the life, liberty, body—or property of any '*person*' [according to *Foundation for Fundamental Rights* case even the remnants of Al-Qaida along with the entire population of FATA if not involved in the active combat at the time of strikes] shall be taken except in accordance with law [here law means domestic general and special laws applicable as such in FATA]."

that latter's "*right answer through law as integrity*" has potentials to protect rights even amid armed conflicts.¹⁴⁴²

Therefore in the light of above mentioned discussions study attempts to deal with another core issue as identified in the course of this research. It questions the utility of '*due process of law*' under Article 4 of the constitution, 1973, especially when the '*law*' itself is not compatible with fundamental right during armed crisis? It is mostly when human rights regime loses its efficacy to function as law of armed conflicts in Pakistan owing to retributive behaviors of domestic criminal laws. To cure this constitutional issue study indicates that instead of this Article, *Objective Resolution* under Art.2A as '*political integrity*' extends its safeguards to bring '*law as integrity*' in Pakistan. As its unanimous dicta '*dispensation of justice through independent judiciary*' leads to Dworkin's "*strong thesis*" to protect core human rights values through writ prerogatives during hostilities. But if the crisis is less than armed conflict and human rights regime also remains intact, even

¹⁴⁴² See in *Foundation for Fundamental Rights v. Federation of Pakistan and 4 others*, PLD 2013 Peshawar 94, 95-101: A combination of Art.4 (2) (a) + 9+ 199 is linked with Article 245(1) of the constitution to issue writ of mandamus and is mingled with the followings. The U.N. General Assembly Resolution No. 2625 (XXV)-Declaration of Principles of International Law Concerning Friendly Relation, Article 3: "protection of war victims" and Article 51-Protection of civilian population- (5) (b): "An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated," Article 52: General protections of civilian objects-(1): "Civilian objects shall not be the object of attack or of reprisals" and (2): "Attacks shall be limited strictly to military objectives" of the additional Protocol I of the Geneva Conventions, 1977, Common Article 3 of all the four Geneva Conventions, 1949, Article 6(1) of the ICCPR, 1966: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life," and Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish) Accordingly court observes, "[absolute] Killing was never the sole objective of an operation as was the case in the drone strikes being carried out in the territory of Pakistan"; also in Munir, "Integrity": 5-25; Dworkin, *Taking Rights Seriously*, 216: as indicates that 'there is always a right answer', since "*always*" is a generalized connotation and covers all kinds of circumstances either sever law and order crisis, proclamation of emergencies or internal armed conflicts.

then the previous modus is effective only up to a conjunction of Art.2A with Art.4 to neutralize stringent criminal laws through Dworkin's "*weak thesis*."

Similarly, if constitutional guarantees are exclusively restrained by the act of parliament under positivist's paradigm of "*rule book community*", and the entire legal system leads to Hart's "*open texture*." Then the same Art.2A as '*primary norm*' enshrines '*justice through independent judiciary*' with potentials to maintain '*bare minimum*' through judicial review of administrative actions.¹⁴⁴³ It is mainly to sustain a threshold of natural justice during administrative actions as court observes, "the rigid view that principles of natural justice applied only to judicial and quasi-judicial acts and not to administrative acts no longer hold the field."¹⁴⁴⁴ And above all Khadduri's "*nomocracy*" as being a Divine imperative for protection of civilians during armed conflict ascertains judicial role to protect the "*bare minimum*" during armed conflicts.¹⁴⁴⁵ Yet Moir indicates ahead that to promote a culture of '*humane treatment*' in all circumstances there is a dire need to disseminate core provisions of Common Article 3 in national jurisdictions under the GC IV.¹⁴⁴⁶ Melander supports his argument and indicates that appropriate legislations for prevention of custodial

¹⁴⁴³ See Moir, *Armed Conflict*, 205-208: As apparently the modus of judicial guarantees seems only the institution of judicial review of administrative action.

¹⁴⁴⁴ See *Smt. Maneka Ghandi v. Union of India* and another, AIR 1978 SC 597, 690.

¹⁴⁴⁵ See Khadduri, *War and Peace in the Law of Islam*, 16-18, 34-41, 102-107.

¹⁴⁴⁶ See Moir, *Armed Conflict*, 243: "indicates that a combination of following provisions of GC-IV requires dissemination of humanitarian guarantees in national jurisdiction. It includes Art. 47(Inviolability of rights) Art.48(Special cases of repatriation under Article 35 of the same Convention under which it is right of the protected person to leave a territory of armed conflict), Art. 127(due care of internees in internment centers and their likely transfer in other safe places) and Art. 148(Dissemination of Convention) of the Genève Convention IV-Relative to Protection of Civilian Person in time of War of August, 1949."

torture and inhumane treatment would serve this purpose both in peace and in conflict.¹⁴⁴⁷ As evident from emerging jurisprudence of prevention against torture which declares it an *absolute right* both in human rights and in humanitarian regimes. Accordingly serves as ‘*bare minimum*’ for ‘*humanely treatment*’ not only under constitutional frameworks but also under the *Common Article 3*.¹⁴⁴⁸ The same may rationalized domestically by assimilating constitutional guarantees like right to life, dignity, and right to fair trial with International bill of rights and Geneva Conventions. Though it has been realized in many judicial pronouncements of, Pakistan yet mainly depends upon appropriate legislative response for its practicality.¹⁴⁴⁹

But then, whether legislative domain and pragmatic statutory instrument are mandatory for dispensation of justice in society? Baxi affirmatively illustrate that justice being an outcome of “*culture of law*” or rule of law is based upon socially legitimate legal system of the state.¹⁴⁵⁰ Since culture denotes here the common shared values of a society, hence ‘*culture of law*’ signifies a shared common sense and values of a given society. Resultantly threshold of justice depend upon thresholds of social legitimacy and utility of particular legal system. He identifies the latter as “*accommodative legal culture*” emerges from a

¹⁴⁴⁷ See Goran Melander, “*Torture Education During Military Services*,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC, 1984), 411, quoted in Moir, *Armed Conflict*, 244.

¹⁴⁴⁸ See Pejic, “Common”: 215.

¹⁴⁴⁹ See Sadurski, “Judicial Review and the Protection of Constitutional Rights”: 298: indicates that emerging trends of judicial review effect legislative behaviors to achieve desired policy objectives; Chamaine Amir Enerva and Kashif Mahmood, “National Implementation of Humanitarian Law and Guarantees,” *Parliamentary Research Digest* 3, Issue. 1 (2016): 22-24.

¹⁴⁵⁰ See Upendra Baxi, “*The Conflicting Conceptions of Legal Cultures and the Conflict of Legal Cultures*,” in *Rechtstheorie: Monistic or Pluralistic Legal Culture? Anthropological and Ethnological Foundations of Traditional and Modern Legal Systems*, eds. Peter Sack, Carl P. Wellman and Mitsukuni Yasaki (Berlin: Duncker & Humblot, 1991), 270-275.

deliberate compromise among primordial or conquered ‘*residual*’ values, established ‘*dominant*’ values and reformative ‘*emerging*’ values.¹⁴⁵¹ Like Chiba, he argues ahead that conflict of laws and ideologically motivated violence against state and government emancipate from competing claims of political authority of these values over territory and population.¹⁴⁵² Subsequently indicates that synthesis of ‘*residual*’ and ‘*emerging*’ values defies the legitimacy of ‘*dominant legal culture*’ if it ever attempts to subdue core religious, traditional and cultural norms of societies.¹⁴⁵³ Unlike positivist’s monism and apparent secularity of western law he emphasizes on the multiplicity of legal sources to attain pragmatic “*people’s law*” in accordance with individuality of states identified by Chiba as “*identity postulate of each legal culture.*”¹⁴⁵⁴ Chiba for this purpose focuses on the ‘*tolerated*’ or insolated socio-cultural practices identified as ‘*informal minor law,*’ policy oriented secular state law and conventions based ‘*trans-state*’ international law under ‘*legal pluralism.*’¹⁴⁵⁵ It is because that in a deep contrast to imposed alien rules Asian society may not only develop intimacy for ‘*people’s law*’ but also practice it with an ‘*internal obligation.*’¹⁴⁵⁶ It seems that a mere literal application of universal, secular, state centric rules cannot comprehend socio-cultural subjectivities of non-Western societies and require inclusions of core local values in their legal systems. Though Baxi and Chiba both locate the issue of *conflict of laws* and provide a generalized jurisprudential remedy to

¹⁴⁵¹ Ibid., 276-278.

¹⁴⁵² Ibid., 279-281; Masaji Chiba, “Legal Pluralism in Sri Lankan Society: Towards a General Theory of Non-Western Law,” *Journal of Legal Pluralism*, nr.33 (1993): 197-200.

¹⁴⁵³ See Baxi, *The Conflicting Conceptions*, 276-278; Masaji Chiba, “Other Phases of Legal Pluralism in the Contemporary World,” *Ratio Juris: Legal Pluralism in the Contemporary World* 11, no. 3 (1998): 240-241.

¹⁴⁵⁴ See Chiba, *Other Phases of Legal Pluralism*: 234.

¹⁴⁵⁵ Ibid., 235, 241-242.

