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Contested Legalities, (De)Coloniality and the State: Understanding the Socio-Legal Tapestry of Pakistan

by

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**A thesis submitted in partial fulfilment of the requirements for the degree
of Doctor of Philosophy in Law**

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Declaration

I declare that this thesis is my original work. Information and excerpts obtained from other sources have been duly acknowledged and cited. Parts of this thesis have been submitted for publication and have been used for conference papers. However, this thesis or any part of it has not been submitted for an award of a degree at this or any other university.

Abstract

The study develops two significant arguments in relation to Pakistan's socio-legal situation and analysis. First, it outlines and discusses the various prominent facets of the country's legal architecture to formulate and present, what the thesis terms as, Pakistan's *Socio-Legal Tapestry*. It considers the historical and conceptual trajectories of some of the multiple legal and normative structures that prevail in the country, their interplay and encounters, as well as their limitations and problems. It puts this socio-legal architecture at the heart of the examination, and by making the different constituents of the legal terrain explicit – components that include common law, Islamic law, colonial law, traditional law, legal 'exteriority' of tribal regions, and issues of 'lawlessness' – it makes the case for a holistic understanding of law as the necessary prerequisite to understanding the difficulties that the country's law, state and the wider society are faced with.

The second significant argument of the study emerges from this expansion of the subject matter of (socio)legal analysis. It is argued that a shift in the understanding of what constitutes law in the context of Pakistan logically leads towards a (re)consideration of the lenses and narratives generally employed to examine it. The identification, examination and problematisation of these narratives – which include the dominant state-oriented legal narrative and the legal positivistic approach, the Islamic law narrative, legal pluralistic approach and the ascendant discourse on human rights – formulate the second substantive part of the study. It is argued that these *Narratives of law* differ in terms of how they perceive the context, identify their priorities, frame the problems and then propose solutions for their rectification. However, caught in a struggle to maintain their definitional consistencies, these narratives are only able to adopt a partial view of the picture and, owing to that, they generate contradictions that ultimately weaken their approach and proposed solutions.

The purpose behind these two arguments is both to make a case for new avenues of context-specific legal analysis, as well as to create possibilities for it in the case of Pakistan. The problems that the country faces and the suffering that its people experience create an urgent need to recognise the deficiencies, both in our conceptualisation of law in this particular context, as well as the narratives, perspectives, theories and ideologies that we employ to approach it. This necessitates the search for alternative narratives for comprehending Pakistan's socio-legal situation, to offer more nuanced approaches that might enable us to frame issues differently. This, I argue, is the most pressing task for those engaged in the analyses of legal, social and political spheres of Pakistan, and the necessary first step if our goal is the (re)formation of the legal and normative orders to make them more accountable to the people. By adopting the framework of colonialism and Coloniality to offer a different lens to understand Pakistan's socio-legal peculiarities, the study presents one such attempt in this vein, with the purpose of initiating discussion and inviting critique.

Abbreviations

AACPA	Actions in Aid of Civil Power (Amendment) Act, 2010
AACPO	Actions in Aid of Civil Power Ordinance, 2011
ADR	Alternative Dispute Resolution
CJ	Chief Justice of Pakistan
CrPC	Criminal Procedure Code of Pakistan 1860
FATA	Federally Administered Tribal Areas of Pakistan
FCR	Frontier Crimes Regulations 1901
FSC	Federal Shariat Court
HRCP	Human Rights Commission of Pakistan
ICJ	International Commission of Jurists
KCDR	Karachi Centre for Dispute Resolution
LHC	Lahore High Court
NAO	Nizam-e-Adl Ordinance, 2009
NGO	Non-Governmental Organisation
NRO	National Reconciliation Ordinance, 2006
NWFP	North West Frontier Province (renamed Khyber-Pakhtunkhwa in 2012)
PATA	Provincially Administered Tribal Areas
PCO	Provisional Constitutional Order, 1999
PCrLJ	Pakistan Criminal Law Journal
PLD	Pakistan Legal Decisions
PML	Pakistan Muslim League
PML(N)	Pakistan Muslim League (Nawaz Sharif)

PPC	Pakistan Penal Code of 1860
PPP	Pakistan People's Party
PTI	Pakistan Tehreek-i-Insaf
SC	Supreme Court of Pakistan
SHC	Sindh High Court, Pakistan
TNSM	Tehreek-e-Nifaz-e-Shariat-e-Muhammadi (a militant religious group in Pakistan)
UDHR	Universal Declaration of Human Rights

Glossary

<i>Adl</i>	Justice
<i>Ahmadi</i>	Followers of Mirza Ghulam Ahmad of Qadiyan, who are considered as non-Muslims under Pakistan's Constitution for disputing the finality of the Prophethood of Muhammad (PBUH)
<i>Faislo</i>	Literally, Decision. A form of local tribunals in Sindh
<i>Hudood</i>	Plural of <i>Hadd</i> , lit. limit. The term is used in this thesis to refer to a series of Islamic Ordinances implemented in Pakistan under General Zia-ul-Haq's regime
<i>Jirga</i>	A form of local tribunals in Balochistan and Khyber-Pakhtunkhwa
<i>Khwaindo Tolana</i>	Circle of Sisters – the name adopted by the first female Jirga in Pakistan
<i>Madrasah</i>	Religious seminary
<i>Mujahideen</i>	Religious fighters. A term generally used in relation to Afghan rebels who fought against the Soviet Union
<i>Nizam-e-Adl</i>	Lit. System of Justice. The Sharia Nizam-e-Adl Act was implemented in selected areas of Pakistan in 2009
<i>Pakhtun/Pashtun</i>	Ethnic group of tribes mostly residing in Afghanistan and Pakistan's North Western regions
<i>Panchayat</i>	Lit. The gathering of five. A form of local tribunals in Punjab
<i>Qazf</i>	False allegation of adultery or fornication; punishable by law
<i>Qazi</i>	Judge, mainly one who dispenses decisions according to Shariah
<i>Sardar</i>	A generic term for landlords or feudal lords
<i>Sarkari Jirga</i>	Official Jirga, as instituted by the Frontier Crimes Ordinance

<i>Sharia/Shariat/Shariah</i>	Islamic law, as a conceptual category
<i>Ulema</i>	Lit. Scholars – a term generally used for Islamic religious scholars
<i>Wadero</i>	A term for landlords or feudal lords used in Sindh
<i>Zina</i>	Fornication and Adultery, as defined in the Pakistan Penal Code
<i>Zina-bil-jabr</i>	Rape, as defined in the Pakistan Penal Code

Statutes Cited

Actions in Aid of Civil Power (Amendment) Act, 2010

Actions in Aid of Civil Power Ordinance, 2011

Anti-Terrorism Act, 1997

Constitution of the Islamic Republic of Pakistan 1956

Constitution of the Republic of Pakistan, 1962

Constitution of the Islamic Republic of Pakistan, 1973

Frontier Crimes Regulations, 1901

Government of India Act, 1935

Indian Independence Act, 1947

Objectives Resolution, 1949

Offence of Zina (Enforcement of Hudood) Ordinance, 1979

Pakistan Penal Code (Act XLV), 1860

Proclamation of Emergency Order, 1999

Provisional Constitutional Order, 1999

Sharia Nizam-e-Adl Regulations, 2009

Case Law Cited

Bashir Ahmad v. The State (PLD 1960 Lah 687)

Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657) [Nusrat Bhutto case]

Farhat Jaleel and others v. Province of Sindh and others (PLD 1990 Karachi 342)

Federation of Pakistan and others v. Moulvi Tamziddun Khan (PLD 1955 Federal Court 240)

Haji Nizam Khan v. Additional District Judge, Lyallpur, and others (1976 PLD LHC 930)

Miss Asma Jillani v. The Government of Punjab (PLD 1972 SC 139) [Asma Jillani case]

Moulvi Tamizuddin Khan v. The Federation of Pakistan (PLD 1955 Sind 96)

Mst. Shazia v. Station House Officer and others (2004 PCrLJ 1523)

Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) [NRO Case]

Reference by His Excellency the Governor General of Pakistan (PLD 1955 FC 435)

Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879) [PCO Judges case]

State v. Dosso and another (PLD 1958 SC 533)

State v. Zia-ur-Rahman (PLD 1973 SC 49)

Suo Motu Case No. 16 OF 2011 (SC)

Supreme Court Bar Association v. the Federation of Pakistan and others (PLD 2002 SC 939)

Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869)

Tanbir Ahmad Siddiky v. Province of East Pakistan and others (PLD 1968 SC 185)

Usif Patel v. Crown (PLD 1955 FC 387)

Workers' Party Pakistan and others v. Federation of Pakistan and others (PLD 2012 SC 681)

Zia-ur-Rehman v. State (PLD 1986 Lah. 428)

I. Introduction

In such *Jirgas* the girl is condemned unheard which is violative (sic.) of human and religious rights as well as the law of the land....

The decision of the Honourable Supreme Court of Pakistan is to be protected, preserved and implemented by all concerned because a duty is cast upon the police to act swiftly and to preserve the basic fabric of the society, Injunction of Islam, law of the land and decision of the Supreme Court of Pakistan. Thus, the decision of *Jirga* declaring a valid piece of law as unlawful amounts to legislation and usurping the powers of Parliament....

The functions, which are exclusively to be performed by the Courts of law, are being performed by the *Jirgas* thereby usurping the powers of the Courts. As such the *Jirgas* are parallel Judicial System which by themselves are unlawful and illegal, therefore any law do not protect them (sic.). Furthermore no appeal is filed against the decisions of *Jirgas* are final which is also against the principle of natural justice.

The Constitution is based on trichotomy of powers i.e. Legislature, Judiciary and Executive. Their powers and duties are enshrined in the Constitution. All these authorities of the State are functioning in accordance with provisions of the Constitution. In the *Jirgas* as mentioned above, the powers of Legislature, judiciary and Executive Authorities are being exercised. All the learned counsel are unanimous that *Jirgas* are against the trichotomy powers of the Constitution. It thus, appears that the *Jirgas* are undermining or attempting to undermine the provisions of the Constitution.¹

The 2004 judicial order of the provincial High Court of Sindh, Pakistan, from which the above excerpts are taken, is considered to be a 'landmark judgement'² on the issue of informal justice systems in the country. Passed within the backdrop of reported harassment of the petitioner and human rights violations at the hand of the local tribunal (or *Jirga*), this judgement is championed by

¹ *Mst. Shazia v. Station House Officer and others* (2004 PCrLJ 1523).

² Ardeshir Cowasjee, 'A first step' *Dawn* (Karachi, Pakistan 02 May 2004)

<<http://www.dawn.com/news/1072875/a-first-step>> last accessed 7 September 2013.

human rights advocates for its declaration of illegality against all forms of local justice mechanisms not sanctioned by the law of the state.³ But it would be a great oversight if our reading of the text remains limited to this. I argue that the conflict that lies at the heart of this judgement is the historical struggle between the formal and informal systems of law and justice in Pakistan, both claiming to be the true guardians and representatives of the people. The expanding discourse on human rights as well as the realisation that the informal justice systems are often found wanting in their ability to safeguard the rights of women, minorities and the members of marginalised communities,⁴ form another shade of this picture. The judgement in question also depicts the capacity of the dominant legal system to pass verdicts of legality or illegality against alternative normative forums that do not originate from it or are not subsumed by it. Moreover, the emphasis on Constitutional Principles and Islamic Injunctions, which are claimed to represent the real ethos of the society, add to the complexity of this picture. This judgement, then, is not merely a denunciation of the practises and legality of informal legal and normative structures that pervade the society. Rather, it provides a portrait of Pakistan's overall socio-legal architecture, encapsulating the multiplicity of its constituents, along with their contestations, mutual encounters, interplay, and competing narratives.

³ Maliha Zia and Riffat Butt, 'Pakistan NGO Alternative Report on CEDAW 2012' (Islamabad, Pakistan 2012) 43.

⁴ This conflict between the traditional justice mechanisms and human rights will be elaborated in Chapters 3 and 5.

Indeed, not just the domain, but even the label of Law is a ‘terrain of contestation’⁵ in the context of Pakistan, and the complexity of this terrain is evident even within the Constitutional framework of the country. The formal legal and constitutional system of the country owes much to its colonial past, and this colonial legacy is still reflected in the civil and penal codes in force in the country.⁶ The fact that Pakistan is officially proclaimed to be an Islamic Republic means that the injunctions and principles of Islamic Law form an undercurrent that flows through the legal and constitutional instruments – a fact that constitutes a source of friction between notions of secular common law and religious law.

The informal normative and justice systems also form a significant facet of the legal architecture, as a large section of the populace continues to rely on them and as, despite the declarations of illegality and struggle with the dominant law, they are sanctioned by the State⁷ in some parts of the country.⁸ Then there is the matter of a legal *exteriority* created through the Constitution – geographical regions to which the executive authority of the State extends, but which have no recourse to mainstream judicial institutions and guarantees.⁹ Added to all of this is the rising internal and external violence in its various guises, commonly

⁵ Balakrishnan Rajagopal, 'Limits of Law in counter-hegemonic globalization: The Indian Supreme Court and the Narmada Valley Struggle' in Boaventura De Sousa Santos and Cesar Rodriguez-Garavito (eds), *Law and Globalization from Below* (Cambridge University Press, Cambridge 2005) 183.

⁶ A description of the continuation of colonial law will be provided in Chapter 3, and revisited in Chapter 8.

⁷ In this document, State (capitalised) is used to refer to the State of the Islamic Republic of Pakistan, while state (non-capitalised) is employed to refer to the entity in general.

⁸ *Official Jirgas* form part of the Frontier Crimes Regulations 1901, which govern Pakistan's tribal regions. This will be elaborated in the section on Tribal Areas in Chapter 3.

⁹ The issue of these Tribal Areas will also be introduced in Chapter 3.

labelled as increasing *lawlessness* (or absence of law), which not only defies legal and normative orderings but also emerges from their mutual conflict. Furthermore, each of these segments of the legal terrain, far from being monolithic, has multiplicities inherent within it. The notion of law in the context of this intricate *Socio-Legal Tapestry* of Pakistan, then, is far more elusive than is generally and readily assumed in legal and political discourses.

It is contended in this study that the principal reason why this complexity remains concealed in mainstream accounts is that the analyses and examinations of the legal architecture of Pakistan remain trapped within specific perspectives and approaches to law, each of which reads the situation through its own definitions and categories. These *Narratives of Law* differ in terms of how they perceive the context, identify their priorities, frame the problems and then propose solutions for their rectification. However, caught in a struggle to maintain their own definitional consistencies, these narratives are only able to adopt and offer a partial view of the picture and owing to that, they generate contradictions that ultimately weaken their foundational approach and proposed solutions. The identification, examination and problematisation¹⁰ of these narratives of law, in relation to a broadened horizon of socio-legal

¹⁰ Michel Foucault's concept of 'Problematisation' presents the more discussed version of this idea. It refers to the examination of the 'phenomena that are taken for granted, largely, because they are too obvious' and, in this manner, to 'objectify what is considered to be objective.' Roger Deacon, 'Theory as Practice: Foucault's Concept of Problematization' (2000) 118 *Telos* 127, 127. However, as I am using this term in the discussion divested from the larger Foucauldian approaches of Genealogy or Archaeology, the usage of the term in the context of the current thesis is closer to Paulo Freire's formulation of Problematisation as a 'pedagogical practice that disrupts taken-for-granted "truths".' Carol Bacchi, 'Why Study Problematisations? Making Politics Visible' (2012) 2 (1) *Open Journal of Political Science* 1, 1.

architecture of Pakistan, provide the context and the crux of the current investigation.

It will be argued in the course of this discussion that we can identify four key narratives of law employed within Pakistan to understand its socio-legal setup. The present study will also highlight that the perspectives that emerge from the narratives of State Law, Islamic Law, Legal Pluralism and Human Rights, exclude from their accounts those significant facets of the context that challenge their fundamental hypotheses.¹¹ The contradictions present within these narratives can be uncovered through two steps: First, through the consideration of the wider social context in which law operates; and second, through the identification and examination of the implicit and explicit (legal-theoretical) assumptions of these narratives. A focus on the wider context enables the subsequent analysis to shed some of the constraints that limit any examination conducted from within a particular perspective on law. At the same time, bridging the gap between these approaches and their theoretical foundations, which often remain hidden, permits not only an abstraction, but also prevents the discussion from being overwhelmed by the complexity of the situation. In this regard, the thesis makes the case for the need for a different narrative of law in this context, and for the necessity of context-specific approaches to law. By adopting the framework of Coloniality to offer a different lens to understand

¹¹ A discussion on these narratives will be carried out in Chapters 3-6.

Pakistan's socio-legal peculiarities,¹² it presents one attempt in this vein, with the purpose of initiating discussion and inviting critique.

A. The need to examine Pakistan's Legal Tapestry

The basic assertions made in this study and the questions raised in this enquiry are 'strong' statements.¹³ They are strong not in the sense of being controversial, although they may be considered as such by those who are engaged in the preservation of the legal systems and the practise of law in Pakistan. The controversial aspect of these assertions springs from the same fount from which their significance emanates. I call them strong statements in the sense of Santos's use of the term, when he argues that strong questions are 'paradigmatic in nature' that question 'the societal and epistemological paradigm that has shaped the current horizon of possibilities within which we make our options'.¹⁴ The questions and arguments discussed in the present text, therefore, are strong statements because they attempt not only a critique of one particular paradigm, but of multiple paradigms, and bring into question our resultant horizon of analytical and material possibilities in a holistic form, while offering a reading of the context which is not generally studied through this angle.

¹² The term Coloniality is coined by Latin American sociologist, Anibal Quijano, and has been elaborated by various scholars, which include Walter Mignolo, Arturo Escobar, Ramón Grosfoguel and Jayan Nayar. A discussion on colonialism and Coloniality is conducted in Chapter 7 of this study. For foundational texts about this idea, see Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 (3) *Nepentla: Views from South* 533; Anibal Quijano, 'Coloniality and Modernity/Rationality' (2007) 21 (2-3) *Cultural Studies* 168.

¹³ Boaventura De Sousa Santos, 'If God were a Human Rights Activist: Human Rights and the Challenge of Political Theologies' *Law, Social Justice & Global Development Journal (LGD)* <http://www.go.warwick.ac.uk/elj/lgd/2009_1/santos> last accessed 5 September 2013, 3.

¹⁴ Ibid.

The primary claim of this research is that the dominant narratives employed to understand law in the socio-legal context of Pakistan, both that fall into the mainstream camp and those that assume positions of alterity or critique, are largely unable to capture the legal realities prevalent in the country. An unquestioning adherence to these narratives and an insufficient apprehension of the legal, contextual, societal and theoretical frames they are built upon, generates contradictions that undermine the solutions proposed through these narratives, while also challenging the viability of the narratives on the whole. Pakistan's legal architecture is a medley of post-colonial and colonial approaches to law, of religious and secular perspectives, of an array of popular justice mechanisms locked in a struggle with both state law as well as the human rights discourse. In this backdrop, the dominant understanding of law in Pakistan that emerges from the idea of Positive Law – i.e., law posited by the state that is considered to have the exclusive right to author law – albeit with its multiple theoretical facets, cannot account for the multiplicities and problematics of law as present and practised in Pakistan. While this approach is prevalent both within the legal fraternity as well as the wider society, the thesis argues that our conception of this entire discourse requires reconsideration. This is in light of the assertion that state-law, though it occupies a dominant position within the legal landscape, does not encompass the entire legal tapestry of Pakistan. Moreover, some aspects of this set-up, such as the laws governing the tribal regions of the country, do carry state authority but fall outside the purview of the courts and the legal system and straddle multiple

narrative and theoretical paradigms simultaneously. In this scenario, the authority of the state coexists with the lack of Rule of Law; the presence of state law coincides with the absence of legal rights and constitutional guarantees. This will be elaborated and discussed further in the course of the thesis.

I would argue that even the narratives that attempt to offer alternatives to this legal positivistic position, as well as their underlying theoretical propositions, are found wanting. Though these approaches provide us with insightful explanations of some facets in isolation, they are not able to provide adequate responses to their internal incongruities. For instance, while the perspective of Islamic law (as practised and advocated in the country) critiques the alien and foreign roots of the common law tradition, it fails to recognise its own foreignness or its roots in precisely the same colonial history from which the mainstream legal system sprang.¹⁵ Similarly, while the legal-pluralistic approach highlights the oppressive nature of state law and the emancipatory potential of traditional and folk laws, it does not challenge the equally problematic and oppressive nature of customary tribunals to the same extent. In a similar vein, the human rights approach to law raises concerns about the patriarchal nature of informal tribunals, but then further limits the options available to marginalised sections, and pins its hopes on the state which is itself riddled with problems of patriarchy and clientelism. It is because of such quandaries that I make the case for a more nuanced narrative and a context-specific approach to law in Pakistan.

¹⁵ Revisited in Chapter 8 on page 251.

Before venturing into a detailed discussion on these narratives, however, it is important to highlight the rationale and the need behind a study of socio-legal tapestry of Pakistan. The reasons why Pakistan is a suitable subject for the purpose of this examination are manifold. First, the social and geo-political situation of the country renders that its domestic issues not only affect the 180 million inhabitants of this sixth most populous country of the world, but that they have repercussions for the wider world as well. Without going into a discussion on the geo-strategic position of Pakistan, on which numerous books and articles have been written in this era of increased preoccupation with securitisation,¹⁶ two factors can be mentioned that highlight the country's wider significance. One is that Pakistan is one of the eight states in the world that are armed with nuclear weapons, and any instability of the state apparatus is considered a cause for International concern.¹⁷ Two, the rise of Islamic militancy and consequent violence in the past two decades, and its alleged linkages to the territory of Pakistan, highlight the relevance of the country's internal matters to events around the world.

¹⁶ For example, see Ayesha Siddiqa Agha, *Military Inc.*: (Oxford University Press, Karachi, Pakistan 2007); Owen Bennet Jones, *Pakistan: Eye of the Storm* (4th edn Yale University Press, New Haven 2011).

¹⁷ There are five states which are termed as Nuclear Weapon States (NWS) under the Nuclear Non-Proliferation Treaty. These are, United States, Russia (formerly Soviet Union), United Kingdom, France and China. There are three states, which are not part of the Treaty, but which have conducted nuclear weapons tests – India, Pakistan and North Korea. Further information available from the Agency for the Prohibition of Nuclear Weapons (OPANAL), 'Nuclear Weapon States' <<http://www.opanal.org/Desarme/Potencias/npowers.htm>> last accessed 11 February 2013.

Israel is also widely considered to have nuclear weapons capability, but it is an official policy of Israel to neither confirm nor deny this. See, Luke Harding, 'Call for Olmert to resign after nuclear gaffe' *The Guardian* (London 12 December) <<http://www.guardian.co.uk/world/2006/dec/12/germany.israel>> last accessed 11 February 2013.

The second reason for selecting the socio-legal architecture of Pakistan as a subject matter is related to the place of legal discourse in the country. Law and legal analysis have emerged as leading paradigms in the country especially in the past 7 years, with the so-termed Lawyers' Movement of 2007.¹⁸ Legal institutions, judiciary and lawyers have gained prominence as 'guardian[s] of law'¹⁹ and justice, and those who were at the forefront of the movement have attained a celebrity status. Yet despite the increased importance of law and lawyers, the analysis of law and legal systems remains deficient in accounting for diverse aspects of the legal situation of the country. The primary reason behind this is that the analysis mainly focuses on technical issues related to the constitution and legal statutes, which fails to explain or include the legal pluralities in Pakistan.²⁰ Legal analysts and experts, having been trained within common law and positivist traditions, tend to ignore other realities pertaining to law's operation in order to fit the complexities and materialities of life within the neat demarcations of the boundaries of law. Because of this, discussions on legal structures that fall outside state-oriented conceptions of law fall prey to debates on domains of power, *realpolitik*, and socio-economic divides within the

¹⁸ A civil society movement for the restoration and independence of the judiciary, spearheaded by lawyers, which continued until 2009. For an introduction to the timeline and movement strategy, see Zahid Shahab Ahmed and Maria J. Stephan, 'Fighting for the rule of law: Civil Resistance and the Lawyers' Movement in Pakistan' (2010) 17 (3) *Democratization* 492.

¹⁹ Kersi B. Shroff and Krishan S. Nehra, 'Suspension and Reinstatement of the Chief Justice of Pakistan: From Judicial Crisis to Restoring Judicial Independence?' *The Library of Congress, August 2007* <<http://www.loc.gov/law/help/pakistan-justice.php>> last accessed 15 July 2013.

²⁰ For instance, see Paula Newberg, *Judging the State : Courts and Constitutional Politics in Pakistan* (Cambridge University Press, Cambridge 1995); Shamil Shams, 'Transparency International: Rule of law can end corruption in Pakistan' *Deutsche Welle*, 6 December 2012 <<http://www.dw.de/rule-of-law-can-end-corruption-in-pakistan/a-16431781>> last accessed 17 July 2013; NNI, 'Rule of law vital to civilize society: CJP' *The Nation*, 9 February 2013 (Pakistan 15 July 2013) <<http://www.nation.com.pk/lahore/09-Feb-2013/rule-of-law-vital-to-civilize-society-cjp>> last accessed 07 August 2013.

country. For instance, the informal legal tribunals are condemned as 'Kangaroo Courts' without 'due process' and Rule of Law;²¹ the demands by some groups for imposition of Islamic Law in the country are understood, not as a clash of different normative orderings, but as issues of governance and political militancy;²² the problems with the functioning of law and courts are commonly discussed in terms of inefficiencies,²³ and socio-economic and political divides hampering the Rule of Law.²⁴

Third, in the same vein, while symptomatic of post-colonial societies in many aspects, Pakistan's constitutional and legal arrangements nevertheless offer a distinct case where major limitations of mainstream legal analyses are evident. The common factors between Pakistan and other post-colonial societies such as India and Bangladesh, which also share a common pre-independence history with Pakistan, are the struggle between state law and notions of indigenous and traditional legalities.²⁵ State law in these instances is an amalgamation of western concepts of social contract, constitutionalism and common law, predominantly originating in the colonial past of these countries. This state law sits in an uneasy relationship with legal and normative orders indigenous to the

²¹ Editorial, 'The farce of tribal *jirgas*' *The Express Tribune*, 28 May 2012

<<http://tribune.com.pk/story/385442/the-farce-of-tribal-jirgas/>> last accessed 16 July 2013.

²² For instance, see Christine C. Fair, Neil Malhotra and Jacob N. Shapiro, 'Islam, Militancy, and Politics in Pakistan: Insights From a National Sample' (2010) 22 (4) *Terrorism and Political Violence* 495.

²³ Dawn, 'Court cases backlog, suffers common Pakistanis' *Dawn* (Islamabad, Pakistan 21 July 2010) <<http://archives.dawn.com/archives/144137>> last accessed 15 November 2013.

²⁴ See, for instance, USAID and Management Systems International, 'Pakistan Rule of Law Assessment - Final Report' (Pakistan 2008).

²⁵ For an account of legal pluralistic issues faced by India in the post-partition period, see Shalini Randeria, 'Entangled Histories: Civil Society, Caste Solidarities and Legal Pluralism in Post-colonial India' in John Keane (ed) *Civil Society: Berlin Perspectives* (Berghahn Books, New York 2006); Balakrishnan Rajagopal (2005) (n 5).

region. But the multiplicity integral to the socio-legal structure of the country includes other factors that distinguish Pakistan from other post-colonial countries. In addition to colonial, western and traditional influences, the legal system of Pakistan is also in the midst of a struggle between notions of Islamic law and a secular understanding of law. The country's constitution also outlines a legal exteriority within its territory in the shape of laws applicable to the tribal areas. And this arrangement, or lack thereof, is further complicated by the presence of areas of lawlessness, where the writ of the state is increasingly challenged. The endeavour of this work will be to flesh out these pluralities and complexities existent in the country's socio-legal arrangement and then interrogate some of the most prominent narratives and legal theoretical frameworks from this perspective.

Fourth, and finally, I have chosen Pakistan as the subject of this examination because of methodological reasons and the importance of the country's legal issues to me personally. Being engaged with the judicial and legal systems of the country in the past highlighted for me the problems faced by the legal and political institutions, as well as their impact on the population that relies on them for dispute resolution and dispensation of justice. My interrogation of both the context of Pakistan and the legal frameworks emerges from a concern to try and comprehend the issues of law and state more effectively, as a critical understanding might lead to a better resolution of the problems. I contend that the pressing task for academics and scholars of Pakistan's socio-legal context is to conceive of more nuanced ways through which the systems could be made

accountable to the people, and could be made more geared towards their suffering. Granted that this would be a lifelong project, this thesis is nevertheless my first major step in that direction.

The assertion I am making here is that law and legal institutions, to the extent that they have become inherently linked with justice, need to be questioned and analysed to create opportunities for the betterment of the people these institutions govern. However, these questions, so long as they stay within any particular paradigm or ideology, will not allow us to get to the roots of complexities. An exclusive focus on any one paradigm – be it positive law or indigenous law, human rights or critical legal theory, religious law or secular law – acts as a blinker which compels us to treat everything that does not fit the criteria of that particular discourse as an exception or anomaly. The chief goal of the researchers then, as some scholars argue,²⁶ should be to focus on the material and conceptual realities of the society in consideration and then move towards their theoretical explanations if possible. This serves as the main rationale behind this study and the aim here is to aid the filling of a void that has emerged due to a lack of emphasis on the socio-legal examination of the country.

²⁶ Brian Z. Tamanaha, 'A Non-essentialist version of Legal Pluralism' (2000) 27 (2) *Journal of Law and Society* 296; also, H. L. A. Hart, *The Concept of Law* (Oxford University Press, New Delhi 2005) 242.

B. Outline and Structure

The structure of the thesis follows the theoretical journey my research has taken in order to trace the perimeter of the research question, as well as to comprehend the complexity of the subject matter. It offers a dialogue between the legal context under consideration and the narratives employed to understand it, and this dialogue frames the flow of the text. The next section of the thesis discusses the methodology and methods employed to conduct this research. It begins by offering a background to the questions from which the research started, and links it to the overarching research question that drives the current study. The section provides information on Engaged Theory,²⁷ which serves as the main methodology for the present examination.

Chapter 1 provides a brief overview of the overall project. It identifies and briefly discusses the four prominent narratives arguably employed to approach law in the context of Pakistan, highlighting some of the contradictions and challenges that emerge when these perspectives are analysed in relation to Pakistan's socio-legal terrain. The first chapter also introduces the main assertions of the thesis and introduces the idea that an alternative narrative of law, such as the one based on the idea of Coloniality, might enable us to understand the issues of the context more holistically.

Chapter 2 constitutes the most descriptive part of the study, and presents an overview of the constitutional and legal turmoil that has gripped Pakistan in the

²⁷ See Methodology on page 25.

post-independence era. The purpose behind this section is to provide the reader an insight into the legal uncertainty at the level of the state, which frames the socio-legal architecture of the country.

Chapter 3 lays out the overall context of the current examination by outlining key aspects of the complex socio-legal terrain of Pakistan. The chapter discusses the country's constitutional arrangement and common law heritage, their engagement with notions of Islamic law, the presence of traditional tribunals and informal courts, problems of colonial laws and rules governing the Tribal regions, and the difficulties associated with the rise of internal and external violence. The historical trajectories of these domains and their mutual interplay will be discussed to provide a footing to allow us to begin to understand what may be characterised within the boundaries of legal and socio-legal spheres.

Chapter 4 addresses and challenges the mainstream understanding of law as it exists within Pakistan, both within the legal fraternity as well as in the wider discourse. It will be argued that this dominant narrative on law is symptomatic of and linked to the legal positivistic approach, which dominates the legal and political discourse in the country. Through a brief discussion on the narrative on law based on this perspective, the chapter argues that the exclusivity of positivism fails to provide us any insight into the plurality of normative orderings that exist in Pakistan. It will also be asserted that our insistence on a Hobbesian approach to state as the solution to all evils is based on our inability to problematise the historical nature of the State in Pakistan.

Chapters 5 and 6 present and discuss the most prominent critiques of the dominant narrative on law as they exist in the country. These critiques focus on the alienation and foreignness of the mainstream legal institutions and instruments, and challenge their link to the colonial legacy of the region. I will argue that these challenges lead to two alternative approaches to law: Islamic Law and Legal Pluralism. Chapters 5 and 6 will be devoted to these two narratives of law respectively. The former chapter will discuss the ascendancy of the Islamic narrative, its nuances and the challenges it presents. The core debates and problems associated with legal pluralism will be covered in Chapter 6. This chapter will argue that while pluralism allows us to recognise the multiplicity of legal and normative orderings in the country, it does not give enough weight to the repressive or problematic notions of the traditional or informal justice systems.

Linked to the problems of legal pluralism, Chapter 7 discusses the human rights approach to law, which is gaining ever more ascendancy in Pakistan, and is the main viewpoint employed to challenge the traditional and informal justice systems of the country. The chapter argues that while human rights campaigners correctly challenge the patriarchy, clientelism and misogyny present in the informal systems, the narrative on the whole fails to highlight the same problems that mar the state mechanisms of the country. Human rights approach to law makes demands for a stronger state and a stronger writ of the government, but through this it often replicates the problems it set out to challenge.

Chapter 8 provides us with a return to the overall context of law and will present an alternative narrative to understand the socio-legal tapestry of Pakistan. Building on the framework of Coloniality and the historical legacy of colonialism, it presents a more nuanced approach to understanding the particularities of the socio-legal terrain of Pakistan. Moreover, borrowing conceptual building blocks from the previous discussion on context and narratives, it will offer a different approach through which law and socio-legal framework of Pakistan may be considered. Though this theorisation would certainly have room for critique and improvement, it would allow us to both comprehend the socio-legal tapestry of Pakistan more holistically, as well as create room for its elaboration and expansion. The last section of the chapter will also present a rereading of the contextual phenomena in the light of the alternative narrative constructed in the previous sections. This will then be followed by a concluding chapter to the dissertation.

II. Background and Methodology

A. Background to the Study

This study, not unlike other research projects of this length and duration, has been a journey through several different questions, theoretical paradigms, questions and methodologies. It initially began with the exploration of the idea of People's Law as an alternative approach to law,²⁸ aimed at emphasising and addressing the problems created or sustained by the dominant legality and mainstream legal frameworks. The original approach, which was later greatly modified, was geared towards focussing on a particular social movement in Pakistan – the *Anjuman Mazarain Punjab* (AMP) which had claimed to have adopted the People's Law perspective to further its struggle.²⁹

i) Examining People's Law and Proto-Legality

The initial idea behind the study was to observe AMP's engagement with the formal legal systems, and examine how its claims of alternative legality were conceptualised and put into practise. If these claims could be translated into concrete measures and strategies by the movement, these would offer valuable insights into the ideas of the engagement between social movements and state

²⁸ For an introduction to this idea, see Jayan Nayar, 'Peoples' Law: Decolonising Legal Imagination' *Law, Social Justice & Global Development* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/nayar/> last accessed 10 June 2010.

²⁹ In 2005, after a rift between the adherents of the movement, one faction of the AMP attempted to organise People's Tribunals to judge the role of the state, military and the law in their oppression, and claimed to distance themselves from the dominant legality. Asserting that what matters is their own memory, history and their toil for a century, this approach argued for a distinct position from the one adopted by the rights-based approach. See, *ibid.*; see also, Asad Farooq, 'Mazarain People's Tribunal Declaration' (Pakistan 2005, available from the author).

law, the encounter between alternative forms of law and dominant legality, and, at best, insights into proto-legal forms³⁰ operating in this region.

The AMP (literally, the Association of Peasants of the Punjab)³¹ represents the struggle of local peasants for rights to land that they and their ancestors have tilled for more than a century in the canal irrigation colonies of Punjab. The establishment of these colonies, which has been called both an 'agricultural colonisation'³² as well as the '[British-Indian] colonial state's greatest achievement',³³ was carried out in the 19th and early 20th centuries, primarily to sustain and cater for the resource requirements of an expanding British-Indian Army.³⁴ With the establishment of the colonies came the need for agricultural labour which led to a significant relocation of people (mainly on a voluntary basis) to the newly established canal colonies, in what Kaur terms the 'first mass migration' of the people of eastern sub-continent.³⁵

The British-Indian government followed a tiered policy of land allocation, the primary focus of which was to grant land to serving or retired military

³⁰ My gratitude to Professor Alan Norrie and Professor Abdul Paliwala for giving me this insight during the PhD upgrade review discussion.

³¹ For a brief account of the AMP's struggle, see Asha Amirali, 'Dispossession, Democracy, Solidarity and Community in Ireland and Pakistan' *Indymedia Ireland* <<http://www.indymedia.ie/article/61697>> last accessed 24 October 2010; Human Rights Watch, 'Soiled Hands: The Pakistan Army's Repression of the Punjab Farmers' Movement' (Human Rights Watch, 2004); Aasim Sajjad Akhtar, 'Are We Not a Working-Class Movement?' (2005) 19 (2) *Socialism and Democracy* 133.

³² Imran Ali, *The Punjab under Imperialism, 1885-1947* (Oxford University Press, New Delhi 1988) 3.

³³ Ian Talbot, 'The Punjab under Colonialism: Order and Transformation in British India' (2007) 14 (1) *Journal of Punjab Studies* 3, 7.

³⁴ Gopal Krishan, 'Demography of the Punjab (1849-1947)' (2004) 11 (1) *Journal of Punjab Studies* 77, 80.

³⁵ Ravinder Kaur, 'The Second Migration: Displacement and Refugees from Rawalpindi during Partition' (2007) 14 (1) *Journal of Punjab Studies* 89, 89.

personnel, army officers, military farms and other military institutions, and relocated 'agricultural castes' – those groups in the Indian subcontinent whose livelihood had become associated with agricultural labour.³⁶ The grantees were not given absolute ownership of land, and land was awarded under 'Rights to Occupancy', through the Colonisation Act of 1893 and its further amendment through the Colonisation Bill 1906.³⁷ This ensured that the ultimate possession of land remained with the Crown, and the peasants held non-alienable rights to possession, with the benefit that they had a right not to be evicted from the land they tilled unless expressly authorised by the colonial government.³⁸

The colonial state promised to give the ownership of land to the peasants once it was made cultivable, although this promise was never fulfilled once the benefits of the land were fully realised and the state recognised its monetary potential.³⁹ A further condition was imposed upon the peasants through a crop-sharing system. The statutes of the time made it clear that these lands were granted in return for a 'rent', which was not paid in cash but was a rent on produce – a share in the crop or the harvest.⁴⁰ The process of establishment of

³⁶ Ibid. 101. The larger tracts of land were granted to landlords and military (which employed peasants to work the land), while peasants and *janglis* were awarded smaller holdings. *Jangli* was a category used for the native pastoral inhabitants by the colonial state, and it is still used as a derogatory term in the local language to portray 'uncivilised'. Gopal Krishan (2004) (n 34) 81. The colonial government considered it a 'civilising mission' to raise the position of the pastoral inhabitants from 'wretched cattle graziers, struggling for existence, to that of prosperous peasant proprietors', as noted by a British Indian Civil Servant of the time. Anjali Gera Roy, 'Land of Five Rivers, Canal Colonies and Oceanic Flows to Southeast Asia' (Third Critical Studies Conference, Kolkata, India, 2009) 4.