¹⁴⁵⁶ See Ibid., 238- 239; Hart, *Concept*, 91-92.

address multiplicities of legal sources, yet unable to specify institutional responsibility in this context. Resultantly legislative postulates offer their vibrancies to not only accommodate ‘*trans-state*’ impulses like international conventions but also ‘*sub-state socio legal entities*’ like local norms and communal methods of mediation through ‘*legal pluralism*.’¹⁴⁵⁷

Yet another quest arises now that whether multiplicities of legal sources is only an oriental phenomenon? Veitch et al., observes under critical legal theory that inability of state law to address numerous social behaviors like domestic violence reveals that multiplicity of informal socio-legal entities also exist in the western civilization.¹⁴⁵⁸ Thence under Weberian doctrine identifies these contesting sources of political authority in to four core categories. These include ‘*informal-irrational*’ as tribal or racial values and cultural norms, ‘*formal-irrational*’ as religious beliefs and dictums, ‘*informal-rational*’ as administrative exceptions or discretions and ‘*formal-rational*’ as contemporary legislative process.¹⁴⁵⁹ And explains further that owing to such multiplicities the western legal system has evolved into ‘*liberal*’, ‘*post liberal*’ and ‘*neo liberal*’ paradigms. While ‘*liberal*’ denotes a minimalist state under laissez-faire doctrine whereas ‘*post liberal*’ signifies a maximalist state to regulate and govern in the pretext of larger public interest and good governance. Similarly under ‘*post liberalism*’ judiciary may transcend upon doctrine of separation of

¹⁴⁵⁷ See Chiba, Other Phases: 228, 242; Baxi, *Conflicting Conceptions*, 267, 270-271.

¹⁴⁵⁸ See Scott Veitch, Emiliios Christodoulidis, and Lindsay Farmer, *Jurisprudence: Themes and Concepts* (New York: Routledge, Taylor & Francis Group, 2012), 252.

¹⁴⁵⁹ *Ibid.*, 225-226.

power to protect public interest and civil liberties mostly through legal realism.¹⁴⁶⁰ Barber recognizes it as pragmatic tool to minimize discrepancies between communal demands, factual concerns and legislative intents with pluralistic perspectives. Since realism and pluralism are analogous expressions for him to give the law a new life and meanings either through adjudication or societal interface.¹⁴⁶¹ Then owing to socio-economic globalization patterns and expanding jurisprudence of international human rights, the minimalist ‘*neo-liberal*’ phase is resurfacing in Europe. Yet it is with sheer legislative obligations to accommodate immigrant’s plurality and multiculturalism through legal pluralism without compromising the national distinctiveness.¹⁴⁶² Nevertheless, the contemporary jurisprudential challenge is that how to incorporate these ‘*socio-legal*’ entities to address conflicts of identities and ideologies especially when they have least or absolutely nil parliamentary representation?

Accordingly like Pound’s ‘*social engineering*’¹⁴⁶³ Menski devises a jurisprudential model to accommodate ‘*tolerated diversities*’ to deal with conflicts of identity. His “*kite model of legislation*” attempts to align centrifugal legal sources and ideologies like divine commandments or natural law dicta, communal or tribal mechanisms of dispute

¹⁴⁶⁰ Ibid., 235-241.

¹⁴⁶¹ See N. W. Barber, "Legal Realism, Pluralism and Their Challengers," *Legal Research Papers Series: University of Oxford*, paper no. 76 (2012): 2-3, 17-18, 20.

¹⁴⁶² See Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006), 599-606; Gad Barzilai, "Beyond Relativism: Where is Political Power?," *Theoretical Inquires in Law* 9, no.2 (2008): 396-399, 405-406, 410; Veitch, *Jurisprudence*, 253-254; Kashif Mahmood, "Integrated /Hybrid Model of Legislative Drafting: Impact of Policy Research on Legislative Drafting," *Parliamentary Research Digest* 3, no. 7 (2016): 14-16.

¹⁴⁶³ See Roscoe Pound, *An Introduction to the Philosophy of Law* (Delhi, India: Universal Law Publishing Co Pvt Ltd under special arrangement with Yale University Press, 2006), 47.

resolutions, socio-cultural values, international human rights law along with other supra-national covenants as well as policy oriented state laws.¹⁴⁶⁴ It is mainly to craft socially unanimous and just legal principles especially for those countries which have crises of national identities and socio-political polarizations.¹⁴⁶⁵ As Ahmed indicates for India and Pakistan that former is suffering from ethno-religious and class conflicts whereas later is having intra-religious contestations over interpretations of *Sharia*.¹⁴⁶⁶ Subsequently Menski contextualizes his model in Pakistan and indicates, “*there remains much need for plurality-conscious management of competing pulls--between four corner of the legal kite namely traditional shari’a law as natural law, the socio-cultural normative systems of local societies-riwaj, the state and its various manifestation of qanun[law],--international law and human rights as new natural law.*”¹⁴⁶⁷ But despite of probable utility of such ‘*plurality management*’ he also recognizes the complexity involves in this entire jurisprudential process through an expression of “*flying kites in turbulent airs.*” As he argues that majoritarian impulses, radicalization of ideologies, national security concerns, regional or global environments and doctrine of public importance or necessity may influence this proposed jurisprudential equilibrium.¹⁴⁶⁸ Consequently to maintain pluralistic balance and to neutralize socio-political pulls he implicitly relies upon Dworkin’s ‘*political integrity*’ thesis not only to construct but also to preserve a holistic ‘*identity postulate*’ for

¹⁴⁶⁴ See Menski, *Comparative Law*, 184-190, 609-612; Werner Menski, “Flying Kites in Pakistan: Turbulence in Theory and Practice,” *Journal of Law and Social Research* 1, no.1 (2010): 46, 50, 52-54.

¹⁴⁶⁵ See Menski, *Flying Kites*: 44; Menski, *Comparative Law*, 596, 606-608, 613: “--*the law of law is that law is just law-*”

¹⁴⁶⁶ See Akbar S. Ahmed, *Jinnah, Pakistan and Islamic Identity: The Search for Saladin* (New York: Routledge Taylor & Francis Group, 1997), 188-189.

¹⁴⁶⁷ See Menski, *Flying Kites*: 51-52.

¹⁴⁶⁸ *Ibid.*, 42-44, 48-49.

Pakistan. And like Khadduri's 'nomocracy' his proposed 'primary rule' or 'basic norm' for Pakistan is practical application of "siyasa shariyya"[governance according to Islamic dicta], which come equally under judicial and legislative domains.¹⁴⁶⁹

Post Conflict Legislative Response to Human Rights Protections in Pakistan

Pound and Dworkin both indicate that judiciary and legislature complement each other to reduce social frictions and to achieve 'collective conception of justice' in contractarian societies.¹⁴⁷⁰ Yet this aspect is deliberated differently by Subotic to discuss the post-conflict *transitional* justice system of Bosnia and Serbia. Since core purpose of her study is to analyze performance of an ad-hoc International Criminal Tribunal for the former Yugoslavia as established to criminalize perpetrator of gross human rights violations. And akin to Moir that, "neither Common Article 3 nor Additional Protocol II in relation to internal armed conflicts has tangible enforcement mechanism."¹⁴⁷¹ She indicates ahead that such has not been done effectively yet slightly differs from Moir to reach this inference. While Moir

¹⁴⁶⁹ See Ibid., 41, 53, 55; Menski, *Comparative Law*, 80-90, 610.

¹⁴⁷⁰ See Pound, *Philosophy of Law*, 47; also in Cotterrell, *Jurisprudence*, 150-160, 162-165: "While legislature gives a practical guide whereas judiciary further explains it in accordance with the core legal values. But does how such practical guide come in to existence? Pound focuses on an integrated system of legislation and adjudication in which social scientist help to identify a core problem of a society which requires to be acknowledged in legislative or judicial forum. Similarly protest or reforms movements also serve this purpose to identify a core social issue to be heard in judicial forum owing to which Dworkin identifies Pound's judiciary as "instrumentalist" which may become vulnerable in the face of a specific political clout. Nevertheless Pound's social engineering has the following steps to achieve the ends of the law which are common in legislative and judicial process. 1): Identification of problem, 2) Analysis of the scope of the existing law to address the problem, 3): Weighing and balancing of conflicting interests which yet belong to the similar nomenclature like individual against individual, collective against collective and national verses national. 4): Legal and constitutional justification of an alternative course of action to minimize social frictions. 5): A likely transformation of policy inputs and moralities in legal rights.6) Pragmatic enforcement of such rights specifically through judiciary under the virtue of its custodianship of the "organic" legal principles"; Dworkin, "Hard": 1058-1059, 1064.

¹⁴⁷¹ See Moir, *Armed Conflict*, 232.

solely focuses on the state and its organs for ‘*effective enforcement*’ of fundamental guarantees whereas Subotic concentrates on societal behaviors besides the state and its organs. She observes accordingly that on the hand mass atrocities are usually an outcome of social apathy to injustice and executive impunities. And on the other hand social indifference to national and international criminal justice system contribute to their ineffectiveness to criminalize the perpetrators. Owing to such impacts, societal attitude is considered as dominator and accomplice not only to regime’s atrocities but also to human rights abuses of armed groups.¹⁴⁷² Yet the question is that how can society assert its influence over these atrocities during pre and post crisis period? As she indicates ahead that autocratic and inefficacious criminal trials in transitional societies merely brings the victor’s retribution which enhances an existing polarization in society. Due to which a post conflict criminal justice system not only losses its utility but also proves counterproductive as only augment social fragmentation among ethnic communities. Subsequently she indicates that subjectivity of societal norms and expectations require some kind of legitimate agency to be qualified as an objective and clustered societal opinion. And for her such institutionalized agency is the parliament in which polarized perspectives not only get an opportunity of dialectical synthesis but also be recognized as legitimate social expressions. Owing to this competitive advantage, she prefers a pluralistic post conflict reformative legislative system, instead of an ‘*elite*’ retribution either through international institutions or through complex national criminal justice system.¹⁴⁷³

¹⁴⁷² See Jelena Subotic, “Expanding the scope of Post-conflict justice: Individual, state and societal responsibility for mass atrocity,” *Journal of Peace Research* 48, no. 2 (2011): 158; Moir, *Armed Conflict*, 125-127, 233-242, 276.

¹⁴⁷³ *Ibid.*, 159-160, 167.

Similarly, Salzberg discusses the vulnerability of international law and apathy of the UN to take affirmative actions to stop human rights violations during a separatist movement in the then East Pakistan in 1971. Accordingly indicates that the pretext of Article 2(7) of the UN Charter, 1945 that asserts a “nonintervention in the domestic affairs of the state” neutralizes the absoluteness of the international bill of rights. As neither the UN nor the International community can intervene until and unless a certain threshold of violence and sufferings occur in a territory of a member state. Owing to such structural void international humanitarian law losses its efficacy as it requires significant mayhem and human rights violations to be attracted. And even then it is ineffective to stop such bloodshed as happened in Pakistan in 1971 due to which an internal conflict transformed in to an international armed conflict.¹⁴⁷⁴ Owing to such indifference to internal disturbances, Cole identifies the international bill of rights as merely “*myth and ceremony.*” Subsequently requires affirmative legislative measures not only for domestic veneration of international law but also for ‘*collective conception of justice*’ in society.¹⁴⁷⁵ Moreover in spite of its legitimacy and legal rational authority¹⁴⁷⁶ even the court itself recognizes the limitations to dispense ‘*complete justice*’ if a legislative intent is requiring otherwise on a face of policy decision. Even though such policy decision lacks the moral strength yet owing doctrine of separation of power courts ought to acknowledge it under a

¹⁴⁷⁴ See John Salzberg, “UN Prevention of Human Rights Violations: The Bangladesh Case,” *International Organization* 27, no. 1 (1973): 115-116, 122-125.

¹⁴⁷⁵ See Wade M. Cole, “Human Rights as Myth and Ceremony? Reevaluating the effectiveness of Human Rights Treatise, 1981-2007,” *American Journal of Sociology* 117, no.4 (2012): 1131-1163-1163

¹⁴⁷⁶ See Sathe, *Judicial Activism in India*, 253.

“*technocratic model of judicial processes.*”¹⁴⁷⁷ As it observes, “if a statutory provision can be read consistently with the principles of natural justice, the court should do so. But if a statutory provision either specifically or by the necessary implication excludes the application of any rules of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority.”¹⁴⁷⁸ Accordingly by honoring such mandate Gies focuses on “*strong integration*” of universal rights in to national identities. It is mainly through awareness campaigns to provide policy inputs for likely legislations.¹⁴⁷⁹ It is the same process identified by Subotic as “*societal responsibility*” to increase a post conflict sociopolitical cohesion.¹⁴⁸⁰ And by Shinwari and Shah as “*legal pluralism*” to augment post-conflict restorative justice either through legislative process or through unconventional alternative dispute resolutions.¹⁴⁸¹ Yet it is pertinent to know at this juncture that how judiciary looks at the legislature’s mandate under its potential for constructive interpretations and how far it can go to implement constitutionalism in Pakistan. As it observes, “--- This does not mean that Principles of Policy, the Objective Resolution, and Article 2A either on their own or when read together can be used to strike down laws. All that it means is that these Articles can be used to understand and interpret the chapter on Fundamental rights in its proper context. This may facilitate an interpretation of Fundamental Rights in harmony with and not divorced from their constitutional

¹⁴⁷⁷ Ibid., 252, 254-257: “*Technocratic model*” as being contrary to judicial activism indicates an absolute observance of doctrine of separation of power in which courts apply the law in its literal sense without questioning the justness of the law.

¹⁴⁷⁸ See *Union of India v. J. N. Sinha*, AIR 1971 SC 40, quoted in *Smt. Maneka Gandhi v. Union of India and another*, AIR 1978 SC 597, 689.

¹⁴⁷⁹ See Lieve Gies, *Mediating Human Rights: Media, Culture and Human Rights Law* (New York: Routledge, Taylor & Francis Group, 2015), 27-34, 100-109.

¹⁴⁸⁰ See Subotic, “mass atrocity”: 166-167.

¹⁴⁸¹ See Naveed Ahmad Shinwari, *Understanding the Informal Justice System: Opportunities and Politics for Legal Pluralism in Pakistan* (Islamabad: Community Appraisal & Motivation Programme, 2015), 59-64, 196-200; Shah, *Drone Strikes*, 217-218: also coincides with Shinwari as indicates that “*Pushtunwali Code*” in conjunction with the domestic criminal law can be relied to minimize post conflict sociopolitical fragmentations.

setting.”¹⁴⁸² Hence this dictum indicates two core aspects. One, as has already been discussed above is that the utility of constructive interpretation mainly rests with the protection of rights in Pakistan. Second, that while remaining within the prescribed limits judiciary may provide policy inputs to the Legislature through judicial review for rights based legislations. As the court observes in the same case that, “court is not concerned with the prudence of the legislation but only with its constitutionality---Constitutions must be interpreted with an eye to the future –which requires legislative intervention.”¹⁴⁸³

Consequently let alone the *Mehram Ali* and *Jamat-i-Islami* cases which have positive impacts on legislative behavior with regards to subsequent amendments in the ATA, 1997 to ensure right to fair trial of terror accused.¹⁴⁸⁴ And *Sh. Liaquat* case due to which the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 has been declared void.¹⁴⁸⁵ The *Balochistan High Court Bar* case is significant as it has been declared in it that, “the word law used in Article 4 of the constitution includes all such principles as having binding force on account of moral, customary or other sociological reasons.”¹⁴⁸⁶ Hence such juristic dissemination in conjunction with Indian perceptive of the state’s tortious obligations to protect life and limb of citizens is employed by the Provincial Assembly of

¹⁴⁸² See *Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others*, 2015 SCMR 1739, 1759.

¹⁴⁸³ *Ibid.*, 1762, 1769.

¹⁴⁸⁴ See *Mehram Ali v. Federation of Pakistan*, PLD 1998 SC 1445; *Jamat-i- Islami v. Federation of Pakistan*, PLD 200 SC 111.

¹⁴⁸⁵ See *Sh. Liaquat Hussain and others v. Federation of Pakistan through ministry of Law, Justice and Parliamentary Affairs, Islamabad*, PLD 1999 SC 504.

¹⁴⁸⁶ See *President Balochistan High Court Bar Association v. Federation of Pakistan*, 2012 SCMR 1784.

Balochistan.¹⁴⁸⁷ Consequently it relies upon a common law principle of ‘*ubi jus ibi remedium*’¹⁴⁸⁸ for enactment of the Balochistan Civilian Victims of Terrorism (Relief and Rehabilitation) Act, 2014 under its contractual obligations. In spite of the fact that subject of external affairs and assimilation of international treaties in to national jurisdiction is a federal subject under entry no. 3 and 32 of Part I of the legislative lists.¹⁴⁸⁹ Yet by the virtue of clause (b) of the Article 142 of the constitution provincial assembly has enacted this statute apparently under a pretext of criminal law.¹⁴⁹⁰ It is not only in consonance with the general protections under Art.13-26 and means of existence for civilians under Art.39 of the GC-IV but also compatible with its Art.144 which asserts an analogical dissemination of this Convention.¹⁴⁹¹ Similarly it is aligned with Common Article 3 of all the GCs, 1949 to protect civilians amid a contemporary internal disturbance in Balochistan.¹⁴⁹² It is also harmonized with the UNSC Resolution 1265, 1999 in relation to protection of civilians in situations of armed conflict.¹⁴⁹³ As its preamble illustrates, “---

¹⁴⁸⁷ See in *Ashwani Gupta v. Government of India and others*, 2006 ACJ 1901, 117: “declares that under social contract doctrine the very basic want is security and safety of the individual person. Resultantly court directs the state to pay the monetary compensation to the terror victims under its tortious obligations.”; *Smt. Kamla Devi v. Government of NCT of Delhi*, 2004 (76) DRJ 739; *Shri Dilip K. Basu v. State of West Bengal and others*, (2003) 11 SCC 723.

¹⁴⁸⁸ See *Smt. Kamla Devi v. Government of NCT of Delhi*, 2004 (76) DRJ 739; Mohsin Abbas Syed (Legal Draftsman, Government of Punjab, Law and Parliamentary Affairs Department) in discussion with the author, January 2016: While for the drafting of this law his services were hired by the Provincial Assembly of Balochistan whereas these Indian judgments were consulted and relied by the drafter to conceive an idea of the State’s tortious and contractual obligations for the compensation of terror victims.

¹⁴⁸⁹ See Assembly, *Constitution*, 201, 203: “Entry No.3 of the Part I of the Federal Legislative List of the Fourth Schedule: “External affairs; the implementing of treaties and agreements,---.” And “Entry No.32: International treaties, conventions, and agreements----.”

¹⁴⁹⁰ *Ibid.*, 74: Art. 142(b): “Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.”

¹⁴⁹¹ See Jean S. Pictet, comp., *The Geneva Conventions of 12 August, 1949 Commentary: IV Geneva Convention Relative to the Protection of Civilian Person in Time of War* (Geneva: International Committee of the Red Cross, 1958), 118-197, 249-252, 580.

¹⁴⁹² *Ibid.*, 25-44: especially the clause 2 of the Article 3: “Wounded and sick shall be collected and cared for.”