³⁷ Rajit Mazumder, *Indian Army and the making of Punjab* (Oxford University Press, New Delhi 2003) 204.

³⁸ See, The Government of the Punjab (1900), 'The Punjab Alienation of Land Act', Act XIII of 1900 <<http://www.pap.gov.pk/uploads/acts/18.html>>

³⁹ *Human Rights Watch* (2004) (n 31) 9.

⁴⁰ *Aasim Sajjad Akhtar* (2005) (n 31) 137.

canal irrigation colonies and increase in cultivated tracts of land continued until the 1940s.⁴¹ With the independence of Pakistan in 1947, the use of land transferred from the British Indian Army to the Pakistan Army, Military Seed Corporation, and other organisations. The de facto conditions regarding the peasants' right to land and occupancy, however, remained unchanged.

AMP's struggle began in the year 2000, when the peasants were forced to shift to cash-contract tenure rather than a crop-sharing system by the Pakistan Army, which inherited the use of this land by the British Indian Army.⁴² Struggling against and denouncing the laws imposed on them by the state, military and western capitalist agriculture, the adherents demanded that their titles to land be recognised by virtue of their century-old claim, toil, indigenous laws, local practises and history. Essentially a struggle for land rights, the movement also claimed to be a popular law movement through its communiques.⁴³ Having attempted to organise People's Tribunals on the issue, the proponents declared to have the right to author their own law, which would accept their claim to land and a century-old livelihood. The claim by one section of the peasants – that what matters is not what the state's notion of law and reading of history is, but the people's own memory of their history, reality, and

⁴¹ Ravinder Kaur (2007) (n 35) 98.

⁴² Aoun Sahi, 'Pakistan: The Tenants' Struggle on Okara Military Farms - Analysis and an interview with the leader of Anjuman Mazarain Punjab' *South Asia Citizens Web* <<http://www.sacw.net/article847.html>> last accessed 15 August 2010.

⁴³ Asad Farooq (n 29).

entitlements – represented an intriguing case in terms of understanding the relation between dominant law and social movements.⁴⁴

ii) From Proto-Legality to the wider Socio-Legal context of Pakistan

To examine AMP's claim of People's Law and its dynamics in relation to dominant legality, I conducted two field trips to Pakistan in 2010 and 2011, during which I interviewed some members of the movement as well as intellectuals and academics who were proponents of the struggle.⁴⁵ The four major findings that emerged during empirical research and from these interviews proved to alter the course of the current study. First, it came to the fore that, while ideas of People's Law had emerged from interactions between the participants of the movement and the academics working in this field, these were not successfully translated into any concrete or sustainable strategy for the struggle.⁴⁶ On the ground, the struggle remained aimed at acquiring land rights rather than formulating or implementing any form of alternative legality.⁴⁷ Second, even though the people's tribunals could not be translated into an effective measure for the struggle, the disengagement of the peasants from legal institutions and frameworks of the State because of violent conflict had strengthened their village tribunals (*panchayats*) and traditional methods of dispute settlement. Third, it emerged that from 2007 onwards, the

⁴⁴ Ibid.

⁴⁵ The interviews were conducted with Dr. Aasim Sajjad Akhtar (Quaid-e-Azam University, Pakistan), Dr. Aasha Amirali (University of Oxford), Dr. Taimur Rahman (Lahore University of Management Sciences, Pakistan), Dr. Asad Farooq (Lahore University of Management Sciences), and two leaders from the AMP.

⁴⁶ Interview with Aasim Sajjad Akhtar and Aasha Amirali (December 2011) and Asad Farooq (December 2011).

⁴⁷ Interview with Dr. Taimur Rahman (December 2011).

movement, army and the government institutions had reached a stalemate.⁴⁸ The incumbent provincial government had renewed its assurance to the local peasants, that their rights to land would be recognised.⁴⁹ With less pressure from the state and the army to force the peasants off the land, the movement had also lost some of its mobilisation momentum. This easing of the conflict, and the assurance of the government, could be explained as a corollary of the weakening of the then army-led central government around the same time,⁵⁰ which any exclusive focus on People's law or the local social movement would not be able to explain in isolation from the wider context.

The fourth and most important outcome of the initial research was that it challenged my understanding of law in the context of Pakistan, which had till then been based on the mainstream discourse on law as it prevails in the country. The encounter between the movement and army, the inefficacy of the state law to resolve the mentioned conflict, the strengthening of village tribunals in the region as a by-product of the struggle, and the emergence of the ideas of People's Law, highlighted the limitation and the contestation of the label of law in Pakistan's socio-legal terrain. It also emphasised the notions of law that are taken for granted and their assumptions that go unchallenged in the mainstream political and legal discourse in Pakistan. The discussions on law and the state permeate the media and common discussions, especially because

⁴⁸ Interview with leaders of the AMP, Okara (December 2011).

⁴⁹ Amir Parvez, 'Anjuman Mazarain Punjab acquired ownership rights' (Communist Workers and Peasants Party, Pakistan 2010)

<http://groups.yahoo.com/group/cmkip_pk/message/17294> last accessed 30 January 2011

⁵⁰ This period coincided with the increasing difficulties faced by the regime of General Pervez Musharraf, and the rise of the Lawyers' Movement for the restoration and independence of the judiciary. These events will be elaborated in Chapter 2 on page 82.

of the unstable political situation, the presence of internal and external violence, and the post-Lawyers' Movement environment which has strengthened the legal narrative in the country.⁵¹ Despite the ubiquitous presence of debates on law and the state, the complexity of these terminologies in the Pakistani context is absent in the dominant accounts of the legal sphere. The studies focussing on the complexity of legal architecture of Pakistan are scarce, and those focussing on theoretical examinations are even less. It was a troubling realisation that the diverse legal and normative structures, that are part of the legal realities of a large section of the country's populace, are mainly discussed through a political lens and are largely excluded from the legal discourse. There is a dearth of comprehensive examinations that would outline, let alone theorise, all the different aspects of this intricate legal and normative architecture of the country. The study that began as a legal ethnographic project then became a significantly different and broader exercise.

Although the scope of this research project has widened through the course, its socio-legal nature has remained. This thesis presents a study of the complex legal tapestry of Pakistan in its societal context. With the diverse aspects of the normative architecture of Pakistan at the heart of the enquiry, the primary aim was to enquire whether this structure, with all its anomalies and facets, could be satisfactorily explained by the narratives and theoretical conceptions of law that are used by political commentators, legal academics and practitioners focussing on Pakistan's law. This journey took me first on a path of discovering

⁵¹ These themes will be revisited throughout the course of the discussion.

the multiple legal orders, normative structures, parallel systems, tendencies and trajectories of law that constitute the socio-legal terrain.⁵² Subsequently, the research identified and problematised the narratives and theoretical propositions based on the conceptions of legal positivism, legal pluralism and informal justice, Islamic law and human rights approaches to law.⁵³ These lenses were explored solely because they are employed by legal academics and practitioners to explain one or more of the facets of Pakistan's legal tapestry. The research, in this regard, is a dialogue between narratives and context, and between theory and practise, the aim of which is not to dismiss or propagate a singular perspective; rather the rationale is to discover how the situation could be understood better in order to improve the lives of those who are subject to these systems. The structure of the thesis represents the course of this journey.

B. Methodology

This research adopts the methodology of *Engaged Theory*, which is a relatively recent approach to social-theoretical study. Although the analytical methodology adopted in the current study bears some similarity to Grounded Theory and Discourse Analysis, there are several reasons why Engaged Theory has been preferred for the purposes of this enquiry.

Discourse Analysis is primarily linked to the reading of statements, acts and the wider discourse to try and uncover what is hidden, or left aside to maintain the

⁵² A discussion on these facets constitutes the subject matter for Chapter 3 on page 96.

⁵³ These perspectives will be elaborated in Chapters 4-7, starting from page 144.

consistency and unity of discourses.⁵⁴ The approach of the present study to identify, question and critique the narratives employed to comprehend law in the context of Pakistan, shares this perspective to some extent. However, it is the emphasis on linguistics and semiotics in Discourse Analysis that differentiates it from the methodology adopted in this study.⁵⁵ While the thesis employs statements from the judiciary, activists, government officials and researchers to construct and analyse the identified narratives of law, it recognises that their implications and assertions are not always hidden that could only be brought to the fore through a linguistic analysis. The meanings that the statements used in this thesis carry are quite evident in most cases, although there is a need to schematise them and to frame them within the larger narrative to understand their implications. In this sense, *narrative* as a category is related to *discourse* as an organisational schema, and these terms have been used interchangeably throughout the discussion. But the purpose of the thesis is to identify and categorise these schema, rather than trace any obscure meaning behind them.⁵⁶

The approach of the thesis also overlaps with some facets of Grounded Theory, while differing in some key respects. Grounded Theory is acknowledged as ‘a major – or perhaps the major – contributor to the acceptance of the legitimacy

⁵⁴ See, the Unity of Discourses and Discursive Formations in Michel Foucault, *The Archaeology of Knowledge* (Routledge, London 2002) 23-43.

⁵⁵ This linguistic turn is a critique levelled against Critical Discourse Analysis as well. See, Sean Phelan and Lincoln Dahlberg, 'Discourse Theory and Critical Media Politics: An Introduction' in Lincoln Dahlberg and Sean Phelan (eds), *Discourse Theory and Critical Media Politics* (Palgrave Macmillan, New York 2011) 9.

⁵⁶ For an overview on Discourse Analysis, see Norman Fairclough, *Critical Discourse Analysis: The critical study of language* (2nd edn., Longman, Harlow 2010).

of qualitative methods in applied social research'.⁵⁷ Strauss and Corbin argue that Grounded Theory is the most influential method of 'carrying out qualitative research when generating theory is the researchers' principal aim'.⁵⁸ It is conceived of as 'a set of flexible analytic guidelines that enable researchers to focus their data collection and to build inductive middle-range theories through successive levels of data analysis and conceptual development'.⁵⁹ Despite the fact that the principal aim of this thesis is to argue for and *generate a theory*, there are two reasons why Grounded Theory has not been employed here. First, the subject matter of my research covers a number of diverse facets of Pakistan's legal and normative structure. Because of this, it would not be possible to discern and encompass all these multiple structures through fieldwork and qualitative data in a short period of time. Second, the critics of Grounded Theory argue that the theory reached through this method is mainly an interpretation of qualitative information, and does not deliver on the ideas of 'theory as discovery' and 'theory as part of an explanatory exercise'.⁶⁰ As the main purpose of the research is to conduct a dialogue between socio-legal context of Pakistan and the legal theories that attempt to explain it, a methodology was required that would allow us to move towards theorisation rather than interpretation of data.

⁵⁷ Gary Thomas and David James, 'Re-inventing grounded theory: some questions about theory, ground and discovery' (2006) 32 (6) *British Educational Research Journal* 767, 768.

⁵⁸ Quoted in *ibid.*

⁵⁹ Kathy Charmaz, 'Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies' in Norman K Denzin and Yvonna S. Lincoln (eds), *The Sage Handbook of Qualitative Research* (3rd Edition edn, Sage Publications, California 2005) 507.

⁶⁰ Gary Thomas and David James (2006) (n 57) 773.

But it is important to mention that theory is not taken here as an unproblematic exercise. I would argue that theory as an abstraction does not possess an inherent value; rather it serves as a means to achieve certain aims, and as a tool to engage with the phenomena at hand and understand it in the larger context. Clifford borrows from Foucault to build on this idea of theory as an instrument and makes his case for Engaged Theory. In *Power/Knowledge*, Foucault argues:

The notion of theory as a toolkit means: (i) The theory to be constructed is not a system but an instrument, a logic of the specificity of power relations and the struggles around them; (ii) That this investigation can only be carried out step by step on the basis of reflection (which will necessarily be historical in some of its aspects) on given situations.⁶¹

Clifford calls these two facets – the instrumentality of theory, and the reflection and dialogue between context and theory – a ‘Toolkit of engaged theory’.⁶² And it is this methodology that has steered the present study. The approach to legal theory adopted here is a reflexive dialogue with practise or the context of socio-legal architecture of Pakistan, the aim of which has been to enrich our understanding of both of them, and draw out themes to improve on their mutual shortcomings. As Deleuze argues, ‘Practise is a set of relays from one theoretical point to another, and theory is a relay from one practise to another. No theory can develop without eventually encountering a wall, and practise is

⁶¹ Michel Foucault, 'On Popular Justice: A Discussion with Maoists' in Colin Gordon (ed) *Power/knowledge: Selected Interviews and Other Writings, 1972-1977* (Harvester Press, Brighton 1980) 145.

⁶² James Clifford, 'On Ethnographic Authority' in Yvonna S. Lincoln and Norman K. Denzin (eds), *Turning Points in Qualitative Research: Tying Knots in the Handkerchief* (AltaMira Press, Walnut Creek, California 2003) 123.

necessary for piercing this wall.’⁶³ Theorisation, in this sense, becomes a political and practical exercise that questions both the realities of the situation at hand and the horizon of possibilities presented by the abstract expositions. Theory, then, is not just an illustration of context, or it ‘does not express, translate, or serve to apply practise; it is practise.’⁶⁴

More significantly, as discussed above, the primary objective behind the research is to understand Pakistan’s socio-legal architecture in order to find ways through which the situation could be improved for the common citizen of the country. The instrumentality of theory granted, it is important to be conscious of the consequences and repercussions of the proposed perspectives. This is the main reason why the methodology of Engaged Theory has been employed here. The key aspect behind Engaged Theory is that it is ‘intended to support social change directly or indirectly’.⁶⁵ Like Grounded Theory, Engaged Theory also adopts the approach that ‘theory evolves dialogically’,⁶⁶ though this dialogue is not between data and analysis, but rather between practise and theory. A key difference lies in the idea that Engaged Theory does not see theorisation as value neutral, but as a political exercise. Carol Adams labels her research on sexuality as an ‘engaged theory that arises from anger; theory that

⁶³ Michel Foucault and Gilles Deleuze, 'Intellectuals and power: A conversation between Michel Foucault and Gilles Deleuze' *libcom.org*, 9 September 2006 <<http://libcom.org/library/intellectuals-power-a-conversation-between-michel-foucault-and-gilles-deleuze>> last accessed 12 February 2012.

⁶⁴ Michel Foucault, Donald Fernand Bouchard and Sherry Simon, *Language, counter-memory, practice : selected essays and interviews* (Blackwell, Oxford 1977) 207.

⁶⁵ Ann Garry, 'Intersections, Social Change and "Engaged Theories": Implications of North American Feminism' (2008) 8 *Pacific and American Studies* 99, 99.

⁶⁶ Jacques M. Chevalier and Daniel J. Buckles, *Participatory Action Research: Theory and Methods for Engaged Inquiry* (Routledge, Oxford 2013) 39.

envisions what is possible. *Engaged Theory* makes change possible'.⁶⁷ And this kind of theorisation makes change possible by exposing problems, offering solutions,⁶⁸ and conducting *reflexive* research that 'reflects on itself' in line with the researchers' 'commitments to changing social history'.⁶⁹ More importantly, Engaged Theory highlights the importance to 'understand that everything is connected'.⁷⁰ It is this commitment to change and the tendency to understand the connection between complex and seemingly unconnected phenomena that characterises the thesis under consideration.

C. Research Method

In relation to the methods for research, I have relied on three categories of texts and literature. First, the literature related to law has been studied to better understand the multiple facets of the socio-legal tapestry of Pakistan. This includes the Constitution(s) of Pakistan and its related documents, legislations relevant to the discussion, and some related case reports and commentaries. Second, the legal-theoretical literature, that encompasses a number of different paradigms and positions, has been engaged with to facilitate the dialogue with the context of the project. Third, I have extensively relied on secondary literature (mainly newspaper columns, articles, speeches, news stories and academic articles) to build a nuanced understanding of Pakistan's legal frameworks, the narratives employed to understand them, and the

⁶⁷ Carol J. Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (The Continuum International Publishing, London 2010) 2.

⁶⁸ *Ibid.*

⁶⁹ Jacques M. Chevalier and Daniel J. Buckles (2013) (n 66) 39.

⁷⁰ Carol J. Adams (2010) (n 67) 2.

contradictions that they raise. Because of the lack of many significant academic studies on different aspects of Pakistan's legal narratives, the newspaper articles and reports are the main resources that highlight issues linked to law, religious notions, human rights, traditional courts, and their interplay.

Chapter 1: Overview of the Study

1.1. Chapter Synopsis

Building on the points raised in the introduction to the current study, this chapter presents and discusses the main research question that guides the enquiry. It considers the key corollaries of the research question, as well as the implications of some of the conceptual categories that will be used throughout the course of this discussion. It also outlines the main assertions and arguments of the thesis in relation to Pakistan's socio-legal terrain, and introduces the four dominant narratives that appear to be employed both within and outside Pakistan to understand law in the context of the country. The chapter highlights the challenges, paradoxes and limitations that appear within the assumptions and application of these narratives, when considered in relation to the socio-legal tapestry of Pakistan. The last section of the chapter maps out the alternative proposition offered by this thesis that paves the way for a different framing of issues presented by the socio-legal situation of Pakistan, and allows us to move towards a more nuanced narrative on law within this context.

1.2. Law in Pakistan: Binaries of Opposition

The relationship between Pakistan and Law is not an easy one to characterise. In the past decade, Pakistan has seen a spirited movement for the restoration

and independence of the judiciary, spearheaded by lawyers,⁷¹ which finds few comparisons outside the country. Since the movement, the country's courts have become one of the prime examples of judicial activism in the world.⁷² The past decade has also seen the end of a military-rule and the first transition of power in the country's history from one civilian government to another. At the same time, however, Pakistan has seen a rise in militancy,⁷³ insurgencies,⁷⁴ and internal and external violence – phenomena which in common parlance as well as academic discourses are referred to as problems associated with *Lawlessness*,⁷⁵ absence of the *Rule of Law*,⁷⁶ erosion of *Sovereignty*,⁷⁷ attacks on *Human Rights*,⁷⁸ and weakening of the *Writ of the State*.⁷⁹ The strengthening and activism of the legal sphere is in this sense coupled with its increasing weakening. The country with one of the most active judiciaries is also termed

⁷¹ For a background on the events preceding the Lawyers' Movement, see Shoaib A. Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf' (2010) 35 (4) *Law & Social Inquiry* 985. For a timeline of events and a discussion on the Movement's strategy, see *Zahid Shahab Ahmed and Maria J. Stephan* (2010) (n 18).

⁷² Charles H. Kennedy, 'The Judicialization of Politics in Pakistan' in Björn Dressel (ed) *The Judicialization of Politics in Asia* (Routledge, Oxford 2012) 158.

⁷³ For an account of Islamist militancy in Pakistan, see *Owen Bennet Jones* (2011) (n 16).

⁷⁴ The nationalist struggle and insurgency in Balochistan has been continuing since the 1970s, and is an issue that the political parties and the armed forces often wrongly band under the umbrella of Islamic militancy. Although this issue will not be covered in this thesis, for an account of Baloch nationalist struggle, see Adeel Khan, 'Baloch Ethnic Nationalism in Pakistan: From Guerrilla War to Nowhere?' (2003) 4 (2) *Asian Ethnicity* 281; and Adeel Khan, *Politics of Identity: Ethnic Nationalism and the State in Pakistan* (Sage Publications, New Delhi 2005) 109-126.

⁷⁵ See, for instance Azhar Hassan Nadeem, *Pakistan: The Political Economy of Lawlessness* (Oxford University Press, Karachi, Pakistan 2002).

⁷⁶ International Bar Association, 'The Rule of Law and Human Rights in the Legal System of Pakistan' (London 1998).

⁷⁷ Hassan-Askari Rizvi, 'Who is sovereign in Pakistan?' (Pakistan Today 2012) <<http://www.pakistantoday.com.pk/2012/08/01/comment/columns/who-is-sovereign-in-pakistan/>> last accessed 6 November 2012.

⁷⁸ Human Rights Commission of Pakistan, 'State of Human Rights in 2012' (HRCP, Lahore, Pakistan 2013), 4-9.

⁷⁹ Khaled Ahmed, 'Pakistan and Nature of the State: Revisionism, Jihad and Governance' *Criterion Quarterly* <<http://www.criterion-quarterly.com/pakistan-and-nature-of-the-state-revisionism-jihad-and-governance/>> last accessed 18 September 2013.

'the most dangerous nation in the world';⁸⁰ the country with an 'ubiquitous'⁸¹ and powerful state is also branded as a 'lawless frontier';⁸² the country armed with nuclear weapons and amassed with the seventh largest army in the world, is also considered a 'fragile'⁸³ and a 'failed state'.⁸⁴ These binaries of opposition, at the least, make an intriguing case that necessitates further enquiry and compels us towards in-depth examinations, both into the nature of these analyses as well as the phenomena they are concerned with.

The present study offers such an examination, though it differs from the general discussions on law in the context of Pakistan in some crucial aspects. It does not analyse the situation in the country in terms of power politics, international relations, foreign policy or security, which guide a great number of discussions on the topics of law and the state, both within and on Pakistan. It is an attempt towards uncovering (or discovering) the notion of law within the socio-political terrain of the country through a discussion on sociological and critical perspectives on law. However, the thesis also moves away from the dominant narratives and theoretical approaches employed to understand law, its

⁸⁰ Ron Moreau and Michael Hirsch, *The Most Dangerous Nation in the World Isn't Iraq. It's Pakistan*. (Newsweek, New York 2007).

⁸¹ Doug Bandow, 'The Islamic Republic Of Pakistan: The World's Most Dangerous Nation Holds An Election' *Forbes* 20 May 2013

<<http://www.forbes.com/sites/dougbandow/2013/05/20/the-islamic-republic-of-pakistan-the-worlds-most-dangerous-nation-holds-an-election/>> last accessed 12 August 2013.

⁸² Robert D. Kaplan, 'The Lawless Frontier' *The Atlantic*

<<http://www.theatlantic.com/magazine/archive/2000/09/the-lawless-frontier/305296/>> last accessed 5 November 2013.

⁸³ According to a recent report on 'Fragility Indicators', Pakistan is one of the top five 'authority-challenged fragile states'. See, David Carment and Yiagadeesan Samy, 'Assessing State Fragility: A Country Indicators for Foreign Policy Report' (Country Indicators for Foreign Policy, Ottawa 2012) 7.

⁸⁴ The Failed State Index 2013 ranks Pakistan as the 13th most failed state in the world, Foreign Policy and The Fund for Peace, 'The Failed States Index 2013' (The Fund for Peace 2013) <<http://ffp.statesindex.org/rankings-2013-sortable>> last accessed 5 November 2013.

institutions, functioning and failings in the context of Pakistan. What follows is not a corpus of cases and judicial decisions, nor a list of laws and legislations, and neither is it solely a discussion on the deficiencies of the administration of justice mechanisms; rather, the study conducts a socio-legal and theoretical exposition of the legal architecture of the country. This is based on the argument that several normative (and legal) structures that exist in the society and govern the realities of the country's populace are excluded from a pure focus on state-authored law and its various instruments.⁸⁵ The legal architecture of the country is an admixture of colonial law, post-colonial law, common law, Islamic law, as well as indigenous and tribal notions of legality. The struggle between these different aspects of the country's legal inheritances, constructions and narratives cannot be encompassed through an exclusive focus on legislations and judicial decisions, or adequately understood while remaining within the dominant narratives of law.

At the same time, however, the current study does not employ or propose a *grand theory* as a panacea to examine the legal and normative architecture of Pakistan and resolve its contradictions. This is primarily because, as it would be argued in the course of this text, there are facets which are unique to the socio-legal structure of Pakistan, and which are difficult for any single legal theory to fully comprehend and explain. In this backdrop, the task at hand is not to construct or resurrect a theoretical proposition based only on its explanatory power; rather, the purpose here is to examine the prominent narratives of law

⁸⁵ See, The Socio-Legal Tapestry of Pakistan on page 96.

as they exist within the country. There is a need to understand the theoretical foundations of these narratives, question their framing of problems as well as the solutions that emerge from this. The main aim for this problematisation is to highlight the necessity and the urgency to move towards alternative narratives and context-specific approaches to law in the context of Pakistan.

I argue that there are four main narratives that dominate the reading and perception of law in the context of Pakistan. These are the narratives of 'law as State-oriented law' (including common law and English constitutional traditions),⁸⁶ of 'Islamic law' (which emerges from a critique of colonial legal legacies, and creates inroads for what it claims as the real ethos of Pakistan),⁸⁷ of 'Legal Pluralism' (which argues for a recognition of the multiplicity of legal and normative orderings)⁸⁸ and the narrative of Human Rights approach to law (which focuses on ideas of the responsiveness and responsibility of law and the state).⁸⁹ The assertion here is that these narratives read the concerned phenomena through their own particular lens, frame the problems according to their own logics and offer solutions based on their own reasoning, but during this process they exclude much more than they include. In order to make their analyses consistent and their perceived resolutions viable, these narratives of law disregard crucial elements that emerge from the socio-legal context of Pakistan. The task, then, is to challenge the foundational assumptions of these narratives; to see whether these frames and their underlying logics provide us

⁸⁶ Chapter 4 on page 144.

⁸⁷ Chapter 5 on page 180.

⁸⁸ Chapter 6 on page 204.

⁸⁹ Chapter 7 on page 228.

with an adequate answer, or whether there is a need to read the situation differently.

1.3. Main Research Question

In this backdrop, the main question addressed by this inquiry is: *How may we understand the socio-legal situation of Pakistan?* As this question leads to several secondary questions as a corollary, a deconstruction of the main research question is required before it can be considered in depth. There are three main components of the question in consideration: Which *situation of Pakistan* are we trying to address? Which phenomena are encompassed within the category of *socio-legal*? And, what does the thesis mean by *understanding* these phenomena? I will briefly consider them in turn.

In recent discussions on the *situation* of law, society and the State in Pakistan, the term is employed to address anything from extremism, terrorism, and political and economic instability,⁹⁰ to inefficiency of governance apparatus and inadequacy of Rule of Law mechanisms.⁹¹ I argue that the matter here is not about selecting which one of these in isolation is the most significant aspect of the said situation; rather, they together form the overall context in which any meaningful discussion on law and society in Pakistan can take place. The legal

⁹⁰ See, generally, Yousuf Nazar, *Balkanisation and Political Economy of Pakistan* (National News Agency, Karachi, Pakistan 2011); Usman Mustafa, 'Determinants and Implications of Major Conflicts in Pakistan' (2013) 4 (1) *Millennial Asia* 67.

⁹¹ See, for instance, Robert D. Lamb and Sadika Hameed, 'Subnational Governance, Service Deliver, and Militancy in Pakistan' (Center for Strategic & International Studies, Washington, D. C. 2012).

situation of Pakistan is considered a *situation* only because it provides us a snapshot to allow comprehension and discussion; it is not a situation based on any temporal fixity, geographical permanence or a definite set of spheres. This does not imply that the current thesis or any single treatise can account for all these disparate spheres. Though not dealing with them explicitly, the case presented here is that some of these occurrences (for instance, the rise of the extremist religious narrative in the country, the problems of governance and rule of law) are interlinked and cannot be considered in isolation. Moreover, these problems, rather than being self-constituting and self-contained, are manifestations of the country's society-state-law disconnect. These problems do not merely exist because of the inefficiency of the legal system; rather, they exist because of the crises that lay at the foundation of law and the State in Pakistan.⁹² Some of the nuances of law and the state as they are *situated* in the country elude the narratives commonly employed to understand them, and therefore the issues that emerge from them appear as distinct phenomena. These incidences, then, are symptoms of a much deeper problem of law and the state and, as will be discussed in the following chapters, they form the backdrop of the context the thesis is attempting to read.

The second component of the main research question emerges from the view adopted here that an exclusive emphasis on the category of law, as it is generally understood, subsumes the discussion to focus on legal instruments and mechanisms. This is why a crucial aspect of the main research question is

⁹² Chapter 8 on page 251.

the emphasis on the *socio-legal* nature of the project. While the thesis does employ the category of socio-legal, it is with some caveats – after all, the research does not present a viewpoint of the particular members of society who adhere to the discussed normative and legal systems, or indeed present a survey of how these structures impact the lives of participants.⁹³ It does not follow the mainstream socio-legal method of starting off from a literature review, conducting ‘field-work’ and surveys based on the conceptual model, and then analysing the ‘data’ and ‘findings’ observed through this brief linkage with the society.⁹⁴ Is it then accurate to term this a socio-legal research and, if so, what is the rationale behind it? I would argue that it is not only correct to use the category of socio-legal, but it is also essential to do so. The legal terrain that this research examines provides us an overview of the broad societal context, focussing on the most prominent (as the existence of others cannot be precluded) normative and legal orderings that exist within this context.⁹⁵ It is set in an environment in which these systems engage and encounter each other. Law, including state law with its dominant role, is taken here as part of the larger societal set-up, where other normative orderings come into conflict with it and struggle with it. Examining the socio-legal context therefore allows us to not only study different legal structures within the country, but also to frame

⁹³ On the topic of the methodological difficulties for socio-legal studies as a discipline, see Reza Banakar and Max Travers, 'Theory and method in socio-legal research: Introduction' in Reza Banakar and Max Travers (eds), *Theory and method in socio-legal research* (Hart, Oxford 2005). On the wider issue of socio-legal studies in the Third World, see Radha D'Souza, 'Imperial Agendas, Global Solidarities and Third World Socio-legal Studies: Methodological Reflections' (2012) 49 *Osgoode Hall Law Journal* 409. D'Souza argues that even the prominent categories within socio-legal studies, such as ‘society’ and ‘pluralism’ etc., need to be reconsidered in their relation to the realities of the Third World countries.

⁹⁴ Jayan Nayar, 'The Politics of Hope and the Other-in-the-World: Thinking Exteriority' (2013) 24 (1) *Law and Critique* 63, 70.

⁹⁵ Chapter 3 on page 96.

them and find their place in the larger societal order. In this manner, the thesis approaches ideas of law and legality as the dominant frame of analysis, situated within the wider context.

Finally, the use of the term *understanding* in relation to the *socio-legal situation of Pakistan* is not merely to list or describe multiple facets of the socio-legal architecture of the country, albeit this description of the diverse elements of the socio-legal terrain is the first and necessary step. Within the growing, but still not sufficiently substantial, socio-legal research studies conducted on the various areas of law in Pakistan, one struggles to find expositions that would bring together and outline the different and disparate legal or normative orderings in one place.⁹⁶ In the past few years, some exceptional accounts on the conceptual and historical trajectories of Islamic law,⁹⁷ colonial law and constitutional law of Pakistan have emerged.⁹⁸ There are also a growing number of publications on human rights and the conflicts between individual rights and traditional customary tribunals.⁹⁹ However, as these accounts mainly

⁹⁶ There are useful insights offered by some notable socio-legal scholars, which I have combined and built on. See, for instance, Shaheen Sardar Ali, 'Applying Islamic Criminal Justice in Plural Legal Systems: Exploring Gender-Sensitive Judicial Responses to Hudood laws in Pakistan' (International Judicial Conference, Islamabad, Pakistan, 2006); Martin Lau, 'Discussion Note on Informal and formal systems of rule of law: How does the donor community approach legal pluralism?' (World Bank Headline Seminar Seminar III: Rule of Law in Fragile and Conflict-Affected Situations, London, 2009); Werner Menski, 'Flying kites in Pakistan: Turbulences in theory and practice' (2010) 1 (1) *Journal of Law and Social Research* 41, 51-52.

⁹⁷ See, for instance, Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Martinus Nijhoff Publishers, Leiden 2006); Rubya Mehdi, *The Islamization of the Law in Pakistan* (Nordic Institute of Asian Studies Monograph Series No 60, Curzon Press, Richmond 1994).

⁹⁸ See, Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, Cambridge 2013).

⁹⁹ See, for instance, Shaheen Sardar Ali, 'The Rights of Ethnic Minorities in Pakistan: A Legal Analysis' (1999) 6 (169-195) *International Journal on Minority and Group Rights* 169; Nasira Iqbal, 'Legal Pluralism in Pakistan and its implications on Women's Rights' in Jennifer Bennett

maintain a focus on selected elements of the socio-legal architecture or any one of the relevant thematic areas (such as pluralism, Islamic law, and so on), for new researchers or readers of socio-legal studies to discover what may be included within the labels of *legal* and *socio-legal* in the Pakistani context becomes an incessant process of re-inventing the wheel. Laying out all the disparate aspects of the country's legal tapestry into one place is therefore the essential first step towards understanding the legal and socio-legal situation of the country, as well as the first contribution of this study.

Outlining the multiple normative and legal orderings of Pakistan inevitably leads to questions on their links, encounters and conflicts. The need to examine these orderings and their encounters exists, not to forecast or predict their future direction(s), but because we do not even have adequate knowledge about their past. The entire purpose behind this exercise is that if a holistic picture of the phenomena could begin to take shape, it might allow us to frame the issues through a different lens and assist us in moving towards a conception of the legal and normative systems that is more responsive to the needs of the country's populace.¹⁰⁰ This is where legal and political theoretical perspectives help us. By highlighting what arguments lay at the heart of the prominent narratives of law, the theoretical propositions assist us in reading the situation, deciphering the institutions involved, and make us aware of the problems and pitfalls associated with our reading(s). As will be discussed in the course of this

(ed) *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007).

¹⁰⁰ See, section The need to examine Pakistan's Legal Tapestry, in Introduction of the current text on page 6.

thesis, however, a number of mainstream legal-theoretical paradigms and the narratives they generate prove problematic when considered in isolation, and are unable to adequately analyse the lacunae that are unique to the legal architecture of Pakistan. Nevertheless, these theoretical viewpoints offer us valuable insights, which can and should be built upon.

The thesis, therefore, approaches the subject matter as a two-way dialogue: it scrutinises the socio-legal architecture of the country from theoretical standpoints, while simultaneously questioning, from the point of view of Pakistan's legal realities, the dominant narratives of law that are constructed on such propositions. The theoretical propositions have been approached primarily because they are, or have been, employed by legal academics and practitioners to explain the nature of Pakistan's legal frameworks, recognise their problems and offer solutions. The ultimate aim of the thesis is to advocate the development of context-specific theories (in the plural) of law emerging from, and applicable to, the context of Pakistan. It offers one attempt towards this, with the goal of inviting discussion, critique and further endeavours.

1.4. Four Narratives and Four Assertions

In light of the discussion above, there are four primary arguments that are offered in this dissertation. First, it brings together and problematises the history and conceptual trajectories of multiple (and more prominent) normative and legal orderings in the country. The list of these normative orderings includes notions of common law and constitutional traditions, Islamic

Law, traditional law, the law of the tribal areas, as well as the increasing spheres of 'lawlessness' and violence. The argument here is that these normative and legal orderings do not form disparate realities, but should be read as part of a whole – it is only when we move towards understanding them as threads within a single *Tapestry* that we can begin to comprehend Law in the Pakistani context.

It is important to qualify why the terminology of *socio-legal tapestry* is significant here.¹⁰¹ Thus far, the thesis has employed the terms 'legal architecture' or 'framework' when addressing the constitutive peculiarities of the legal set-up in Pakistan. I am aware, however, that the use of all these terms in this context (set-up, architecture, framework, formation, structure) is inadequate for two reasons. One reason for the inadequacy is that such terms appear to signify that the system they refer to has a pre-defined purpose and a *telos* which consciously provides a rationale for the system's particular shape and constitution. Moreover, these conceptual categories imply that the system is a holistic entity with internal consistency, with its constitutive elements or sections arranged in some kind of order, or co-existing with some kind of an agreement. These elements or sections may overlap, but they nevertheless are implied to have a mutual acceptance for each other or the whole 'framework' or 'structure' breaks down. As the following chapters will show, it is difficult to read the legal architecture or framework of Pakistan in the said manner. The constitutive elements of the legal framework of the country have emerged from different historical trajectories, different conceptual and normative notions,

¹⁰¹ With thanks to Dr. Jayan Nayar for suggesting the term 'tapestry' to approach the complexity of the phenomena in consideration.

different needs and realities. These constitutive sections are also in a struggle amongst themselves, competing to dominate each other, vying to impose one's own normative definitions over the other. So the use of the terms framework or architecture here is with a caveat – the phenomena these refer to are not always consistent, similar or symmetrical. These different claims to law exist in a conflict with each other, which is at times violent, each judging, negating or trying to overcome the other on its own terms. Each of these normative orders and narratives pulls the terrain towards different tangents. In this sense, the socio-legal setup of the country is more akin to a tapestry, with interwoven threads of different normative orderings – considering any of these in isolation from the others creates a gap, and pulling one (normative) thread away from the others creates the possibility for the entire framework to collapse.

The second assertion made in this thesis pertains to the dominant narratives employed to understand or explain, both law within the context of Pakistan, and the complexity of the socio-legal architecture. As mentioned above, the thesis examines these narratives that are employed, in common discourses as well as academic or legal practitioner accounts, to understand the functioning of law in the country. These narratives problematise the situation through their own specific logics, highlight the deficiencies of the systems through their own readings, and offer solutions based on their own judgements on the issues.

In this regard, I argue that there are four main narratives that dominate the reading and perception of Law in the context of Pakistan. The most prominent

narrative focusses on law as a specific domain of the state institutions and focuses exclusively on the constitution, legislations, court judgements and state proclamations. This, as it would be elaborated, is based on the tradition of common law which is part of the colonial legacy of the region, as well as the prevalence of the legal positivistic discourse within the spheres of legal practise and academia. The second narrative approaches the common law and positivist notion as 'alien' legal traditions, and criticises the colonial legacy of the region. With the idea that the current legal and judicial architecture was imposed on the region by the colonial authorities to further their own aims of governance, this narrative favours the normative orderings allegedly more rooted within the region's history, and prefers the notion of Islamic law in place of a western-styled legal system.¹⁰² The third narrative to understand law in the context of Pakistan in part emerges from the second narrative. Based on the ideas of legal pluralism, it critiques the colonial legacy that underpins the state law and formal legal institutions and then argues for the resurrection of, or a return to, the local and indigenous mechanisms of justice. This perspective mainly argues that the state law, indigenous laws and Islamic law are all *valid* and *legal* normative orders that co-exist within the Pakistani context, and should be respected as such. The fourth narrative, though an emergent one, is increasingly gaining a dominant position among civil society activists, Non-Governmental Organisations and even among the legal fraternity. It criticises the misogynist, sectarian and elitist practises within the forums of state law, Islamic law and traditional tribunals from the perspective of Human Rights. It is primarily

¹⁰² Khurshid Ahmad, 'Islam and Democracy: Some Conceptual and Contemporary Dimensions' (2000) 90 (1-2) *The Muslim World* 1, 19.

geared towards the demands for state's accountability and goes as far as claiming that every other legal/normative order that exists outside the state's authority is illegal.¹⁰³

As modes to 'organise and make sense of the experience and action',¹⁰⁴ each of these narratives reads the situation of Law in its own particular manner, with the framing of issues and problems, as well as solutions to these, based on their initial perception or structuring of the situation. I argue that while these narratives provide us with useful insights about law in the context of Pakistan, their foundational logics compel them to ignore those facets that do not conform to their predefined categories. In order to maintain their internal consistencies, these narratives exclude far more than they include in their analyses and, in this process, the viability of their framing and proposed resolutions comes into question. The myopic and isolationist standpoints adopted through these narratives ignore the country's socio-legal realities, which undermines their own assumptions. But it is important to state here that this critique is primarily levelled against the narratives built around the multiple legal-theoretical frameworks, rather than against the frameworks themselves. Indeed it would not be possible, or even desirable, to analyse these diverse formulations such as human rights, pluralism or Islamic law in a single study. The current thesis therefore differentiates these frameworks from the narratives that emerge from them, whose mutilated form can be identified in

¹⁰³ Chapter 7 on page 228.

¹⁰⁴ David Carr, *Time, Narrative, and History* (Indiana University Press, Bloomington, Indiana 1991) 71.

Pakistan's legal and political discourse. These issues will be elaborated in the course of this thesis, as subsequent chapters will consider each of these narratives in depth.

The third key assertion of the thesis emerges from this problematisation of the dominant narratives of law, which prove unable to explain the lacunae of the complex legal tapestry of Pakistan. I argue that these contradictions and the different facets of this legal tapestry exist in the footprint of historical colonialism and consequent notions of 'Coloniality'¹⁰⁵ that still dominate the normative orderings. Therefore, a preferable approach to understanding the complexity in question is to situate the current system of law in the narrative of continuing Coloniality, through which the crises at the heart of the system(s) can be approached in a more nuanced manner.

Fourth, and finally, the thesis makes the case for an alternative lens through which some of these contradictions and lacunae can be framed and understood better. Through building on the framework of Coloniality the thesis argues that it is not the inefficiency of the state and the lack of nation-building measures that lay behind the problems that Pakistan is currently embroiled in; rather it is the flawed logic of state formation and nation-building that have resulted in disastrous consequences.

¹⁰⁵ Walter D. Mignolo, 'Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' (2007) 21 (2) *Cultural Studies* 449.

1.5. The Crises of Law in Pakistan

Although Chapter 8 will be devoted to a detailed discussion on the last two assertions, it is important to provide a sketch of the alternative narrative on law here before moving further. To move towards a more nuanced narrative on law in Pakistan, the study takes cue from the discussion on colonialism in the sub-continent and highlights how, in addition to the mainstream legal instruments and institutions, even the notions of Islamic law and local customs were fossilised and transformed through the colonial encounter.¹⁰⁶ In this sense, colonialism provides the common thread that runs through all the different components of Pakistan's socio-legal tapestry, and lays the terrain in which the current events play out. However, differentiating its proposition from other post-colonial assertions, the study argues that to move towards a de-colonial,¹⁰⁷ rather than a post-colonial position, it is necessary to divest the Coloniality in Law from the historical event of colonialism. Building on the frameworks provided by Anibal Quijano,¹⁰⁸ Walter Mignolo and others, I will argue that Coloniality in Law introduced three different tendencies within the legal terrain of the sub-continent: First, it generated a Colonial Logic within legal institutions and frameworks, that alienated them from the people and focussed them on self-preservation; second, it transformed the rationalities that lay behind the multiple legalities, and thus instituted a colonial and totalitarian nature of law; and finally, it led to the Fetishisation of the legal form, because of which an undue focus remains on the structure and form of law rather than their

¹⁰⁶ Chapter 8 on page 251.

¹⁰⁷ *Walter D. Mignolo* (2007) (n 105).

¹⁰⁸ See, *Anibal Quijano* (2007) (n 12).

alignment to notions of justice. (Re)reading the socio-legal context of Pakistan through these lenses, I will argue that what characterises Pakistan's socio-legal predicaments is a contestation between totalitarian and colonial legalities, and the crisis of state formation that is still caught within the colonial logic.

1.6. Conclusion

The facets outlined in the discussion above will be clarified and discussed in detail in the following chapters. But before the identified narratives of law and an alternative perspective can be discussed in detail, it is important to ground it in the context which they claim to read and analyse. The next two chapters would therefore present a brief history of the legal and constitutional crises that Pakistan has faced since independence, and then conduct a discussion on the different facets of the legal and normative tapestry of the country.

Chapter 2: A History of Legal Uncertainty: Post-Independence Turmoil in Pakistan

2.1. Chapter Synopsis

In order to discuss and analyse the narratives of law introduced in the preceding chapter in relation to the socio-legal tapestry of Pakistan,¹⁰⁹ it is important to first lay out and ascertain the phenomena that constitute the context of the study. The identification, elaboration and examination of the context provide the subject matter for the current chapter and the chapter that follows. The present chapter presents a brief history of the constitutional and legal turmoil that has gripped Pakistan since its independence. It encompasses the major political and legal upheavals that the country has witnessed in its 66 year history, the power struggle between the political cadre and the armed forces, and the oscillations between secular and religious discourses on law and their interplay in the legal arena. The main purpose behind providing this brief description is to offer the reader a snapshot into not only the turbulent history of legal and constitutional structures of Pakistan, but also to emphasise the complexity of the subject matter, in order to convey the reason why divesting law from the discourse of politics is fraught with difficulty in this context. Chapter 3 will build on this description and develop the context of the study further, by discussing the multiple normative and legal orderings that exist in the country and form distinct yet interconnected threads within the socio-legal tapestry of Pakistan.

¹⁰⁹ See, Chapter 1, Four Narratives and Four Assertions on page 42.

2.2. A History of Legal and Constitutional Uncertainty

Entrants to the field of socio-legal study in the context of Pakistan are faced with a two-fold challenge: First, the lack of an extensive research and literature base to build further research on; and second, the difficulty in disentangling the complexity of the subject matter. The first difficulty facing those involved in legal-theoretical or socio-legal study of Pakistan arises from the unavailability of a sizeable research literature and scarcity of rigorous prior analyses, on the subject, that may provide sound footing for further analysis.¹¹⁰ Despite the importance and the need for using socio-legal analysis to understand the complex legal orders in post-colonial countries,¹¹¹ an examination of the literature on law from or on Pakistan further highlights this issue. It reveals, along with less than a handful of studies on socio-legal aspects,¹¹² books and publications on issues of taxation, family law, finance, analysis of legal decisions and commentaries on the criminal codes and procedures, and so forth. These texts are interspersed with academic and newspaper articles on different aspects of law, particularly the struggles between the judiciary and the

¹¹⁰ The bulk of research corpus in this sphere comes from a relatively small community of notable socio-legal scholars, who have provided us deep insights into the socio-legal plurality and the workings of particular legal orderings in the context of Pakistan. This includes the work of Prof Shaheen Sardar Ali (University of Warwick), Prof Anita Weiss (University of Oregon), Prof Martin Lau (SOAS, London), Prof Werner Menski (SOAS, London), Prof Javaid Rehman (Brunel University) and Rubya Mehdi (University of Copenhagen). Some noteworthy publications have emerged from Ihsan Yilmaz, (Fatih University, Turkey), Osama Siddique (Lahore University of Management Sciences, Pakistan), Ayesha Shahid (Brunel University) and Azam Chaudhary (Quaid-e-Azam University, Pakistan), among others. The relevant works of these scholars will be cited in the relevant sections of the dissertation. However, the argument, that this above-mentioned list of scholars covers a great percentage of the overall socio-legal corpus on Pakistan, is presented primarily to underscore the scarcity of publications in this field.

¹¹¹ See, for instance, Santos's description of the limitation of conventional view of law (and even law and society) and his assertion of interlegality and plurality of legal orders. Boaventura De Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 (3) *Journal of Law and Society* 279.

¹¹² See, footnote 96.

government, which have seen an exponential increase since the Lawyers' Movement of 2007.¹¹³ Granting the importance of literature on doctrinal law in the sphere of legal practise, the assertion made here is that this rather one-dimensional picture of the legal system is symptomatic of the dominant narrative on law in the country. This narrative, based on the legal positivistic approach to law, focuses primarily on state-authored and state-oriented law, and does not permit one to grasp a more nuanced and complete picture of legal systems in their societal context.

There are some recent contributions, however, that recognise this void and attempt to bridge the gap between law and its sociological or theoretical analysis. There have been efforts to trace the role of religious legal conceptions and Islamisation in the Constitution, laws and judicial approach in Pakistan, though some of these accounts are caught within particular ideological perspectives and are unable to transcend these confines.¹¹⁴ Other recent studies, carried out primarily to advocate human rights and women's rights issues, have also brought the issues of legal pluralism in the country to the fore.¹¹⁵ There are publications tracing the colonial history of the laws in Pakistan, mainly focussing on the genealogies of particular laws, which include

¹¹³ See, footnote 18.

¹¹⁴ See, for instance, Mohammad Amin, *Islamization of Laws in Pakistan* (Sang-e-Meel Publications, Lahore 1989); Rashida Patel, *Islamisation of Laws in Pakistan* (Faiza Publishers, Karachi 1986). There are, however, some excellent expositions on the relationship between Islam and the legal system of Pakistan. See, for instance, *Rubya Mehdi* (1994) (n 97).

¹¹⁵ See, for instance, Shaheen Sardar Ali and Javaid Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* (Curzon, Richmond 2001); *Shaheen Sardar Ali* (1999) (n 99); Nafisa Shah, 'Making of Crime, Custom and Culture: The Case of Karo Kari Killings of Upper Sindh' in Jennifer Bennett (ed) *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007).

some controversial Islamic laws and regulations governing the Tribal Regions of the country.¹¹⁶ However, all these studies on aspects of Islamisation, Pluralism and Colonialism of Pakistan's laws taken together would in all probability number in tens rather than hundreds.¹¹⁷

The second key challenge that impedes sociological and theoretical analysis of law in Pakistan, and which acts as a contributing factor behind the deficiency of research focus on this topic, is the complexity of the subject matter. This complexity of the historical and political situation of Pakistan hinders any clear analysis, evaluation or (re)thinking of law and the state without falling prey to any of the numerous traps that the current socio-political environment of the country lays out. The persistent and numerous issues that the country is troubled with render that the discussions on law and the state are generally conducted from the lens of politics and ideological standpoints, rather than being conducted as socio-legal, critical or theoretical debates.

The unaccountability of the state and its hijacking by individuals with socio-economic power, and the dominance of the country's armed forces in every aspect of the state and society represent just one part of the picture.¹¹⁸ This is coupled with blatant intervention of neo-imperialist policies in the country,

¹¹⁶ *Martin Lau* (2006) (n 97); *Osama Siddique* (2013) (n 98).

¹¹⁷ For instance, the British Library, the largest library in the world, holds only 451 books in different languages relevant to different topics of Law in Pakistan (last accessed on 5 August 2013). Out of these, less than ten percent can be said to be broadly linked to any notions of socio-legal or theoretical research on Law in Pakistan.

¹¹⁸ On the dominant role of the military in Pakistani politics and economy, see generally, Hassan-Askari Rizvi, *The Military and Politics in Pakistan, 1947-86* (Konark Publishers, New Delhi, India 1988); *Ayesha Siddiqa Agha* (2007) (n 16).

backed by military force and economic sanctions.¹¹⁹ The situation is further complicated by the rise of militancy and insurgencies, an analysis of which is often obscured by the use of religious terminology.¹²⁰ There is an alarming rise of religious and political intolerance amongst sections of the populace that gives rise to religious and sectarian conflicts and violence. In the past three decades, there has been an exponential increase in lootings, kidnappings and religious/political target-killings, being provided new recruits every day from amongst an ever-starving and marginalised population.¹²¹

In recent years, the havoc wreaked by natural disasters and calamities due to climate shift, ill planning and self-interest on the part of the powers that govern have further added to the destabilisation of the societal frameworks.¹²² Amongst all this, the functions of the government are held hostage to the struggle between main political parties to get into power for self-serving reasons,¹²³ and corruption acquiring a state of normalcy – from the level of the individual occupying the lowest socio-economic strata to being institutionalised at the highest levels of governing bodies.¹²⁴ The people of Pakistan are also burdened with a general lack of availability and increase in prices of common and basic amenities, lack of education and a rise in illiteracy, inflation, food

¹¹⁹ Frequent drone strikes and economic sanctions by the US are the most appropriate cases in point. See, *Yousuf Nazar* (2011) (n 90) 17-24.

¹²⁰ *Christine C. Fair, Neil Malhotra and Jacob N. Shapiro* (2010) (n 22) 513 and 517.

¹²¹ *Human Rights Commission of Pakistan* (2013) (n 78) 59-68.

¹²² James Lewis, 'Corruption : the hidden perpetrator of under-development and vulnerability to natural hazards and disasters: the Pat Reid lecture 2010' (2011) 3 (2) *Jamba: Journal of Disaster Risk Studies* 464, 472.

¹²³ *Owen Bennet Jones* (2011) (n 16) 226-256.

¹²⁴ Deborah Hardoon and Finn Heinrich, 'Daily Lives and Corruption: Public Opinion in South Asia' (Transparency International, Berlin 2011) 12.

shortage, unemployment, and the absence of adequate and cheap health-care.¹²⁵ The increase in a general sense of fear and insecurity, in the major metropolitan centres amongst others, paints the picture of the society as being trapped in a Hobbesian 'state of nature',¹²⁶ which is reflected in the calls from political commentators for a stronger state, modelled on the Hobbesian conception.¹²⁷ These factors indeed create a complicated situation.

In relation to the particularities of the socio-legal terrain, even if we just focus on the state posited law and the Constitution of Pakistan, the constitutional arrangement and the legal system appears to be at once colonial and post-colonial; it is contextualised but at the same time decidedly foreign; it is Islamic, with several reservations and modifications, but also includes major facets of Western legal traditions, primarily the remnants of the colonial state. The system is democratic, but the constitutional preamble clearly states that sovereignty in this country does not lie directly with the people, but is vested with the Almighty, from which the people only exercise a borrowed authority.¹²⁸ The mainstream legal and constitutional arrangements are further challenged by some of the remnants of the British Indian legal framework as a legacy of the colonial era, which are still active and blatantly colonial in their nature.¹²⁹ This is drawn into greater difficulty by the presence of traditional

¹²⁵ Yousuf Nazar (2011) (n 90) vii-xxvii.

¹²⁶ Thomas Hobbes, *Hobbes's Leviathan. Reprinted from the edition of 1651 (With an essay by the late W. G. Pogson Smith)* (Clarendon Press, Oxford 1909) xi.

¹²⁷ Hajrah Mumtaz, 'A collapsing contract' *Dawn* (Pakistan 24 January 2010)

<<http://m.dawn.com/news/516022/a-collapsing-contract>> last accessed 8 May 2013.

¹²⁸ Preamble to the Constitution of the Islamic Republic of Pakistan, 1973.

¹²⁹ For instance, the Frontier Crimes Regulation 1901, which is still in force in the tribal regions of the country.

(legal) institutions that cater to a large section of the populace, but whose human rights record is troubling, and whose existence is either denied or their functions challenged by the national courts.¹³⁰ The state-oriented legal structure has oscillated between the presidential and parliamentary systems several times in its history, and the constitution has also been ‘abrogated’,¹³¹ or ‘held in abeyance’,¹³² on a number of occasions by military regimes. In short, the nature of the constitution as a charter of agreement between the people, and the state and law that flow from it, have varied on so many occasions that their foundational facets have become blurred. A brief historical account of this constitutional and legal turmoil will be elaborated in the following sections in this chapter.

2.3. Crafting a Post-Colonial State: A brief history of constitutional crises, 1947-1973

The Constitution, legal system and common law traditions that Pakistan inherited at the time of independence have not survived unscathed through the course of its turbulent history. Pakistan gained independence in 1947 through the partition of British India, and consisted of two major territories at the time of its creation – East and West Pakistan, separated by a thousand miles of Indian territory. The geographical divide between the two units not only

¹³⁰ This will be elaborated further in Chapter 3 on page 96 (Socio-legal Tapestry of Pakistan) and Chapter 6 on page 204 (Narrative of Legal Pluralism).

¹³¹ By General Ayub Khan in 1958 and General Zia-ul-Haq in 1979, as will be discussed in this chapter.

¹³² By General Pervez Musharraf in 1999, through the Provisional Constitutional Order 1999. This will be discussed below.

signalled towards the problems of governance and planning that were to emerge after independence, but also reflected the existing cultural, linguistic and ethnic divisions between the populations of the two regions, with Islam being the major common denominator.¹³³

In the dominant and official historical account, Pakistan was the result of the demands of the Muslims of the Indian Sub-continent for a separate state, where they would have the freedom to preserve, follow and propagate their culture and religion.¹³⁴ This notion of a *state for Muslims* was actively employed by the All India Muslim League to foment a political struggle,¹³⁵ and was carried through to the post-independence constitutional development of the country. This was clearly reflected in the debates of the country's first Constituent Assembly, which was tasked with drafting the first constitutional framework. Liaquat Ali Khan, Pakistan's first Prime Minister, said in his speech at the fifth session of the Assembly: 'The State will create such conditions as are conducive to the building up (sic.) of a *truly Islamic society*, which means that the State will have to play a positive part in this effort.'¹³⁶

However, the shape and nature of this idea of *Islamic Society* never became clear. Mohammad Ali Jinnah, Pakistan's first Governor General and the

¹³³ Aziz Ahmad, 'India and Pakistan' in P. M. Holt, Ann K. S. Lambton and Bernard Lewis (eds), *The Cambridge History of Islam: The Indian Sub-Continent, South-East Asia, Africa and the Muslim West* (Cambridge University Press, Cambridge 1977) 111.

¹³⁴ Ilhan Niaz, *The culture of power and governance of Pakistan, 1947-2008* (Oxford University Press, Oxford 2010) 64-68.

¹³⁵ Ibid.

¹³⁶ Tanzilur-Rahman, *Objectives Resolution and its Impact on Pakistan Constitution and Law* (Royal Book Company, Karachi 1996) 6-7 (emphasis added).

President of the Constituent Assembly, had stated in 1948 that his vision of Pakistan was not that of a 'theocratic state to be ruled by priests with a divine mission. We have many non-Muslims – Hindus, Christians and Parsis [Zoroastrians] but they are all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan.'¹³⁷ On the other hand, the stance of the Islamic political parties and religious leaders was evidently different, as they asserted that

The Islamic State means a state which is run on the exalted and excellent principles of Islam . . . people who do not subscribe to those ideas may have a place in the administrative machinery of the State but they cannot be entrusted with the responsibility of framing the general policy of the State on dealing with matters vital to its safety and integrity.¹³⁸

The uncertainty and lack of clarity emerging from this paradoxical nature of the pre-independence struggle, as well nature of Pakistan's post-independence relation with Islam, continues to this day. Based on this, an increasing number of scholars working on colonial and post-colonial history of the subcontinent challenge the very basis of linking Islam with the creation of Pakistan. Hamza Alavi, one of the most renowned historians of Pakistan, used the term *salariat* to describe the particular class of Muslim urban professionals and salaried individuals that spearheaded the movement for Pakistan's independence.¹³⁹ He claims that the main rationale that guided this salariat was to create a state

¹³⁷ G. W. Choudhury, 'Constitution-Making Dilemmas in Pakistan' (1955) 8 (4) *The Western Political Quarterly* 589, 590.

¹³⁸ Ibid.

¹³⁹ Hamza Alavi, 'Ethnicity, Muslim Society, and the Pakistan Ideology' in Anita Weiss (ed) *Islamic Reassertion in Pakistan* (Syracuse University press, Syracuse 1986) 24.

apparatus that would allow it more power and influence.¹⁴⁰ In this view, Islam was used primarily as a political slogan rather than a religious ideology; a political symbol employed to forge a 'community of believers'¹⁴¹ and citizens from an inherently 'inoperative community'.¹⁴² Alavi also argued that despite the mainstream rhetoric of Islam being at the centre of the demand for Pakistan, most of the Islamic political groups of the pre-partition subcontinent were staunchly against partition and creation of a separate state, as a division of Muslim population would hamper their aims of creating a global Muslim *Umma* (literally, a community of Believers).¹⁴³ This confusion about the ideology or true ethos behind the independence movement is coupled with a graver and more prominent question that is evident from the debates mentioned above: If Pakistan was to be a separate state for Muslims, was it to be an Islamic theocratic state, or a democratic state with special safeguards for Muslims? The absence of a consensus on these questions captures the discussions today, just as it lay at the foundation of the constitutional problems and deadlocks that gripped the State from the beginning.

2.3.1. From Independent State to a Crown Dominion

The Constituent Assembly formulated at the time of independence and tasked with providing the country its first constitution, also struggled with these

¹⁴⁰ Ibid.

¹⁴¹ The term 'Community of Believers' is generally taken as a translation of *Umma*, which refers to the pan-Islamic Muslim community.

¹⁴² See Nancy's critique of the idea that a community can be created or fashioned through such symbolism, Jean-Luc Nancy, 'The Inoperative Community' in Peter Connor (ed) *The Inoperative Community* (University of Minnesota Press, Minnesota 1991).

¹⁴³ Hamza Alavi (1986) (n 139) 30.

notions. It sought to bring together the ethnically diverse and geographically differentiated communities through a national framework based on a religious ideology.¹⁴⁴ However, with issues of official language, provincial autonomy and regional disparity (between West Pakistan and East Pakistan, now Bangladesh) inherited as a colonial legacy, the Constituent Assembly was unable to provide the country a workable charter.¹⁴⁵ For the first 9 years after independence, Pakistan remained without an overarching constitution. The legislative framework that governed Pakistan during this initial period was the Government of India Act of 1935, as amended by the Indian Independence Act of 1947. The only constitutional instrument that the Constituent Assembly could successfully promulgate during this period was the Objectives Resolution of 1949, which was conceived as the statement of ideology and principles that would underline the future laws and governing mechanisms of the country.¹⁴⁶ However, even this Resolution was not without its controversies. Vesting the State with a borrowed sovereignty as 'a sacred trust' from the Almighty, the Objectives Resolution expressly linked the State with Islamic social principles.¹⁴⁷ In reply to concerns raised by non-Muslim members of the Constituent Assembly on linking politics and religion, one member counter-argued that the 'Constitution may be interpreted, as it will be, by people who come after us. We cannot bind our successors; but these interpretations must at least follow the fundamental principles which have been embodied for anybody

¹⁴⁴ For a detailed account of the religious struggle, issue of regional representation, distribution of powers and problems of national language that significantly hampered constitution making after independence, see *G. W. Choudhury* (1955) (n 137).

¹⁴⁵ *Ibid.* 589; *Paula Newberg* (1995) (n 20) 18-20.

¹⁴⁶ *Tanzilur-Rahman* (1996) (n 136) 4.

¹⁴⁷ Objectives Resolution of 1949, subsequently appended to the 1956 Constitution of Pakistan as Preamble.

to study in our [Islamic] Scriptures (sic).'¹⁴⁸ It is important to note that despite the importance attributed to it, the Objectives Resolution did not become a justiciable and substantive part of the Constitution until the 1980s.¹⁴⁹

The Indian Independence Act of 1947 had vested in the legislatures of the nascent states of India and Pakistan the complete authority to frame their laws and constitutions,¹⁵⁰ with the proviso that the laws of British Indian state would remain in force until the legislatures could formulate their own legal frameworks.¹⁵¹ India successfully formulated its Constitution soon after independence and formally enacted it in November 1949.¹⁵² The Constituent Assembly of Pakistan on the other hand, embroiled in political and ideological struggles that reflected the conflicts within the larger society, proved unable to reach a consensus on a constitutional framework until October 1954,¹⁵³ when the Assembly was dissolved by the Governor General of Pakistan, Ghulam Mohammad.¹⁵⁴ Ghulam Mohammad declared that it 'had become unrepresentative' and mired in political and power struggle.¹⁵⁵ Historians claim, however, that 'real objection was that the Assembly was about to adopt a constitution of which he disapproved'¹⁵⁶ as it sought to curtail the powers of the

¹⁴⁸ *Tanzilur-Rahman* (1996) (n 136) 10.

¹⁴⁹ On the issue of justiciability of the Objectives Resolution and the manifestation of this debate in cases before the superior judiciary, see *Martin Lau* (2006) (n 97) 47-54.

¹⁵⁰ Article 6 of the Indian Independence Act, 1947.

¹⁵¹ *Ibid.* Article 18(3).

¹⁵² Preamble to The Constitution of India, 1949.

¹⁵³ Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Oxford University Press, Karachi, Pakistan 1995) 118-119.

¹⁵⁴ *Paula Newberg* (1995) (n 20) 23.

¹⁵⁵ Leslie Wolf-Phillips, 'Constitutional Legitimacy: A study of the doctrine of necessity' (1979) 1 (4) *Third World Quarterly* 97, 98; *G. W. Choudhury* (1955) (n 137) 589.

¹⁵⁶ *Leslie Wolf-Phillips* (1979) (n 155) 98; *Tanzilur-Rahman* (1996) (n 136) 40-41.

Governor General's office. It is noted by scholars that at the time of the dissolution of the Assembly, a Draft Constitution had already been formulated and made public, with a view that it would be formally adopted in December of that year.¹⁵⁷

Maulvi Tamizuddin Khan, the President of the Constituent Assembly, challenged the dissolution of the Assembly and filed a petition in the Sindh Chief Court, alleging that the Governor General's actions were in contravention of the sovereign right of the Assembly.¹⁵⁸ The Chief Court gave a unanimous decision against the dissolution of the Assembly, and reversed the steps taken by the Governor General.¹⁵⁹ It acknowledged the Constituent Assembly as a 'sovereign body'¹⁶⁰ and declared that the 'people of India were given the freedom and the independence to frame any Constitution they liked', with complete freedom from the Crown or Governor General.¹⁶¹ Ghulam Mohammad, adamant that his actions were taken under his sovereign prerogative as a representative of the British Crown in dominion, appealed against the decision in the Federal Court. The Federal Court's judgement on this issue is a landmark in the country's constitutional and legal history for two key reasons. First, it treated the legal

¹⁵⁷ *Tanzilur-Rahman* (1996) (n 136) 40-41.

¹⁵⁸ *Paula Newberg* (1995) (n 20) 42. It is said that Tamizuddin Khan had to sneak past the intelligence agents stationed at the gates of the Sindh High Court 'through a side gate clad in a burqa [veil]' to submit his petition. Sharifuddin Pirzada, quoted in *Ilhan Niaz* (2010) (n 134) 180. Albeit anecdotal evidence, it portrays the power disparity between bureaucracy/armed forces and political representatives, which is more ironic in this instance as it concerns the person heading the committee responsible for drafting the constitutional and legal framework for the country.

¹⁵⁹ *Moulvi Tamizuddin Khan v. The Federation of Pakistan* (PLD 1955 Sind 96)

¹⁶⁰ *Paula Newberg* (1995) (n 20) 43.

¹⁶¹ *Ibid.* 43. The stance taken by the Sindh Chief Court was that the legislative assembly, by virtue of Indian Independence Act of 1947, had complete 'sovereignty' to make laws without the consent of the Crown, or the Governor General as its alleged representative in the dominion. *Moulvi Tamizuddin Khan v. The Federation of Pakistan* (n 159).

status of Pakistan as a Crown Dominion rather than an independent state, by considering the Governor General as a representative of the British Crown.¹⁶² Through this step, the judgement stripped the Constituent Assembly, as the only sitting parliamentary body, of its sovereignty to formulate valid laws, unless they had been granted an assent by the office of the Governor General.¹⁶³ The Court stated that the Assembly could not be considered a sovereign body because, as the rules it formulated had to be given assent by the Governor General, the real sovereignty therefore lay with him.¹⁶⁴ This was a novel reading of the Indian Independence Act and of the issues of sovereignty, dominion and independence on the part of the Federal Court. Second, this judgement created the problematic nexus between the superior judiciary and the executive, and began the controversial practise of the apex court validating the actions of the executive to dismiss the legislatures and constituent assemblies – an exercise which has been repeated a number of times in the country's history since then.¹⁶⁵

Following the dissolution of the Constituent Assembly and the annulment of its legislation, Pakistan was without any effective laws and without a law-making body. The Federation tried to overcome this legal void by granting retrospective

¹⁶² *Federation of Pakistan and others v. Moulvi Tamziddun Khan* (PLD 1955 FC 240).

¹⁶³ The remarkable reasoning used by the Federal Court was that as the Governor General never gave his assent to the laws under which Tamizuddin Khan filed his petition, the Sindh Chief Court was misplaced in considering the petition and applying these laws in the first place. *Federation of Pakistan and others v. Moulvi Tamziddun Khan* (n 162). One consequence of this reasoning was that all the laws that were not given an express assent by the Governor General became invalid, which led to a problematic legal vacuum.

¹⁶⁴ A point on which Justice Cornelius presented a dissenting opinion, arguing that there is a difference between sovereignty and power, with the Governor General only holding the power to give assent. *Ibid.*

¹⁶⁵ See generally, *Leslie Wolf-Phillips* (1979) (n 155); *Hassan-Askari Rizvi* (1988) (n 118).

assent to validate the laws formulated by the Constituent Assembly.¹⁶⁶ This decision was overturned by the Federal Court in *Usif Patel and others v. the Crown*,¹⁶⁷ when the Court declared that even the authority and sovereignty of the Governor General, although extended to the power of assent and validation, was limited in terms of law-making capacities.¹⁶⁸ It was noted in the judgement that ‘a more incongruous position in a democratic state is difficult to conceive particularly when the legislature itself, which can control the Governor General’s actions, is alleged to have been dissolved.’¹⁶⁹ The absence of a law-making body and the limitation of Governor General’s authority to formulate or recognise laws, led to a legislative vacuum at the level of the State. To resolve this deadlock, the Governor General submitted a Reference before the Federal Court to request its advice on this issue.¹⁷⁰ In its advice on the Reference, while upholding the legality of the dissolution of the Assembly by a majority, the Federal Court generated another legal anomaly that continued to have ramifications in the following decades. Importing the maxims of *salus populi suprema est lex* (the health of the people is the supreme law) and ‘necessity makes lawful what is otherwise unlawful’,¹⁷¹ the Chief Justice coined the (in)famous Doctrine of State Necessity. He stated in the judgement that

[S]ubject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an

¹⁶⁶ *Paula Newberg* (1995) (n 20) 51.

¹⁶⁷ *Usif Patel and others v. the Crown* (PLD 1955 FC 387).

¹⁶⁸ *Usif Patel and others v. the Crown* (n 167).

¹⁶⁹ *Paula Newberg* (1995) (n 20) 51. The Court failed to appreciate, however, that this ‘incongruous position’ stemmed from the Court’s own (mis)reading of sovereignty, independence and power to assent.

¹⁷⁰ Reference by His Excellency the Governor General of Pakistan (PLD 1955 FC 435).

¹⁷¹ *Ibid.*.

intention to preserve the constitution, the State or the Society and to prevent it from dissolution, and affirms Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful (sic.).¹⁷²

He further noted that

If the law as stated by Chitty that the Crown is the only branch of Legislature that is capable of performing any act at a time when Parliament is not in being is correct (sic.), legislative powers of the Crown in an emergency are a necessary corollary from that statement, and the same result flows from Dicey's statement that the free exercise of a discretionary or prerogative power at a critical juncture is essential to the executive Government of every civilized country....¹⁷³

Based on this reasoning, the Court held by a majority that under the 'common law of civil or State necessity', the Governor General as a representative of the Crown in dominion had the power to grant retrospective assent to the laws made by the Constituent Assembly, until a new legislature assumes its law-making role.¹⁷⁴ The notions of State Necessity, and the use of emergency powers by the bureaucracy and armed forces to dissolve assemblies, disregard constitutional principles as well as assume the law-making function, have been used several times since then and paved the way for martial laws and political crises that have dominated the history of the country.¹⁷⁵ The most recent reiteration of these practises came with the imposition of martial law by General Pervez Musharraf, when the Supreme Court again validated the legality

¹⁷² Ibid..

¹⁷³ Ibid..

¹⁷⁴ Ibid..

¹⁷⁵ In its 66 year history, Pakistan has been under direct (or constitutionally validated) military rule for almost 34 years. 2013 saw the first transition of power in the country's history from one politically elected government to another, and from one civilian President to another.

of the military coup and declared it 'inevitable'.¹⁷⁶ In a judgement that echoed a similar verdict given half-a-century ago, the Court justified its position by claiming that the

Doctrine of State Necessity is recognised not only in Islam and other religions of the world but also accepted by the eminent international jurists including Hugo Grotius, Chitty and de Smith and some superior Courts from foreign jurisdictions to fill a political vacuum and bridge the gap (sic.).¹⁷⁷

2.3.2. First Martial Law and the Division of Pakistan

Following the Reference issue in 1955, a second Constituent Assembly was elected in the country, which successfully formulated and adopted Pakistan's first Constitution in 1956.¹⁷⁸ This Constitution finally ended Pakistan's dominion status, and instituted the Islamic Republic of Pakistan as a Federation.¹⁷⁹ The Constitution of 1956 provided for a unicameral legislature based on the parliamentary system with the Prime Minister as the head of the government, and abolished the office of the Governor General.¹⁸⁰ While it incorporated the Objectives Resolution of 1949 as its Preamble, and made provisions for ensuring that the laws are not repugnant to Islamic injunctions, the 1956 Constitution did not declare Islam as the State Religion.¹⁸¹ The presence of a constitutional framework, however, could not resolve the

¹⁷⁶ Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869).

¹⁷⁷ *Syed Zafar Ali Shah case* (n 176).

¹⁷⁸ Abdullah Ahsan, 'Pakistan since Independence: An Historical Analysis' (2003) 93 (3-4) *The Muslim World* 351, 353.

¹⁷⁹ Constitution of the Islamic Republic of Pakistan, 1956.

¹⁸⁰ Ibid. Chapters I and II.

¹⁸¹ Ibid.

multitude of political and social crises and the power struggle that had become deep-rooted by this time.¹⁸² This meant that the life of the Constitution proved to be short-lived, and it was abrogated in October 1958 by the first President of Pakistan, Iskander Mirza.¹⁸³ Mirza dissolved the parliament and the constitutional framework, and imposed Martial Law, installing General Ayub Khan as the head of the armed forces and the Chief Martial Law Administrator.¹⁸⁴ He outlawed all political parties and suspended civil rights, and blamed the 'ruthless struggle for power' and 'the prostitution of Islam for political ends' for creating the necessity of military rule.¹⁸⁵ This was the first direct inroad for the military to enter politics and control state power. But Iskander Mirza did not foresee the consequences of this action for himself, as less than a month later he was deposed by Ayub Khan, arrested and then exiled to Great Britain where he lived in relative obscurity until his death.¹⁸⁶

General Ayub Khan's rise to power paved the way for the country's powerful military to delve into politics.¹⁸⁷ With the 'resentment and distrust that army and civil service officers have harboured towards politicians,'¹⁸⁸ the first steps that Ayub Khan adopted were geared towards a radical overhaul of the political

¹⁸² For an overview of the growing difficulties between East and West Pakistan, see Farhan Hanif Siddiqi, 'The Failed Experiment with Federalism in Pakistan (1947-1971)' in Emilian Kavalski and Magdalena Zolkos (eds), *Defunct Federalisms: Critical Perspectives on Federal Failure* (Ashgate, Aldershot 2008) 71-86.

¹⁸³ Wayne Ayres Wilcox, 'The Pakistan Coup d'Etat of 1958' (1965) 38 (2) *Pacific Affairs* 142, 142-143.

¹⁸⁴ Ibid. 142-43.

¹⁸⁵ Ibid. 142.

¹⁸⁶ Stephen Philip Cohen, *The Idea of Pakistan* (Brookings Institution Press, Washington, D. C. 2004) 60; Paula Newberg (1995) (n 20) 72.

¹⁸⁷ On the issue of military's involvement in the political sphere, see generally Hassan-Askari Rizvi (1988) (n 118) .

¹⁸⁸ Khalid B. Sayeed, 'Pakistan's Basic Democracy' (1961) 15 (3) *The Middle East Journal* 249, 250; see also, Farhan Hanif Siddiqi (2008) (n 182) 73.

and legal framework. He banned all political parties in the country and curtailed the power of the judiciary to challenge martial law regulations.¹⁸⁹ He assumed the additional role as the President of Pakistan and, on the very same day, the Supreme Court gave its judgement in the *Dosso case*.¹⁹⁰ In this landmark judgement, the Supreme Court chose another angle to justify the military rule, by employing Hans Kelsen's theoretical framework. Kelsen argued that the norms regulating societal conduct flow from a basic norm, which 'constitutes the unity of the multiplicity of [behaviour regulating] norms'.¹⁹¹ He termed this foundational rule as *Grundnorm*, which provides the 'reason for the validity of all norms belonging to the same legal order'.¹⁹² This notion of *Grundnorm*, as well as Kelsen's proposition that 'a revolution occurs... whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way',¹⁹³ were taken by the Supreme Court as prescriptions and justifications rather than theoretical conceptions. Building on these two ideas, the Supreme Court held that as the military coup had effectively changed the basic norm of laws implemented in the country, and that this action could only be construed as 'extra-constitutional', the Court had no authority but to work within the confines of this new law and *Grundnorm*.¹⁹⁴ Thus the Supreme Court adopted this unique reading of legal positivism, Kelsen's conceptual framework, as well

¹⁸⁹ Paula Newberg (1995) (n 20) 72.

¹⁹⁰ *State v. Dosso and another* (PLD 1958 SC 533).

¹⁹¹ Hans Kelsen, *Pure Theory of Law*. Translation from the Second German Edition by Max Knight. (The Lawbook Exchange, New Jersey 2005) 205.

¹⁹² Ibid.

¹⁹³ Hans Kelsen, *General Theory of Law and the State* (Harvard University Press, Cambridge, Mass. 1949) 117.

¹⁹⁴ *State v. Dosso* (n 190)

as its own relation to legality and constitution, to declare the martial law as valid.