¹⁴⁹³ See United Nations Security Council, “Protections of Civilians in situations of armed conflict as well as attacks on objects protected under international law,” *Distr. General S/ Res/ 1265 99-26794* (1999):1-5;

necessary to take measures for providing institutionalized response for relief and rehabilitation of civilian individuals and their families who fall victims of terrorist act--.”¹⁴⁹⁴

This law is significant in five contexts, since firstly it authoritatively recognizes an occurrence of high threshold of violence in Balochistan owing to which it emerges as a law of conflict.¹⁴⁹⁵ Secondly it recognizes the legal right of civilian victims to be cared, assisted and treated humanely in accordance with the core parameter of human rights and humanitarian law under Ss.3, 7 and 8 of the Act.¹⁴⁹⁶ It is mainly because of the definition of ‘civilian victim’ as incorporated in clause (b) of the S.2 of this Act which employs expression of ‘person’ instead of ‘citizen’. Accordingly, its scope can be extended to non-residents of Pakistan if are not involved in terrorist acts as well as to body corporates and other organizations such as NGO’s as involved in humanitarian assistance and other relief operations. Similarly, the connotation of ‘civilian victim’ in this clause has been liberally widened to include not only the spouse and siblings but also to include parents and other legal heirs in case of death of a natural person. Moreover alike Zakaria’s interpretation of

President Balochistan High Court Bar Association v. Federation of Pakistan, 2012 SCMR 1784; gives directions for protection of civilian victims in the wake of a sever law and order crisis in Balochistan.

¹⁴⁹⁴ See Provincial Assembly of Balochistan, “The Balochistan Civilian Victims of Terrorism (Relief and Rehabilitation) Act, 2014: Act No.4 of 2014,” *Baln Act IV of 2014*, 6/2/14, www.pabalochistan.gov.pk/index.php/acts/details/en/27/358 : 3.

¹⁴⁹⁵ *Ibid.*, 4: for Clause (I) of the Sec.2: “terrorist act- means an unlawful act using any explosive, weapon or any other means of force or show of force by a terrorist against a person or property to intimidate or coerce public, a section of public, the Government, Federal Government or any agency or authority of a Government in furtherance of political, sectarian violence and an armed conflict between a terrorist and a law enforcement agency.” And Clause (b) of subsection (1) of the Sec.6 of the Act: “bomb, explosive or inflammable substance, firearm or other means of force used in the terrorist act.”

¹⁴⁹⁶ *Ibid.*, 5-7: Subsection (1) of the S.3 of the Act: “--- a civilian victim shall be entitled to---grant specified--for the harm caused to body or property due to a terrorist act,” Sec.7: “ immediate free medical treatment of boldly and mental injury in public or private hospital.”, Sec.8: “to ensure subsistence rights Rehabilitation of civilian victim includes [(a): monthly grants, (b): “opportunities to free education or vocational training either to the victim along with his /her dependents or in case of death to his/her dependents and other family members,” (c): “ a continued free health care to victim and his/her family members”].”

'causalities' the connotation of 'harm' in it and in clause (e) of subsection 2 of the S.6 include both injuries to body as well as property.¹⁴⁹⁷ Besides it the former is further divided in to physical as well psychological harm in clause (f) of this section.¹⁴⁹⁸ Thirdly it not only covers the harm inflicted by the terrorist acts but also covers unintentional harms incurred to civilians in the wake of necessity during law enforcement operations.¹⁴⁹⁹

Then the fourth important context is that in spite of its relevance to terrorism and armed conflict the theoretical framework of this Act is based upon restorative rather than retributive justice. As mainly intends to diminish a post conflict collective environment of vengeance through the remedial measures. These include not only physiological and psychological rehabilitations under Ss.3, 7 and 8 but also awareness campaigns and advocacies for the respect of core human rights values under S.16 of this Act. While the word "*shall*" in the later section indicates an obligation on government's end to enforce a human rights regime through such pluralistic and participatory approaches in conflict ridden areas.¹⁵⁰⁰ And finally the Act emphasizes on an efficient and effective institutionalized mechanism to depart humanitarian assistance during conflicts. Since threshold of violence and use of force is not prescribed as such owing to which it seems to

¹⁴⁹⁷ Ibid., 3-5: "civilian victim- means a person not being a terrorist or a personal od a law enforcement agency on duty, who suffer harm to body, who suffers harm to body or property due to any terrorist act and, in the event of death of the person, includes the spouse of the victim or, in absence of a spouse but in order of precedence, a child, mother, father, minor sibling or other legal heirs of the victim." And the S.6 (2) (e) of this Act: "nature of injury to body or property of the civilian victim."

¹⁴⁹⁸ Ibid., 4: "---- an illness, psychological—and of trauma."

¹⁴⁹⁹ Ibid., 5: clause (d) of subsection (2) of the Sec. 6 of this Act: "for an ascertainment of a civilian victim --the law enforcement agency which conducted the operation and name of the terrorist against whom the operation is conducted."

¹⁵⁰⁰ Ibid., 9: Sec.16: "The Government shall conduct a periodic publicity campaign in order to develop awareness about rights, procedure and grievances redressal mechanism-----"

cover lesser, moderate and high thresholds of armed conflicts. Resultantly appears to fill the void of humanitarian law as has been mentioned above by assimilating the relief and rehabilitation mechanism of the Common Article 3 of GCs in national jurisdiction.¹⁵⁰¹ It is also pertinent to mention that the language of S.11 of the Act and Common Art. 3(1) is almost identical to maintain non-partisanship and equality to depart humane treatments to non-combatant civilian victims.¹⁵⁰²

Similarly aligning with Pound's perspective of selection of interest, finding the legal limits for its adjustment and weighing it with an opposite yet equal interest, legislatures prioritize the protection against custodial torture through two different Bills.¹⁵⁰³ This absolute right is selected firstly owing to ratification of the UNCAT, 1984 by Pakistan in 2010.¹⁵⁰⁴ Secondly by the virtue of its Articles 1, 2, 4 and 5 as emphasized on member states for

¹⁵⁰¹ Ibid., 1: "statement of objects and reasons of the Act:--for timely recognition and assistance for civilian victims of terrorist acts; recognize right of civilian victims to receive state assistance for relief, health care and rehabilitation.[to] create an effective mechanism to track, investigate and analyze civilian harm in terrorist act."

¹⁵⁰² Ibid: Sec.11 of the Act: "Equal Treatment--(1): ---assistance shall not be denied on the basis of age, gender, religion, race, creed, colour or place of residence." (2): "The Government shall not discriminate against any civilian victim solely---" "; Moir, *Armed Conflict*, 30: "The Common Article 3 of GCs: (1) -- shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."

¹⁵⁰³ See in Private Member's Bills Introduced, "The Custodial Death and Custodial Rape (Prevention & Punishment) Act, 2014: A Bill," *National Assembly of Pakistan 2nd Parliamentary Year*, Sr. 55 (2014-2015): 1-8,

[http:// www.na.gov.pk/uploads/documents/1415360249_881.pdf](http://www.na.gov.pk/uploads/documents/1415360249_881.pdf) ; Private Members' Bills introduced in the Senate, "The Torture and Custodial Death (Punishment) Act, 2014," *Senate of Pakistan 2/2/15 (2015)*:1-15, [http:// www.senate.gov.pk/uploads/documents/1423821319_501.pdf](http://www.senate.gov.pk/uploads/documents/1423821319_501.pdf) ; Cotterrell, *Jurisprudence*, 154-157.

¹⁵⁰⁴ See Moir, *Armed Conflict*, 199-202; Pejic, "Common Article 3": 205-211: indicates that not only in human rights but also in humanitarian law regimes protection against inhuman and degrading treatment through custodial torture is absolute. Since neither can be subject to law nor can be permitted at any cost to extract information or evidence, subsequently is a non -derogable right in all circumstance; also in M. R. Mafzool Zake, M. Faisal Israr, and Kashif Mahmood Tariq, eds., *Human Rights Framework in Pakistan: Participants Handbook V* (Islamabad: Pakistan Institute For Parliamentary Services, 2014), 30-31.

enabling legislations and assimilations in their criminal justice system.¹⁵⁰⁵ Thirdly to fill the void in criminal justice system as the court indicates, “[though] torture is a naked violation of human right yet custodial torture has not been defined in the constitution or any other law.”¹⁵⁰⁶ Fourthly is to maintain a balance between protections and infringements of liberties during arrests and detentions in accordance with judicial directions.¹⁵⁰⁷ Since the court in conjecture with Moir, Goldstone, Lewis, Haberfeld et al., Arnheim, Ganguly and Iyer declares custodial torture as a core instrument of human rights violations during all circumstance.¹⁵⁰⁸ Consequently, same is taken in to consideration in these Bills to eradicate this menace by proposing an impartial agency for investigation and monitoring. And finally due to constitutional obligations under Article 14 and entries no 3 and 32 of Federal legislative list of the constitution of Pakistan, 1973.¹⁵⁰⁹ Subsequently is envisioned not

¹⁵⁰⁵ See United Nations, patient, “Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” General Assembly Resolution 39/46 (1984): 1-3: Art.1: “torture---intently inflicted on a person for---a confession ---coercing----at the instigation of or with consent or acquiescence of a public official---”, Art. 2: “(1): Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (2): No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any public emergency, may be invoked as justification of torture.(3): An order from superior officer or a public authority may not be invoked as a justification of torture.”, Art. 4: (1): Each State Party shall ensure that all acts of torture are offences under its criminal law---- (2): Each State Party shall make these offences punishable by appropriate penalties---.” and Art.5: “Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Art.4----”; Interestingly all of these provisions have been extensively incorporated in the Bills.

¹⁵⁰⁶ See *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610, 615-630.

¹⁵⁰⁷ See *Dr. Mehmood Nayyar Azam v. State of Chhattisgarh*, 2013 SCMR 66, SC of India.

¹⁵⁰⁸ See e.g. into *Mohtrama Benazir Bhutto and another v. President of Pakistan and others*, PLD 1998 SC 388, 467-469; Moir, *Armed Conflict*, 58-67; Richard Goldstone, “*The Tension between Combating Terrorism and Protecting Civil Rights*,” in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (Cambridge: Cambridge University Press, 2005), 158; William H. Lewis, “*Intelligence: An Endangered Species*,” in *Terrorists in our Midst: Combating Foreign Affinity Terrorism in America*, ed. Yonah Alexander (California: Praeger Security International, 2010), 66; M.R. Haberfeld, Joseph F. King, and Charles Andrew Lieberman, *Terrorism within Comparative International Context: The Counter-Terrorism Response and Preparedness* (New York: Springer Publications, 2009), 95; Michael Arnheim, *The Handbook of Human Rights Law: An Accessible Approach to the Issues and Principles* (London: Kogan -page publications, 2004), 105-106; D.K. Ganguly, *Law Relating to Protection of Human Rights And Violation of Human Rights Problems* (Allahabad: Dwivedi Law Agency, 2012), 54-59; Venkat Iyer, *States of Emergency: The Indian Experience* (New Delhi: Butterworths India, 2000), 178-182.