Ayub Khan also introduced radical changes in the political structure of the country. Through a Presidential Order in 1959, he promulgated a new local body system termed 'Basic Democracy'.¹⁹⁵ Through the Basic Democracies Plan, a five-tiered local government system was instituted with the Union Councils (for rural areas) or Town Committees (for urban areas) at the lowest strata, progressing upward through Tehsil/Thana Councils, District Councils, Divisional Councils, to Provincial Development Council at the top.¹⁹⁶ The system created a body of 80,000 *Basic Democrats*, both elected and nominated, with the system of elections generally restricted to the lowest tier of the local government. This 'neat hierarchical form' of this local government structure corresponded to the General's 'desire to see the country as organised as her army.'¹⁹⁷

While the Basic Democracy system was promoted as devolution of power from the centre to the localities, scholars argue that the primary rationale behind it was to limit the influence of the political parties and to gain legitimacy for the military government.¹⁹⁸ This is evident from the fact that in 1961, the Basic Democrats were selected as the only Electoral College for a Presidential

¹⁹⁵ Khalid B. Sayeed (1961) (n 188) 249.

¹⁹⁶ Ibid. 250-251.

¹⁹⁷ Ibid. 250.

¹⁹⁸ S. Akbar Zaidi, 'The Political Economy of Decentralization in Pakistan' (Transversal Theme "Decentralisation and Social Movements" Working Paper No 1, Islamabad, Pakistan 2005) 15-17.

Referendum, which ultimately gave Ayub Khan the legitimacy to shift from the role of the Chief Martial Law Administrator to that of an elected President of the country.¹⁹⁹ In essence, then, Ayub Khan's government 'rested on the foundations of Basic Democracies' and the military, as well as the local elites who dominated the local government structures, mutually benefitted from this arrangement.²⁰⁰ Although he admitted 'hating the Constitution and constitutionalism',²⁰¹ following his election Ayub Khan paradoxically formulated a new Constitution for Pakistan in 1962. This Constitution declared Pakistan to be a Federal Republic, and instituted a presidential form of government.²⁰² The powers of the office of the President were vastly increased, who was also granted the formal authority to dissolve legislative assemblies and declare emergency to by-pass any existing legal and constitutional frameworks.²⁰³

Elections for a new legislative assembly were conducted in 1965, where the Basic Democrats served once again as the indirect Electoral College.²⁰⁴ Though Ayub Khan now held the office of the President and had a favourable Constitution and legislature in place, 1965 saw a bitter war between India and Pakistan as well as worsening of relations between East and West Pakistan.²⁰⁵ With the political and social unrest continuing and opposition growing, Ayub

¹⁹⁹ Paula Newberg (1995) (n 20) 80-86.

²⁰⁰ S. Akbar Zaidi (2005) (n 198) 15-17.

²⁰¹ Zulfikar Khalid Maluka (1995) (n 153) 171.

²⁰² Rather than an Islamic Republic, as held in the previous constitution. However, this was later changed back to Islamic Republic amidst protests. See, The Constitution of the Republic of Pakistan, 1962.

²⁰³ The Constitution of the Republic of Pakistan, 1962.

²⁰⁴ Paula Newberg (1995) (n 20) 80-86.

²⁰⁵ Farhan Hanif Siddiqi (2008) (n 182) 77-85.

Khan was deposed by the Commander-in-Chief of the Armed Forces, General Yahya Khan, who imposed martial law in 1969 and abrogated the Constitution.²⁰⁶ In March 1970, Yahya Khan promulgated the Legal Framework Order, proposing a new structure for the assemblies and a new scheme for elections. It was acknowledged that the constitution and law making responsibilities should be vested with the federal and provincial legislatures elected under the LFO.²⁰⁷

In December 1970, after 23 years of power struggle, the first ever general elections were held in the country. Conducted on the basis of proportional representation, and largely considered to be fair, the elections resulted in the Pakistan People's Party winning a majority of seats in West Pakistan and the Awami League gained both a majority in East Pakistan as well as an overall majority.²⁰⁸ The election results reflected the void between Pakistan's two territories, which had grown socially and linguistically apart in the preceding decades. With both Zulfikar Ali Bhutto (People's Party) and Sheikh Mujibur Rahman (Awami League) claiming to be the majority holders, a deadlock ensued between the two political parties. This struggle turned into protests, which in turn led to a bitter war of secession in 1971.²⁰⁹ As the army's operation to quell the unrest in East Pakistan became harsher, the leaders of East Pakistan (with alleged help from India) responded with armed resistance. In December 1971, the West Pakistani forces surrendered and East Pakistan declared its

²⁰⁶ *Stephen Philip Cohen* (2004) (n 186) 8.

²⁰⁷ *Paula Newberg* (1995) (n 20) 114.

²⁰⁸ *Stephen Philip Cohen* (2004) (n 186) 8.

²⁰⁹ *Paula Newberg* (1995) (n 20) 115-118.

independence as Bangladesh.²¹⁰ Siddiqi points out that the tragic irony of this scenario is that this was not a minority rights struggle, but that as 51% of the population of Pakistan resided in East Pakistan, it was the 'majority group [that] seceded from the state'.²¹¹

Four days after the secession of Bangladesh, Yahya Khan handed over power to Bhutto, who was posited as the President and civilian Chief Martial Law Administrator.²¹² With no constitution in place, defeat of the armed forces, the country divided in half and more significantly, the Islamic ideology of the State called into question,²¹³ Bhutto and the incumbent government worked to piece together a new constitution for the country.²¹⁴ Declared in 1973, the new Constitution was unanimously approved by the different parties within the assembly.²¹⁵ As will be discussed in detail in the next chapter, the Constitution of 1973 is largely based on the western constitutional principles of representative democracy and separation of powers. It establishes the national assembly and the senate as the main representative bodies, and institutes a Parliamentary form of government. Part II of the document guarantees fundamental rights, such as those of religion, freedom of speech, movement and the like. The Constitution also establishes a hierarchical judicial structure, modelled on a common law system, with the Supreme Court at the apex of the court system. The 1973 Constitution, considered a consensus document

²¹⁰ *Stephen Philip Cohen* (2004) (n 186) 8-9.

²¹¹ *Farhan Hanif Siddiqi* (2008) (n 182) 71.

²¹² *Paula Newberg* (1995) (n 20) 115-120.

²¹³ *Ibid.* 118.

²¹⁴ *Stephen Philip Cohen* (2004) (n 186) 76-83.

²¹⁵ *Zulfikar Khalid Maluka* (1995) (n 153) 241.

between various political parties of the country (including the religious political parties, such as the Jamaat-e-Islami), is the one that still governs the country. However, it has been abrogated or temporarily suspended by two different martial law regimes since then. It has also gone through several amendments and extensive modifications under General Zia's Islamisation campaign, which will be discussed in the following section.

2.4. On Religion and State Law: A brief history of Islamisation of laws, 1973-1999

It is argued by some scholars that at the time of the independence of Pakistan, the aspiration of the Muslim League was not to create a theocratic state, even though it had propagated the cause of a separate territory for Muslims.²¹⁶ Jinnah, who is credited as the Founder of the Nation, was adamant that secularism and freedom for minorities should direct the policies of the newly found state.²¹⁷ In one of his well-known speeches before the Constituent Assembly, he had asserted that the religion or caste of any citizen of Pakistan 'has nothing to do with the business of the State.'²¹⁸ However, with Jinnah's death in September 1948²¹⁹ and with no other political figure in place to command the same personal authority, the power struggle that had raged

²¹⁶ *Hamza Alavi* (1986) (n 139) 24.

²¹⁷ *G. W. Choudhury* (1955) (n 137) 590.

²¹⁸ Muhammad Ali Jinnah, 'First Presidential Address to the Constituent Assembly of Pakistan ' (Karachi, 11 August 1947).

²¹⁹ *Stephen Philip Cohen* (2004) (n 186) 7. Jinnah had suffered from Tuberculosis for some time, although the news of his illness had not been made public while the negotiations with the British continued.

between the self-serving sections of military, politicians and Islamic forces, increased in intensity.

Owing to the problems faced by the Constituent Assembly shortly after creation,²²⁰ the religious sections began their ascendancy and Jinnah's absence rendered that the political leadership proved unable to counter their demands. In an echo of the discussion on Constituent Assembly debates mentioned above, the religious political parties and groups asserted that since Pakistan was created as a separate homeland for the Muslims of the sub-continent, its framework should be guided by Islamic principles. They demanded the imposition of the *Shariah* (Islamic Jurisprudence), and their first victory came with the passage of the Objectives Resolution in 1949, which was loaded with 'theological undertones'.²²¹ The articles of the Resolution, initially intended to serve as guiding principles, vested sovereignty with the Almighty and introduced principles of Islam as the basis of the social contract of the state.²²²

As discussed in the previous section, a multitude of political crises meant that Pakistan was unable to acquire its first constitution until 1956. This Constitution declared Pakistan an Islamic Republic, and introduced the

²²⁰ See, *Crafting a Post-Colonial State: A brief history of constitutional crises, 1947-1973*, on page 56.

²²¹ *Zulfikar Khalid Maluka* (1995) (n 153) 125-126; *Martin Lau* (2006) (n 97); *Tanzilur-Rahman* (1996) (n 136).

²²² The Objectives Resolution, which now forms the Preamble of the Constitution, begins by the statement: 'Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.'

possibility of a system of separate electorates for the non-Muslim minorities.²²³ However, the Constitution of 1962 promulgated under General Ayub's martial law regime, which superseded the 1956 Constitution, attempted to tone down the religious undercurrent. It declared Pakistan to be a Republic rather than an Islamic Republic.²²⁴ The political upheavals continued until the early 1970s, which also saw East Pakistan secede to become the independent state of Bangladesh in 1971. With Zulfikar Ali Bhutto at the helm of power in the new setup, a 'consensus based' Constitution was formulated in 1973,²²⁵ and Bhutto was sworn in as the country's first democratically elected Prime Minister later that year. However, in order to reach a consensus, the incumbent regime had to concede to the demands of the clergy and religious political parties that had gained support within the larger society in the preceding years.²²⁶ The 1973 Constitution again proclaimed Pakistan as an Islamic Republic and instituted the Council of Islamic Ideology as an advisory body to the executive and legislature, whose task was to bring the existing and future laws in conformity

²²³ Articles 1 and 142, respectively, of the Constitution of the Islamic Republic of Pakistan, 1956.

²²⁴ Article 1 of the Constitution of the Republic of Pakistan, 1962. Protests and demands from the religious sections, however, meant that the title of Islamic Republic was reinstated later during Ayub Khan's regime.

²²⁵ Osama Siddique, 'The Jurisprudence of Dissolutions: Presidential Power to dissolve Assemblies under the Pakistan Constitution and its discontents' (2006) 23 (3) *Arizona Journal of International & Comparative Law* 615, 628.

²²⁶ At the heart of the Pakistan movement was the widely held belief that Muslims of the sub-continent should have a separate homeland wherein they would have the freedom to practice their beliefs. Though the Islamic political parties were initially against the idea of Pakistan on the grounds that it would split Muslims into two different countries (they even went so far as to declare Jinnah an 'infidel'), after independence they stepped up their activities. The inability of the Muslim League to connect with the masses (compared to Indian National Congress across the border) and the struggle for power between the politicians and the military meant that the support from Islamic political parties increased in significance. See, Lawrence Ziring, 'From Islamic Republic to Islamic State in Pakistan' (1984) 24 (9) *Asian Survey* 931, 931-946.

with Islamic principles.²²⁷ In an unprecedented and significant move, the Constitution also declared Islam as the 'State Religion' of the country.²²⁸

The struggle for dominance between liberal and secular sections and the clergy continued during the 1970s. Bhutto, whose party carried the slogan of 'Roti, Kapra, Makan' (Bread, Clothing, Shelter), became increasingly isolated for not being able to fulfil his pro-poor rhetoric. His rule was criticised for becoming increasingly authoritarian and, despite the measures to introduce further Islamic aspects in the legal system, he was vehemently opposed by the religious sections for what they perceived were Western, secular or socialist inclinations. His grip on power weakened and during the last days of his rule, Bhutto, who himself had previously claimed publicly that 'Yes...it is *sharab* [alcohol, that I am drinking]! Unlike you [clerics], I don't drink the blood of the people',²²⁹ announced complete prohibition against the manufacture and consumption of alcohol, in a move to appease the religious groups. In another symbolic gesture, the weekly holiday was moved from Sunday to Friday, as it is considered a day of prayer for Muslims.²³⁰

One aspect that has been the most significant in terms of affecting the status or rights of minorities, or in fact affecting the larger narratives around religion and

²²⁷ Article 2 of the Constitution of the Islamic Republic of Pakistan, 1973.

²²⁸ Ibid.

²²⁹ Tariq Ali, 'Imperial Delusions' (2005) 16 *Macalester International Journal* 29 41.

²³⁰ Stephen Philip Cohen (2004) (n 186) 170.

citizenship, was the official declaration of *Ahmadis* as non-Muslims in 1974.²³¹ *Ahmadis*, who assert that they are ‘followers of Islam’,²³² are denounced by Islamic scholars within Pakistan as apostates for disputing the finality of Prophethood – a central tenet of Islamic faith.²³³ Although the region had witnessed large-scale anti-*Ahmadi* riots previously, both before partition (in 1934) as well as after Pakistan came into existence (in 1953),²³⁴ the new legal amendments officially categorised them as non-Muslims in the Constitution.²³⁵ This provided the constitutional foundation which was later built upon by General Zia-ul-Haq, who introduced further legal and constitutional changes, effectively declaring it a punishable offence for *Ahmadis* to employ Islamic terminology, texts, or even call their places of worship ‘Mosques’.²³⁶

Bhutto continued to run the country under the guise of ‘Islamic Socialism’ until 1977,²³⁷ when the army once again took over the state and declared Martial Law. Bhutto was arrested and subsequently tried for the murder of a political

²³¹ Javaid Rehman, ‘Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities’ (2000) 7 *International Journal on Minority and Group Rights* 139, 146.

²³² Ibid.

²³³ Rehman writes that the declaration of *Ahmadiyya* community as non-Muslim was dictated by ‘political concerns and motivations.’ He notes that before their status as Muslims was disputed, *Ahmadis* had been part of governmental and bureaucratic setup, and had played an ‘influential role’ in the pre-independence struggle. Ibid. 156.

²³⁴ Paula Newberg (1995) (n 20) 240. See also, S. E. Brush, ‘*Ahmadiyyat* In Pakistan’ (1955) 45 (2) *The Muslim World* 145.

²³⁵ The 2nd Amendment to the 1973 Constitution appended the following clause to Article 260: ‘A person who does not believe in the absolute and unqualified finality of The Prophethood of Muhammad (Peace be upon him), the last of the Prophets, or claims to be a Prophet in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon him), or recognizes such a claimant as a Prophet or religious reformer, is not a Muslim for the purposes of the Constitution or law.’ Constitution, (Second Amendment) Act, 1974, Pakistan.

²³⁶ Article 298A and 298B of the Pakistan Penal Code. Also see, Javaid Rehman (2000) (n 231) 156.

²³⁷ Aasim Sajjad Akhtar, Asha Amirali and Muhammad Ali Raza, ‘Reading between the lines: The mullah–military alliance in Pakistan’ (2006) 15 (4) *Contemporary South Asia* 383, 387.

opponent. In a trial which he denounced for being 'barbarous',²³⁸ he was found guilty of murder by the Supreme Court and executed in April 1979. With the fate of Pakistan's first democratically elected Prime Minister thus decided, General Zia-ul-Haq opened yet another chapter of military rule that lasted until 1988. The most vocal support for General Zia's coup came from the religious groups and clergy who had become vehement opponents of Bhutto's government, and who were rewarded in return through Zia's Islamisation programme and 'patronage politics'.²³⁹ A significant event that guided Zia regime's policies throughout the 1980s was its support to the United States' efforts to counter the Soviet invasion of Afghanistan.²⁴⁰ Towards this end, his regime relied on a strong narrative of the conflict being a holy struggle of Muslims against the atheist communist ideology. It used religious slogans to generate the sense of an ideological war, and employed this discourse to support the Afghan *Mujahideen* (religious warriors). The regime actively engaged in the establishment of *Madrassahs* (religious seminaries) in Pakistan, where Afghan Mujahideen and militants from the two countries could be trained for battle.²⁴¹ Based on the problems of weaponisation, criminality and religious conflict that these steps generated in the country, Yousuf Nazar argues that the "Afghan jihad" turned Pakistan into a brutalised and criminalised society.'²⁴²

²³⁸ Zulfikar Ali Bhutto, *My Dearest Daughter: A letter from the death cell* (2007) 7.

²³⁹ Aasim Sajjad Akhtar, *Asha Amirali and Muhammad Ali Raza* (2006) (n 237) 387.

²⁴⁰ Stephen Philip Cohen (2004) (n 186) 9-10.

²⁴¹ Ibid. 183-184.

²⁴² Yousuf Nazar (2011) (n 90) viii.

In this backdrop of patronage politics and religious conflict, during the 11 years of Zia's regime the move towards Islamisation of the legal and constitutional frameworks gained significant momentum. Through the implementation of *Nizam-e-Mustapha* (literally, the System of Prophet Muhammad of Islam, PBUH),²⁴³ Zia radically altered the nature of the dominant legal architecture of the country. He passed a series of Presidential Ordinances in 1979 that included an Islamic classification of crimes and punishments in the criminal code.²⁴⁴ Though considered to have a 'minor impact' at the time,²⁴⁵ these changes in the penal code appear in hindsight to be 'counter-productive' to the goals of engendering equality of citizenship for religious minorities, as the controversial blasphemy laws highlight.²⁴⁶ He also established the Federal Shariat Court and the Acceleration of Islamisation Committee as constitutional bodies, geared towards ensuring that the legal and political frameworks in the country are in conformity with Islamic principles.²⁴⁷ These Islamisation measures will be discussed in greater detail in following chapter on Pakistan's socio-legal tapestry.

²⁴³ Aasim Sajjad Akhtar, Asha Amirali and Muhammad Ali Raza (2006) (n387).

²⁴⁴ Charles H. Kennedy, 'Islamization and Legal Reform in Pakistan, 1979-1989' (1990) 63 (1) *Pacific Affairs* 62, 62.

²⁴⁵ Ibid.

²⁴⁶ Abdullah Ahsan (2003) (n 178) 365. I have written elsewhere that a genealogical examination of the Blasphemy Laws of Pakistan, probably the most controversial and recognised facets of the country's legal code, reflects that this much criticised law is an Islamised version of the Blasphemy provisions of British colonial government's Indian Penal Code. Furthermore, the lineage of these Acts can be traced to the Blasphemy Act of 1697, part of English common and Canon laws which were part of the English law until 2008. Raza Saeed, 'Metamorphosis of the Ideals and the Actuals: Blasphemy Laws in Pakistan and the Transplantation of Justice in British India' (2013) 7 (2) *Pólemos: Journal of Law, Literature and Culture* 235.

²⁴⁷ Zulfikar Khalid Maluka (1995) (n 153) 260-266. For a list of the multiple institutions and committees instituted by General Zia during his Islamisation campaign, see Mohammad Amin (1989) (n 114) 63.

Like his predecessors, Zia promulgated a greatly amended Constitution in 1985, following which he assumed the office of the President and held general elections on a non-party basis.²⁴⁸ He remained in power as the President of the country,²⁴⁹ until his assassination in 1988, following which the government once again reverted to civilian rule, with Benazir Bhutto (daughter of Zulfikar Ali Bhutto) as the elected Prime Minister.²⁵⁰ However, the civilian governments, bureaucracy, army and the clergy remained tangled in a vicious battle for power. The decade between 1988 and 1998 saw four different civilian governments take power through general elections, though none of them were able to complete their terms. The country had nine different Prime Ministers during this ten-year period. Benazir Bhutto and her Pakistan People's Party also formed governments twice in that decade, only to be dismissed by the sitting Presidents on charges of corruption and inefficiency.²⁵¹ Despite the promise of progress and slogans of liberalism and democracy, none of these governments proved able or willing to curtail or undo the tide of Islamisation of the legal system, or provide greater protection to minorities or women.

Two significant legal developments during this decade of political uncertainty were the establishment of the Anti-Terrorism Courts and the introduction of the 15th Amendment to the Constitution (Shariah Bill). The Anti-Terrorism Courts

²⁴⁸ Rasul B. Rais, 'Pakistan in 1988: From Command to Conciliation Politics' (1989) 29 (2) *Asian Survey* 199, 199-200.

²⁴⁹ One key feature of the 1985 Constitutional Amendment was that it significantly enhanced Presidential powers to dissolve standing legislatures, by virtue of Article 58(2)(b) of the Constitution. In the following decades, this provision was used several times by sitting Presidents to dissolve elected assemblies (until its repeal in 2010). For a detailed discussion on Article 58(2)(b) and its political ramifications, see generally, *Osama Siddique* (2006) (n 225).

²⁵⁰ *Rasul B. Rais* (1989) (n 248) 199-205.

²⁵¹ For an overview of this decade of political upheaval, see *Osama Siddique* (2006) (n 225).

were established by virtue of the Anti-Terrorism Act, 1997, that granted wide ranging powers to law enforcement agencies, permitting them to try suspects in their absence²⁵² and search premises without warrants.²⁵³ The Anti-Terrorism Courts were initially given the sole jurisdiction to try terrorism related incidents, which were not subject to review by the superior courts.²⁵⁴ This institution of a parallel judiciary was challenged by the superior courts, and declared unconstitutional by the Supreme Court in 1998.²⁵⁵ The law, as subsequently modified by the Anti-Terrorism (Amendment) Ordinance of 1999 proclaimed in the first year of General Pervez Musharraf's military regime, brought these courts within the jurisdiction of the provincial High Courts, and significantly expanded the definition of the 'Terrorist Act'.²⁵⁶

The other notable development of this period was Shariah Bill, which was introduced in the parliament soon after Pakistan conducted nuclear tests in 1998, following which an emergency had been declared in the country by Prime Minister Nawaz Sharif's government. Although the Bill was never passed, it sought to give the Federal Government the power and the responsibility to impose Islamic laws in the country. The Bill established that in line with the spirit of the Objectives Resolution, Quran and Sunnah will be the 'Supreme Law' of Pakistan,²⁵⁷ having effect 'notwithstanding anything contained in the

²⁵² Article 19(10) of the Anti-Terrorism Act, 1997.

²⁵³ Ibid. Article 10.

²⁵⁴ Ibid. Article 12 and 25.

²⁵⁵ *Martin Lau* (2006) (n 97) 105-106.

²⁵⁶ Article 6 of the Anti-Terrorism (Amendment) Ordinance 1999 included 'gang rape, child molestation, or robbery coupled with rape' in the definition of a Terrorist Act.

²⁵⁷ Article 2(1) of the Constitution (Fifteenth Amendment) Bill, 1998.

Constitution, any law or judgement of any Court'.²⁵⁸ It further obliged the Federal Government to 'enforce Shariah, establish *salat* [prayer], to administer *zakat* [annual taxation]' and to promote the Islamic principle of prescribing 'what is right and [forbidding] what is wrong.'²⁵⁹ It also attempted to modify the requirement of two-thirds majority in the parliament needed to pass constitutional amendments, to a simple majority in the case of Islamic laws.²⁶⁰ This Bill was never approved by the parliament, partly because of the criticism it received,²⁶¹ and partly because of the political fallout between the government and armed forces as the aftermath of the Kargil conflict.²⁶² The Kargil conflict also provided the impetus for yet another Martial Law in the country, when General Pervez Musharraf deposed Nawaz Sharif in 1999.

2.5. Between Islamisation and 'Enlightened Moderation': A brief history of constitutional and legal frameworks – 1999-2013

In 1999, after a decade of constant changes in governments, dissolution of assemblies and a power struggle between political parties, bureaucracy and armed forces, General Musharraf led Pakistan's fourth military coup since the country's independence. The military and the government of Prime Minister Nawaz Sharif were at loggerheads in the aftermath of the Kargil conflict

²⁵⁸ Ibid. Article 2(5).

²⁵⁹ Ibid. Article 2(1).

²⁶⁰ Ibid. Article 3.

²⁶¹ Political commentators denounced what seemed to be an attempt by Prime Minister Nawaz Sharif to use Islamic slogans to further his political interests. Eqbal Ahmad, *Eqbal Ahmad: Confronting Empire – Interviews with David Barsamian* (South End Press, Cambridge, Massachusetts 2000) 160.

²⁶² For an account of the Kargil conflict, see *Owen Bennet Jones* (2011) (n 16) 107-123.

between India and Pakistan in 1998.²⁶³ It is noted by commentators that at the time the conflict erupted, the political leaders of the two countries were trying to ease the relations and address the Kashmir dispute through back-channel diplomacy.²⁶⁴ When the Kargil conflict came to international attention, the political leadership had to intervene and order the Pakistani forces to withdraw, a move that the armed forces saw as surrender and 'betrayal by an uninformed civilian.'²⁶⁵ The incident that provided an inroad for Musharraf's takeover of political power occurred when Nawaz Sharif attempted to depose General Musharraf from his position as the Chief of the Army Staff.²⁶⁶ The deposition order was passed and a new army chief sworn in on 12th October 1999, while General Musharraf was on a civilian plane returning from an official visit to Sri Lanka. His plane was not permitted to land in Pakistani airspace, which led to a capture of civilian air command and other institutions by takeover sections of the army loyal to Musharraf.²⁶⁷ The army arrested Nawaz Sharif and his supporters and dissolved the parliament, with Musharraf assuming the office of the Chief Executive of Pakistan.²⁶⁸ The argument that General Musharraf's plane was not permitted to land with only limited fuel remaining became the subject of a hijacking trial, where the newly established Anti-Terrorism Court convicted Nawaz Sharif and awarded him a life sentence.²⁶⁹ Sharif was later exiled to Saudi Arabia after entering a political arrangement with Musharraf.

²⁶³ *Stephen Philip Cohen* (2004) (n 186) 88. For an account of the Kargil conflict, see *Owen Bennet Jones* (2011) (n 16) 107-123.

²⁶⁴ *Owen Bennet Jones* (2011) (n 16) 114-116.

²⁶⁵ *Stephen Philip Cohen* (2004) (n 186) 151.

²⁶⁶ For a detailed account of this incident, see *Owen Bennet Jones* (2011) (n 16) 291-298.

²⁶⁷ *Ibid.*

²⁶⁸ Proclamation of Emergency, October 14, 1999.

²⁶⁹ *Owen Bennet Jones* (2011) (n 16).

The Proclamation of Emergency Order of 1999 through which General Musharraf dissolved the legislature and the government did not abrogate the Constitution; rather, in a novel use of legal and constitutional reasoning, it declared that the 'Constitution of the Islamic Republic of Pakistan shall remain in abeyance'.²⁷⁰ This 'deliberately softer image'²⁷¹ of the Martial Law was perhaps based on the knowledge gained from the issue of legal vacuum created by the first military rule.²⁷² The Provisional Constitutional Order (PCO) of 1999, proclaimed on the same date,²⁷³ declared that 'Notwithstanding the abeyance of the provisions of the Constitution... Pakistan shall... be governed, as nearly as may be, in accordance with the Constitution.'²⁷⁴ The PCO also denied courts the authority to challenge any orders that may emerge from the Proclamation of Emergency.²⁷⁵ Following the promulgation of the PCO, Musharraf installed a new government with handpicked individuals as cabinet members, and forced the judiciary to take a new oath of office in 2000 under the authority of the PCO.²⁷⁶ Forced to renege on their oath taken under the 1973 Constitution, several judges refused to comply with the demands of the military regime and resigned.²⁷⁷ Although the newly installed judges of the Supreme Court validated

²⁷⁰ Clause (a) of the Proclamation of Emergency, October 14, 1999.

²⁷¹ *Osama Siddique* (2006) (n 225) 695.

²⁷² Discussed in the Dosso and Reference cases above, this paradoxical and ironic term allowed him to make amendments to the Constitution.

²⁷³ *Osama Siddique* (2006) (n 225) 695.

²⁷⁴ Article 2(1) of the Provisional Constitutional Order, 1999.

²⁷⁵ *Ibid.* Article 4.

²⁷⁶ Taiyyaba Ahmed Qureshi, 'State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan' (2010) 35 (2) *North Carolina Journal of International Law and Commercial Regulation* 485, 491; *Osama Siddique* (2006) (n 225) 696.

²⁷⁷ *Osama Siddique* (2006) (n 225) 696.

the legality of Musharraf's coup in *Zafar Ali Shah*,²⁷⁸ the struggle between the military and the judiciary that the oath-of-office issue highlighted, remained an undercurrent for the Musharraf era. The discussion will return to this presently.

Soon after Musharraf took power, a major event that changed the course of global politics, and which had even greater ramifications for Pakistan, was the September 11, 2001, attacks on the World Trade Centre in New York.²⁷⁹ With Al-Qaeda's acceptance of responsibility for these attacks,²⁸⁰ and with the Al-Qaeda leadership said to be given shelter by the Taliban regime in Afghanistan,²⁸¹ Pakistan was given a Hobson's choice. The United States administration, emphasising the US intent to invade Afghanistan, conveyed to the Pakistani Ambassador: 'You are either 100 per cent with us or 100 per cent against us... there is no grey area.'²⁸² Despite its previous support for the Taliban government in Afghanistan, the military regime preferred the former option.

This event played a major role in guiding the overall direction of Musharraf's rule. As discussed in the section above, the previous military rule of General Zia-ul-Haq was geared towards an increasing Islamisation of the country and society, primarily due to the Cold War needs of the time. Pakistan during his era

²⁷⁸ Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869).

²⁷⁹ Though none of the attackers involved in the incident were Pakistani nationals, it was later claimed that the perpetrators had received training in Pakistan and the alleged mastermind of the attacks was later captured from Karachi.

²⁸⁰ Owen Bennet Jones (2011) (n 16) 40.

²⁸¹ Ibid. 75.

²⁸² Ibid. 2.

required a ready army of religiously motivated *Mujahideen* to fight against Soviet Union and the communist ideology.²⁸³ Musharraf's rule was marked by opposite needs of the time. With the Islamic discourse of the previous decades now considered dangerous in the new climate, the post-September 11 period required a toning down of the religious narrative. Thus 'Enlightened Moderation' – an attempt to convey a moderate version of Islam – became the guiding phrase for Musharraf's policies, and the new mantra for the same military power that had led the Islamisation campaign.²⁸⁴

The biggest clash between the two competing slogans of Islamisation and 'Enlightened Moderation' occurred during the *Lal Masjid* (Red Mosque) incident in Islamabad in 2007, when the religious seminaries associated with the Mosque were sieged and captured by the armed forces.²⁸⁵ *Jamia Hafsa*, the women's seminary associated with the Mosque, is claimed to be the largest Islamic institution for women in the world, with almost 6,000 students.²⁸⁶ In the

²⁸³ See, On Religion and State Law: A brief history of Islamisation of laws, 1973-1999, on page 73.

²⁸⁴ General Musharraf's own elaboration of the phrase provides an interesting read. He writes that the 'idea of "enlightened moderation" dawned on me in my study one night when I was meditating on all this [violence]. To stop violence, we need a global solution. The turmoil in the Muslim world arises primarily because of unresolved, long-standing political disputes that have created a sense of injustice, alienation, deprivation, powerlessness, and hopelessness in the masses. ... Enlightened moderation is a two-pronged strategy that I sincerely believe is also a win-win strategy. One prong, to be the responsibility of the Muslim world, is the rejection of terrorism and extremism in order to concentrate fully on internal socioeconomic development. The other prong, to be the responsibility of the West in general and the United States in particular, is to put their full weight behind finding a just resolution of all political disputes afflicting Muslim societies.' Pervez Musharraf, *In the Line of Fire: A Memoir* (Simon & Schuster, London 2006) 295-296.

²⁸⁵ Ashok K. Behuria, 'The Rise of Pakistani Taliban and the Response of the State' (2007) 31 (5) *Strategic Analysis* 699, 712-713.

²⁸⁶ Fawzia Afzal-Khan, 'What lies beneath: Dispatch from the front lines of the Burqa Brigade' (2008) 14 (1) *Social Identities* 3, 5.

period leading up to the 2007 siege, the Mosque²⁸⁷ and the seminary became a hub of militant activity.²⁸⁸ Despite being situated in the heart of the Capital of Pakistan, the students from the seminary (particularly female students) increasingly challenged government authority and kidnapped and attacked those individuals in the vicinity who were considered to be 'secular'²⁸⁹ and suspected of 'sexual-depravity'.²⁹⁰ Through its attempts at 'cleansing' the society of its 'immoral sexuality' and 'sexual corruption',²⁹¹ led by heavily armed students,²⁹² the Mosque increasingly challenged government authority, denounced its legitimacy, and argued for a complete overthrow of the regime in favour of the imposition of Shariah.²⁹³ In 2007, after negotiations between the government and the clerics, for surrender of arms and curtailment of the Mosque's activities, failed, the government launched an army-led operation.²⁹⁴ The bloodied operation in which scores of soldiers, seminary students and militants were killed, including one of the two leaders of the Mosque, has since gained symbolic value as a rallying point for Islamic militant groups operating in Pakistan.²⁹⁵ It is used by Islamic militant groups as evidence of the State's insincerity towards Islamisation measures. Despite such incidents and the claims of 'Enlightened Moderation', however, the Musharraf regime and

²⁸⁷ Established by Maulana Abdullah, a religious cleric and a confidant of General Zia-ul-Haq, Lal Masjid had played a major role in the recruitment and training of Mujahideen during the Soviet-Afghan War in the 1980s. Maulana Abdullah, who was alleged to have links with Al-Qaeda leadership, was assassinated in 1998 by unknown assailants.

²⁸⁸ Farida Shaheed, 'Contested Identities: Gendered Politics, Gendered Religion in Pakistan' (2010) 31 (6) *Third World Quarterly* 851, 862-863.

²⁸⁹ Ibid.

²⁹⁰ Fawzia Afzal-Khan (2008) (n 286) 3.

²⁹¹ Farida Shaheed (2010) (n 288) 862-863.

²⁹² Fawzia Afzal-Khan (2008) (n 286) 4.

²⁹³ Ashok K. Behuria (2007) (n 285) 712.

²⁹⁴ The operation was codenamed 'operation silence'. Ibid. 713.

²⁹⁵ Ibid.

Pakistan's intelligence agencies are accused of playing a double game with their continued support for Taliban and other religious militant groups as they are considered as strategic assets in Afghanistan and Kashmir.²⁹⁶

The conflicts between the Islamic and 'Moderate' discourses were also witnessed in some of the legal developments of the era, the most notable of which were the issues surrounding the Protection of Women (Criminal Laws Amendment) Act of 2006. This Act challenged some of the problematic frameworks of Islamic law in the country, particularly the Hudood Ordinances of 1979.²⁹⁷ One of the major issues that emerged from these Ordinances, as will be discussed in the next chapter, related to miscarriage of justice and violation of women's rights by virtue of the fact that women's reporting of an offence of rape against them was often construed as an admission of guilt, through which they themselves were tried for adultery or fornication.²⁹⁸ The 2006 Act categorically established the difference between *Zina-bil-jabr* (rape) and *Zina* (fornication), and amended the procedures surrounding evidence and punishment.²⁹⁹ However, some scholars argue that the 'feeble' Act was 'full of loopholes and lacunas', and more akin to an exercise in politics to appease both

²⁹⁶ Ibid. 713-714.

²⁹⁷ Moeen Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamisation of Pakistan's Law' (2012) LX (4) *The American Journal of Comparative Law* 875, 892; Rubya Mehdi, 'The Protection of Women (Criminal Laws Amendment) Act, 2006 in Pakistan' *Droit et cultures [En ligne]* 59, 1 June 2010 <<http://droitcultures.revues.org/2016>> last accessed 14 November 2013.

²⁹⁸ Moeen Cheema (2012) (n 297) 892.

²⁹⁹ Ibid.

religious groups and women's rights activists, as it did not target the underlying discriminatory structure of the Hudood Ordinances.³⁰⁰

In addition to the Islamic/Moderate dispute, the major feature that marked Musharraf's regime was its oscillating relationship with the superior judiciary. As mentioned above, after the promulgation of the PCO, several judges of the judiciary including the Chief Justice of Pakistan had refused to take a new oath of office. The new judiciary that subsequently took office gave a notable judgement in 2000, when the legality of the Martial Law was challenged in the Supreme Court.³⁰¹ The Court, in a move reminiscent of its previous incarnations, went back to the Doctrine of State necessity³⁰² to justify the legitimacy of the coup. It declared that

We are of the view that the machinery of the Government at the Centre and the Provinces had completely broken down and the Constitution had been made unworkable. A situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of the State necessity...³⁰³

This amiable relationship between the new judiciary and the military regime, however, did not last. In 2002, Musharraf assumed the office of the President of Pakistan following a referendum in the country³⁰⁴ in which, as with previous referendums under military regimes, only one question was presented to the

³⁰⁰ *Rubya Mehdi* (2010) (n 297).

³⁰¹ *Syed Zafar Ali Shah case* (n 176).

³⁰² Coined in *State v Dosso* (n 190).

³⁰³ *Syed Zafar Ali Shah case* (n 176).

³⁰⁴ *Osama Siddique* (2006) (n 225) 620.

population – whether they supported moderation in Islam and consequently supported Pervez Musharraf's election as President. Soon after assuming the new role, Musharraf promulgated wide-ranging constitutional amendments through the Legal Framework Ordinance of 2002. This Ordinance, while reinstating the 1973 Constitution, increased the powers of the President, and indemnified Musharraf for all actions taken before his election as the President.³⁰⁵ The Ordinance was struck down by the Supreme Court, which ruled that the constitutional amendment required ratification by the parliament, although it was subsequently passed in 2003 when politicians supported by Musharraf formed the new legislature.

The relationship between the judiciary and the Musharraf regime continued its oscillation until 2005, during which three different Chief Justices assumed office. Iftikhar Muhammad Chaudhary took charge as the Chief Justice of Pakistan in 2005, and although not challenging the Executive authority expressly, he increasingly questioned the government and the armed forces on the issue of the 'forced disappearances' of people in Balochistan.³⁰⁶ During his tenure, the SC also challenged and annulled a number of celebrated economic measures taken by the government, the most notable of which was the privatisation of the Pakistan Steel Mills.³⁰⁷ Fearful that the Chief Justice might not support the legality of Musharraf's candidacy for the oncoming Presidential re-election, the armed forces asked the CJ to resign on allegations of misuse of

³⁰⁵ *Taiyyaba Ahmed Qureshi* (2010) (n 276) 492-493.