¹⁵⁰⁹ See Assembly, comp., *Constitution*, 10, 201-203.

only to declare custodial torture a criminal offence but also to balance it against the immunity of public officials as under S.197 of the Cr. P.C.¹⁵¹⁰

It seems from the above-mentioned legislative responses that if judiciary is considered as custodian of “*letters*” of the constitution then legislature is certainly a custodian of the “*spirit*” of constitution.¹⁵¹¹ The compatibility between both of these aspects not only constitutes as Menski and Chiba’s *pluralism* but also the only viability to establish Baxi’s *legal culture*, Binder’s *constitutionalism* and Khadduri’s *justice* in Pakistan. Similarly Zaka et al. indicates that state building rests with enforcements of human rights values and for this purpose, he emphasizes on political legitimacy, rule of law, human security, social justice, access to justice, and good governance. Since all of these preceding elements are prerequisites to materialize human rights regime in Pakistan.¹⁵¹² Resultantly a frictionless confluence of parliamentary and judicial oversights of executive actions is mandatory to achieve such resolve. However, the question is that what is the relevancy of Baxi’s *people law* and Menski’s *Kite model of legislation* in the apparent secular and monist legal system of Pakistan?¹⁵¹³ Similarly, the question is that whether the categorical imperative of social

¹⁵¹⁰ See Ganguly, *Human Rights Problems*, 53-54; also in The Custodial Death and Custodial Rape (Prevention & Punishment) Act, 2014: A Bill: Sec.17 (2): for the trail of custodial torture, this bill is intending to give exclusive jurisdiction to session court by rooting out the protections as given to public officials with regards to their official engagements under S.197 of the Cr. P.C. Hence explicitly acknowledges its negative externalities and causation for engendering executive impunities.

¹⁵¹¹ See *Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others*, 2015 SCMR 1739, 1745.

¹⁵¹² See Zaka, et al., eds., *Human Rights Framework in Pakistan*, 32-33.

¹⁵¹³ See Veit Bader, “Constitutionalizing secularism, alternative secularism or liberal-democratic constitutionalism? : A Critical reading of some Turkish, ECtHR and Indian Supreme Court cases on ‘secularism’,” *Utrecht Law Review* 6, issue no. 3 (2010): 14: indicates that if a State’s legal system does not enforce a specific religious ideology and protects religious heterogeneities by protecting religious minorities from religious majorities then it construes as secular under his formulation of “*verities of secularism*.”

contract doctrine is compatible with Menski's quest for identity postulate under *Siyasa* and *Rawaj*? Interestingly Menski himself satisfies the later quest as his connotation of 'tolerated diversity' indicates that his confluence of *Siyasa* and *Rawaj* is not an absolutist phenomenon for Pakistan. Rather it is synonymous to Khadduri's *nomocracy*, which only focuses on the justness of daily routine through dispensation of justice in accordance with the Kantian *rightful conditions through commonwealth of laws*. Thus *Siyasa* and *Rawaj* in the Kite model is not for theocracy or cultural domination but only to accommodate religious and socio-cultural aspirations of community to establish a *people's law for people*. Moreover alike Rawls and Dworkin's thesis of civil disobedience it recognizes probability of political dissents and conflicts of orientations among citizens by focusing to manage them amicably rather to eliminate them absolutely.¹⁵¹⁴ Such adaptability of the Kite model and its relevancy to Pakistan is also evident from a recently published official report about the integration of the FATA with Khyber Pakhtunkhwa.¹⁵¹⁵ This report not only recommends the amendments in Article 246 and 247 of the constitution to extend the writ jurisdictions of high court and Supreme Court to FATA but also recommends abolition of the draconian Frontier Crime Regulation, 1901.¹⁵¹⁶ These recommendations intend to enforce fundamental rights and other human rights guarantees by curbing executive impunities and patterns of retributive penology. Since both of these later attributes have unanimously considered as core cause for contemporary civil unrest and

Under such connotation, neither the legal system of Pakistan induces a specific religious ideology on non-Muslims nor permits the Muslim majority to coerce minorities, so qualifies as secular. Moreover contains a parliamentary liberal democracy that is another variety of Bader's secularism.

¹⁵¹⁴ See Menski, *Flying Kites in Pakistan*: 50-55.

¹⁵¹⁵ See Ministry of States and Frontier Regions (GOP), *Report of the Committee on FATA Reforms 2016* (Islamabad: Ministry of State & Frontier Regions, Government of Pakistan, 2016), 35.

¹⁵¹⁶ *Ibid.*, 6-7, 37-38.

conflict in the said area.¹⁵¹⁷ However, it is recommended in this report that instead of abrupt legal change the Jirga system and *Pashtunwali* codes should be retained through a proposed *Tribal Areas Rewaj Act*.¹⁵¹⁸ It is worth mentioning here that according to Shams-ur-Rehman *Pashtunwali* is not merely a cluster of Pashtun culture or traditions but also contain core Islamic values without being qualified as theocracy. Thereby religious rituals are major components of Pashtun culture yet on the other hand religious dicta or ecclesiastics do not have the political authority among the locales as such.¹⁵¹⁹ As he illustrates in the following words, “*Islam [is] practiced as a cultural norm without strictly deciding the matters on basis of Shari’s.*”¹⁵²⁰ Then a question arises here that is it a dichotomous scenario? He responds contrarily and indicates that *Pashtunwali code* is a merger of Islam, local traditions and human rights as espouses dignity, equality, reciprocity, sanctity of women, protection of property, shelter, self-determination, and liberty.¹⁵²¹ Accordingly being a *people’s law* it is not only aligned with Khadduri’s *nomocracy* but also compatible with Kant’s *rightful conditions*. Resultantly, Government of Pakistan intends to retain *Pashtunwali* in the proposed integration process by perceiving it attuned with fundamental rights as enshrined under Article 9-28 of the constitution of Pakistan, 1973.¹⁵²²

¹⁵¹⁷ Ibid., 1-2, 16-20; Kashif Mahmood, “Governance and Reforming of FATA,” *Research Digest: Pakistan Institute for Parliamentary Services* 2, no. 11 (2015): 15-21.

¹⁵¹⁸ See Ministry, *FATA Reforms 2016*, 11-12, 18, 20.

¹⁵¹⁹ See Ghulam Shams-ur-Rehman, “Pashtunwali and Islam: The Conflict of Authority in the Traditional Pashtun Society,” *Pakistan Journal of Social Sciences* 35, no.1 (2015): 302-305.

¹⁵²⁰ Ibid., 306.

¹⁵²¹ Ibid., 299- 301.

¹⁵²² See Ministry, *FATA Reforms 2016*, 37-38.

Then in context of *Jirga* report indicates that being representatives of tribes *Maliks* and *Lungidar* would act as jury to determine the question of fact. While the court would determine questions of law as well as pronounce the final decree especially in the criminal adjudications. Likewise, the alternative dispute resolution would be prioritized in civil matters through the said *Jirga* to minimize social frictions.¹⁵²³ This report reveals further that such evolutionary *pluralism* in FATA is intended to achieve socio-political cohesions with rest of the country and to eliminate contemporary alienations, deprivations, and armed conflicts.¹⁵²⁴ Besides retention of *Jirga* and *Rewaj* not only conforms Baxi's view about the significance of *residual culture* but also conforms Ellwood's thesis that abrupt or enforced transformations may unfold popular uprising.¹⁵²⁵ Hence the case study of FATA reforms firstly reveals that *Kite model* and *categorical imperative* complement each other to craft *people's law*. Then indicates that such consonance is relevant to Pakistan to cure its internal issues such as superficial liberalism, radical religious doctrines, cultural devoid, ethnic polarizations, dogmatic security paradigms, and institutional frictions. Similarly indicates that emergence of collective conception of justice in Pakistan is possible only through holistic legislative process and institutional integrations.¹⁵²⁶

¹⁵²³ Ibid., 11-12, 22: "--with certain changes in procedures, the *Jirga* process could start resembling the "jury system" which is acceptable internationally. Simultaneously, any legal instrument, which incorporates *Rewaj* as part of the judicial process, must ensure that it is not in conflict with the fundamental rights as well as other substantive laws administered in Khyber Pakhtunkhwa."

¹⁵²⁴ Ibid., 39-53.

¹⁵²⁵ Ibid., 38; See also into Baxi, *The Conflicting Conceptions*, 276-278; Charles A. Ellwood, "A Psychological Theory of Revolutions," *American Journal of Sociology* 11, no. 1 (1905): 50-53.

¹⁵²⁶ See Kashif Mahmood, "Integrated /Hybrid Model of Legislative Drafting: Impact of Policy Research on Legislative Drafting," *Parliamentary Research Digest* 3, no. 7 (2016): 14-15; Muhammad Ramzan and Kashif Mahmood, "Measures to decrease Crisis of Governance and Susceptible Constitutionalism in Pakistan," *Saussurea* 5, no.7 (2015): 213-223; Muhammad Ramzan and Kashif Mahmood, "Rationalizing Alternate Dispute Resolution in Pakistan," *International Journal of Research in Social Sciences* 6, no. 1 (2016): 93-95.

Conclusion

This study is a combination of basic and applied research mostly through library sources for which methodology of qualitative analysis and case law study is resorted to conceptualize the framework of statehood, citizenship, and rule of law in different paradigms. It is mainly to develop an understanding as to why states act against their own subjects and citizens, and to grasp the role of legal system and laws amidst such conflict.

Studies indicate that legal fiction of social contract and egalitarianism, under rightful conditions of categorical imperative, is devised to curtail arbitrary powers of regimes. The concept of fundamental rights emerges from this fictional categorical imperative and is meant to protect personal and civil liberties. The sanctity attached to the core principles as enshrined in these rights not only dictates the majoritarian impulses in the lawmaking process but also tends to cure arbitrary adjudication and ensures rights based governance. Such priori rationality and consensus of commons for the fictional imperatives positively transcends in to two paradigms, the first deals with the state's legitimacy and second deals with the issue of citizenship. The former paradigm is identified with obligations to protect order, rights, procedural fairness, and justice. The latter paradigm is concerned with obligations to conform to respective general will and legitimate order as long as it fulfills rightful conditions of Kantian perceptive. Hence both of these interdependent paradigms collectively form liberal democracy and popular sovereignty in which citizens can resort to

conscious objections to any law or policy if it is contrary to collective conception of justice. Such recourse initially takes the form of indirect disobedience by challenging contours of respective law or policy in the court of law through instrument of writ petitions. Then it turns into direct actions like non-violent protests if judicial remedy lacks political justification or reasonably contrary to popular conception of justice. These politically conscious protests seem the last resort of civil society to extend threshold of liberties or to maintain their rightful conditions in contractarian societies. Similarly, state as mean to achieve civil liberties and fundamental guarantees can resort to extra-legal executive prerogative only to protect spirit of Kantian imperatives.

Yet the above-mentioned liberal contractarianism mostly revolves around an ultimate conception of egalitarian equality that is hard to accomplish in ethnically and socially polarized societies. In such societies, laws and legal system are mostly meant to establish coercive order, let alone to represent collective conception of justice with centrality of personal and civil liberties. Nevertheless, it is similar for Pakistan by keeping in view its ethnic, sociocultural, and theological atomization and colonial legacies of administrative and adjudicative patterns. Owing to such patterns, neither governance nor adjudication had rights centered approach. Rather it remained focused to embed deterrence through administrative penology and retributive justice especially until the induction of writ jurisdiction in the legal system in 1954. Yet such induction was futile because not only the nomenclature of laws but also the institutional psyche of executive and judiciary remained the same in spite of the constitutional cover of judicial review of administrative actions in

1956. Mainly owing to an “*execu-judicial psyche*”¹⁵²⁷ the district judiciary perceived itself more of an executive officer than a judge. A premature demise of the constitution in 1958 and totalitarian regime of Ayub that lasted until 1970 through Yahya aggravated this scenario. A vicious cycle of colonial laws, intensification of civil military establishment, controlled, as well as aristocratic public representation and political segregation of commons resulted in a rise of separatist movements in the East Pakistan in the late sixties. The judicial apathy to protect personal and civil liberties during the ‘*Operation Searchlight*’ augmented an allegation of mass scale human rights abuses with impunity in 1971. Owing to which an internal disturbance transcended into an internal armed conflict and then into a full scale international armed conflict in the same year.

Then regardless of Bhutto’s charismatic socialism, inception of egalitarian connotation of ‘*we the people,*’ fundamentality of rights and integration of judicial review of legislation in the Constitution, 1973 the above-mentioned vicious cycle remained intact. Alike its predecessors this democratic regime also unleashed the instrumentality of criminal law to curb the political dissents. It not only resorted to indiscriminate use of force with impunity during Balochistan unrest in 1973-78 but also preferred the tool of preventive detention to curtail the PNA movement which lasted up to Zia’s Martial law. Interestingly not only the district but also the higher judiciary was unable to control custodial torture and

¹⁵²⁷ See Kashif Mahmood Tariq, *Vulnerabilities of judicial Review in Public Policy in Pakistan* (Lahore: Manzoor Law Book House, 2016), 79-80, 151: this terminology illustrates an institutional attitude of judiciary which hinders equity based justice in Pakistan especially in district courts. He further elaborates that judicial officers of district judiciary are mostly restrained to dispense “*complete or pragmatic justice*” due to such institutional pull and are forced to apply rules mechanically alike executives. Moreover their recruitment, training patterns and routinization of tasks are akin to district management group due to which maintenance of status quo under legal positivism seems their priority.

administrative highhandedness in both eras. Zia's regime not only augmented the role of armed forces in almost all civilian spheres but also introduced the concept of Pan-Islamism through Jihad against the then soviet invasion in Afghanistan. While the former aspect still linger in the form of Ss. 2 (1) (d) and 59 of the PAA, 1952 whereas the latter is menacing national security in the form of TTP and its factions. His 'hyper-nationalism' through religion not only hampered the contractual paradigms of objective resolution and preamble of the Constitution 1973 but also unbridled the sectarian violence which attained optimality during the mid-90s. Although it was attempted to be curbed through the ATA, 1997 in the second tenure of Nawaz, yet instead of dealing with sectarian or political terrorism this special law has been widely used by police to deter ordinary criminals.

Subsequently from Musharif's regime till now the international '*war against terror*' has introduced some novel concepts in the domestic crime control model of Pakistan. As the connotation of non-state actors and unlawful combatant with an unprecedented wave of ideological terrorism not only blur the lines between peace and conflict but also between human rights and humanitarian regimes. Hence the ordinary criminal laws of Pakistan which was not compatible as such with fundamental guarantees. As on the one hand combination of Ss. 52, 76, 79, 80, 188, of the PPC and Ss. 144, 197 of the Cr. P.C engenders an environment of executive impunity.¹⁵²⁸ Moreover restrains on lower courts to issue injunction against public functionaries under clause (d) of S.56 of the Specific Relief

¹⁵²⁸ See e.g. for a validity of this view into Muzammal Afzal, "Amnesty terms Section 144 a draconian law, calls for release of all PTI workers," *Dawn News*, November 1, 2016, national edition.

Act, 1877¹⁵²⁹ indicates an environment of executive's supremacy. Subsequently POPA, 2014 in conjunction with Act No I and II of 2015 amid contemporary TTP insurrection has drastically restrained personal liberties by ousting the writ prerogative of superior courts.

It appears from this statutory overview, relevant literature and case laws that governments in Pakistan implicitly violate core human rights values during conflicts mostly through instrument of criminal laws. These violations cover arbitrary deprivation of life and liberty through preventive detention, reliance on custodial torture and inhuman treatment for confession and self-incrimination during such detentions and internments. Likewise shot at sight on merely subjective apprehensions, indiscriminate use of lethal arms during exchange of fire, violation of privacy of home during siege and search and degrading treatment during curfew. Similarly, the presumption of guilt, summary trial in spite of insufficient evidence and in camera proceedings especially for military trials appear contrary to the right to fair trial.

Nevertheless, there are some other negative externalities of these laws which yet not relate to rights and liberties as such but are pertinent in relation to their impacts. Since the severities of criminal laws mean nothing without the inception of relevant implementing agencies. Therefore when law materializes them in accordance with its objectives they tend to be contrary to collective conception of justice. As in case of police in the subcontinent which was evolved by the colonial rulers to control polarized subjects through legal

¹⁵²⁹ See Raja Said Akbar Khan, comp., *The Specific Relief Act: students Commentary* (Lahore: PLD Publishers, 2009), 115-120: [hereinafter SRA, 1877] .

rationales of penal and criminal procedure codes. However amid the implementing process the Indian society developed a sense of alienation, injustice and coercion for this indigenous institution. Resultantly police and other law enforcement agencies were considered as agents of subjugations and totalitarianism among commons who developed two kinds of core behaviors against them. As firstly the masses preferred to keep themselves away from these institutions and profoundly relied upon the alternative dispute resolution such as local *Panchayats* or *Jirga*. And secondly they often attempted to unleash their assault against these forces in the wake of liberation movements in the colonial India. Interestingly both of these social behaviors are intact until now as of the continuities of laws¹⁵³⁰, however the former is contemporarily encountering another anomaly in Pakistan. As owing to ethnic and sectarian fragmentations, political polarization and class conflicts the community has lost not only its cohesion but also its confidence over unconventional means of dispute resolution. Consequently individual as well as collective vengeances mainly focus on the above mentioned later attribute owing to which crimes against state, its forces and order are perceived as ideological manifestations of politics of dissent. However as a reaction to such native orientations for internal disturbances scope of criminal laws extends to almost every public and private sphere which ultimately gives the law enforcement agencies a mandate to intrude sociopolitical paradigms of Pakistan in the name of national security and order.

¹⁵³⁰ See into Kashif Mahmood Tariq, *Legal Response to Custodial Death & Torture* (Lahore: Manzoor Law Book House, 2017), 120.