³⁰⁶ Thought to be in the custody of the army and the para-military forces, detained during counter-insurgency measures. *Kersi B. Shroff and Krishan S. Nehra* (2007) (n 19).

³⁰⁷ *Taiyyaba Ahmed Qureshi* (2010) (n 276) 493-494.

authority.³⁰⁸ On his refusal, a series of measures were adopted against him, which included his house arrest and the initiation of a Presidential Reference for his removal.³⁰⁹ The protests and movement sparked by the CJ's refusal to submit to the authority of a military General, gained momentum amongst the students, political parties, civil society organisations, with lawyers being at the forefront of the struggle.³¹⁰ The struggle culminated in the restoration of the CJ to his office in July 2007 although, soon after, Musharraf imposed a Constitutional Emergency in the country in November 2007, and suspended all courts and sitting judges.³¹¹

Protests against Musharraf's regime erupted again. The assassination of Benazir Bhutto in December 2007 provided not only fresh impetus to the Lawyers' Movement, but also resulted in her Pakistan People's Party later sweeping the parliamentary elections in February 2008.³¹² Musharraf resigned from his post as President in 2008 and while the new President, Asif Ali Zardari, initially proved reluctant to reinstate the deposed judges, the continuation of mass protests resulted in the restoration of Chief Justice and the judiciary to office in 2009.³¹³

The constitutional and legal developments in the years since then have been in three main tangents: Greater strength gained by political parties in relation to

³⁰⁸ Ibid. 487.

³⁰⁹ *Kersi B. Shroff and Krishan S. Nehra* (2007) (n 19).

³¹⁰ See, generally, *Zahid Shahab Ahmed and Maria J. Stephan* (2010) (n 18); *Shoaib A. Ghias* (2010) (n 71).

³¹¹ *Shoaib A. Ghias* (2010) (n 71) 986.

³¹² *Zahid Shahab Ahmed and Maria J. Stephan* (2010) (n 18) 498.

³¹³ Ibid. 499-505.

the armed forces, a renewed focus on the independence of the judiciary, and the efforts to deal with the increasing problems of lawlessness and militancy. A greater willingness on the part of political parties to settle disputes without seeking a recourse through the support of the armed forces culminated, not just in the completion of electoral term for an elected government for the first time in Pakistan's history,³¹⁴ but also resulted in the Eighteenth Amendment to the Constitution in 2010. This Amendment has introduced a set of wide-ranging reforms in the Constitution, the most significant of which relate to: the removal of the Presidential power to dissolve the elected assemblies and greater powers to the Prime Minister;³¹⁵ a renaming of Khyber-Pakhtunkhwa province from North West Frontier Province, as a result of the demand from the people of the region;³¹⁶ a repeal of Legal Framework Order implemented by Musharraf;³¹⁷ and an express linking of the abrogation or suspension of the Constitution to the High Crime of Treason.³¹⁸

The second key feature of legal development in the past few years is the renewed focus on the independence of the judiciary, which has made judicial activism far more pronounced than it was in the preceding decades.³¹⁹ The Human Rights Cell of the Supreme Court of Pakistan, though established in

³¹⁴ For a history of elections and electoral politics in Pakistan, see PILDAT, 'The First 10 General Elections of Pakistan: A Story of Pakistan's Transition from Democracy Above Rule of Law to Democracy Under Rule of Law - 1970-2013' (Pakistan Institute of Legislative Development and Transparency, Islamabad, Pakistan 2013).

³¹⁵ Article 17 of the Constitution (Eighteenth Amendment) Act, 2010.

³¹⁶ Ibid. Article 3

³¹⁷ Ibid. Article 2.

³¹⁸ Ibid. Article 3(1). Early in 2014, General Musharraf was charged with Treason for imposition of Emergency in the country, and the trial is currently *sub judice*.

³¹⁹ Charles H. Kennedy (2012) (n 72) 158.

2005, is said to be working with 'renewed zeal and fervour' since the restoration of the judiciary in 2009.³²⁰ SC has used the provision of original jurisdiction to take Suo Motu notices on a variety of issues, ranging from transgression or abuse of government authority to human rights violations.³²¹ The SC has also increasingly challenged the executive power, measures that have attracted both praise and criticism from the legal fraternity. It forced a sitting Prime Minister to resign in 2012 for not pursuing the allegations of corruption and money laundering against the President of Pakistan at the time, Asif Ali Zardari.³²² One of the most significant cases currently in the SC relates to the charges of treason against Pervez Musharraf for the 2007 promulgation of Emergency and suspension of the courts, though the outcome of this case depends on international and domestic political considerations as much as legal frameworks and judicial activism.

The issues of lawlessness and militancy have also provided a key direction for legal and constitutional developments in Pakistan. During its tenure, the previous government had strengthened the powers afforded to the armed forces to detain, interrogate and question those individuals who were suspected of involvement in terrorism and militancy.³²³ Anti-Terrorism Courts have also gained increased powers and visibility in the legal discourse, where they are able to try cases ranging from burglary and kidnapping to instances of mass

³²⁰ Human Rights Cell, 'Supreme Court of Pakistan Human Rights Cell Annual Report' (Supreme Court of Pakistan, Islamabad 2010/11) 132.

³²¹ Discussed in Chapter 7 on page 235.

³²² Anas Malik, 'Pakistan in 2012: An Assertive Judiciary in a Pre-Election Year' (2013) 53 (1) *Asian Survey* 34, 39-40.

³²³ For instance, the Actions in Aid of Civil Power Ordinance, 2011, grant extensive powers to the armed forces to detain suspects for unspecified periods of time.

violence.³²⁴ Currently, there are parliamentary debates surrounding the enactment of Pakistan Protection Ordinance. Criticised by human rights activists and sections from the legal fraternity, the Pakistan Protection Ordinance seeks to give wide-ranging power to the government and armed forces to detain and charge anyone suspected of working against the integrity, or even the ideology, of the country.³²⁵ Despite the opposition, it seems likely that the act will go through the parliament, given the discourse that exists in the country to strengthen the Writ of the State to deal with issues of lawlessness and militancy.

2.6. Conclusion

The purpose behind the preceding exposition on Pakistan's legal and constitutional history was to highlight the uncertainty of the mainstream legal frameworks. The incessant shifts between military rule and political governments and between secular and Islamic notions of law emphasise the problems that grip, not just the constitutional terrain, but also socio-legal analyses in the country. Moreover, the chapter sought to introduce some of the key conceptions, cases, the reasoning employed by the superior judiciary, as well as the nature of the state and its link with Islam, which will emerge again through the course of this study.

³²⁴ Ahmad Nazir Warraich, 'Crossing the fine line: There is an inverse relationship between anti-terrorism legislation and protecting civil liberties. Is there a way out?' *The News* (Pakistan 20 October 2013) <<http://jang.com.pk/thenews/oct2013-weekly/nos-20-10-2013/dia.htm#2>> last accessed 20 October 2013.

³²⁵ Imran Mukhtar, 'NA body defers PPO till next week' *The Nation* (Islamabad, Pakistan 27 March 2014) <<http://www.nation.com.pk/editors-picks/27-Mar-2014/na-body-defers-ppo-till-next-week>> last accessed 27 March 2014.

Building on the idea of uncertainty of mainstream legal ordering developed in this chapter, the following chapter will present a sketch of Pakistan's socio-legal tapestry. It will take a conceptual journey through the different elements of the country's socio-legal terrain – western and common law traditions, Islamic law, traditional legality, colonial law as exteriority within the constitution, and lawlessness. The study contends that these multiple components form part of the overall legal architecture of Pakistan, and that if they are excluded from legal analysis, it leaves us with a foundation that is not strong enough to build sound legal analyses on.

Chapter 3: The Socio-Legal Tapestry of Pakistan

3.1. Chapter Synopsis: The Plurality of Pakistan's Legal Architecture

The previous chapter presented a brief history of the political, legal and constitutional uncertainty that has gripped Pakistan since its inception.³²⁶ The purpose behind this discussion was to highlight the major factors that stymie socio-legal analysis by capturing it within the realm of political and constitutional discussions. It was further highlighted that the state-oriented legal and constitutional systems have faced their fair share of hurdles since Pakistan's independence. The constitutional history has been marred by power struggles and incessant political and constitutional turmoil; moves between democratic to military dictatorships; shifts between presidential and parliamentary authority; and oscillations between religious and secular ideals. However, it is argued in this study that the Constitution and state-oriented law form only one aspect, albeit the dominant one, of the overall legal tapestry of the country. In order to grasp the holistic picture of law in the context of Pakistan, it is necessary to consider the multiple normative and legal orderings in the country, in addition to constitutional and legal turmoil at the level of the state.

In this regard, building on the discussion on the turbulent history of law and the Constitution of Pakistan, the purpose of this chapter is to bring together the diverse forms of legality that exist in Pakistan on one platform, in order to

³²⁶ Chapter 2 on page 50.

enable us to discuss the diverse narratives that are commonly employed to understand them. It is only through building and grasping an overall picture of the socio-legal architecture that we can ground the various narratives of law, offer critiques, understand their limitations, and realise the need to move towards more nuanced narratives and approaches to law in Pakistan. There are five different yet interrelated spheres of the socio-legal tapestry that will be discussed below: Constitutional and common law frameworks that have largely been inherited by Pakistan from the pre-independence era; structures and instruments related to Islamic law, that have gained prominence in the last few decades; traditional and local mechanisms of justice that prevail in the country despite being challenged by the dominant legal system; the laws governing the Tribal Areas, which still carry an evidently colonial nature; and finally, the spheres of 'lawlessness', generally considered to be the *absence* of law and order, but which need to be considered here because of their role in the multiple narratives of law in Pakistan. Despite the structure of this chapter based along these five distinct topics, the aim behind considering them within the socio-legal tapestry is to argue that these spheres of legality are interconnected, and cannot be completely divested from one another.

3.2. Constitutional Arrangement and Common law

Notwithstanding the struggle between religious and secular notions, the constitutional and common law traditions Pakistan inherited from its colonial legacy constitute the dominant legal system of the country. Based on their historical legacy, the state-oriented legal system is largely formulated on the

principles of English constitutional and legal traditions.³²⁷ The Constitution of 1973, which is currently in force, designates the country an Islamic Republic³²⁸ and institutes a Parliamentary system of Governance³²⁹ and a hierarchy of Courts.³³⁰ Article 175(1) of the Constitution establishes a Supreme Court at the Federal level, and five High Courts – one for each of the four Provinces, and one High Court for the Islamabad Capital Territory.³³¹ The Supreme Court has Original (Suo Motu) Jurisdiction on matters of dispute between Federal Government and Provincial Governments, as well as on matters of public importance,³³² and appellate jurisdiction on decisions of the High Courts.³³³ It also has advisory jurisdiction on questions referred to the Court by the President.³³⁴ Below the Supreme Court, there's a hierarchy of civil and criminal courts, culminating with the High Courts at the top within their respective regions.³³⁵

The common law tradition means that the principle of *stare decisis* (legal precedent) is followed by the courts according to their hierarchy.³³⁶ Article 188 of the Constitution makes the decisions of the Supreme Court on the questions of law binding on all subordinate courts. The decisions of the High Court are

³²⁷ Martin Lau, 'Introduction to the Pakistani Legal System, with special reference to the Law of Contract' in Eugene Cotran and Chibli Mallat (eds), *Yearbook of Islamic and Middle Eastern Law* (Kluwer Law International, London 1994) 3.

³²⁸ Article 1 of the Constitution of the Islamic Republic of Pakistan, 1973.

³²⁹ Ibid. Part III, Chapter 2.

³³⁰ Ibid. Part VI, Chapters 1-4.

³³¹ Ibid. Article 175(1). Islamabad High Court established through the Constitution (Eighteenth Amendment) Act, 2010.

³³² Ibid. Article 184.

³³³ Ibid. Article 185.

³³⁴ Ibid. Article 186.

³³⁵ For a graphical description of the hierarchy of Courts in Pakistan, see *Martin Lau* (1994) (n 327) 4 and 7.

³³⁶ Articles 109, 201, 203(GG) of the Constitution of the Islamic Republic of Pakistan, 1973.

binding on itself, as well as on the subordinate courts that lie under its jurisdiction, but not on the High Courts from other provinces.³³⁷ The decisions of the Privy Council, which was the apex court for the British Indian state and continued this role even after partition until 1950, are treated with 'due respect', as they are considered by the Supreme Court to be 'expositions of the law by one of the highest judicial tribunals in the world composed of distinguished men who had special knowledge about our public law.'³³⁸ But the Privy Council judgements do not bind the courts and cannot prevail over the Supreme or Federal Court decisions.³³⁹ The superior courts have also highlighted the difference between the foundational norms and ideologies of the pre and post-partition judicial systems of the country, stating that 'We are governed by a written Constitution; and have an ideology based on the religion of Islam. Common law of England is not, and cannot be, the common law or the national law of Pakistan.'³⁴⁰

But there are other streams within the Judicature which make the structure more complicated. The Federal Shariat Court (FSC) is commonly criticised as being a parallel judiciary within the country. The FSC, established in 1980,³⁴¹ has been given the remit to examine any and all laws that may be repugnant to Islamic injunctions.³⁴² The decisions of the FSC, which also has *suo motu*

³³⁷ Subject to the convention noted by the Lahore High Court in (PLD 1960 Lah 687), quoted in *Martin Lau* (1994) (n 327) 12-13.

³³⁸ Ibid. 9.

³³⁹ Ibid.

³⁴⁰ Ibid. 10.

³⁴¹ Through the Presidential Order No. 1 of 1980 (incorporated into Article 203, Chapter 3-A of the 1973 Constitution).

³⁴² Article 203D of the Constitution of the Islamic Republic of Pakistan, 1973.

jurisdiction,³⁴³ can only be reviewed through the Shariat Appellate Bench of the Supreme Court³⁴⁴ and particular issues with this judicial framework will be further discussed below. The judicial system also includes special Anti-Terrorism Courts (ATCs) which were established in 1997.³⁴⁵ Initially, the ATCs were constituted as special military tribunals, the judgements from which could not be appealed to the superior courts in Pakistan.³⁴⁶ However, after the Supreme Court's ruling of unconstitutionality against ATCs in the *Mehram Ali* case³⁴⁷ and the subsequent amendments to the concerned legislations, the ATCs now fall within the jurisdiction of the High Courts. The ATCs specifically deal with issues of 'Terrorism' under the Anti-Terrorism legislation, broadly defined to cover not just terrorist activities but even robbery and *dacoity*.³⁴⁸

There are two further anomalies in the national judicature, in addition to the controversial nature of FSC and ATCs. The Provincially Administered Tribal Areas (PATA) and the Federally Administered Tribal Areas (FATA)³⁴⁹ of the country are directly governed under the President and Provincial Governor's executive authority.³⁵⁰ The judicial matters within these regions are managed by appointed *Jirgas*, the committee of elders selected for this purpose, working under the authority of the Commissioner.³⁵¹ The decisions of *Jirgas* can be

³⁴³ Ibid. Article 203D(1).

³⁴⁴ Ibid. Article 203F(3).

³⁴⁵ Reconstituted in 1999 by the Anti-Terrorism (Amendment) Ordinance 1999.

³⁴⁶ Articles 12 and 25 of the Anti-Terrorism Act, 1997.

³⁴⁷ *Martin Lau* (2006) (n 97) 105-106.

³⁴⁸ Shabana Fayyaz, 'Responding to Terrorism: Pakistan's Anti-Terrorism Laws' (Pakistan Institute for Peace Studies, Islamabad, Pakistan 2008) 5.

³⁴⁹ Defined through Article 246 of the Constitution of the Islamic Republic of Pakistan, 1973.

³⁵⁰ Ibid. Article 247.

³⁵¹ The Frontier Crimes Regulation, 1901.

appealed to the Commissioner, but the Supreme Court and the High Courts do not have any jurisdiction to review these decisions, unless stipulated by the President or the Parliament.³⁵² This anomaly will be further discussed in the section on colonial law below. Moreover, the Nizam-e-Adl (literally, the System of Justice) Regulation of 2009 introduced yet another mechanism of justice administration based on Islamic conceptions, in the Malakand region of the country.³⁵³ These regulations established the office of *Qazis* (Islamic Judges) as the main judicial body, who would consider cases based on a different notion of procedure and evidence as required by national laws.³⁵⁴

This brief overview of the dominant state-oriented legal system shows that even at the level of the state law, different tendencies and mechanisms of law can be identified. With common law and British constitutional traditions operating at the level of the superior courts, the manifestations of Islamic law are evident through the presence of Federal Shariat Court and the recently instituted Qazi courts. The contestation between the Islamic and secular (for lack of a better word) notions of law is also evident in the instances of the Nizam-e-Adl Ordinance, which was implemented due to a demand by Islamic militant groups,³⁵⁵ as well as the Anti-Terrorism Ordinance existing under the same legal framework. Moreover, the Regulations governing the Tribal Areas depict both the legacy of colonial laws instituted by the British Indian state, as well as provide a glimpse into the traditional mechanisms of justice by using the

³⁵² Article 247(7) of the 1973 Constitution.

³⁵³ The Shariah Nizam-e-Adl Ordinance, 2009.

³⁵⁴ Ibid. Article 6.

³⁵⁵ This will be discussed in the following section.

terminology and systems of *jirgas*. The sections below will elaborate on each of these spheres of law and legality in order to lay out a holistic picture of Pakistan's socio-legal tapestry.

3.3. Islamic law

The gradual ascendancy of the Islamic religious ideology since independence has meant that the country has oscillated between notions of secular law and human rights on the one hand, and religious law on the other.³⁵⁶ In the case of Pakistan, religious law principles are solely considered to have their foundations in Islam,³⁵⁷ and predominantly in the religious interpretation of the largest Muslim sect in the country (i.e., Muslims from the Sunni-Hanafi sect). Any laws thus created in Pakistan in the name of Islam often have troubling consequences for minorities in the country.³⁵⁸ The influence of Islam on the constitutional and legal system(s) is pervasive, and it is difficult to disentangle it to contrast with the common law or secular traditions. However, I will highlight some of its salient features as evident at three different levels: Constitution, Judiciary and Penal Laws.

³⁵⁶ As discussed in Chapter 2 on page 82.

³⁵⁷ Article 227(1) of the 1973 Constitution states that 'All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.'

³⁵⁸ For a discussion on the problems faced by religious minorities in Pakistan, see *Javaid Rehman* (2000) (n 233).

3.3.1. Islam and the Constitution

The Constitution of 1973, which is currently in place, carries heavy theological tones. The Objectives Resolution forms the Preamble of the Constitution, which vests sovereignty with the Almighty and contains provisions that expressly link religion and the state. The first few lines of the Preamble read:

Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;
And whereas it is the will of the people of Pakistan to establish an order...
Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;
Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah...³⁵⁹

Although the Preamble then includes statements about rights and safeguards for minorities as well as fundamental rights of citizens, it reverts to religious notions and concludes by:

Now, therefore, we, the people of Pakistan,
Cognisant of our responsibility before Almighty Allah and men;
Cognisant of the sacrifices made by the people in the cause of Pakistan;
Faithful to the declaration made by the Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice;
...adopt, enact and give to ourselves, this Constitution.³⁶⁰

With the Objectives Resolution considered as the 'cornerstone of Pakistan's legal edifice'³⁶¹ and 'the bond which binds the nation',³⁶² its message and

³⁵⁹ Preamble to the Constitution of the Islamic Republic of Pakistan, 1973.

³⁶⁰ Ibid.

³⁶¹ A. K. Brohi, former Law Minister of Pakistan, quoted in *Rashida Patel* (1986) (n 114) 7.

religious shade cannot be disregarded. Ever since the Resolution was made a justiciable and substantive part of the Constitution in 1985,³⁶³ the religious discourse has gained further prominence within the legal realm, with the superior courts declaring that the Resolution is the country's 'Supra Constitutional document',³⁶⁴ and that it 'provides a new approach to constitutional interpretation' based on Islamic injunctions.³⁶⁵

However, the Islamic tone of the Constitution is not limited to the Preamble, and equally pervades the rest of the charter. Article 1(1) of the Constitution declares the country to be a Federation known as the Islamic Republic of Pakistan.³⁶⁶ In an express move to link state and religion, Article 2 proclaims Islam to be the 'State Religion' of the country.³⁶⁷ Article 31 of the Constitution highlights that it is necessary for the State to take steps to enable Muslims 'to order their lives in accordance with the fundamental principles and basic concepts of Islam....'³⁶⁸ This Article also binds the State to make the teaching of Quran and *Islamiat* (Islamic Studies) compulsory in educational institutions and to promote the 'observance of the Islamic moral standards'.³⁶⁹

In a step to bring the entire legal framework of the country in conformity with Islamic principles, the elaborate Part IX of the Constitution deals solely with

³⁶² Yahya Bakhtiar, former Attorney General of Pakistan, quoted in *ibid*.

³⁶³ By virtue of Article 2A of the Constitution of the Islamic Republic of Pakistan, 1973.

³⁶⁴ *Ziaur Rehman vs. State* (PLD 1986 Lah.428)

³⁶⁵ *Farhat Jaleel and others v. Province of Sindh and others* (PLD 1990 Karachi 342).

³⁶⁶ Article 1(1) of the 1973 Constitution.

³⁶⁷ *Ibid*. Article 2.

³⁶⁸ *Ibid*. Article 31(1).

³⁶⁹ *Ibid*.

Islamic Provisions. As a subsection of this segment of the Constitution, Article 227(1) affirms that all laws have to comply with Islamic injunctions. It reads:

All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions.³⁷⁰

Moreover, the Constitution also institutes the Council of Islamic Ideology (referred to as the Islamic Council),³⁷¹ outlining its function as an advisory body to guide the Parliament, Provincial Assemblies and the Executive on steps to bring the existing and future laws in line with Islamic injunctions.³⁷²

In addition to the above facets, there are three further features that emerge from the intertwining of Islam with the Constitution of Pakistan. First, the two houses of the legislature are officially referred to as the 'Majlis-e-Shoora (Parliament)' throughout the document, by virtue of a 1985 Presidential Ordinance.³⁷³ This combination of Arabic words *Majlis* (gathering, council) and

³⁷⁰ Ibid. Article 227(1).

³⁷¹ Ibid. Article 228.

³⁷² Ibid. Article 230. The Council of Islamic ideology has recently come under increased public scrutiny because of its two controversial decisions. In 2013, the Council ruled that DNA cannot be accepted as primary evidence in rape cases, and that the evidence should be in conformity with Islamic notions of law, which give primacy to witness testimony (of Muslim males, more so than any other sections of the society). APP, 'CII rules out DNA as primary evidence in rape cases' *Dawn* (Islamabad, Pakistan 23 September 2013) <<http://www.dawn.com/news/1044879/cii-rules-out-dna-as-primary-evidence-in-rape-cases>> last accessed 23 September 2013. Second, the Council decided in early 2014 that laws prohibiting marriage before the age of consent are un-Islamic, as a minimum age of consent is not prescribed in Islam. Kalbe Ali, 'Pakistani laws prohibiting underage marriage un-Islamic: CII' *Dawn* (Islamabad, Pakistan 11 March 2014) <<http://www.dawn.com/news/1092468/pakistani-laws-prohibiting-underage-marriage-un-islamic-cii>> last accessed 11 March 2014. There has been an outcry against this from human rights activists as well as some politicians, and the matter is currently being debated in the National Assembly.

³⁷³ Article 50 of the 1973 Constitution.

Shoora/Shura (consultation) to refer to the Parliament emanate from a need to accentuate and emphasize the express link between Islam and the Pakistani legal system. Second, while the Constitution (re)iterates the rights of minorities in its provisions, it assumes for itself the authority to distinguish between Muslims and non-Muslims. Article 260 of the Constitution, which deals with the definitions of different terms and entities referred to in the document, also *defines* who can be considered a Muslim.³⁷⁴ Article 260(3)(a) offers a *definition* of a Muslim, while the next clause proclaims that any ‘person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani group or the Lahori group (who call themselves ‘*Ahmadis*’ or by any other name), or a Bahai, and a person belonging to any of the scheduled castes’ will be termed as non-Muslims for the purposes of law and the constitution.³⁷⁵ A similar caveat is placed on some fundamental rights such as the right to free speech, which is granted to every citizen of the country, although made ‘subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan....’³⁷⁶ The third aspect of the interweaving of Islamic and common law notions deals with the creation of the Federal Shariat Court, which brings us to the next area of discussion: the link between Islamic discourse and the Judicature.

³⁷⁴ Ibid. Article 260.

³⁷⁵ Ibid. Article 226(3)(a) and Article 226(3)(b).

³⁷⁶ Ibid. Article 19.

3.3.2. Islamic law, Judicature and parallel mechanisms of Justice

There have been several expositions on the relationship between Islam and the practises of the judiciary in Pakistan. Martin Lau, through an illuminating examination of Pakistani case law since independence, argues that the Islamisation of the legal system has primarily been a 'judge-led process'.³⁷⁷ He argues that the purpose behind the judiciary's turn towards Islamisation was 'judicial self-assertion'³⁷⁸ and a desire to reach for certainty in a context of perpetual political uncertainty and flux.³⁷⁹ It is important, however, to expand the scope of analysis and recognise that in addition to the judiciary's role, the ascendancy of Islam in the legal discourse also has roots in the social, political, religious and ideological struggles that Pakistan has witnessed since independence. The case of Objectives Resolution and post-independence constitutional debates, discussed previously, are prime examples in this regard. In a similar vein, the creation of the Federal Shariat Court is a measure that has roots both in the rise of Islamic narrative in the society as well as the political needs of the regimes in power.

The Federal Shariat Court (FSC) was established in 1980 by General Zia's Presidential Order and was subsequently protected under the Eighth Amendment to the Constitution in 1985. Article 203A of the current Constitution establishes the FSC, comprising eight judges in total, selected from the judges of the superior courts as well as three *Ulema* (Islamic religious

³⁷⁷ *Martin Lau* (2006) (n 97) 1.

³⁷⁸ *Ibid.* 211.

³⁷⁹ *Ibid.* 15.

scholars).³⁸⁰ Article 203D(1) grants the FSC *Suo Motu* and original jurisdiction to 'examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah....'³⁸¹ If the Court finds that any law conflicts with Islamic injunctions, it may afford the government the opportunity to explain its position.³⁸² However, if the Court reaches a decision that the law is still repugnant to Islamic conceptions, the government has to adopt measures to bring the particular law in line with Islamic injunctions. Article 203D(3)(b) further states that any 'such law or provision shall, to the extent to which it is held to be so repugnant, *cease to have effect* on the day on which the decision of the Court takes effect.'³⁸³

The FSC is also granted the wide-reaching authority to 'call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of *Hudood*',³⁸⁴ following which it may reduce, suspend or enhance the sentence.³⁸⁵ The Constitution further declares that all decisions of the FSC are binding on all High Courts and any courts subordinate to them.³⁸⁶ Since the establishment of the FSC, it has been argued that it institutes a system of parallel judiciary in Pakistan that 'raised a haunting spectre of an orthodox and anti-democratic Islamist judiciary.'³⁸⁷ The proponents of the FSC, on the other hand, maintain that the question of parallel judiciary does not arise as any

³⁸⁰ Article 203A of Chapter 3A of the 1973 Constitution.

³⁸¹ *Ibid.* Article 203D(1).

³⁸² *Ibid.* Article 203D(2).

³⁸³ *Ibid.* Article 203D(3)(b) (emphasis added).

³⁸⁴ Article 203DD(1).

³⁸⁵ Article 203DD(1) and Article 203DD(2).

³⁸⁶ Article 203GG.

³⁸⁷ *Moeen Cheema* (2012) (n 297) 880.

judgement of the FSC may be appealed before the Supreme Court.³⁸⁸ However, it is pertinent to note that an appeal to the Supreme Court to review an FSC judgement can only be heard by the special Shariat Appellate Bench of the Supreme Court. The Shariat Appellate Bench can comprise of ‘three Muslim Judges of the Supreme Court’, and no more than two *Ulema*, who can either be selected through a consultation between the President and the Chief Justice, or they may be selected from amongst the judges of the FSC itself.³⁸⁹ It is fair to argue, then, that while the Supreme Court does sit at the apex of the judicial system, a niche has been carved out in the Supreme Court in relation to cases relating to Islamic provisions, thus giving some credence to claims of instituting a parallel judiciary in the country.

Intriguingly, however, the FSC is not the only instance of a parallel (Islamic) judicial system within Pakistan, with *Nizam-e-Adl* (lit. system of justice) constituting another lacuna within the legal system. The historical context in which this system was instituted evolved from the ongoing struggle between Islamic militant groups and the State. Between 2007 and 2009, the armed forces and the Taliban were locked in a fierce battle in the Swat region of the Khyber-Pukhtunkhwa province of Pakistan.³⁹⁰ In February 2009, a truce was called between the government and the militants, and the Swat Peace Accord was agreed between the leader of the *Tehreek-e-Nifaz-e-Shariat-e-Muhammadi*

³⁸⁸ By virtue of Article 203F of the 1973 Constitution.

³⁸⁹ Article 203F(3)(a) of the 1973 Constitution.

³⁹⁰ Owen Bennet Jones *Owen Bennet Jones* (2011) (n 16) 40. The Taliban and its allied groups had increasingly strengthened their hold in Swat and its adjoining valleys in the preceding years. Following Pakistan Army’s operation in 2007 to force the militants out of the area, the militants gradually re-entered the region, increased their hostilities against the state and established their own system of justice. Ibid.

(TNSM) and the Provincial Governor.³⁹¹ One of the conditions of this Accord was the imposition of *Shariah* in the region.³⁹² The Sharia Nizam-e-Adl Regulation of 2009 was officially proclaimed by the President in 2009 towards this end, and was supported by the National assembly through a non-binding resolution.³⁹³ The Nizam-e-Adl Regulation, applicable to selected Provincially Administered Tribal Areas (PATA),³⁹⁴ established a five-tiered court system in the region. The Court of the Executive Magistrate forms the lowest tier of the structure, progressing through the Courts of Illaqa Qazi (Area Judge), Aa'la Illaqa Qazi (Superior Area Judge), Izafi Zilla Qazi (Additional Regional Judge), with the Court of Zilla Qazi (Regional Judge) at the top of the structure.³⁹⁵ The appellate jurisdiction to review the decisions of these courts lie with the Dar-ul-Qaza (House of Qazis), leading to the Dar-ul-Dar-ul-Qaza (Superior House of Qazis) at the apex.³⁹⁶

The Islamist groups largely welcomed the establishment of this legal framework to apply Islamic law in the region and dispense speedy justice. On the other side, however, civil society organisations and human rights groups have greatly denounced the controversial laws as surrendering to the militant demands.³⁹⁷

³⁹¹ For a detailed discussion on Swat Peace Accord, the incidents leading up to it, and on the provisions of Nizam-e-Adl Regulation, see Noor Ul Haq and Yasir Imtiaz, 'Swat Peace Accord' (Islamabad Policy Research Institute, Islamabad, Pakistan 2009).

³⁹² From the Text of Swat Peace Accord, cited in *ibid.* 1.

³⁹³ *Ibid.* 19.

³⁹⁴ Primarily Malakand and its adjoining areas.

³⁹⁵ Article 5 of the Sharia Nizam-e-Adl Regulation, 2009.

³⁹⁶ *Ibid.* Article 2.

³⁹⁷ Asma Jahangir, 'HRCP sees risk to basic rights and constitution' *Human Rights Commission of Pakistan, Lahore, Pakistan, 20 February 2009*
<<http://hrpcblogger.wordpress.com/2009/02/20/hrpcb-sees-risk-to-basic-rights-and-constitution/>> last accessed 17 August 2013.

The government has tried to downplay the argument that Nizam-e-Adl Regulations create a parallel judicial system in the region, by asserting that the role of the country's superior judiciary is already built into the Regulation.³⁹⁸ It has argued that the Dar-ul-Qaza is established pursuant to Article 183(2) of the Constitution, as a Bench of the Supreme Court, while Dar-ul-Qaza actually refers to a High Court Bench, and is established under Article 198(4) of the Constitution.³⁹⁹ However, there are three features of the Regulation that reinforce the claims of a parallel judicial system. First, the Regulation declares void any laws and constitutional provisions previously applicable to the region that do not correspond to the 'Injunctions of Quran Majeed or Sunnah'.⁴⁰⁰ It further affirms that the proceedings of the Qazi Courts should be guided by principles of Islamic law, rather than on the basis of precedent or any procedural or substantive law of the state.⁴⁰¹ Second, the Regulation grants wide-ranging authority to the Executive Magistrate to carry out its duty of '*Sadd-e-Zara-Jinayat*', which 'means and includes all actions and steps taken under the Shariah laws and any other law in force for the time being for the control of crimes.'⁴⁰² Third, the TNSM and Taliban leaders have repeatedly denounced the Supreme and High Courts of Pakistan for following 'un-Islamic laws',⁴⁰³ and the express appellate jurisdiction of the superior courts would not have been acceptable to them. The promulgation of *Nizam-e-Adl* might be considered an attempt to placate the situation, but the fact remains that the

³⁹⁸ Noor Ul Haq and Yasir Imtiaz (2009) (n 391) 30.

³⁹⁹ Ibid.

⁴⁰⁰ Article 4 of the Sharia Nizam-e-Adl Regulation, 2009.

⁴⁰¹ Ibid. Article 9(1).

⁴⁰² Ibid. Article 7(3).

⁴⁰³ See, generally, Ashok K. Behuria (2007) (n 285).

Supreme Court and High Courts are not expressly named in the Regulations even on a single occasion.

The future and influence of the Nizam-e-Adl Regulation on the region, as well as its impact on the wider legal system, remains uncertain.⁴⁰⁴ However, it is important to note in July 2013 the President signed an amendment to the Regulation, aimed at 'expediting the submission of challans by police to courts'.⁴⁰⁵ Based on this, it can be said that although the application of this Regulation may be uncertain in practise, it is clear that these laws are taken as part of the current legal framework of the country by the State.

3.3.3. Islamic provisions and the Penal law of Pakistan

In addition to the Constitution and Judicature, the penal and criminal law frameworks of Pakistan also carry evidence of the Islamisation measures of the preceding decades. Pakistan inherited its main structure of criminal law from the British Indian state.⁴⁰⁶ The Pakistan Penal Code (PPC) is an adoption from the Indian Penal Code of 1860 and forms the main corpus of criminal laws in the country. The biggest change in the nature of the PPC occurred in the 1980s, during the Zia regime's application of Nizam-e-Mustapha.⁴⁰⁷ Through Presidential Ordinances in 1979, 1982 and 1986, attempts were made to

⁴⁰⁴ As the truce between the government and the militants has not held true, leading to another Army Operation later in 2009.

⁴⁰⁵ APP, 'Nizam-e-Adl Regulation: Police bound to submit challans within 14 days' *The Express Tribune* (17 July 2013) <<http://tribune.com.pk/story/578158/nizam-e-adl-regulation-police-bound-to-submit-challans-within-14/>> last accessed 17 July 2013.

⁴⁰⁶ *Martin Lau* (1994) (n 327) 6.

⁴⁰⁷ *Aasim Sajjad Akhtar, Asha Amirali and Muhammad Ali Raza* (2006) (n387).

Islamise the code which had its origin in common law and colonial politics. A series of five ordinances, collectively known as the Hudood Ordinances of 1979 – *Zina*, *Qazf*, Prohibition Order, Offence Against Property, and Execution of Punishment of Whipping – were instrumental in changing the nature of the criminal code.⁴⁰⁸

The most (in)famous amongst these laws is The Offence of Zina (Enforcement of Hudood) Ordinance, 1979. This Ordinance aimed to ‘bring in conformity with the injunctions of Islam the law relating to the Offence of Zina’,⁴⁰⁹ with *Zina* referring to the acts of adultery or fornication. Controversially, although the Zina Ordinance also included punishment for the offence of *Zina-bil-jabr* (rape), the evidentiary requirements and the burden of proof was so problematic that it led to numerous cases of miscarriage of justice.⁴¹⁰ In several cases, if the prosecution against the accused proved unsuccessful, the accusation by the victims (mostly women) was considered an admission of guilt and they were charged with adultery or fornication.⁴¹¹ The Protection of Women (Criminal Laws Amendment) Act of 2006 has gone some way to amend the provisions surrounding rape offences and evidentiary requirements and bring them in line with the human rights guarantees and narratives,⁴¹² however critics argue that

⁴⁰⁸ For an introduction to the Hudood Ordinances, see *Rubya Mehdi* (2010) (n 408); Martin Lau, 'Twenty-Five Years of Hudood Ordinances - A Review' (2007) 64 (4) *Washington and Lee Law Review* 1291.

⁴⁰⁹ The Offence of Zina (Enforcement Of Hudood) Ordinance, No. VII of 1979.

⁴¹⁰ *Moeen Cheema* (2012) (n 297) 879-881.

⁴¹¹ *Martin Lau* (2007) (n 408) 1296-1298.

⁴¹² *Ibid.* 1306-1313.

this amendment has not challenged the underlying structure of the Hudood laws which is inherently discriminatory towards women and minorities.⁴¹³

The Blasphemy Laws of Pakistan are another example within the criminal code which have been influenced by Islamisation. These laws are built on the structure introduced in the Indian Penal Code by the British colonial state during the 1920s. Article 295 of the Indian Penal Code proscribed damaging or defiling a place of worship, outraging religious feelings or defaming holy personages of any religion.⁴¹⁴ The Islamisation carried out during the 1980s amended the laws to make the defiling of the Quran or defaming Prophet Muhammad (PBUH) a criminal offence.⁴¹⁵ The fact that these laws now serve to protect only the dominant religion of Pakistan is one issue. The other problem with these laws lies with the fact that an allegation of Blasphemy causes such public outrage that it has led to several instances of mob justice, vigilantism, and attacks on the accused.⁴¹⁶ Human rights groups and some political parties have been demanding a revision to these laws for several years – a demand that is vehemently opposed by Muslim religious groups, and is unlikely to be considered by the government in the foreseeable future.⁴¹⁷ It is argued by some scholars that the purpose behind these laws, intended by the British Indian state, was to ensure harmony between different faiths and diverse cultures that

⁴¹³ *Rubya Mehdi* (2010) (n 408).

⁴¹⁴ Article 295 of the Indian Penal Code of 1860.

⁴¹⁵ *Charles H. Kennedy* (1990) (n 244) 62-63.

⁴¹⁶ Osama Siddique and Zahra Hayat, 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan - Controversial Origins, Design Defects, and Free Speech Implications' (2008) 17 (2) *Minnesota Journal of International Law* 303, 383.

⁴¹⁷ In 2011, the sitting Governor of Punjab was assassinated by a member of his own security detail for allegedly expressing a desire to reconsider the Blasphemy laws. I will consider this instance in Chapter 5.

inhabited the Indian sub-continent.⁴¹⁸ However, as I have argued elsewhere,⁴¹⁹ the Blasphemy laws, with their roots not just in colonial law but also British canon law, provide us a prime example of the uneasy relationship between state's legal authority, colonial law, Islamic law and human rights.

Pakistan's formal legal system, be it the mainstream juridical structure or the officially recognised Islamic systems that run parallel to it, is not the only area where an impression of religious conceptions of law has been imprinted. With the presence of Islam in the Indian sub-continent dating back several centuries, Islamic conceptions are also interwoven in the traditional and customary legal systems. As a separate normative/legal system – or, a plethora of normative systems – the traditional courts are a significant part of the country's legal architecture, and will be discussed in some detail below.

3.4. Traditional Law and Informal Courts

Traditional law is a difficult concept to define in the context of Pakistan. Part of this difficulty lies in the fact that this phenomenon has not been examined systematically and the studies that focus exclusively on this sphere are few and

⁴¹⁸ *Osama Siddique and Zahra Hayat* (2008) (n 416) 337. The Indian Law Commission, which was responsible for drafting the Indian Penal Code, stated in the preface to the chapter containing these laws: 'The principle on which this chapter has been framed is a principle on which it would be desirable that all governments should act but from which the British Government in India cannot depart without risking the dissolution of society; it is this, that every man should be suffered to profess his own religion, and that no man should be suffered to insult the religion of another'. Ibid. 336.

⁴¹⁹ *Raza Saeed* (2013) (n 246).

far between.⁴²⁰ In 1965, Adamson Hoebel wrote of the 'folk law' of West Pakistan as being 'an uncharted universe';⁴²¹ and the situation has not changed significantly since then. Moreover, the mainstream legal and judicial systems generally tend to downplay the role of traditional tribunals or declare them illegal,⁴²² which contributes both to the lack of clarity on this area as well as precludes the attempts to understand them as valid alternative normative and legal systems. Despite being marginalised in the state-oriented legal analyses of the Pakistani legal architecture, the traditional courts are pervasive in the country. A large section of the populace expresses its 'confidence in the panchayat system in case of a dispute.'⁴²³ Justice Nasira Iqbal, although critical of traditional tribunals from the vantage point of common law, notes that in 'rural areas, where sixty per cent of the population resides, the *Jirga/Panchayat* system prevails'.⁴²⁴ Based on his ethnographic research, Azam Chaudhary goes further and considers the traditional legal systems as the dominant mechanisms of law in Pakistan.⁴²⁵

⁴²⁰ Azam Chaudhary has provided an insightful legal-anthropological account of the workings of the traditional justice mechanisms in Punjab. See, Muhammad Azam Chaudhary, *Justice in Practice: Legal Ethnography of a Pakistan Punjabi Village* (Oxford University Press, Oxford 1999). For the formal legal system's reading of local tribunals, see Justice Saleem Akhtar and others, 'Study on Informal Justice System in Pakistan' (Sindh Judicial Academy, Karachi, Pakistan 2009).

⁴²¹ Adamson Hoebel, 'Fundamental Culture Postulates and Judicial Lawmaking in Pakistan' (1965) 67 (6) *American Anthropologist, Part 2: The Ethnography of Law* 43, 44.

⁴²² *Mst. Shazia v. Station House Officer and others* Pakistan Criminal Law Journal (Sindh High Court).

⁴²³ Samar Minallah, 'Judiciary as a Catalyst for Social Change' (International Judicial Conference, Islamabad, Pakistan, 2006).

⁴²⁴ *Nasira Iqbal* (2007) (n 99) 106.

⁴²⁵ Muhammad Azam Chaudhary, 'The Rule of Law Problems in Pakistan: An Anthropological Perspective of the Daughter's Traditional Share in the Patrimony in the Punjab' (2009) XXX (2) *Pakistan Journal of History and Culture* 101, 101-102.

The traditional and customary law in Pakistan appears in the shape of normative orders of the community or locality, primarily adjudicated by informal village or community courts.⁴²⁶ This adds a mechanism of adjudication to the already complex judicial system of the country. There are layers of village courts, *panchayats* and *jirgas* (courts of elders), and ad hoc tribunals, which come together for resolution of disputes that arise within the community or locality. These normative orderings do not present a uniform structure or exist in a codified form, as 'uniformity is as unnatural to the village as it is natural to Government'.⁴²⁷ Hoebel writes that 'deeply embedded in the village and tribal areas of Pakistan is a vast array of local folk systems of law varying from village to village and area to area'.⁴²⁸ Because of this, terms such as traditional or local law are used in the current study as 'simplified term[s] for a large number of differently practised versions of folk law'.⁴²⁹

In the province of Punjab, the informal tribunal is commonly referred to as *Panchayat* (literally, the council of five), although the number and structure of these councils vary from area to area, depending on the needs of the situation and the disputes in question.⁴³⁰ The traditional tribunals in Sindh province are generally called *Faislo* (literally, decision or settlement).⁴³¹ *Jirgas*, as tribal councils or gatherings, are common to the provinces of Baluchistan and Khyber-

⁴²⁶ Shaheen Sardar Ali (1999) (n 99), 186-188.

⁴²⁷ Muhammad Azam Chaudhary (1999) (n 420) 85.

⁴²⁸ Adamson Hoebel (1965) (n 421) 44.

⁴²⁹ Muhammad Azam Chaudhary (1999) (n 420).

⁴³⁰ Justice Saleem Akhtar and others (2009) (n 420) 22-23.

⁴³¹ Ibid.

Pukhtunkhwa, though they differ in their structure and the normative codes they follow.⁴³²

The history of *Panchayats*, *Jirgas* and *Faislos* in the South Asian region dates back centuries, and predates the formalisation of law during colonial times.⁴³³ Elphinstone, during his journey through the Frontier region of the sub-continent in 1809, regarded the Jirga to be in a 'remarkably high state of organisation'.⁴³⁴ The British Imperial Gazetteer of India, first published in 1880s, mentioned that 'for the ordinary rustic, it is caste and the Panchayat or caste-council that enforce the only moral code which he understands.'⁴³⁵ The Gazetteer also acknowledged that 'most civil suits are referred by the *Hakims* of districts to a panchayat (council of elders)'.⁴³⁶ However, as these tribunals were primarily based on an oral tradition of law,⁴³⁷ few traces of the pre-colonial traditional legal systems remain. In the regions which now formulate the provinces of Punjab and Sindh, the British were able to establish the multiple institutions necessary for the running of the colonial state: revenue extraction mechanism, courts, policing institutions, etc.⁴³⁸ The existence of *panchayats* and *faislos*, therefore, was not essential for the functioning of the state. In the Frontier and Balochistan regions, however, the British regime was not able to

⁴³² Ibid.

⁴³³ Ibid. 23. For a brief overview of the history of *panchayats*, see Shaheen Sardar Ali and Javaid Rehman (2001) (n 115) 92-97.

⁴³⁴ Elphinstone, quoted in Shaheen Sardar Ali (1999) (n 99), 187.

⁴³⁵ W. Crooke, 'Religions' in Herbert Risley and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol I* (Clarendon Press, Oxford 1909) 433.

⁴³⁶ E. H. S. Clarke, 'Afghanistan' in Herbert Risley and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol V* (Clarendon Press, Oxford 1909) 60.

⁴³⁷ Justice Saleem Akhtar and others (2009) (n 433) 24.

⁴³⁸ Shaheen Sardar Ali and Javaid Rehman (2001) (n 115) 93-94.

expand its rule in the same manner, and the colonial state resorted to include the system of *jirgas* within its legal framework to control this region. These appropriated 'official *jirgas*' are differentiated from the 'traditional *jirgas*',⁴³⁹ and they still exist as a parallel system of law in Pakistan as part of the legal framework governing the Tribal Regions. This topic will be continued in further depth in the next section.

The systems of *jirgas*, *panchayats* and *faislos*, along with various other traditional and indigenous normative systems, exist today as mediated by two centuries of colonial rule. After independence, these tribunals faced different trajectories. In India, the *panchayat* was considered a necessary part of the village life and local government, and thus it was included and subsumed within the local government structure.⁴⁴⁰ In Pakistan, although *panchayats* and *faislos* are considered part of rural life as a *de facto* condition, the state does not formally accept their legitimacy or legality.⁴⁴¹ The *jirgas* in the Federally Administered Tribal Areas, however, are considered a part of the constitutional and legal frameworks with the continuation of the Frontier Crimes Regulations as a colonial legacy. Whether the claim is for their legality or necessity, it is evident that these tribunals nevertheless do exist in society in diverse manifestations.

⁴³⁹ Shaheen Sardar Ali (1999) (n 99) 188.

⁴⁴⁰ For instance, see A. R. Desai, *Rural Sociology in India* (Popular Prakashan, Mumbai 1969).

⁴⁴¹ The Basic Democracies Plan, implemented by General Ayub Khan (discussed in Chapter 2 on page 66) abolished the system of *panchayats* in 1959. See, Shaheen Sardar Ali and Javaid Rehman (2001) (n 115) 91.

Along with the difference between the multiple forms and structures of these tribunals, they also differ from period to period, from region to region, while their substantive nature remains fluid as well. Some researchers claim that the traditional tribunals are mainly concerned with local disputes, while others claim that they are also convened to resolve inter-village or inter-tribal disputes, albeit disputes of non-criminal nature. However, from the evidence gained from the handful of anthropological and ethnographic accounts of traditional law available, it can be discerned that these tribunals do indeed deal with issues that fall within the criminal law purview of the state.⁴⁴² But the purpose behind traditional tribunals differs from that of the courts or criminal law of the state. Scholars argue that the main aim of the *panchayats*, *jirgas* and *faislos* is not to find guilt in the manner of common law systems, but to correct societal imbalance, though through this they often violate the norms or laws of the state or the rights of the accused. For instance, Rabia Ali argues that in some *faislos* in Sindh, murder or honour killing is not the main crime being judged.⁴⁴³ Critical of the traditional tribunals, she notes that the *faislo* 'is not intended to determine guilt or innocence, but to restore the balance in society that has been disturbed by the necessity of an honour killing. Murder is not the crime here; rather the crime is the damage done to property and honour of those who have had to kill their woman.'⁴⁴⁴

⁴⁴² Muhammad Azam Chaudhary (1999) (n 420) 100-103.

⁴⁴³ Rabia Ali, 'The Dark Side of Honour' (Shirkat Gah Women's Resource Centre: Women victims in Pakistan, Lahore, Pakistan 2001) 25.

⁴⁴⁴ Ibid.

Shaheen Ali also argues in the same vein that, 'a subtle point, which is frequently obscured by the semi-judicial role of the Jirga, is that the body's function is to settle peacefully an existing situation more than to judge right or wrong, determine guilt, or pass sentence.'⁴⁴⁵ However, in some instances, the local courts do pass punishments and sentences to restore this perceived societal balance: 'Decisions are usually very simple: Mahmud had a right to kill Afzal because Afzal had killed Mahmud's uncle, and no more is made of the affair....'⁴⁴⁶ Azam Chaudhary also mentions the diverse nature of punishments and sanctions that *panchayats* in Punjab award, either to the offending party or to the party that refuses to accept the decision.⁴⁴⁷ These range from ostracism, social boycott, and public disgrace to fines and other harsher means of coercion.⁴⁴⁸ In September 2013, two cases were reported in the press where tribunals in Sindh attempted to establish guilt by the age-old method of making the accused walk bare-foot on coal.⁴⁴⁹ However, Chaudhary also argues that the main aim of the panchayat is the normalisation of relations between the parties, as well as the larger community, and in this manner the tribunals or their decisions 'are not abrupt but a gradual development in which [the] meeting could be seen as the last step of the process.'⁴⁵⁰

Apart from the few ethnographic, anthropological and legal-pluralistic studies, the main area of research that sheds light on the traditional law aspect of

⁴⁴⁵ Shaheen Sardar Ali (1999) (n 99) 188.

⁴⁴⁶ Ibid.

⁴⁴⁷ Muhammad Azam Chaudhary (1999) (n 420) 101-104.

⁴⁴⁸ Ibid.

⁴⁴⁹ Rasul Bakhsh Rais, 'Trial by Fire' *The Express Tribune* (Karachi, Pakistan 24 September 2013) <<http://tribune.com.pk/story/608168/trial-by-fire/>> last accessed 24 September 2013.

⁴⁵⁰ Ibid. 102.

Pakistan's legal framework stems from examinations conducted from a women's rights perspective. Challenging the romanticised notion of local tribunals, such studies argue that far from being the 'Folk Law of the People',⁴⁵¹ traditional courts replicate the patriarchy embedded within the societal culture,⁴⁵² and contribute towards the oppression of women and marginalised sections of the society. There have been numerous instances where local tribunals or *panchayats* have subjected defendants to cruel and inhumane punishments, more often to preserve a skewed sense of 'honour' of the community or the family.⁴⁵³ In 2002, in a case that generated headlines across the world, a village council of Mirwala ordered the rape of Mukhtar Mai.⁴⁵⁴ The charge for which she was punished was that her younger brother, an 11 year old boy, was accused of having a relationship with a girl ten years senior to him, who belonged to the influential Mastoi clan.⁴⁵⁵ Mukhtar Mai was offered as 'compensation' to balance out the injustice committed against the 'honour' of the powerful caste, following which she was brutalised and thrown out naked on the street in the name of justice.⁴⁵⁶ There have been several such horrendous instances where inhumane punishments have been imposed on women to settle

⁴⁵¹ Adamson Hoebel (1965) (n 421) 44.

⁴⁵² Saima Jasam, 'Cultural Violence, Legal Pluralism and Women Rights: A Case Study of Pakistan' (Heinrich Boll Foundation, Lahore, Pakistan 2009) 2.

⁴⁵³ Ibid. 6.

⁴⁵⁴ Nadia Blétry, 'Pakistan's Panchayat Justice: Good Faith Arbitration or Brutal Tribal Law' <http://www.worldcrunch.com/pakistans-panchayat-justice-good-faith-arbitration-or-brutal-tribal-law/world-affairs/pakistan-039-s-panchayat-justice-good-faith-arbitration-or-brutal-tribal-law-/c1s5988/#.ULKG_qW7NII> last accessed 15 August 2013.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

family disputes, land issues, personal enmities and the twisted sense of honour of the family.⁴⁵⁷

As mentioned previously, the superior courts of Pakistan have challenged the legality of informal traditional courts based on an assertion that such punishments violate women's rights, and therefore are in direct conflict with state laws. In a notable judgment in the case of *Shazia v. SHO* cited previously, the provincial High Court of Sindh declared *jirgahs* and *panchayats* as 'unconstitutional'.⁴⁵⁸ The Court declared

Private persons have no authority to execute the decision of *jirgas* nor the *jirgas* have the authority to execute their own decisions through their own sources. If such decisions are carried out and executed by killing persons, then the offence of murder will be committed and they will be liable for action as per the law... the *jirgas* have also usurped the powers of the executing authorities which is not permissible under the Constitution or the law.⁴⁵⁹

Despite the declarations of illegality and demands from human rights and women's rights groups that traditional tribunals should be completely banned from the country, there are various reasons why they still persist in the society. First, the adherents of these legal and normative structures have minimal contact with state institutions or courts, be it civil or criminal.⁴⁶⁰ For them, it is not a matter of choice between formal or traditional courts, but a matter of an

⁴⁵⁷ WUNRN, 'Pakistan - News' *Women's UN Report Network*, 26 January 2011 <http://www.wunrn.com/news/2011/01_11/01_24/012411_pakistan2.htm> last accessed 12 February 2013.

⁴⁵⁸ *Shazia v. SHO* (n 1).

⁴⁵⁹ Ibid. See also, Asian Human Rights Commission and Pakistan Human Rights Education Forum, 'Recent cases of 'honour killing' in Sindh Province, Pakistan' (2004) 3 (3) *Article 2* 32, 33.

⁴⁶⁰ *Adamson Hoebel* (1965) (n 421).

immediate or direct relationship with the local tribunals, where the state courts are far removed from the equation. Although, in some instances, people use both official and traditional means of dispute resolution simultaneously, the state legal system is approached mainly to influence the dispute as a 'pressure instrument'.⁴⁶¹ In the circles where traditional legal and normative systems hold their dominance, the distrust of the police and a sense of alienation from the formal system remain.⁴⁶²

The second reason for the continuation of traditional systems is that the traditional courts generally follow codes that are based on the history, traditions and the *version* of religious understanding followed in that particular community.⁴⁶³ For instance, the *jirgas* among Pushtun tribes follow the indigenous customary code of *Pashtunwali*, while those in Balochistan follow the Baloch *Mayar*.⁴⁶⁴ A colonial officer wrote about some facets of the *Mayar* during his compilation of the Sibi Gazette: 'To avenge blood; to fight to death for a person who has taken refuge with him.... To be hospitable and to provide for the safety of the person.... To refrain from killing a man who had entered the shrine of a *Pir* so long as he remained within its precincts....to punish an adulterer with death.'⁴⁶⁵ Several of these traditional ideas of honour, hospitality and revenge often do not have a commonality with the legal/illegal differentiation of the state laws. In this context, too, the state laws are taken as

⁴⁶¹ Muhammad Azam Chaudhary (1999) (n 420) 77.

⁴⁶² Ibid. 71.

⁴⁶³ Adamson Hoebel (1965) (n 421).

⁴⁶⁴ Nafisa Shah (2007) (n 115) 138-139.

⁴⁶⁵ Ibid. 139.

alien impositions, that is if their existence is acknowledged in the first place, and it is argued that 'the law of the police and the courts is not the law of the people'.⁴⁶⁶

It is also important to point out that, while there are aspects of traditional customs that employ Islamic conceptions and Shariah, religion as understood and followed within communities and rural areas is not always in agreement with the mainstream interpretations of the *Sharia* or Islamic Jurisprudence. For instance, in an 18th century account of the Pashtun region, one woman inhabitant of the locality explained that '[t]he nikah (religious ceremony of a wedding), for instance, is Shariat, but our celebration with guns and drums and singing and dancing is rawaj [custom]. Death and funeral rites are Shariat, but our weeping and lamenting is our own custom, quite against the law in Islam.'⁴⁶⁷ Hoebel also argued that, while traditional normativity incorporated ideas of Islamic Law, 'the folk ignorance of Islam is in fact profound. The Great Tradition and the Little Traditions are, as is to be expected, two different things.'⁴⁶⁸

The third and most important reason behind the persistence of traditional tribunals is the fact that the traditional codes are deeply intertwined with the power structures as they exist in the locality.⁴⁶⁹ These tribunals often reflect the

⁴⁶⁶ Adamson Hoebel (1965) (n 421) 45.

⁴⁶⁷ Quoted in Robert Nichols, *Settling the Frontier: Land, Law, and Society in the Peshawar Valley, 1500-1900* (Oxford University Press, Oxford 2001) 46.

⁴⁶⁸ Adamson Hoebel (1965) (n 421) 44.

⁴⁶⁹ Nasira Iqbal (2007) (n 99) 101.

misogynist and patriarchal relations that they exist in, and their customs become deeply problematic in terms of women's rights and larger human rights issues. The power structures mainly revolve around the patron-client and landlord-peasant relationships and in most cases it is the wealthy and the powerful who possess the authority to become adjudicators in these courts.⁴⁷⁰ Although some of these may be conceived of as a democratic 'round table conference' without a 'chairman or a presiding officer', and as an assembly that is 'probably the closest thing to Athenian democracy that has existed since the original',⁴⁷¹ this does not hold true for traditional tribunals. It is generally the *sardars* or *waderos* (local or tribal chiefs) who preside over *jirgas* and other tribunals, mediate the disputes, pass judgements, and have a great stake in the continuation of these systems.⁴⁷² Some of these local chiefs are also part of the political set-up of the country, who are not 'interested in changing the almost medieval world they themselves inhabit'.⁴⁷³ There have been several instances in which sitting members of National and Provincial Assemblies of the country have been reported to preside over tribunals.⁴⁷⁴ This intertwining of local justice mechanisms and patriarchal power structures is the primary reason that makes traditional tribunals deeply problematic and brings them in conflict with state laws and the human rights narrative.

⁴⁷⁰ Adamson Hoebel (1965) (n 421) 44.

⁴⁷¹ Shaheen Sardar Ali (1999) (n 99) 187.

⁴⁷² Rabia Ali (2001) (n 443) 25.

⁴⁷³ Ibid. 25.

⁴⁷⁴ Dawn, 'PPP MPA presides over *jirga*' Dawn (Dadu, Pakistan 31 March 2009)

<<http://www.dawn.com/news/894479/ppp-mpa-presides-over-jirga>> last accessed 15 March 2013.

In 2012, the National Commission on the Status of Women filed a petition in the Supreme Court of Pakistan, requesting the apex court to support the 2004 judgement of the Sindh High Court and declare the *jirgahs* and *panchayats* illegal throughout the country.⁴⁷⁵ Though the judgement in this case is still pending, it is unclear as to what effect it would have in curbing the traditional tribunals, as they seem to fill a void that provincial and national courts are unable to bridge. Despite the declaration of illegality, the traditional courts continue to exist, as they provide a 'quick and free form of justice'⁴⁷⁶ for those who do not possess the time and resources required to take the formal litigation route.⁴⁷⁷ In 2013, a women's group in the Swat region held the first ever women's Jirga to address the abuses suffered by two women in the community. Termed as *Khwaindo Tolana* (circle of sisters),⁴⁷⁸ this was a symbolic gesture to indict the state as well as the male-oriented local tribunals, after these women could not get any respite from the local *jirgas* or the state legal system. I will return to this example in Chapter 8, as an evidence of the potentiality of alternative justice systems to think creatively and move away from the confines and categories imposed by the dominant approaches to law.

⁴⁷⁵ *National Commission on Status of Women through its Chairperson v. Govt. of Pakistan through its Secretary Law & Justice, etc.* (Constitutional Petition No. 24 of 2012, instituted by the Supreme Court of Pakistan on 14 March 2012).

⁴⁷⁶ Nadia Blétry (2012) (n 454).

⁴⁷⁷ There have even been demands from political parties to employ traditional tribunals to deal with the issues of terrorism and militancy in the country. The 2002 Loya Jirga (Grand Jirga) of the Pashtun people in Pakistan and Afghanistan, facilitated by the two governments, reflects that the continued acceptability and demand of these traditional systems still persists in the region.

⁴⁷⁸ Syed Mohammad Ali, 'Significance of the female *jirga*' (Pakistan 09 August 2013) <<http://tribune.com.pk/story/588473/significance-of-the-female-jirga/>> last accessed 12 November 2013.

3.5. Colonial Law and the Tribal Regions

The legal and constitutional frameworks of Pakistan are torn between multiple tendencies that affect them, pulling them into different and often opposite directions. The ideas that emerge within the conceptions of Islamic law, common law and traditional law, are all caught in an uneasy relation, each trying to safeguard its existence, if not trying to assert its domination on the other. One aspect that binds them together is the shared history, or even origin,⁴⁷⁹ based on the colonial past of the sub-continent. While the constitutional and common law traditions of Pakistan evidently owe their existence to the British colonial era,⁴⁸⁰ even Islamic law⁴⁸¹ and the traditional laws⁴⁸² of the region have not remained immune to this influence. The codification of the Muhammadan Law, and the differentiation and application of Muslim and Hindu Personal Laws,⁴⁸³ was one of the main facets through which the colonial legal architecture attempted to govern the population. The colonial law also arguably established the rudimentary forms of parallel legal systems, not just through the separation of Muslim and Hindu laws, but also by delimiting the substantive areas where religious laws could be applicable – inheritance, marriage, adoption, etc.⁴⁸⁴ In other instances, or where there was a conflict of law, the common law of the British colonial government reigned supreme.

⁴⁷⁹ I will expand on this idea in Chapter 8.

⁴⁸⁰ *Martin Lau* (1994) (n 327) 3.

⁴⁸¹ Michael Anderson, 'Islamic Law and the Colonial Encounter in British India' in Chibli Mallat and Jane Connors (eds), *Islamic Family Law* (Graham & Trotman Limited, London 1993) 214.

⁴⁸² *Shaheen Sardar Ali and Javaid Rehman* (2001) (n 115) 93-94.

⁴⁸³ H. W. C. Carnduff, 'Legislation and Justice' in Herbert Risley and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol IV* (Clarendon Press, Oxford 1909) 127.

⁴⁸⁴ See, *Michael Anderson* (1993) (n 481).

The colonial encounter also radically altered the nature of the traditional and customary laws that existed in the region.⁴⁸⁵ The traditional systems that could prove to be beneficial for the governance needs of the colonial state were altered and subsumed within the overall state structure,⁴⁸⁶ while those that were not needed for administrative or regulatory purposes were disregarded. This manner of selective engagement with traditional normative orders has continued in Pakistan in the post-independence period. However, there are some laws that form part of Pakistan's legal architecture today that are still blatantly colonial, not just in terms of history but also in their nature, and the laws governing the Tribal Areas of Pakistan is the most relevant example in this regard.

The Federally Administered Tribal Areas (FATA) of Pakistan are recognised in the world today because of their link with Islamist militancy. Marred by tribal infighting, these territories are also recognised as the strongholds of the Pakistani Taliban and Al-Qaeda allied groups that clash with both the armed forces of the country as well as the inhabitants who resist against them.⁴⁸⁷ These regions are afflicted with routine drone strikes, in which over 3,000 people have been killed to date, though the problems of access to the region

⁴⁸⁵ *Shaheen Sardar Ali and Javaid Rehman* (2001) (n 115) 51-55.

⁴⁸⁶ *Ibid.* 94.

⁴⁸⁷ *Owen Bennet Jones* (2011) (n 16) 25-42.

mean that this figure is difficult to confirm.⁴⁸⁸ And these areas are still governed by draconian laws⁴⁸⁹ that the British colonial state implemented in the region.

The case of the FATA territories is uniquely interesting because it not only provides us an insight into the remnants of the colonial law, but also creates an 'exteriority'⁴⁹⁰ within the constitutional and legal framework of the country. Exteriority is taken here to refer to that which is not subsumed within law; that which exists in a 'relation of exception' as Agamben notes when he writes that this is an 'extreme form of relation by which something is included solely through its exclusion.'⁴⁹¹ The notion of Tribal Regions as exteriority, however, moves away from how critical theory conceptualises exteriority – as that which is always in a dialectical and formative engagement with law;⁴⁹² as that which lies outside law, though it 'institutes [law] as a form', as law 'exists only in regard to its transgression-infraction.'⁴⁹³ The exteriority of Tribal Areas exists,

⁴⁸⁸ Christine Fair et. al. note that according to the Bureau of Investigative Journalism 'there have been 352 drone strikes in Pakistan, of which 300 have taken place under the Obama administration. Together, these drone strikes have killed between 2,590 and 3,383 persons, of whom anywhere between 472 and 885 have been civilians, including 176 children. In addition, the BIJ assesses that between 1,255 and 1,408 persons have been injured by drones.' C. Christine Fair, Karl Kaltenthaler and William J. Miller, 'Pakistani Opposition to American Drone Strikes' (2014) 129 (1) *Political Science Quarterly* 1, 16.

⁴⁸⁹ Because of their harsh provisions, these Frontier Crimes Regulation is generally called 'black law'. *Shaheen Sardar Ali* (1999) (n 99) 189.

⁴⁹⁰ Peter Fitzpatrick, 'Dominions: Law, Literature and the Right to Death' (2004) 31 (1) *Journal of Law and Society* 142, 146.

⁴⁹¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, Calif. 1998) 18.

⁴⁹² For a discussion and critique of the conceptual category of 'exteriority', see *Jayan Nayar* (2013) (n 94).

⁴⁹³ *Peter Fitzpatrick* (2004) (n 490) 3-4.

not as something that law is yet to subsume; rather it is that which law has subsumed, and declared exterior within its boundaries.⁴⁹⁴

The FATA region is home to about 3.3 million people, or roughly about 2% of the country's population. This figure, though appearing small, is significant if we take into account that the population of FATA is roughly equivalent to the combined Hindu and Christian inhabitants of the country as a whole.⁴⁹⁵ Considered by some to be the most dangerous place on earth,⁴⁹⁶ the general opinion of commentators (and spectators, alike) is that the problems faced by the people of this region can be dealt with through strengthening the writ of the state. This emerges from the common understanding that the problems of the region emerge from the lack of effective governance and law – an idea also implicit in the term 'lawless tribal areas' that is generally used to refer to the region.⁴⁹⁷ This approach, however, ignores the fact that it is not the absence of law that creates problems in the region, but rather the nature and the logic of law that has governed the region since the late 19th century, and is still in place after more than a century.

The territories in question lie in the North West of Pakistan, on the Pakistan-Afghan border. The British colonial government in 1840s and 1850s occupied

⁴⁹⁴ In this sense, perhaps the category of Homo Sacer is a relevant concept to understand the realities of the inhabitants of this region. However, as the lives of these people are plagued both with Islamic militancy and state violence, the concept as well as the context require further analysis and consideration, which lie beyond the scope of this study. See, *Giorgio Agamben* (1998) (n 491).

⁴⁹⁵ US Department of State, *International religious Freedom Report 2002* (Washington DC 2002)

⁴⁹⁶ *Ron Moreau and Michael Hirsch* (2007) (n 80).

⁴⁹⁷ *Noor Ul Haq and Yasir Imtiaz* (2009) (n 391) 90.

the regions of Sindh and Punjab.⁴⁹⁸ In the North-West of this British Indian territory, though the British captured the FATA territories at the end of the 19th century, they were unable to fully capture the region that now forms Afghanistan.⁴⁹⁹ In order to create an effective defence of their captured territories, the colonial regime adopted a Frontier approach, creating a series of frontier outposts to keep the mountain tribes in check.⁵⁰⁰ This strategy, however, did not work well. It is reported that between 1857 and 1881 the British sent 23 expeditions into the mountain regions, most of which proved unsuccessful.⁵⁰¹ At the same time, the British interests in India faced a threat from the advance of the Russian Empire, which by 1870s had captured several important cities in present day Afghanistan. In order to create an effective buffer between the British colonial territory and the Russian Empire, a pact was signed between the British and the *Amir* (ruler) of Afghanistan.⁵⁰² This pact (called the Durand Pact of 1893) created a 1900 mile boundary between the territories and cut through the tribal habitations arbitrarily. Named the Durand Line after Mortimer Durand, the British diplomat who negotiated the pact, this line acts to this day as a de facto border between Pakistan and Afghanistan.⁵⁰³ In 1907, Lord Curzon (who had been the Viceroy of India from 1899 to 1905) apprised the audience in a lecture at Oxford about the result of the pact:

The result in the case of the Indian Empire is probably without precedent, for it gives to Great Britain not a single or double but a

⁴⁹⁸ Bijan Omrani, 'The Durand Line: History And Problems Of The Afghan-Pakistan Border' (2009) 40 (2) *Asian Affairs* 177, 181-183.

⁴⁹⁹ Robert Nichols (2001) (n 467) 172-173.

⁵⁰⁰ Bijan Omrani (2009) (n 498) 183-187.

⁵⁰¹ Ibid. 183.

⁵⁰² Ibid. 184-185.

⁵⁰³ Ibid. 183-184.

threefold Frontier, (1) the administrative border of British India, (2) the Durand Line, or Frontier of active protection, (3) the Afghan border, which is the outer or advanced strategical (sic.) Frontier.⁵⁰⁴

Simply put, the arrangement that was reached was that, between the British Indian 'subjects' and the Russian Empire, there would be Afghan territory and 'tribal' people as a buffer zone (as the Frontier of active protection).⁵⁰⁵ What Lord Curzon failed to mention in his account was that through the unique mechanism that was implemented in the region, the 'tribal' people were not considered 'subjects' of either the British Empire, or the Afghan Amir, although they were subject to coercion and criminal legal penalties from both sovereigns.⁵⁰⁶ The Tribal Regions were thus included in the British Empire in a 'relation of exception'⁵⁰⁷ from the very beginning. They became subject to the Frontier Crimes Regulations, first enacted in 1848, but later promulgated in their more recognised form in 1901.⁵⁰⁸ The Frontier Crimes Regulations (FCR) vested complete executive and judicial authority in the Governor or Commissioner of the region. The Commissioner, who acted as the main representative of the Crown, was to act in conjunction with unelected tribal *jirgas*, the members of which were nominated by the authority of the colonial state.⁵⁰⁹ As mentioned previously, this appropriated category of 'Official Jirga' is

⁵⁰⁴ George Nathaniel Curzon, 'Lord Curzon of Kedleston (Viceroy of India 1898-1905): 1907 Romanes Lecture on the subject of Frontiers' (Oxford, 1907).

⁵⁰⁵ Robert Nichols (2001) (n 467) 172.

⁵⁰⁶ Ibid.; Bijan Omrani (2009) (n 498) 187-188.

⁵⁰⁷ Giorgio Agamben (1998) (n 491) 18.

⁵⁰⁸ Robert Nichols (2001) (n 467) 183-188.

⁵⁰⁹ Amir Mohammed Khan, 'Justice Denied' *Newsline*

<<http://www.newsline magazine.com/2004/12/justice-denied/>> last accessed 25 November 2013.

distinct from the traditional Jirga of the region, mainly because it is hierarchical and does not carry the same legitimacy in terms of customary norms.⁵¹⁰

There were several other problematic aspects contained within the FCR from the outset. Section 21 of the FCR allowed the executive to blockade, excommunicate, debar, or seize the persons or property of any tribe whose members would act 'in a hostile or unfriendly manner towards the British Government or towards persons residing within British India'.⁵¹¹ Introducing the problematic notion of collective punishment, Section 22 permitted the Deputy Commissioner or Commissioner to impose fines on any village if some of its inhabitants were believed to have been involved in a criminal offence.⁵¹² Section 23 continued this problematic idea even further, and stated that

Where, within the area occupied by a village community or part of a village-community, a person is dangerously or fatally wounded by an unlawful act, or the body is found of a person believed to have been unlawfully killed, the members of the village community or part thereof shall be deemed to have committed an offence under Section 22, unless the headmen of the village-community or part thereof can show that the members thereof –

(a) had not an opportunity of preventing the offence or arresting the offender; or

(b) have used all reasonable means to bring the offender to justice.⁵¹³

In addition to collective punishment, the above-mentioned laws also shift the burden of proof on the particular community which is then required to prove

⁵¹⁰ *Shaheen Sardar Ali* (1999) (n 99) 188.

⁵¹¹ Section 21 of the Frontier Crimes Regulations, 1901.

⁵¹² *Ibid.* Section 22.

⁵¹³ *Ibid.* Section 23.

that it had employed reasonable means to prevent the offence, or punish the offender. Through similar drastic provisions, the FCR authorised the Commissioner to halt the establishment of a new village, or direct the removal of a village, in order to preserve the security of the British Indian territories.⁵¹⁴ Article 48 of the FCR barred any appeals from the decisions of the Deputy Commissioners and Commissioners, while Article 60 carried it further and stated that no decisions under FCR could be set aside by any Civil or Criminal Court of British India.

After the departure of the British from the Indian sub-continent, the FCR were adopted by the State of Pakistan, and the territories have continued to be governed without any change in this colonial legacy or any significant modification in the FCR. The exceptional status of the Tribal Areas is given constitutional validity, with the Constitution extending the executive authority of the President to FATA, while expressly stating that '[n]o Act of Majlis-e-Shoora (Parliament) shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs...'.⁵¹⁵ The issue of judicial recourse is an equally troubling matter, as '[n]either the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides.'⁵¹⁶

⁵¹⁴ Ibid. Sections 31 and 32 respectively.

⁵¹⁵ Article 247(3) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁵¹⁶ Ibid. Article 247(7).

In 2011, the President of Pakistan further increased the brutal nature of these laws when an ordinance was passed granting the country's armed forces unbridled authority to detain anyone suspected of involvement in terrorism offences.⁵¹⁷ These laws, entitled Actions in Aid of Civil Power Ordinance (AACPO) 2011, have meant that those inhabitants of the region who were charged with terrorism offences, had no recourse to judicial trials. Moreover, the suspects can be detained for unspecified periods of time and can be sentenced to death at the armed forces' discretion.⁵¹⁸ In another twisted logic, the AACPO allows the armed forces to detain anyone who is suspected of having connections with the FATA territories, even if they are not present in the region themselves.⁵¹⁹

Due to the cruel and discriminatory nature of FCR, political and human rights activists have often denounced these provisions as 'black laws'.⁵²⁰ A recent and notable case of Dr Shakil Afridi provides an instance of the operation of these Regulations in FATA region. In 2011, Dr Afridi was alleged to have assisted the American Central Intelligence Agency in tracking down Osama Bin Laden, while under the guise of a door-to-door polio vaccination campaign. The case was not brought to the judiciary for trial, but was rather judged under FCR, through which the Commissioner gave Afridi a summary punishment of 33 years. The

⁵¹⁷ Arif Taj, 'SCBA threatens to challenge FATA, PATA Regulations' *Pakistan Today* (Pakistan 15 August 2011) <<http://www.pakistantoday.com.pk/2011/08/15/national/scba-threatens-to-challenge-fata-pata-regulations/>> last accessed 13 June 2013.

⁵¹⁸ Ibid.

⁵¹⁹ Article 9 of the Actions in Aid of Civil Power Ordinance.

⁵²⁰ Rahimullah Yusufzai, 'Analysis: Pakistan's tribal frontiers' <http://news.bbc.co.uk/1/hi/world/south_asia/1711316.stm#story> last accessed 14 December 2001.

national formal courts, till now, have not made evident their own reading of the issue and have not declared this case to be in violation of the generic principle of the rule of law.⁵²¹

The British colonial laws of these territories, then, were problematic from the outset. These Tribal territories were not settler or administrative colonies, and there was no question of direct or indirect rule involved here.⁵²² This was in fact a different, more blatant type of colonialism, radically unlike the two types of colonial governance which academic accounts elaborate on.⁵²³ As these territories were created to ensure a buffer and a frontier between the British colonial interests and a competing Empire across the region, it was the strategic value of the territory rather than the people that mattered. A more troubling facet of this picture is that this colonial logic continued after independence of Pakistan. With the existence of cases such as Shakil Afridi's, and the continuation of FCR, AACPO and other similar laws, FATA presents us with a uniquely problematic and intriguing scenario – not only does it continue the logic of colonialism in a post-colonial setting,⁵²⁴ but also creates an 'exteriority' or an Agambian 'exception'⁵²⁵ within the constitutional and legal architecture of Pakistan. And now the inhabitants of this region are caught up in the multiple repressive logics and their repercussions – colonialism, imperialism and Islamic

⁵²¹ Waseem Ahmad Shah, 'Dr Shakil Afridi now to be probed for foreign links' *Dawn* (Peshawar, Pakistan 21 March 2014) <<http://www.dawn.com/news/1094553/dr-shakil-afridi-now-to-be-probed-for-foreign-links>> last accessed 21 March 2014.