Consequently this propensity of executive prerogative diminishes not only the doctrine of separation of power but also egalitarian pluralism and welfare-ism as devised by contractual scheme of the constitution, 1973. Similarly the threshold of administrative penology augments up the extent where even a least dissent is endeavored through administrative means of arrest, detentions and use of force. Resultantly in a deep contrast to liberal democratic norms and federalism this cycle of communal and administrative behaviors gives a connotation of police state with strong center in Pakistan. Interestingly the domestic positive law jurisprudence seems indifferent to such administrative and political evolutions and is merely concerned to apply alien rule to complex indigenous situations. Such indifference has not only proved fatal to order but also to the conception of citizenship and liberties at the time of communal violence in 1947, then during political violence of 1971 and even till now in the face ideological violence. Hence, occurrences of phenomenal violence in these junctures indicate the following. Firstly, the absolute administrative measures in collaboration with stringent laws have often proved to be inapt to control ideological deviance and violence. This inference seems true in the wake of a recent suicidal terrorist attack by TTP on the university campus Charsadda in spite of the enactments of POPA, 2014 and Act I and II of 2015.¹⁵³¹ Secondly, the ordinary law enforcement mechanism is unable to deter amid the escalation of actual armed resistance owing to which resort to armed forces seems inevitable. This inference seems true in the wake of the partition centered collective violence of 1947, when the then government of united India did not prioritize resort to armed forces. However, such resort also bring with

¹⁵³¹ See Ali Akbar, "APS mastermind claims Bacha Khan University attack, 21 killed," *Dawn News*, January 21, 2016, national edition.

itself an indiscriminate use of force under doctrine of military necessity owing to which violation of core values are bound to occur as happened in 1971. Thirdly, despite the validity and coercive powers of positive laws and legal systems, they become irrelevant during transitional phase of societies. During such phases a resort to natural law seems the only viable way to control human rights abuses. However, the apathy and aloofness of judiciary not only from multifaceted sociopolitical issues but also from the natural law aggravates an environment of violence and counter violence. As same has happened in 1947, 1971 and even contemporarily in PATA, prior to the TTP insurgency in Swat.

Subsequently owing the above mentioned scenario this study indicates that sociological jurisprudence with legal realism seems a viable way forward under the existing legal system of Pakistan. It is not only to protect rights as has been held in the central argument of this study but also to protect public order because a maximization of criminal law's obligations is itself dangerous to public order and national security. As under the law of marginal utility, an increase in an already extremely stringent legal order may lead either to absolute subjugation or to revolt against the regime. Consequently, law ought to be aligned with sociopolitical wants of society through legislative and judicial postulates. However in this process of "*social engineering*" and to maintain a '*bare minimum of justice and fairness*' core principles of Divine law, common law, human rights and humanitarian law can help to avoid a probability of "*timocracy*."¹⁵³² Hence, for this purpose judiciary seems

¹⁵³² See Majid Khadduri, *The Islamic Concept of Justice* (Baltimore: Johns Hopkins University Press, 1984), 1-6, 8-11, 97-101: The "*timocracy*" indicates a charismatic impact of the class which has means of living and administration and can influence legislative as well as adjudicative process. Resultantly to avoid the negative impulse of

an appropriate forum. However, with a little addition in its central argument study indicates at this juncture that not only the higher judiciary through writ prerogative or public interest litigation but also the lower judiciary can do so. For the later argument study focuses on the SRA, 1877 with an overriding effect on clause (d) and (k) of its S.56 mainly to reduce burdens from writ jurisdictions.

For the above mentioned formulation powers of justice of peace under Ss.22 and 25 of the Cr. P.C. can be resorted in combination with different sections of SRA, 1877 in a following manner. As with the S.42 for certiorari, Ss. 45-51 for mandamus, Ss.52-54 for quo warranto, S.55 of the SRA, 1877 for prohibition and S.491 of the Cr. P.C for habeas corpus. It is mostly for the tortious obligations of the state under Art.174 of the Constitution, 1973 for which ‘*contract*’ under SRA can be liberally constructed as ‘*social contract*’ between state and its citizens.¹⁵³³ Resultantly such constructive interpretations under Ss. 22 and 25 of the Cr.P.C as well as under 199 and 184(3) of the constitution would help to reduce an accumulation of relative deprivation among commons at a pre conflict stage. Moreover, to harness the communal wisdom and conception of justice with legal rights and to maneuver armed groups to respect human rights a resort to informal justice can be made through alternative dispute resolution in criminal law jurisprudence. For such purpose the local forums of *Panchayats* or *Jirga* can be institutionalized by jelling the connotation of justice of peace with village headman under Ss. 22 and 45 of the

the time and space and to discourage a mean of litigations for personal glory as well as to discourage retribution during armed conflict he relies upon the “*nomocracy*.”

¹⁵³³ See Assembly, comp., *Constitution*, 92: “Article 174-Suits and proceedings—The Federation may sue or be sued by the name of Pakistan and a Province may sue or be sued by the name of the Province.”

Cr. P.C. Subsequently their pronouncements on a touchstone of Art.2A, 3 and 4 of the constitution, 1973 can be equated with the special executive magistracy in pre and post conflict paradigms under clause (3-5) of S.14 of the Cr. P.C.

For the institutionalization of such alternative remedies the ‘*socio-legal*’ *Pushtunwali* codes and alike may be relied upon to craft a “*bare minimum*” in pre-conflict paradigms. Such indigenous norms are not only conducive to dispense justice through arbitrations and mediations but also be resorted to achieve a unanimous popular sovereignty amid socio-cultural, political and religious heterogeneities.¹⁵³⁴ Because it is a feasible and cost effective mechanism at the grass root level to maneuver general public over a centrality of political authority and to provide popular postulates to the legislature to draft ‘*people’s laws*’ in Pakistan.¹⁵³⁵ It is mainly through close interactions among religious scholars, academicians, native gentry, district administration, and local non-government organizations for amicable solutions of civil or even criminal disputes.¹⁵³⁶ Subsequently *Panchayats* or *Jirgas* may legally be mandated to ensure the ‘*individual centric enabling meta rights*’ which would establish culture of humanity, tolerance, and liberty. Likewise

¹⁵³⁴ See Ghulam Shams-ur-Rehman, “Pashtunwali and Islam: The Conflict of Authority in the Traditional Pashtun Society,” *Pakistan Journal of Social Sciences* 35, no.1 (2015): 302-306; Masaji Chiba, “Other Phases of Legal Pluralism in the Contemporary World,” *Ratio Juris: Legal Pluralism in the Contemporary World* 11, no. 3 (1998): 232-233.

¹⁵³⁵ See Upendra Baxi, “*The Conflicting Conceptions of Legal Cultures and the Conflict of Legal Cultures*,” in *Rechtstheorie: Monistic or Pluralistic Legal Culture? Anthropological and Ethnological Foundations of Traditional and Modern Legal Systems*, eds. Peter Sack, Carl P. Wellman and Mitsukuni Yasaki (Berlin: Duncker & Humblot, 1991), 275-277.

¹⁵³⁶ See Werner Menski, “Flying Kites in Pakistan: Turbulence in Theory and Practice,” *Journal of Law and Social Research* 1, no.1 (2010): 48-50; Muhammad Ramazan and Kashif Mahmood, “Rationalizing Alternate Dispute Resolution in Pakistan.” *International Journal of Research in Social Sciences* 6, no. issue. 1 (2016): 88-95; National Assembly of Pakistan, “The Alternate Dispute Resolution Act, 2016,” accessed on November 25, 2016, [http:// na.gov.pk/uploads/documents/1479464263_627.pdf](http://na.gov.pk/uploads/documents/1479464263_627.pdf): “a government bill which indicates that an alternate dispute resolution system can facilitate settlement of disputes without resort to formal litigation.”

would enable the substantive constitutional guarantees to get social legitimacy at the grass root level especially in tribal or feudal areas of Pakistan.¹⁵³⁷ These include individual integrity, sanctity of women, privacy of home, inviolability of property, honor and reputation, neighborhood obligations, family and communal bonding and liabilities to protect and raise individuals.¹⁵³⁸

Moreover a culture of mutual respect and tolerance for religious heterogeneity and believes can be promoted through the traditional authority of *Panchayats or Jirgas*. Likewise charismatic authority of shrines and affiliated popular culture of charity can be institutionalized to provide the '*meta rights*' of food and subsistence to all poor residents of community irrespective to their religious believes. Along with such culture of humanity a bottom up method of community policing in aid of law enforcement agencies and local government can be resorted to curb foreign radical elements without encroaching upon their humanitarian guarantees. Resultantly an indigenous culture of tolerance, adaptability, and humanism would be able to neutralize the foreign radicalization through its dialect without compromising the national identity of Pakistan. Such an unconventional approach is formulated to cope up the unconventional nature of the '*fifth generation warfare*', which unlike conventional wars mainly rests with clandestine hostilities of ideologically motivated non-state actors.¹⁵³⁹ Hence, it is very difficult to avoid collateral damages during

¹⁵³⁷ See Shams-ur-Rehman, Traditional Pashtun Society: 299-301.

¹⁵³⁸ See Charlotte Garden, "Meta Rights," *Fordham Law Review* 83, no.2 (2014): 856-861.

¹⁵³⁹ See Donald J. Reed, "Beyond the War on Terror: into the Fifth Generation of War and Conflict," *Studies in Conflict & Terrorism* 31, no. 8 (2008): 699-700, 716: "indicates that first generation war was focused on qalums, second on armours, third on egility and mobility, fourth on internal armed conflicts and civil wars, but the fifth being a most complex and fluid is based upon conflicts of ideologies and identities."

law enforcement operations especially when groups resort to complex tactics like improvised explosive devices, suicide bombing and suicidal terror attacks on civilian areas. Similarly, the combat against extremism becomes extremely fluid owing to the usability of thickly populated residential places, schools, and markets as battlefield during counter terrorism operations. Besides it becomes highly complicated when terrorists take the shelter behind the human shield of innocent civilians. Consequently unintended casualties and damages to civilian objects as “*democratic dilemma in asymmetrical warfare*” are bound to happen during law enforcement actions which paradoxically denunciate forces for their alleged involvement in the mass scale human rights abuses.¹⁵⁴⁰

Accordingly, a pro-people socio-legal approach seems mandatory to counter suchlike warfare of ideologies and to adopt a holistic community centric “*counter-radicalization*” strategy.¹⁵⁴¹ Firstly, it is due to empirical inability of criminal laws to deter ideologically centered deviances.¹⁵⁴² Secondly owing to precondition of public demand for sustainable peace and their support to *counter radicalization* measures without which the phenomena of “*violent extremism*” cannot be dealt with.¹⁵⁴³ Nonetheless, it is only possible when people at large would have sensitization and respect for humanity, humane treatment,

¹⁵⁴⁰ See Jashua L. Gleis and Benedetta Berti, *Hezbollah and Hamas: A Comparative Study* (Baltimore: The Johns Hopkins University Press, 2012), 173-174: “for paradoxes and dynamics of counterinsurgency and counter terrorism measures.”