⁵²² For instance, see Mithi Mukherjee, 'Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings' (2005) 23 (3) *Law and History Review* 589.

⁵²³ For instance, see *ibid.*

⁵²⁴ I will build on this further in Chapter 8 on page 251.

⁵²⁵ *Giorgio Agamben* (1998) (n 491) 18.

militancy. I argue that it is instances such as these that make it impossible to reconcile the mainstream legal assumptions of positive law with the equally emphasised notion of rule of law.

3.6. 'Lawlessness' and the demand for a Leviathan

The exclusion of the people of the Federally Administered Tribal Areas (FATA) from constitutional guarantees and fundamental rights is not the only consequence of the continuation of the colonial logic. The last two decades have seen this region come to be regarded as the one of the most dangerous places in the world⁵²⁶ and a 'lawless frontier',⁵²⁷ owing to the rise of militant groups linked to Taliban and the Al-Qaeda.⁵²⁸ Said to be the 'epicentre of global Islamic terrorism',⁵²⁹ this region has also faced the brunt of US led drone strikes, in which more than 3,000 people have died, with almost one-third of them believed to be civilians.⁵³⁰ The rise of Islamic militancy, linked to the history of the Soviet-Afghan War in 1980s and United States led War-on-Terror since 2001, has had devastating repercussions for the entire country. In the last decade, the militants of the region have mounted horrendous attacks on civilian population, armed forces and government personnel. It is estimated that more

⁵²⁶ Ron Moreau and Michael Hirsch (2007) (n 80).

⁵²⁷ Robert D. Kaplan (2000) (n 82).

⁵²⁸ Owen Bennet Jones (2011) (n 16) 25-35.

⁵²⁹ The Bureau of Investigative Journalism, 'Obama 2012 Pakistan strikes' (The Bureau of Investigative Journalism 2012) <<http://www.thebureauinvestigates.com/2012/01/11/obama-2012-strikes/>> last accessed 10 October 2012.

⁵³⁰ C. Christine Fair, Karl Kaltenthaler and William J. Miller (2014) (n 488) 16.

than 50,000 people in Pakistan have died because of terrorism-related incidents in the country since 2001.⁵³¹

With religious militancy providing one explanation for the increasing violence in the country, the rise of criminal incidents and target killings adds to this troubling scenario. The ever decreasing capacity of the State of Pakistan to safeguard its territory and provide security to the populace is evident. For instance, in just one week in October, there were 1810 thefts and violent crimes reported in the 4 major cities of the country.⁵³² In Karachi, the economic centre and the most populated city of Pakistan, more than 1200 people were reported killed in the first half of 2012.⁵³³ In a rather appropriate description, one news article described Karachi's situation recently in these words:

Karachi, a sprawling port city on the Arabian Sea and economic hub of Pakistan, has long been beset by religious, sectarian and ethnic strife. Here armed wings of political parties battle for control of the city, Sunnis and Shias die in tit-for-tat sectarian killings, and Taliban gunmen attack banks and kill police officers.⁵³⁴

Based on its significance and its impact on the overall socio-legal structures and narratives in the country, I argue that lawlessness and violence are interwoven in the socio-legal tapestry of Pakistan. It is contended here that the situation of

⁵³¹ Dawn, 'State and non-state terrorism' *Dawn* (Pakistan 5 March 2014) <<http://www.dawn.com/news/1091119/state-and-non-state-terrorism>> last accessed 5 March 2014.

⁵³² Pakistan Criminal Records, 'PCR Exclusive - Weekly Crime Statistics' 5 October 2012) <<http://pakistancriminalrecords.com/2012/10/05/pcr-exclusive-weekly-crime-statistics-10/>> last accessed 16 September 2013.

⁵³³ Ibid.

⁵³⁴ Dawn, 'Karachi police arrest MQM activist in Randhawa killing' *Dawn* (1 October 2013) <<http://www.dawn.com/news/1046733/karachi-police-arrest-mqm-activist-in-randhawa-killing-case>> last accessed 2 October 2013.

growing uncertainty and violence has seen the emergence, as well as the strengthening, of several narratives that the legal and judicial frameworks of Pakistan are now struggling with. First, this internal war has seen a rise in the Islamic discourse in Pakistan.⁵³⁵ The militancy, which generally claims to be a struggle for the establishment of Shariah in the country, has given ground to wider religious and sectarian conflicts.⁵³⁶ It has also reinforced several violent religious groups that aim to implement their own versions of Islamic law in Pakistan, as the case of Red Mosque discussed in the previous chapter elaborated.

Second, as violence – political, religious, sectarian, and criminal – has increased, so has the criticism of the state to provide security of person and property to its citizens.⁵³⁷ With idea of ‘lawlessness’ as ‘absence of law’ becoming a term of common parlance in Pakistan,⁵³⁸ the narrative of a ‘strong state’ and ‘state-sovereignty’ has also gained prominence in political and legal discourse.⁵³⁹ The government and the armed forces are increasingly criticised for their incapacity to safeguard Pakistan’s boundaries from external actors, and commentators

⁵³⁵ See, for instance, *Christine C. Fair, Neil Malhotra and Jacob N. Shapiro* (2010) (n 22); Pew Research Center, 'Most Muslims Want Democracy, Personal Freedoms, and Islam in Political Life: Few Believe U.S. Backs Democracy' (Washington, D.C. 2012).

⁵³⁶ *Anas Malik* (2013) (n 322) 45.

⁵³⁷ Waqas Naeem, 'Hobbes' predictions: A strong ruler is needed to steer country out of crisis' *The Express Tribune* (Islamabad, Pakistan 07 September 2013) <<http://tribune.com.pk/story/600863/hobbes-predictions-a-strong-ruler-is-needed-to-steer-country-out-of-crisis/>> last accessed 07 September 2013.

⁵³⁸ See, for instance, *Azhar Hassan Nadeem* (2002) (n 75).

⁵³⁹ Waqas Naeem (07 September 2013) (n 537).

demand that only by strengthening the writ of the state and ensuring rule of law can the country be saved from its troubles.⁵⁴⁰

The human rights discourse has also gained further ascendancy because of this conflict. Human rights organisations claim that the state is, on the one hand, violating the rights and liberties of the people of the Frontier Regions in the name of security⁵⁴¹ while, on the other hand, it is proving unwilling and unable to safeguard the lives and security of its wider citizenry from attacks by the militants.⁵⁴²

Finally, owing to all this, there has been a reinforcement of what I consider as the Hobbesian narrative on law and the state. Legal and political commentators consider the situation of Pakistan as ‘a war of all against all’,⁵⁴³ in which the lives of the individuals have become akin to that in the Hobbesian state of nature – ‘solitary, nasty, poor, brutish and short’.⁵⁴⁴ As the problems are considered to have emerged from a weak state and an incapacitated government, the solutions offered also carry the same tones: that Pakistan needs to be a stronger state; it needs a more expansive judicial system to deal with militancy, terrorism and violence; and that Pakistan needs a Leviathan.⁵⁴⁵

⁵⁴⁰ Hajrah Mumtaz (24 January 2010) (n 127).

⁵⁴¹ *Human Rights Commission of Pakistan* (2013) (n 16) 323-324.

⁵⁴² *Ibid.* 61.

⁵⁴³ I.A Rehman, 'A dehumanised horde' *Dawn* (Pakistan 26 April 2012)

<<http://www.dawn.com/news/713520/a-dehumanised-horde>> last accessed 20 December 2013

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Waqas Naeem (07 September 2013) (n 537).

3.7. Pakistan's Socio-Legal Tapestry and the Narratives of Law

The main purpose of the above discussion on historical and conceptual trajectories of different aspects of Pakistan's legal tapestry, as well as the history of legal uncertainty discussed in the previous chapter, was to lay out what the study takes as its context. It was highlighted in the foregoing discussion that even if we consider the dominant state-oriented legal system, there are glimpses of Islamic law, local tribunals and colonial law that become evident. In order to approach the socio-legal architecture of the country, then, it is necessary to consider the multiple legal orderings that exist in the society. Common law, Islamic law, traditional courts, colonial law, as well as the notions of legal exteriority and lawlessness are all constituent components of Pakistan's socio-legal tapestry, and exist in a situation of mutual encounter. Islamic law informs both the judicature and the constitution of the dominant legal frameworks, while also engaging with traditional normative systems; the traditional courts, though challenged by the state, provide judicial recourse to those who are removed from the mainstream legal system; and colonial law pervades the laws of the country, and is more expressly visible in the laws governing the Tribal Areas. Moreover, these multiple normative orderings are coupled with the rising issues of lawlessness and violence, which generate a multitude of legal narratives. As mentioned in Chapter 1, I identify four main narratives that are employed within Pakistan to approach its (socio)legal setup: state-oriented legal narrative, Islamic narrative on law, legal-pluralist approach and the human rights narrative of law. The following four chapters will now consider each of these narratives in turn, discussing their manifestations in the

legal and political discourse, while also identifying some of the contradictions that emerge from an exclusive assertion on their underlying assumptions as well as from a partial view of the socio-legal terrain.

Chapter 4: Tracing the limits of the Dominant Legal Narrative in Pakistan

4.1. Chapter Synopsis

The previous two chapters have presented a history of the constitutional and legal turmoil that has beset Pakistan since its independence. They also outlined the multiple legal and normative orderings present in the country, and discussed their historical and conceptual trajectories to illustrate the complexity and diversity that inheres within the label of 'Law' in the socio-legal context of Pakistan. Building on this foundation, the thesis will now examine and problematise the prevalent narratives that appear to be employed to understand Law in Pakistan's context. The present chapter will focus on the most prominent narrative amongst these – the notion that confines law within the categories of the state and the constitution. I will argue that the narrative manifests itself in Pakistan by linking law and justice to categories of exclusivity, administration of justice, issues of access and management of socio-legal realities. It further holds that if these prerequisites are fulfilled, it will resolve the problems associated with the legal situation of Pakistan.

It will be argued in the course of this chapter that the notions of access and administration do not highlight the root causes of the problems, and are limited to treating its symptoms. Moreover, the assertion that a stronger state will lead to peace hides the contradictions that emerge from the nature of the state in Pakistan. It will also be highlighted in the following discussion that the

dominant narrative on law emerges from an unquestioned influence of the legal positivist approach to law. The most evident limitation of the dominant legal narrative in the country emanates from this approach, which makes it unable to account for the plurality of legal and normative structures that exist and prevail in the country. This approach not only presents a one-dimensional picture of the (socio)legal tapestry of Pakistan, but if understood more thoroughly, it also brings to the fore several challenges and contradictions which it is unable to resolve.

4.2. 'There is but one law for all...'

When the Law and Justice Commission of Pakistan⁵⁴⁶ organised its annual International Judicial Conference in April 2012, it chose '*There is but one law for all...*' as its guiding theme. The Conference employed the phrase to convey a 'resolve to [this] time-honoured adage' and reaffirm the commitment of legal fraternity to the 'principles of Rule of Law'.⁵⁴⁷ The Chief Justice of the Supreme Court of Pakistan further strengthened this view when, in his keynote address at the Conference, he stated that through the adoption and application of this maxim, the country can 'achieve the goals of good governance, democracy, social justice and the rule of law'.⁵⁴⁸ Intriguingly, the phrase itself is borrowed

⁵⁴⁶ The Law and Justice Commission of Pakistan is a Federal Government Institution, with the responsibility to review existing laws in the country for the purposes of reform, codification and unification. LJCP, 'Law and Justice Commission of Pakistan' <<http://www.ljcp.gov.pk/>> last accessed 12 September 2013.

⁵⁴⁷ LJCP, 'There is but one law for all...' (International Judicial Conference, Islamabad, Pakistan, 2012) 121.

⁵⁴⁸ Ibid. 18.

from one of Edmund Burke's speeches,⁵⁴⁹ delivered in May 1774 before the House of Lords in Great Britain during the Impeachment Trial of Warren Hastings.⁵⁵⁰ The fact that the phrase essentially argues for the timelessness and universality of natural law is just one interesting facet of its context.⁵⁵¹ A more remarkable aspect for the purposes of the current discussion is the prescient nature of the debates that surrounded this trial.

Hastings, the first Governor-General of the emerging British colonial set-up in the Indian sub-continent, was charged with 'high crimes and misdemeanor',⁵⁵² including corruption, extortion, misuse of political and judicial power, and despotism.⁵⁵³ His defence was mainly based on two arguments. First, asserting that the colonial possessions of the British East India Company amounted to private property, he disputed the authority of the British Government to challenge and control the colonial enterprise.⁵⁵⁴ Second, he maintained that any colonial or sovereign authority exercised in the colonies by the Company was granted through treaties by the (defeated) Mughal Empire and *Nawabs* (rulers)

⁵⁴⁹ Edmund Burke was a renowned 18th century statesman and parliamentarian of Great Britain. For an account of Burke's speeches and ideas in relation to East India Company's colonial policies, see Siraj Ahmed, 'The Theater of the Civilized Self: Edmund Burke and the East India Trials' (2002) 78 (1) *Representations* 28.

⁵⁵⁰ The complete phrase reads: 'I know no human being exempt from the law. The law is the security of the people of England; it is the security of the people of India; it is the security of every person that is governed, and of every person that governs. There is but one law for all, namely, that law which governs all law, the law of our Creator, the law of humanity, justice, equity,—the Law of Nature and of Nations.' Edmund Burke, *The Works of the Right Honourable Edmund Burke (Twelve Volumes)* (John C. Nimmo, London 1887) 135.

⁵⁵¹ Mithi Mukherjee (2005) (n 522) 610.

⁵⁵² *A detailed account of the proceedings in the House of Lords on the subject of the articles charged in the Impeachment of Warren Hastings, Esq.* Woodfall's Parliamentary Reports, London, 1795, 3.

⁵⁵³ *Ibid.* 3.

⁵⁵⁴ Mithi Mukherjee (2005) (n 522) 603.

of Bengal.⁵⁵⁵ By this argument, the sovereignty exercised by the East India Company was ultimately said to be derived from local laws and customs, as well as the sovereignty of the local rulers.⁵⁵⁶ Rather than denying incidences of corruption, extortion and violence, his defence sought to justify them as being in conformity with the practises of indigenous rulers and as necessary, to expand and strengthen the Empire.⁵⁵⁷ Edmund Burke as the chief prosecutor, on the other hand, argued that the British East India Company in fact exercised sovereign authority in the occupied lands and that apart from being subject to the sovereignty of the Crown there was a 'natural law' that bound Hastings and the Company.⁵⁵⁸ He therefore asserted that sovereign authority in India should not be exercised according to the practises of 'usurpers' but by the laws of India,⁵⁵⁹ and that to curb the transgressions of Hastings and the East India Company,⁵⁶⁰ the legal and judicial authority of the British Government should be extended to the colonised lands.⁵⁶¹

Mukherjee argues that the two differing arguments by Hastings and Burke in fact represented two competing logics towards colonialism, being debated at a

⁵⁵⁵ Ibid. 603-605.

⁵⁵⁶ Ibid. 604.

⁵⁵⁷ Ibid. 610-611.

⁵⁵⁸ Burke denounced the 'geographical morality' of the Company, criticising the general attitude that 'as if, when you have crossed the equinoctial line, all the virtues die.' Nick Robins, *The Corporation that changed the World: How the East India Company shaped the Modern Multinational* (Pluto Press, London 2006) 133-134. For a discussion on Burke's arguments against geographical morality, see also David Harvey, *Cosmopolitanism and the geographies of freedom* (Columbia University Press, New York ; Chichester 2009) 42-50.

⁵⁵⁹ P. J. Marshall, 'The making of an imperial Icon: The case of Warren Hastings' (2008) 27 (3) *The Journal of Imperial and Commonwealth History* 1, 10.

⁵⁶⁰ For an account of East India Company's operations in the Indian subcontinent, see Nick Robins (2006) (n 558).

⁵⁶¹ The House of Lords acquitted Hastings on all charges against him. For an exposition of voting in the House of Lords during this trial, see G. M. Ditchfield, 'The House of Lords and the Impeachment of Warren Hastings' (1994) 13 (3) *Parliamentary History* 277.

time when the British hold on American settler-colonies had declined and a new form of colonisation, based on indirect rule, was emerging.⁵⁶² He identifies these two sets of ‘competing and conflicting aims and strategies’ as *Colonial* (represented by Hasting’s assertion on the legitimacy of conquest and necessity of violence) and *Imperial* (illustrated by Burke’s insistence on governance through constitutional and judicial mechanisms).⁵⁶³ Though the two strategies differed in their adopted tactics – one focussing on control through naked force and the other on control through the use of law and juridical mechanisms – they converged in their ultimate aim. This ultimate goal was the continuation and expansion of the colonial set-up in India for the benefit of the metropole.⁵⁶⁴ ‘There is but one law for all...’, then, hid behind it a plethora of disputes: between natural law and sovereign assertion; between respect for local customs and their employment to further one’s self-interest; and between rule through conquest and judicial authority. The fact that makes this scenario intriguing is that the phrase and its utilisation to emphasise the incontestable nature of Rule of Law, as in the case of the Chief Justice’s assertion above, hides similar disputes two centuries thence.

Rule of Law, Sovereignty, and Writ of the State are the current terms of choice in political and legal discussions in Pakistan.⁵⁶⁵ Despite the complexity of the socio-legal terrain of the country as discussed in the preceding chapter, the

⁵⁶² Mithi Mukherjee (2005) (n 522) 593.

⁵⁶³ Ibid. 595.

⁵⁶⁴ Shaheen Sardar Ali and Javaid Rehman, *Indigenous peoples and ethnic minorities of Pakistan: constitutional and legal perspectives* (Curzon, Richmond 2001) 12.

⁵⁶⁵ This will be elaborated in the following sections of this chapter.

dominant narrative of law in Pakistan from which the said terms emerge considers 'Law' as an incontrovertible and indisputable term. Focussing on Law as it is instituted and implemented by the state, the narrative centres, not on the complex and uncertain socio-political phenomena that underpin the legal architecture, but the 'legal fiction' of certainty, predictability and uniformity.⁵⁶⁶ I argue that the logic of this dominant narrative is underpinned by the assumptions of legal positivism, which guide the way it perceives the societal context, frames the issues, identifies deficiencies and proposes solutions to these identified problems. However, in this process, the dominant narrative and its underlying logic fail to explain their internal contradictions, and exclude some significant aspects of the socio-legal tapestry that challenge their neat categorisations. I will expand on these assertions below, prior to which it is necessary to outline some of the contours of the dominant narrative on law as it exists in Pakistan.

4.3. The dominant narrative of Law in Pakistan: State-Law as 'The Law'

The concept of rule of law is deeply linked to the principle⁵⁶⁷ of justice... [with] independence of the judiciary and the role of judicial process as fundamental characteristics of the rule of law.... The administration of inexpensive, unbiased and fair justice leads the society to a civilized form of governance. Equality, impartiality and integrity in dispensation of justice are vital elements for the good governance of a state. Good

⁵⁶⁶ *Peter Fitzpatrick* (2004) (n 490) 145.

⁵⁶⁷ Note that 'principle of justice' is in singular.

governance leads to the maintenance of peace, tranquillity and nitty gritty (sic.) of socio-economic activities.⁵⁶⁸

The above teleological statement by the former Chief Justice of Pakistan, Iftikhar Chaudhary, provides a good summation of the dominant state-oriented narrative of law in Pakistan. I argue that this narrative in its common manifestation, as the statement brings to the fore, is hinged on four key and intermeshed notions. First, it assumes justice, and law as a corollary, to be a *singular* and non-contentious concept which flows from the Constitution and *Grundnorm*⁵⁶⁹ of the country. Linked to this is the assertion of *exclusivity* – that preservation of this singular justice and law (generally paired with order) is primarily the responsibility and the domain of the state, with the judiciary acting as the main institution tasked to safeguard them. Second, the narrative equates justice with the *administration* of law, which results in issues of access, provision and efficiency becoming paramount.⁵⁷⁰ Third, the narrative links justice and administration with the notion of management, rule of law and ‘good’ governance.⁵⁷¹ While exclusivity reserves for the state the authority to declare what is legal or illegal, the idea of governance takes it towards the imposition of this singular notion of law at the expense of other existent normative orderings. Finally, the narrative assumes that ensuring the administration of justice, rule of law, writ of the state, and good governance will

⁵⁶⁸ *LJCP* (2012) (n 547) 18 (emphasis added).

⁵⁶⁹ A concept theorised by Hans Kelsen, which was used actively by the superior courts in Pakistan to justify the military takeovers and will be discussed later. See *Hans Kelsen* (2005) (n 191) 205. There have also been assertions by the courts that Islam provides the Grundnorm of the country, as mentioned previously

⁵⁷⁰ See, Law and the ‘Administration’ of Justice, below on page 155.

⁵⁷¹ See, Justice, Management and Governance, below on page 157.

necessarily lead to order, which is then equated with socio-economic improvement and peace. Based on equating violence and other problems prevalent in the country to the absence of law, or *lawlessness*, this notion presumes the provision and preservation of law as a panacea, despite the presence of evidence to the contrary.⁵⁷² Each of these four points will be briefly explored below, highlighting the assertions and the narrative that exists around them in Pakistan's context.

4.3.1. The Exclusivity and Singularity of Law and Justice

The primary notion of the dominant narrative on law in Pakistan is the assertion on singular and incontestable nature of justice, emerging from the exclusive linkage of law to state authority and the Constitution. The media and legal forums in Pakistan are replete with assertions vesting the State with the responsibility to preserve and provide justice, amongst the expansive list of duties that the State is required to fulfil. Ideas and demands in relation to the duties of the State range from ensuring food security⁵⁷³ and equality, to human rights⁵⁷⁴ and women's welfare,⁵⁷⁵ from safeguarding the rights of children⁵⁷⁶ to

⁵⁷² See, Peace and Provision of Justice, below on page 160.

⁵⁷³ Julia Lemétayer, 'PAKISTAN: Half of the population is exposed to food insecurity because of bad governance and abuses' (Pakistan 2010).

⁵⁷⁴ Ahmad Nazir Warraich (20 October 2013) (n 324).

⁵⁷⁵ Pakistan Workers' Federation, *One Voice of Workers - Newsletter* (Pakistan Workers' Federation, Lahore, Pakistan 2009) 2.

⁵⁷⁶ Business Recorder, 'Experts underscore need for comprehensive survey to tackle child labour' *Business Recorder* (Pakistan 13 October 2012) <<http://www.brecorder.com/general-news/172:pakistan/1247372:experts-underscore-need-for-comprehensive-survey-to-tackle-child-labour/?date=2012-10-13>> last accessed 14 April 2013.

a uniform education system.⁵⁷⁷ Within this, the State and the judiciary are deemed responsible for enforcing 'law to ensure peace'⁵⁷⁸ and to provide a 'right to *adl* [justice]'⁵⁷⁹ to its citizens. Legal and political commentators stress that the entitlements of a state include not only a monopoly over 'violence,'⁵⁸⁰ but also taxation as its 'sovereign prerogative,' the payment of which is a 'test of loyalty of any citizen.'⁵⁸¹ The State is urged to create 'an egalitarian society in which all are equal before the law', and where justice is 'speedy, affordable, honest and blind.'⁵⁸² Judiciary is considered to be the most important institution to achieve this end, and it has been called the 'true arbitrator' of law and justice.⁵⁸³ As the 'ultimate protector of the rights of citizens',⁵⁸⁴ the judiciary's role in safeguarding the constitutional principles is hailed to be of paramount importance, as 'undiluted adherence to the norms and principles of the constitution and practise of rule of law are keystones' for ensuring justice and democracy.⁵⁸⁵

⁵⁷⁷ Humayun Gauhar, 'Pakistan zindabad' *Pakistan Today* (Pakistan 13 August 2011) <<http://www.pakistantoday.com.pk/2011/08/13/comment/pakistan-zindabad/>> last accessed 19 July 2013.

⁵⁷⁸ Dawn, 'Justice Jilani on 'Peace thru Law': 'Democracy is a way of life, not mere right to vote' *Dawn* (Lahore, Pakistan 20 October 2012) <<http://www.dawn.com/news/758068/justice-jilani-on-peace-thru-law-democracy-is-a-way-of-life-not-mere-right-to-vote>> last accessed 9 October 2013.

⁵⁷⁹ Ibid.

⁵⁸⁰ Amir Zia, 'Delusion versus reality' *The News* (Pakistan 09 December 2013) <<http://www.thenews.com.pk/Todays-News-9-219067-Delusion-versus-reality>> last accessed 09 December 2013.

⁵⁸¹ Huzaima Bukhari and Dr. Ikramul Haq, 'Democratizing political parties' (2011) July 24-30 *Weekly Tax Journal* 223, 224.

⁵⁸² Dawn (20 October 2012) (n 578).

⁵⁸³ The News, 'Peace, security are state's responsibility: CJ' *The News* (Lahore, Pakistan 10 September 2011) <<http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=8686&Cat=13>> last accessed 14 March 2013.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid.

It is granted that these assertions are far from novel, as a narrative on the duties of the state and the importance of the judiciary permeates the wider academic and legal-theoretical discussions on law and the state beyond the discourse in Pakistan. However, the significance of this notion for the purposes of current discussion lies in the fact that as law and justice are made the responsibility of the state, they also become the domain of the state. When justice is intrinsically tied to state-authored law, it generates a singular and exclusive idea of justice which, by virtue of its association with the constitution of the country, is considered beyond dispute.⁵⁸⁶ In a 2012 judgement, the Supreme Court considered a diversity of meanings of the word ‘just’, with it correlating to ‘what is legal or lawful’, ‘righteous’, ‘fair’, that which conforms to ‘the requirements of right or of positive law’.⁵⁸⁷ However, the judgement indicated that in its own jurisprudence, the Court has adhered to the understanding that “‘just” means according to law’.⁵⁸⁸ In a similar vein, the wider political and legal discussions in the country on Rule of Law hardly ever raise questions in relation to the nature and authority of the law whose *Rule* is so readily propounded.⁵⁸⁹ One consequence of such assertions of singularity and exclusivity is that any notion of law or justice that emerges from outside these frameworks is discounted and declared illegal.⁵⁹⁰ It has been argued by commentators and activists that the Pakistani State is not only duty-bound to protect its citizens and provide them justice, but also to ‘save’ them from other normative orderings that exist in the

⁵⁸⁶ The one prominent contestation in this regard has been between Islamic principles and the constitutional traditions inherited at the time of independence, as discussed in Chapter 2 and 3.

⁵⁸⁷ *Workers’ Party Pakistan and others v. Federation of Pakistan and others* (PLD 2012 SC 681).

⁵⁸⁸ *Utility Stores Corporation of Pakistan Ltd v. Punjab Labour Appellate Tribunal* (PLD 1987 SC 447), quoted in *Workers’ Party Pakistan* (n 587).

⁵⁸⁹ *The News* (10 September 2011) (n 583).

⁵⁹⁰ See, Traditional Law and Informal Courts in Chapter 3 on page 115.

society.⁵⁹¹ With the judiciary as the ultimate arbiter of legality, and the main institution vested with the responsibility to uphold the law, it also assumes the authority to bar any other form of normative ordering that does not fit its criteria.⁵⁹²

Although not encompassed within the subject matter of the current study, it should be pointed out that another consequence of the dominant narrative of law, and an unquestioning assertion on rule of law, is the ascendancy of the term *sovereignty* in Pakistan. It could be argued that with exclusivity of law acting as an inward-facing idea, the notion of sovereignty is employed mainly towards the threats faced by Pakistan from external actors, although this idea would require further examination. The terminology of sovereignty is invoked time and time again by political parties, political commentators, judiciary, lawyers and civil society organisations to address mainly the United States led drone strikes in the North-Western region of Pakistan. The incumbent Prime Minister of Pakistan stated in 2013 that the 'drone strikes violate the sovereignty of Pakistan,'⁵⁹³ a statement that is supported by several rival political parties as well. Pakistan's Ambassador to the United Nations also seconded the view that drone strikes undermine the country's sovereignty, when speaking at the UN General Assembly⁵⁹⁴ to discuss the resolution on the

⁵⁹¹ Asma Jahangir (2009) (n 397).

⁵⁹² See, for instance, Shazia v. SHO (n 1).

⁵⁹³ AFP, 'Drone strikes against Pakistan's sovereignty: Nawaz' *Dawn* (London 20 October 2013) <<http://www.dawn.com/news/1050419/drone-strikes-against-pakistans-sovereignty-nawaz>> last accessed 20 October 2013.

⁵⁹⁴ Parvez Jabri, 'Drone hits violate Pak sovereignty, international law' *Business Recorder* (Pakistan 20 December 2013) <<http://www.brecorder.com/top-news/1-front-top->

*Protection of human rights and fundamental freedoms while countering terrorism.*⁵⁹⁵ The Pakistan Tehreek-i-Insaf (PTI), which emerged as the third largest party in the country after the 2013 general elections, has also denounced drone attacks in Pakistan as a breach of the country's sovereignty. It has made this argument its most important policy issue, and staged a month-long sit-in against the drone strike that killed the leader of the Pakistani Taliban in November 2013.⁵⁹⁶

4.3.2. Law and the 'Administration' of Justice

Returning to the main assertions that emanate from the dominant narrative of law in Pakistan, the second notion that lies at the heart of this account links law to issues of provision and administration of justice. Once the state is vested with the exclusive authority to formulate laws and provide justice, it leads to a focus on the idea of provision of justice as a corollary.⁵⁹⁷ This perspective contends that the problems that pervade the societal structures of Pakistan emerge from a deficient application and dispensation of law, rather than any shortcomings in the laws themselves.⁵⁹⁸ The 'administration of justice' and 'justice delivery'⁵⁹⁹

news/149648-drone-hits-violate-pak-sovereignty-international-law.html> last accessed 28 December 2013.

⁵⁹⁵ United Nations General Assembly, 'Protection of human rights and fundamental freedoms while countering terrorism - Note by the Secretary-General' (Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives, 2009).

⁵⁹⁶ B. Z. Abdullah, *PTI sit-in against drone strikes enters 26th day* (PTI, Khyber Pukhtoonkhwa, Pakistan 2013).

⁵⁹⁷ See the quotation cited in Section 'There is but one law for all...' (footnote 568), *LJCP* (2012) (n 547).

⁵⁹⁸ Iftikhar Muhammad Chaudhary, 'Address by Mr. Justice Iftikhar Muhammad Chaudhry, Hon'ble Chief Justice Of Pakistan' (New Judicial Year Ceremony, Islamabad, Pakistan, September 2012).

⁵⁹⁹ Ibid.

are then considered as 'pre-requisite[s] for rule of law in a society', by providing which the 'Judiciary plays central role in promoting social justice'.⁶⁰⁰ When law and justice are conceived of as subjects of administration and delivery, then it is the issues of efficiency, access, resources and backlogs of cases that become paramount. The outgoing Chief Justice of the Lahore High Court stated in 2012 that 'it was the inefficiency of the legal system that compromised its effectiveness.'⁶⁰¹ The former Chief Justice of Pakistan claimed that during his term in office, he adopted measures to 'improve the administration of justice in the country which includes addressing the issue of backlog of cases.'⁶⁰² He also praised the judges of the Supreme Court for their work on a 'war footing' to 'expedite the disposal of cases.'⁶⁰³

The emphasis on administration, provision, efficiency and case backlogs, correlate to the issues of access of justice, which assumes that the main problems of law pertain to the people's lack of access to judicial and legal recourse. It is generally stated that the existence of traditional normative systems and even militancy⁶⁰⁴ can be linked to inadequate provision of justice and lack of access. The apex court claimed in 2013 that local tribunals and

⁶⁰⁰ Iftikhar A. Khan, 'Pakistan, Azad Kashmir judiciaries join hands' *Dawn* (Islamabad, Pakistan 09 August 2013) <<http://www.dawn.com/news/1041281/pakistan-azad-kashmir-judiciaries-join-hands>> last accessed 09 August 2013.

⁶⁰¹ Dawn, 'LHC chief sees flaws in justice system' *Dawn* (Lahore, Pakistan 25 May 2012) <<http://www.dawn.com/news/721450/lhc-chief-sees-flaws-in-justice-system>> last accessed 02 January 2013.

⁶⁰² The Express Tribune, 'Judicial allowance: 'Should all court staff get special pay?' *The Express Tribune* (Pakistan 14 December 2013) <<http://pktimes.4com.co/tag/judicial>> last accessed 14 December 2013.

⁶⁰³ Ibid.

⁶⁰⁴ Rana Yasif, 'Peace through law: Weak rule of law spawns militancy, says CJP' *The Express Tribune* (Lahore, Pakistan 21 October 2012) <<http://tribune.com.pk/story/454673/peace-through-law-weak-rule-of-law-spawns-militancy-says-cjp/>> last accessed 20 December 2013.

courts exist 'only in places where the police had failed'⁶⁰⁵ to perform its duties. To counter such perceived problems, Pakistan has seen the emergence of a multitude of Access to Justice and Alternative Dispute Resolution (ADR) projects in the past few years.⁶⁰⁶ The Asian Development Bank's Access to Justice Programme and the International Finance Corporation's establishment of Karachi Centre for Dispute Resolution materialised from this very concept.⁶⁰⁷ There have been several other initiatives towards ADR and Access to Justice, generally funded and supported by international development and donor organisations.⁶⁰⁸ The recent example of mobile courts instituted in the province of Khyber-Pakhtunkhwa is also part of this approach. Partly funded by the provincial government and partly by the United Nations Development Fund and other donor organisations,⁶⁰⁹ the mobile courts aim towards providing access to courts to people living in remote areas and to deliver 'justice at the doorsteps.'⁶¹⁰

4.3.3. Justice, Management and Governance

The third key assertion of the dominant state-oriented narrative of law in Pakistan associates the idea of justice to governance and management. Building on the aspects of singularity, exclusivity, administration and provision, this

⁶⁰⁵ Geo TV, 'Government should act against illegal *Jirgas*: SC' <<http://www.geo.tv/article-108899-Government-should-act-against-illegal-jirgas-SC->> last accessed 11 July 2013.

⁶⁰⁶ *Osama Siddique* (2013) (n 98).

⁶⁰⁷ I worked at the institution as its first Case Administrator in 2007.

⁶⁰⁸ *Osama Siddique* (2013) (n 98) 263-265.

⁶⁰⁹ AFP, 'KPK's drive for justice' *Dawn* (Peshawar, Pakistan 29 August 2013)

<<http://www.dawn.com/news/1039186/kpks-drive-for-justice>> last accessed 29 August 2013

⁶¹⁰ The News, 'KPK novel mobile court kicks off' *The News* (Peshawar, Pakistan 27 July 2013) <<http://www.thenews.com.pk/article-111229-KPK-novel-mobile-court-kicks-off>> last accessed 25 August 2013.

principle imports the language of governance in relation to phenomena that may otherwise seem unmanageable or disparate. A conception that the 'proper aim of the legal order... is to minimise the arbitrary elements in legal norms and decisions',⁶¹¹ shifts the focus of law and justice to order, certainty and predictability. The International Bar Association's mission to Pakistan in 1998, in its report on human rights and rule of law situation in Pakistan, asserted that the 'law must possess characteristics of certainty, generality and equality.'⁶¹² The provincial Peshawar High Court undertook an exercise in 2011, the main rationale for which was to 'promote consistency, certainty, stability and predictability in application and interpretation of laws'.⁶¹³ This view of certainty and predictability is carried further by legal and political commentators, who argue against any 'uncertainty and unpredictability about a court's actions' through claims such as 'liberty finds no refuge in unpredictability.'⁶¹⁴

With the conceptual order and categories of the dominant narrative established, these are then employed to classify and judge the societal realities. The fluidity and complexity present in the socio-political and legal context is conceived in a manner so as to conform to the 'all-too-solid certainty',⁶¹⁵ predictability,

⁶¹¹ Philip Selznick, quoted in John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 48.

⁶¹² *International Bar Association* (1998) (n 76) 7.

⁶¹³ Peshawar High Court, 'Judgements of Hon'ble Justice Ejaz Afzal Khan' *PHC, Peshawar, Pakistan 2011* <http://www.peshawarhighcourt.gov.pk/judgements_ejaz_afzal_khan.php> last accessed 17 August 2013.

⁶¹⁴ Khurram Hashmi, 'The power of suo motu' *The Express Tribune* (Pakistan 01 May 2012) <<http://tribune.com.pk/story/372164/the-power-of-suo-motu/>> last accessed 17 September 2013.

⁶¹⁵ *Peter Fitzpatrick* (2004) (n 490) 145.

consistency and a definitive structure which is accorded to law in dominant legal understanding. The conceptions of law or the phenomena that challenge this certainty, predictability and categories of management, are proclaimed as illegalities. The importance of 'governance instruments' is emphasised to 'reduce normative conflicts' as '*coping with normative plurality* has shown to be an important precondition for legal certainty and Rule of Law'.⁶¹⁶ All that falls on the wrong side of the formal/informal categorisation of dominant law is proclaimed unlawful. As discussed previously, this approach has led to the declaration of illegality against all forms of local and indigenous tribunals not sanctioned by the State.⁶¹⁷ In the above-cited 2004 judgement, the Sindh High Court gave a detailed opinion on the issue of local tribunals, and declared that the '*jirga* system is unlawful and illegal which is against the provisions of the Constitution (sic.) and the law of the land.'⁶¹⁸ The Supreme Court similarly declared local tribunals to be 'against humanity', and decreed that '[n]o Jirga should be held and if that happens then police will be responsible (sic.)'.⁶¹⁹ This notion of governance and management of society through law raises significant concerns in relation to a complex socio-legal context such as that of Pakistan.⁶²⁰

⁶¹⁶ Susanne Mahrwald, 'Rule of Law: The Case of Pakistan' (Rule of Law in the Islamic Republic of Pakistan, Berlin, October 2009) 8 (emphasis added).

⁶¹⁷ Shazia v. SHO (n 1).

⁶¹⁸ Ibid.

⁶¹⁹ Terence J Sigamony, 'Inhuman punishments by *jirgas* are illegal: SC' *The Nation* (Pakistan 12 July 2013) <<http://www.nation.com.pk/national/12-Jul-2013/inhuman-punishments-by-jirgas-are-illegal-sc>> last accessed 20 December 2013.

⁶²⁰ For a critique of this *instrumentalist* view of law, see Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 (4) *Law and Society Review* 719.