¹⁵⁴¹ See Hamed El-Said, *New Approaches to Countering Terrorism: Designing and Evaluating Counter Radicalization and De-Radicalization Programs* (London: Palgrave Macmillan, 2015), 10.

¹⁵⁴² *Ibid.*, 8-11, 220-225: “keeping in view the diminishing impact of retributive measures emphasizes on the prison centric De-radicalization techniques for inmates in which physiological reformation is given priority over rigorous punishments”; Scott Veitch et al., *Jurisprudence: Themes and Concepts* (New York: Routledge, Taylor & Francis Group, 2012), 252.

¹⁵⁴³ See El-Said, *New Approaches to Countering Terrorism*, 48-52.

tolerance and dialect with diversity through awareness campaigns and seminars.¹⁵⁴⁴ It is mostly through parliamentary democracy and constitutionalism for which not only the Parliament but also all respective Provincial assemblies and local bodies ought to function as policy institutions and think tanks. Then the question is that how these formulations can be materialized and what could be its modus operandi in Pakistan? This study indicates accordingly that firstly it is a core responsibility of legislatures to devise such legislative postulates and principles, which should not only minimize social frictions by accommodating all major stakeholders but also maximize accumulative benefits in line with national identity and interests.¹⁵⁴⁵ Secondly, major stake holders should be invited in special public hearings under the auspicious of the relevant standing committees of Senate, National Assembly and all provincial assemblies to discuss contours of the legislative proposals and bills. Similarly International human rights and humanitarian guarantees should be domestically disseminated yet inconformity with traditional authority of socio-cultural norms and charismatic authority of religious belief and practices.¹⁵⁴⁶ Hence the Objective Resolution, Article 3, 4, 9, 14, 25, 37, 38 and 187 of the constitution, appropriate principles of equity and tortious obligations, applicable international instruments and relevant *Quranic* injunctions can be combined harmoniously to articulate a pragmatic domestic jurisprudence of human rights. Subsequently Masud provides framework for

¹⁵⁴⁴ See The International Committee of the Red Cross, "The International Committee of the Red Cross's Role in Situations of Violence below the Threshold of Armed Conflict: Policy Document," *International Review of the Red Cross: Scope of the Law in Armed Conflict* 96, no. 893 (2014): 296-297.

¹⁵⁴⁵ See Menski, Flying Kites in Pakistan: 49-55.

¹⁵⁴⁶ See e.g. into Chamaine Amir Enerva and Kashif Mahmood, "National Implementation of Humanitarian Law and Guarantees," *Parliamentary Research Digest* 3, Issue. 1 (2016): 22-24; Kashif Mahmood, "Integrated /Hybrid Model of Legislative Drafting: Impact of Policy Research on Legislative Drafting," *Parliamentary Research Digest* 3, no. 7 (2016): 14-18.

confluence of Islam with modernity according to which values like rationality, logic, human dignity, protection of life and property, equality, social reciprocity, altruism, fair trial, privacy of home and sanctity of women can be aligned together to craft human rights jurisprudence of Pakistan.¹⁵⁴⁷ And alike Dalacoura indicates ahead that such eventuality can neutralize the occurrence of violent extremism, vanity and aggression. It is because sharia and international bill of rights have common objectives that are public interest, peace and welfare of humanity.¹⁵⁴⁸ Iqbal at this juncture indicates that contemporary parliament is not only synonymous to the connotation of *Caliphate* but also has obligation to legislate in accordance with Islamic *Ijtihad*. Accordingly, the legislative reasoning and policy formulation should be aligned with the concept of *Tuhid* that enshrines, inviolability of human dignity, protection of personal and civil liberties, equality, socioeconomic justice, common good and national solidarity. Hence his legal pluralism espouses that instead of selective deduction from the *Quran*, a holistic inductive method with logic, objectivity and relevancy should be resorted by the legislature to cater contemporary issues and to uphold good governance. Consequently, identifies such parliamentary form as “*spiritual democracy*” because it is meant to enforce the Will of people in accordance with the Will of God to maintain socioeconomic justice.¹⁵⁴⁹

¹⁵⁴⁷ See Muhammad Khalid Masud, “Religious counter-narrative against violent extremism,” (Analysis Paper at Pakistan Peace Collective, Federal Ministry for Information, Broadcasting and National Heritage, Islamabad, January 14, 2017), 28-31.

¹⁵⁴⁸ See into Katerina Dalacoura, *Islam, Liberalism and Human Rights* (London: I.B. Tauris & Co Ltd, 2007), 41-45, 48, 55, 63-64.

¹⁵⁴⁹ See Mohammad Iqbal, *The Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934), 139-170.

Then for pragmatic due process of law and pursuit to happiness the Bhagwati's model of 'socio-legal' vigilance committees can be restored to Pakistan. Thus either under suo motu cognizance or under public interest litigations the apex or high court may appoint them temporarily by incorporating members of civil society, technical experts, local public representatives and religious scholars under clause (1-3) of Article 187 of the constitution. It is mainly for two reasons, firstly to dispense a tangible justice rather than a theoretical 'complete justice'. Secondly to elucidate some unexplained constitutional provisions like if clause (a) of Art.37 "interest of backward classes or areas" is read with Art.25 "all citizen are equal" then neither indicates 'backward classes' nor suggests any judicial remedy for them as being non-justiciable.¹⁵⁵⁰ Resultantly such incentivized legal pluralism seems a better alternative than a punitive contempt of the court mechanism for compliance of judicial pronouncements. Apparently, it may not only be resorted by apex court and high courts but also for lowers courts to ensure rights based public nuisance.

Likewise, jurisdiction of the federal ombudsman office with supra *socio-legal* composition be extended to areas which are exceptionally excluded from the operation of writ jurisdictions under Article 232 and 245 during crises periods. Then to FATA as well, which has been excluded from judicial oversight under Clause (7) of the Article 247 mainly to entertain applications against administrative malpractices and highhandedness.¹⁵⁵¹ These quasi-judicial forums can not only be resorted to analyze and

¹⁵⁵⁰ See Senate of Pakistan, *The Constitution of the Islamic Republic of Pakistan: As Amended up to the 7th January, 2015* (Islamabad: Senate Secretariat, 2016), 18.

¹⁵⁵¹ See into Ministry of Law and Justice, "the Federal Ombudsmen Institutional Reforms Ordinance, 2013," accessed November 26, 2016, <http://ombudsman.gov.pk>.

manage trends of executive impunities during law enforcement operations but also be relied upon to engage armed groups dialectically. Accordingly, their utility rests upon four different contexts; firstly, they would ascertain actual loss to lives and properties of the entire population regardless to combatant or civilian during armed conflicts. Secondly, they would determine the tortious obligations of the wrongdoer and threshold of the highhandedness for pecuniary compensations rather than persecutions and criminalization. Subsequently these fact-findings would be communicated to the human rights cells of the superior judiciary to ensure due compliance of tortious obligations under its justice of peace context. Thirdly, they would mediate and negotiate to eliminate deadlocks between dissenters and government through conflict management mechanism owing to their '*socio-legal*' composition and legitimacy. Lastly, they would be able to sensitize armed forces as well as armed groups about the humanitarian guarantees and humanely treatments mainly owing to their perceived social legitimacy.

The preceding argument is crucial as firstly legal pluralism in conjunction with critical legal theories and radical criminology recognizes a persistent existence of dissent in society by focusing on its management rather than its absolute annihilation. Thus, as compared to monist pure theory of law, it gives pragmatic ways to govern through social engineering amid significant contestations over political authority in multi-cultural societies. Suchlike legal accommodations of '*intolerants*' would not only save the territorial integrity of a state but also promote due process of law by expanding horizons of

civil liberties.¹⁵⁵² As mostly, trivial differences transform in to major deviances against public order and state due to mismanagement and superficial isolations of stringent social control forces.¹⁵⁵³ Then secondly the dialectical method of legal pluralism is also aligning with community centered ‘*counter-radicalization*’ and prison centered ‘*de-radicalization*’ approaches of counterinsurgency. It emphasizes on multipronged strategies first to find out causes of conflicts and their transformation in to violent extremism. Then deal with socioeconomic and psychological rehabilitation of respective community and individuals rather than absolute retribution mainly through judicial and legislative ‘*therapeutic jurisprudence*’. Though both of these novel measures conceive violent extremism as irrational outcomes of deprived and isolated societies, yet judiciary mainly focuses on ‘*micro*’ issues like post-arrest psychological, religious and social rehabilitations as well as right to fair trial and protections against custodial torture. And the legislature mainly focuses on policy based ‘*macro*’ issues like educational and vocational trainings, post-release socio-economic empowerment through creation of jobs, reconstruction of infrastructure, sociopolitical reintegration and special laws for general immensity.¹⁵⁵⁴ Thus contrary to conventional control strategies like stigmatization, isolation, polarization and deprivation of liberties to install fear and sense of powerlessness these approaches empower the conflict ridden societies to be involved into dialogues and negotiations.

¹⁵⁵² See Menski, *Flying Kites*: 49-50.

¹⁵⁵³ See Katherine S. Williams, *Textbook on Criminology* (New York: Oxford University Press, 2001), 417, 451, 456.

¹⁵⁵⁴ See El-Said, *New Approaches to Countering Terrorism*, 17-47; Bruce J. Winick, “Therapeutic Jurisprudence and Problem Solving Courts,” *Fordham Urban Law Journal* 30, no. 3 (2003): 1078-1082.

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