4.3.4. Peace and Provision of Justice

Finally, the fourth key conception linked to the dominant narrative on law in Pakistan is that it is presumed that if issues of provision of justice are resolved, governance mechanisms are established and writ of the state enforced, it will necessarily lead towards socio-economic betterment and, subsequently, 'peace and tranquillity.'⁶²¹ It is presupposed that a 'peaceful, stable and prosperous Pakistan can be delivered through... good governance and, most important, the sanctity of the rule of law.'⁶²² This notion reduces the occurrences of militancy, insurgency and lawlessness to deficiencies of the legal system and absence of law, and maintains that in the enforcement and strengthening of law lies the panacea to these problems. Addressing the reasons behind the current militancy and violence faced by Pakistan, the Chief Justice remarked at the 2012 Peace Through Law International Conference that the 'cumulative effect of constitutional deviations and weak rule of law in the past has resulted in present day militant and terrorist tendencies,'⁶²³ further arguing that an adherence to 'national and international laws guarantees peace.'⁶²⁴ There is, however, evidence to the contrary. The situation of law (and order) is problematic, not only in areas where the writ of the state is weak or absent, but also in major cosmopolitan centres of the country. Karachi, considered to be the economic lifeline of the country, has suffered a major share of violence and instability that has gripped the country. In 2013, there were more than 1200

⁶²¹ See, The dominant narrative of Law in Pakistan: State-Law as 'The Law', on page 149.

⁶²² Tariq Khosa, 'Mandate for governance' *Dawn* (Pakistan 20 May 2013) <<http://m.dawn.com/news/1012413/mandate-for-governance>> last accessed 3 July 2013.

⁶²³ Rana Yasif (21 October 2012) (n 604).

⁶²⁴ Ibid. See also Agencies, 'Implementation of laws ensures peace: CJ' *Pakistan Today* (Pakistan 20 October 2012) <<http://www.pakistantoday.com.pk/2012/10/20/national/implementation-of-laws-ensures-peace-cj/>> last accessed 05 June 2013.

people who lost their lives in sectarian or political strife, or through targeted killings and the prevalence of street crime.⁶²⁵ Similarly, Lahore, the second biggest city of the country, and even the capital Islamabad, have suffered from crime and terrorist incidences in recent years.⁶²⁶ Based on this, the argument presented by the dominant narrative, that all such occurrences emerge from an absence of the rule of law, lawlessness and the weakening of the writ of the state, do not hold ground. It is argued here that Pakistan is in fact caught in the logic of what Jenny Pearce calls 'perverse state formation'.⁶²⁷

4.4. Problematising the Dominant Narrative on Law in Pakistan

The ideas of positivism and state law which argue for the imminence of peace and tranquillity once rule of law and sovereignty are established, do so in the presence of evidence to the contrary. As stated above, it is not only in areas where the *state does not exist* that violence takes place, but that the violence exists despite, and perhaps because of, the presence of the current form of *state as it exists* in Pakistan. The notion of perverse state formation presents primarily this idea. Through a detailed study of Latin American countries, Pearce argues against the commonly held view of 'failed state threatened by urban social violence.'⁶²⁸ She argues that in the Latin American scenario, the state has not sought to find solutions to violence or to monopolise it; rather the 'state gains huge political capital from its ongoing confrontations at the same

⁶²⁵ *Pakistan Criminal Records* (5 October 2012) (n 532).

⁶²⁶ *Ibid.*

⁶²⁷ Jenny Pearce, 'Perverse state formation and securitized democracy in Latin America' (2010) 17 (2) *Democratization* 286, 297

⁶²⁸ *Ibid.*

time as it allies with pathological and corrupt violent actors outside the state in order to gain temporary victories.’⁶²⁹ The state, then, not only constructs the boundaries between citizens and non-citizens,⁶³⁰ but ‘positively contributes to the multiplication of deadly personal interactions and private violences (sic).’⁶³¹ This account is equally applicable to the situation of Pakistan and if this is indeed the trend adopted by the state of Pakistan, the assertions of a stronger state and greater writ of the government will not resolve the crises.

Another major issue that emerges from the dominant narrative’s approach to link law with governance, administration, Access to Justice and ADR concepts, as mentioned in the foregoing analysis, is that these do not target the root of the problems. The focus of these projects is not on improving the democratic nature or accountability of the legal system as a whole, but to address issues of access and inefficiency within it. They largely focus on commercial and civil cases, with the idea (or ideology) that contract enforcement and an efficient legal system will lead towards an improvement in the economy and attract foreign direct investment.⁶³² These initiatives do not question or challenge the foundational notions behind legislations, institutions, procedures, or the legal system as a whole, but emphasise the perception that it is the wrongful and inept implementation which is the problem.

⁶²⁹ Ibid. 299.

⁶³⁰ Ibid.

⁶³¹ Ibid. 300.

⁶³² Investment Climate Advisory Services in Middle East and North Africa, 'Promoting Alternative Dispute Resolution through Mediation' <<https://www.wbginvestmentclimate.org/uploads/IFC%20ADR%20Project%20Pakistan%20Fact%20Sheet%202010.pdf>> last accessed 17 December 2013.

However, a more evident deficiency that emerges from the dominant narrative on law in Pakistan is its inability to account for the plurality of legal and normative structures that exist within the country. The excessive focus on predictability and certainty, as well as the need to govern the disparate social realities, compels the legal and juridical institutions to co-opt or reject all that does not fit their neat categorisation. But is it a fair criticism that the legal understanding does not take the fluidity of legal orderings into account? As Carl Schmitt notes, 'all law is situational law'⁶³³ and that there is no law or norm that can be applied to chaos.⁶³⁴ For law to maintain its functionality, it has to make sense of the fluidity and existence of multiple normative orderings. At the very least, for law to come into being it has to take the first and constitutive step of distinguishing between *legal* and *illegal*. For any notion of law to exist, there has to be the first distinction of what qualifies as law and what does not, what lies within its boundary and what lies outside it; it has to 'draw any distinction and call it the first'.⁶³⁵ To begin comprehension of the societal phenomena that confronts it, law has to define, delineate, structure and understand what it is referring to, and what lies outside its distinction. But this is where the problem lies, as in this exercise of demarcation, what is left out is as important as what is included inside. As Agamben notes, it is by looking at the exception that we understand the general and the generalisable.⁶³⁶

⁶³³ Quoted in Giorgio Agamben (1998) (n 491) 16.

⁶³⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press, Cambridge, Mass. 1988) 13.

⁶³⁵ Spencer-Brown, quoted in Andreas Philippopoulos-Mihalopoulos, 'The Successful Failing of Legal Theory' in Amita Dhanda and Archana Parashar (eds), *Decolonisation of legal knowledge* (Routledge, Abingdon 2009) 45.

⁶³⁶ Giorgio Agamben (1998) (n 491) 15-21.

It is therefore argued here that the mainstream legal understanding and the dominant narrative on law in the context of Pakistan is problematic primarily because the neat configuration it creates excludes much more than it includes, it hides more than it shows. The entire focus of legal understanding in the country's context on Rule of Law, predictability, certainty, administration of justice⁶³⁷ fails to raise the questions: Which laws, and whose laws, are being referred to when we talk about the Rule of Law? Which notion of justice is being administered? What of the constitution and the *Grundnorm*⁶³⁸ from which all these laws are said to originate? Who is the subject of these laws? And who decides on all these decisions and why? The problematic tendency to focus simply on the implementation and administrative issues related to justice, law and constitution portrays the predisposition to take these notions and concepts as given. As shown above, without questioning what they stand for and what their consequences may be, the issues of law are made out to be those of wrongful implementation and lack of access. An unquestioning adherence to this narrative means that the concepts of Rule of Law, Administration of Justice, Access to Justice, and Governance have become ends in themselves, rather than any goal that lay at their heart in the beginning.

I argue that this exclusion of the socio-legal realities through exclusivity, their omission through administration, and denunciation through governance, are some of the key limitations of the dominant narrative on law in the context of Pakistan. However, this is not the only weakness of this perspective. It is

⁶³⁷ See, Law and the 'Administration' of Justice, above

⁶³⁸ See, A History of Legal and Constitutional Uncertainty in Chapter 2 on page 51.

contended here that this dominant narrative, its foundational assumptions and corollaries are directly linked to the legal positivist approach to law that has dominated legal and political imagination in the country. In this regard, approaching the theoretical basis of this narrative allows us not only to trace the source of this narrative, but also highlights the problematic reading of it that emerges within the country's legal and political discourse. The need, then, is to consider some of the underlying logics of this mode of legal conceptualisation in order to uncover the contradictions it presents in the context of Pakistan.

4.5. The Dominant Narrative and Legal Positivism

Legal Positivism is not something that only has an indirect influence on the legal system and mainstream legal understanding in the context of Pakistan. The more affluent part of the legal community of the country is trained and educated in the Anglo-American traditions of common law and positivism that guide the mainstream legal system. As a legacy of colonialism, even the domestic curriculum and system of legal education is primarily based around these systems, in which the ideas of legal positivism and the supremacy (or exclusivity) of state law dominate.⁶³⁹ Not only do judges reiterate the conception of 'There is but one law...' in their speeches, but there have been numerous instances in which the positivistic legal-theoretical debates have openly featured in judgements. In the landmark case of *State v. Dosso*, which

⁶³⁹ On the crises and problems of legal education in Pakistan, see generally Nasir Aslam Zahid, 'The role of Legal Education in Pakistan' (1st Pakistan Judicial Academies Summit, Sindh Judicial Academy, Karachi, Pakistan, June 2011); Osama Siddique, 'Legal Education in Pakistan: The Domination of Practitioners and the "Critically Endangered" Academic' (2014) 63 (3) *Journal of Legal Education* 499.

was discussed in Chapter 2, the Federal Court of Pakistan expressly employed a unique interpretation of Kelsen's theory of the *Grundnorm* to validate martial law in Pakistan.⁶⁴⁰ But the influence of positivism is not limited to this one instance of judicial interpretation. References to Hobbes abound in legal and political discussions, as Pakistan is seen as a country caught in the 'state of nature'.⁶⁴¹ The influence of the dominant narrative and its theoretical underpinnings, then, pervades the wider legal and political discourse in the country.

4.5.1. Of *Grundnorm* and Commands

But before elaborating on the above-mentioned points, it is important to note that legal positivism is far from a singular theory. There have been numerous expositions presented in the past several centuries that can be banded under this umbrella.⁶⁴² Nonetheless, there are three primary ideas that can be discerned from the different propositions within legal positivism:⁶⁴³ the sovereign authority's relation to the authorship of law, the focus on description of law rather than prescription,⁶⁴⁴ and the divesting of law from morality.⁶⁴⁵ For

⁶⁴⁰ See, From Independent State to a Crown Dominion in Chapter 2, above.

⁶⁴¹ See, for instance, Waqas Naeem (07 September 2013) (n 537).

⁶⁴² See, generally, Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Reidel Publishing, Dordrecht, Holland 1992); Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (Cambridge University Press, Cambridge 2008).

⁶⁴³ Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 (4) *Oxford Journal of Legal Studies* 683, 686.

⁶⁴⁴ Legal positivism asserts that law should be understood as it is posited, what law is, rather than what it ought to be. Kelsen, for instance, writes at the beginning of *The Pure Theory of Law* that 'as a theory, its exclusive purpose is to know and describe its object. The theory attempts to answer the question what and how the law is, not how it ought to be. It is a science of law (jurisprudence), not legal politics'. *Hans Kelsen* (2005) (n 191) 1. This resonates with John Austin's approach as well, when he presents his ideas on general jurisprudence as readings of 'law as it necessarily is', while distinguishing the science of jurisprudence from the science of

the purposes of our present dialogue, the discussion will only focus on the first of these foundational notions as it has been the subject of debate in Pakistan's legal and constitutional development, and because of its link with the overall socio-legal tapestry of the country.

The question of sovereign authority to formulate and implement laws has been the focus for several theorists of legal positivism, with John Austin and Hans Kelsen being among the foremost. Austin's *Command Theory of Law*, though widely challenged and enriched in subsequent centuries, conceived of law as orders of a sovereign, backed by a threat in the case of non-compliance. He argued that laws are types of commands, which oblige or impose a duty upon a certain class of individuals, given affect by the threat of sanction or fear of punishment if they are not fulfilled.⁶⁴⁶ These laws are implemented by superiors on their inferiors, the superiors primarily being categorised as those who have '*might*: the power of affecting others'.⁶⁴⁷ Through this approach, the actual substantive content of the command becomes irrelevant; the focus is rather on the source of the command. As long as the command or the law is valid, i.e. it is given by a sovereign or those who possess the might to enforce their commands, it is valid law. In fact, Austin characterises positive law as 'law

legislation. John Austin, 'Lecture I' in W. Rumble (ed) *John Austin: The Province of Jurisprudence Determined* (Cambridge University Press, Cambridge 1995) xiii.

⁶⁴⁵ For instance, John Austin, one of the foremost theorists of positivism, wrote: 'The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.' *John Austin* (1995) (n 644) 157.

⁶⁴⁶ Ibid. 28-30.

⁶⁴⁷ Ibid. 30.

existing by position', being an 'aggregate of rules, established by political superiors'.⁶⁴⁸

Kelsen's approach provided a more sophisticated account of law as commands. He argued that even though the commands given by a criminal and those given by a government official may have the 'same subjective meaning',⁶⁴⁹ only the latter was a 'norm-positing' act derived from law. He conceived of law as consisting of norms that 'regulate human behaviour,'⁶⁵⁰ by laying out rules through which behaviour is 'commanded, permitted or authorised.'⁶⁵¹ The norms possess a system of rewards for obedience, but their dominant feature is the provision of sanctions and punishments (although not always in the form of physical violence). He thus characterised law as 'a coercive order' in which the 'decisive criterion is the element of force'.⁶⁵² Kelsen argued that the norms regulating societal conduct flow from a basic norm, which 'constitutes the unity of the multiplicity of [behaviour regulating] norms'.⁶⁵³ He termed this foundational rule as *Grundnorm*, which provides the 'reason for the validity of all norms belonging to the same legal order'.⁶⁵⁴ Kelsen distinguished between the validity and the efficacy of a legal or normative system and contended that while validity implied a notion of ought rather than is, as a prescription of the behaviour in consideration, the efficacy of a norm related to the behaviour's actual conformity with the prescribed norms. The efficacy, then, was a

⁶⁴⁸ Ibid. 19.

⁶⁴⁹ *Hans Kelsen* (2005) (n 191) 8.

⁶⁵⁰ Ibid. 31.

⁶⁵¹ Ibid. 5.

⁶⁵² Ibid. 34.

⁶⁵³ Ibid. 205.

⁶⁵⁴ Ibid.

‘condition of validity.’⁶⁵⁵ In sketching out his *science of law*, he also discussed the possibility of a change in the Grundnorm or the imposition of a new valid legal order. He argued that a ‘revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself.’⁶⁵⁶ He further asserted that ‘[from] a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.’⁶⁵⁷

The fact that makes Kelsen and Austin’s approaches relevant in the context of the current discussion is that they have played a vital role in the history of constitutional and democratic turmoil in Pakistan. These propositions have been expressly relied upon by the superior judiciary to justify the imposition of martial law regimes, overthrow of democratic governments and the suspension of the Constitution. In *State v. Dosso*,⁶⁵⁸ deciding on the matter of the legality of the 1958 martial law imposition, the incumbent Chief Justice cited extensive passages from Kelsen’s work to present a reasoning. The Court decided that as the military coup is considered to have altered the basic norm of the country’s legal system, the coup is valid as an extra-constitutional measure.⁶⁵⁹ It further argued that the Supreme Court, being a creature of the Constitution and the legal order, could not go beyond it and declare it illegal. He stated that

⁶⁵⁵ Ibid. 11.

⁶⁵⁶ *Hans Kelsen* (1949) (n 193) 117.

⁶⁵⁷ Ibid. 117.

⁶⁵⁸ *State v Dosso* (n 190).

⁶⁵⁹ Ibid.

[A] victorious revolution or a successful coup d'état is an internationally recognised legal method of changing a Constitution.... After a change of the character I have mentioned has taken place, the national Legal Order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdiction, and can function only to the extent and in the manner determined by the new constitution.⁶⁶⁰

Although a few decades later the Supreme Court retracted its problematic reading of Kelsen's argument,⁶⁶¹ this instance signifies the manner in which legal-theoretical propositions manifest themselves in the legal realities of the country. The path of judicial validation of martial law regimes that this judgement opened up was repeated later in 1977.⁶⁶² In the *Nusrat Bhutto case*, the Supreme Court concluded that its previous reliance on Kelsen was based both on an incorrect reading as well as the wrong assumption that Kelsen's theory was a proposition of legal theory rather than an established principle of law.⁶⁶³ Despite this, however, it approved General Zia's martial law regime on the basis of the Doctrine of State Necessity. In the same judgement, one of the Justices of the Supreme Court relied on the Rhodesian Court's reading of Austin to approve the martial law regime noting that 'it is clear that in Rhodesia the regimes edicts are laws (sic.) enforced in the Austinian sense by the Courts.'⁶⁶⁴ Writing a concurring opinion, he quoted that 'under English constitutional law respect is paid not to a constitution as such but to the Government which by its authority gives the constitution the force of law (sic.).'⁶⁶⁵ He therefore concluded that 'From the above with which I fully agree it is abundantly clear

⁶⁶⁰ Ibid.

⁶⁶¹ Asma Jillani v. The Government of Punjab (PLD 1972 SC 139).

⁶⁶² Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657).

⁶⁶³ Asma Jillani case (n 661).

⁶⁶⁴ Nusrat Bhutto case (n 662).

⁶⁶⁵ Ibid.

that this Court derives its jurisdiction from the Laws (Continuance in Force) Order [of the military regime] and that it has to accept and enforce laws of the de facto Government for the time being.’⁶⁶⁶

There have been several accounts on how the idea of revolutionary legality and law as posited command stemmed from the Supreme Court’s misreading of Kelsen’s descriptive theory of law, as well as its inability to differentiate positivistic theories from juristic sources.⁶⁶⁷ The questions that this study raises, however, are far more evident in relation to Pakistan’s socio-legal context. First, the emphasis on state-law that continually legitimises, and is overridden by, military coups and martial laws creates not a constitutional or legal regime but a rule based on absolute and naked power. Perhaps in this sense Pakistan’s legal system offers the most palpable example of Austin’s command theory, although the critiques offered against Austin’s position make it highly untenable.⁶⁶⁸ Second, in a country where the *basic norm* of legality has altered from colonial law to martial law, from secular law to religious law, from dictatorship to democracy and back again, the ideas about supremacy of the constitution, rule of law, writ of the state cannot hold ground.

⁶⁶⁶ Ibid.

⁶⁶⁷ See, for instance, T. K. K. Iyer, 'Constitutional Law in Pakistan: Kelsen in the Courts' (1973) 21 (4) *The American Journal of Comparative Law* 759; also, Paula Newberg (1995) (n 20).

⁶⁶⁸ H.L.A Hart provided the most notable critique of Austin’s position in the twentieth century. Hart argued that though the categorisation of law as orders backed by threats possessed some semblance to criminal law statutes, this categorisation could not account for the fact that criminal statutes equally apply to those who have enacted the laws. Similarly, he argued that Austin’s categorisation excludes the various forms of law that confer powers and lay out rules of operation for other laws. He asserted that the ‘key to the science of jurisprudence’ did not lie in understanding law as a command backed by a threat, but rather in the union of primary and secondary rules. See, *H. L. A. Hart* (2005) (n 26) 79.

4.5.2. The demand for a Leviathan

This brings us to the most evident and pervasive manifestation of legal positivistic theories that underpin the foundations of Pakistan's dominant legal narrative. The Hobbesian perspective employed to frame the problems of Pakistan's socio-legal architecture is a prime example of the pervasiveness of positivistic thought in the country's political and legal discourse. Political commentators in Pakistan have argued that the problems faced by Pakistan can all be attributed to the 'collapse of the social contract,'⁶⁶⁹ and that 'Hobbes's state of nature – characterised by incessant conflict, chaos and insecurity – seems prescient when it comes to countries suffering from lawlessness including Pakistan.'⁶⁷⁰ It has also been stated that the 'indifference with which loss of life is treated in Pakistan suggests that it was for people like us that Hobbes wrote: "No arts, no letters, no society, and which is worst of all, continual fear, (sic.) and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short."'⁶⁷¹ If the problems are framed with the approach that Pakistan faces 'the same problems that the European society did in the 17th century,'⁶⁷² the solutions also carry the Hobbesian tones – Pakistan then needs a 'strong, incorruptible government which would restore peace and order,'⁶⁷³ the enforcement of the writ of the state, better governance, stronger state, a Leviathan.

⁶⁶⁹ Hajrah Mumtaz (24 January 2010) (n 127).

⁶⁷⁰ Waqas Naeem (07 September 2013) (n 537).

⁶⁷¹ I.A Rehman (26 April 2012) (n 543).

⁶⁷² Dawn, 'Past Present: The fragile state' *Dawn* (Pakistan 03 March 2013) <<http://www.dawn.com/news/789935/past-present-the-fragile-state>> last accessed 27 March 2013.

⁶⁷³ Ibid.

Hobbes's argument for a *Leviathan* is one of the more recognised symbols of the modern state and law.⁶⁷⁴ He argued that an examination of the nature of man leads to an identification of three main causes of conflict – competition, diffidence, and glory.⁶⁷⁵ In the absence of a 'common Power to keep them all in awe,' the nature of man to focus on personal interest and private gain leads to a perpetual conflict, a condition of war 'as if of every man, against every man.'⁶⁷⁶ In this time of conflict, no arts or industry can prevail because of the uncertainty of their gains and what takes hold instead, 'and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.'⁶⁷⁷ It is primarily on these apparent similarities between the Hobbesian state of nature and the conflicts in the Pakistani society that commentators appear compelled to revert to these ideas. However, it is necessary to take this a bit further and consider whether this seeming similarity really does translate into the theoretical arguments that commentators make. Hobbes argues that in this state of conflict, the conceptions of justice or injustice do not hold, and force and fraud become the 'cardinal virtues'.⁶⁷⁸ As, for Hobbes, justice is inextricably linked to law, in the perpetual war 'nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place.

⁶⁷⁴ MacCormick and Sebok trace the roots of legal positivism to the ideas of Jeremy Bentham (1748-1832) and John Austin (1790-1859), who are considered to be 'the founding fathers of English jurisprudence'. Neil MacCormick and Ota Weinberger (1992) (n 642) 182; Anthony J. Sebok (2008) (n 642) 23. Some other accounts take it even further to David Hume (1711-1776) and Thomas Hobbes (1588-1679), with Lon Fuller claiming Hobbes to be the 'father of legal positivism'. Whether Hobbes's construction of the *Leviathan* is a construction under the paradigm of legal positivism or within the opposing approach of natural law, has been the subject of extensive debate. Fuller argues that the construction overlaps the two approaches, with Hobbes founding his idea of 'legal positivism on a natural-law basis.' Lon Luvois Fuller, *The Law in Quest of Itself* (The Lawbook Exchange, New Jersey 1999) 19-20.

⁶⁷⁵ Thomas Hobbes (1909) (n 126) 96.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid. 99.

⁶⁷⁸ Ibid. 96

Where there is no common Power, there is no Law: where no Law, no Injustice.’⁶⁷⁹

However, for Hobbes, even during this state of conflict, the ‘Passions that incline men to Peace’ (the fear of death, a desire for harmonious living, and the hope of achieving this from their own efforts), aided by reason which guides men to identify common grounds of agreement, provide a course for resolution.⁶⁸⁰ The solution lies in men’s curbing of their own liberties and making themselves subject to a higher authority through the creation of an ‘Artificial Man’, ‘that great Leviathan called a Common-Wealth, or State.’⁶⁸¹ For this artificial man, the judicature and executive serve as its ‘artificial joints’, equity as its reason, and law as its will.⁶⁸² The State or the Commonwealth is thus given sovereignty over people through a covenant amongst the people, who cannot enter into a new covenant or challenge the existing one lawfully or without committing injustice. The Commonwealth is responsible for the safety of the people, though it cannot be subject to the laws that it creates itself as Sovereignty cannot be subject to any other power, including that of the judicature to decide on laws and impose punishments. Hobbes also maintains that while subjects may protest against political bodies and assemblies, they cannot protest against the Sovereign, as ‘every Subject is the Author’ of the commands of the Sovereign.⁶⁸³

⁶⁷⁹ Ibid.

⁶⁸⁰ Ibid.

⁶⁸¹ Ibid. 132

⁶⁸² Ibid. 8.

⁶⁸³ Ibid. 175.

The primary critique levelled against the Hobbesian notion of State is that it provides a justification for an absolutist rule, where the subjects do not hold any real power to challenge the structure that governs them. Important as this argument is, I focus on a different set of problems that the Hobbesian approach presents in the Pakistani context. It is argued here that the primary question for classical jurists, Hobbes included, was the 'analysis of the contradictory nature of private property'.⁶⁸⁴ Private property, as distinct from the prevalent post-Marxist analysis of it, correlated to a private right, a revolutionary idea of equality of every 'man' as against the notions of hierarchy or privilege propounded by the natural rights perspectives. Fine asserts that classical jurists were not uncritical of the problems and contradictions of private property. They were aware of the 'dark side' of private property – the issues of individual 'egoism' and 'self-interest'.⁶⁸⁵ The question that these contradictions raised was how to align the private rights and interests of the individual with the interests of the collective sphere for the benefit of the public. Conscious of the paradoxes of private right, and arguing against the constructions of divine order that preceded it, classical jurisprudence focussed on the presence of an earthly authority – the state. The state was to be an institution that would be able to resolve these contradictions, and align the interests of the individual with the interests of the collective. And it is in this light that the Hobbesian proposition can be understood. Fine argues that Hobbes took the idea of private right, along with its associated egoism and self-interest to an extreme, to its breaking point.

⁶⁸⁴ Robert Fine, *Democracy and the Rule of law: Marx's Critique of the Legal Form* (Blackburn Press, New Jersey 2002) 11.

⁶⁸⁵ Ibid. 12.

He portrayed a society where the individual interest became supreme, trying to acquire and consume more through any means available. Consequently, it would reduce the society to a 'war of all against all' and the life of the individual became 'solitary, nasty, poor, brutish, and short'. The *Leviathan* is an entity that emerges from the *pactum societatis* of the individuals (a mutual agreement between the members of the society) willing to submit to a higher authority in order to avoid this state of perpetual fear and war. The *Leviathan* represents the state as the will of the collective; it is vested with absolute authority to give commands, pass laws, and maintain order. The will of the state and the laws passed by it, then, are legitimate and absolute in their own right.

In this backdrop, the thesis contends that the generic reading of Hobbes from which Pakistan's mainstream accounts of a strong state emerge, is deeply flawed. First, the Hobbesian State of Nature which is so readily projected on to the Pakistani situation is, theoretically, radically different from the context that the country presents. For Hobbes, the war of man against man is the preceding stage of law where law, and consequently any conception of justice, does not exist. *Where there is no law, there is no injustice* warrants the idea that whatever acts are committed in the so-termed state of nature are beyond our judgement of justice or injustice, as they are primarily driven by the natural law of self-preservation. It is highly doubtful that the legal and political commentators be able to apply this reading to Pakistan and remove any connotations of right/wrong or just/unjust from the equation, as the demands for a stronger state primarily emerge from the perceived acts of injustice that are perpetrated

against the populace. Second, and more significantly, with the Hobbesian approach, the state of nature precedes the law and the State and that from this warring stage a consensus and a contract emerge from within the people that vests their authority and rights in the Sovereign. The situation of Pakistan, in this sense, is not due to problems of the Hobbesian *state of nature*, but rather as problems emerging from the *nature of the State*. Pakistan presents a post-Leviathan state of affairs where the social contract (if it existed at all) has seemingly fractured, primarily because of the contradictions which the State itself supported and ingrained. Demanding a stronger state without reflecting on the nature of law and the State in the country can only lead to a renewed and perpetual cycle of societal fractures and conflicts.

4.6. Legal Centralism: Moving from legal positivism to other narratives

As has been discussed previously, the major challenge facing the dominant narrative of law in Pakistan, and its positivist underpinnings, is that it is unable to account for the multiple legal orderings and realities of the country. The federal and provincial courts have declared on many occasions that any tribunal that does not have the sanction of the state is to be considered illegal.⁶⁸⁶ Moreover, the assertion on state-law and the constitution ignores the fact that the legal and constitutional frameworks have changed so radically through Pakistan's history, that this undermines the very idea of a foundational legal

⁶⁸⁶ See, Traditional Law and Informal Courts in Chapter 3, above.

norm. The fact that the country has had numerous constitutions is just one facet of the picture; the *Grundnorm* itself has changed from colonial to common law to now a hybrid between Islamic law and secular law, with it being unclear which one takes precedence. Furthermore, the narrative ignores, or hides, the contradictions that emerge from the state itself.⁶⁸⁷ This contradiction challenges the assumption that through an assertion on a stronger state and a Leviathan, the problems of the country could be resolved.

It is argued here that the problems of the dominant narrative emerge from the same difficulty that legal positivism faces in relation to complex post-colonial societies such as Pakistan. This is because an excessive focus on posited and state-authored law has taken the discourse towards 'the ideology of legal centralism',⁶⁸⁸ and further away from other formulations of legality that exist outside it. Legal centralism situates the sovereign state at the centre, in the possession of the sole law-making authority. In this view, it asserts that 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'.⁶⁸⁹ All laws are either derived from the sovereign command, or can ultimately be traced back to the sovereign constitution. Griffiths writes:

In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending from a sovereign command or from the bottom upwards as deriving their validity from

⁶⁸⁷ See, Peace and Provision of Justice, above.

⁶⁸⁸ John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 3.

⁶⁸⁹ Ibid.

ever more general layers of norms until one reaches some ultimate norm(s).⁶⁹⁰

Austin's proposition of law as the command of the sovereign, or Hobbesian assertion of it as the Will of the Leviathan⁶⁹¹ are the most evident examples of the top-down approach to law. However, even other approaches follow the same basic idea. The *Grundnorm* in Kelsen's approach also gives primacy to the state and sovereign constitution, from which all legality emanates. Through this emphasis on the 'time-space of the nation' and the state,⁶⁹² the state-oriented narrative ignores any conception of law that emerges from outside the state-authored versions of law and legality, and on the flipside, it justifies as legal any illegality that emerges from it. This is the main claim I have asserted above: that it is not only difficult for legal understanding based on positivism to grasp the fluidity of a complex admixture of multiple legal and normative orderings, but that it is impossible for it to recognise the state and state-law's own contradictions in the Pakistani context. With this critique as the backdrop, the discussion will now turn to three alternative narratives of law that can be identified in the socio-legal context of Pakistan. These narratives, based on Islamic law, legal pluralism and human rights approach to law, will be elaborated in the following chapters.

⁶⁹⁰ Ibid.

⁶⁹¹ Thomas Hobbes (1909) (n 126) 6.

⁶⁹² Boaventura De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Law in Context, Butterworths LexisNexis, London 2002) 86.

Chapter 5: Local Responses to an ‘Alien Law’: The Islamic Narrative of Law in Pakistan

5.1. Chapter Synopsis

Chapter 3 of the current thesis outlined the multiple legal and normative structures that comprise the prominent facets of the socio-legal tapestry of Pakistan.⁶⁹³ As part of this discussion, it also considered the historical trajectory of Islamic Law in the country, and its interplay with the constitutional and legal frameworks. The previous chapter identified and highlighted the dominant narrative of law that, borrowing insights from the legal positivistic conception of law, appears to be employed to understand and reform the socio-legal architecture of the country. It focusses on the exclusive authority of the state to author and implement legal and constitutional frameworks. It also discussed some of the contradictions that emerge from an unquestioning adherence to both the narrative as well as its underlying theoretical propositions. In the current chapter, I argue that the main critique of state law as it is present in the country emerges from a different perspective, which links the law in its present form to its colonial past. By levelling a critique of alienation or foreignness against the mainstream legal system, this perspective provides the basis of two narratives of law. The first perspective, while arguing that the problem of the legal system lies in its secularism and colonial roots, takes it towards the Islamic narrative, and it forms the subject matter of the current chapter. The other

⁶⁹³ See, Chapter 3 on page 96.

perspective, claiming that the problem of the law lies in its foreignness, focuses the narrative towards traditional and local mechanisms of law, and this will form the basis of discussion in chapter 6.

It will be argued in this chapter that the ascendancy of the Islamic narrative of law in Pakistan leads to three distinct difficulties in relation to the country's socio-legal context. First, although the main critique presented by this narrative against the dominant structures and narrative of law condemns their colonial heritage, the notions of Islamic law as they are currently applied in the country, are by-products of the same colonial legacy. Second, by virtue of it being exclusive and isolationist, the Islamic narrative further marginalises religious minorities, and comes into conflict with both the human rights approaches as well as ideas of citizenship. Finally, the ascendancy of the Islamic narrative creates significant problems in the political domain, which lead to the amplification of the issues of lawlessness and militancy in the country. The chapter will return to a discussion on these contradictions, prior to which I will outline the contours of the Islamic narrative of law as it exists in Pakistan.

5.2. 'A burden on the soul is alien law'

ہندیاں منکر ز قانون فرنگ
درنگیرد سحر و افسون فرنگ
روح را بار گراں آئین غیر
گرچہ آید ز آسمان آئین غیر

[The people of this land defy the law
The West has given to them; they spurn its charms.
A burden on the soul is alien law
A sorrow e'en though it be heaven-sent.]

– Allama Muhammad Iqbal⁶⁹⁴

The critique of the dominant narrative of law in Pakistan offered in the previous chapter is not the only dimension from which the mainstream legal structures are analysed and challenged. The local responses from within the country to this mainstream legal discourse appear to have taken a different path. It is argued in the current examination that there are two main manifestations of the local responses. The first response, which forms the subject matter of the current chapter, emerges from the Islamic conception of law that has been in conflict with Pakistan's inherited legal traditions since independence. The second response argues for the recognition of (or a return to) the traditional and local justice mechanisms. These local responses present the most prominent critique of the mainstream legal ordering and the dominant narrative on law in the country. At the heart of both these responses (Islamic conception as well as pluralism) lies a similar two-fold critique of the legal and constitutional systems. These are the assertions of Alienation and Ethos.

First, the local narratives of law highlight the link between the dominant legal system and its colonial history, and therefore challenge the legal system as an alien imposition. As discussed previously, the legal and juridical institutions of

⁶⁹⁴ S. Quadratullah Fatimi, 'Islamic Universalism and Territorial Nationalism in Iqbal's thought' *Iqbal Review* <<http://www.allamaiqbal.com/publications/journals/review/oct76/index.html>> last accessed 15 September 2013.

Pakistan are inherited from the British colonial state and even the civil and criminal codes are largely borrowed from the pre-independence era.⁶⁹⁵ Political commentators and legal researchers proclaim 'that the foundations upon which our legal institution is constructed are foreign and, therefore, perhaps *inherently alien* to us.'⁶⁹⁶ They argue that the problems that emerge from the imposition of a foreign law in the region are not recent but that the 'induction of legal procedures, the administration of criminal justice and the induction of an alien law'⁶⁹⁷ contributed to the 'destabilising' of Indian society at the time of the British rule in India, as this 'negated the past-established mode of deciding disputes.'⁶⁹⁸ It is further contended from this perspective that the nexus between the dominant legal system and its colonial heritage also results in people seeking recourse through local justice systems – the 'writ [of such tribunals] is more acceptable than the formal law as people consider formal law as an "alien" law.'⁶⁹⁹ Some religious leaders and academics take this argument further to the extent that they even attribute Pakistan's historical conflict between democracy and dictatorship to this foreign imposition of law. They argue that any manifestation of 'arbitrary power... is more a product of colonialization (sic.) and Westernization, and not of Muslim ideals' and that Muslims 'regard the Western secular version of democracy as alien to their

⁶⁹⁵ *Martin Lau* (1994) (n 327) 3.

⁶⁹⁶ Amber Darr, 'Judiciary goes native' *Dawn* (Pakistan 17 June 2013) <<http://www.dawn.com/news/1018721/judiciary-goes-native>> last accessed 20 July 2013 (emphasis added).

⁶⁹⁷ Aftab Nabi, 'The Enigma of the Crime of Cattle Theft in Colonial Sindh, 1843 - 1947' (2011) 3 (1) *Pakistan Journal of Criminology* 35, 47-48.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ Legal Empowerment of the Poor Programme, 'Voices of the Unheard: Legal Empowerment of the Poor in Pakistan' (United Nations Development Programme and Insaf Network Pakistan, Islamabad, Pakistan 2012) 114.

principles, values and traditions.’⁷⁰⁰ Some writers take this to a different extreme and contradictory position to claim that it is not only the problems of Pakistan’s socio-legal system that can be attributed to a foreign law; rather, even that which is worthwhile within the foreign legal systems themselves also owes its existence to Islam.⁷⁰¹ The vice-President of a prominent university in Pakistan stated at a conference in 2013 that the ‘present British law has borrowed many concepts of human rights from the Islamic teachings and traditions,’ although they have been mutilated in the present era and ‘have become a tool to lend support to criminals.’⁷⁰²

Second, and more significantly, once the dominant legal system is denounced as foreign, alien and disconnected from the society, the task that logically emerges from it is that of recovering or discovering what the *native* or *familiar*⁷⁰³ form or foundation of law should be. This is where two differing local responses and their proposed solutions can be identified. The pluralistic perspective, rather than proclaiming a return to a true ethos of Pakistan, appeals to the historical and traditional linkages between people and local justice mechanisms.⁷⁰⁴ As will be elaborated in the next chapter, it argues for the recognition and continuation of alternative justice systems which a great section of the populace continues to

⁷⁰⁰ *Khurshid Ahmad* (2000) (n 102) 19.

⁷⁰¹ Dawn, ‘British law borrowed HR concepts from Islam’ *Dawn* (Islamabad, Pakistan 17 September 2006) <<http://www.dawn.com/news/210715/british-law-borrowed-hr-concepts-from-islam>> last accessed 05 January 2013.

⁷⁰² *Ibid.*

⁷⁰³ I use this term here in the manner proposed by Hans Lindahl, when he suggests that the distinction between familiar/strange legal systems is more fundamental than the domestic/foreign categorisation. Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, Oxford 2013) 42.

⁷⁰⁴ See, Chapter 6, below on page 204.

rely on.⁷⁰⁵ The Islamic narrative on law, on the other hand, claims to represent the societal beliefs and the true ethos of the people of the country.⁷⁰⁶ It argues not just for an alternative form of legal ordering, but primarily for the recognition of the Islamic ideological foundations of law and the constitution, as well as the claimed original basis of the independence of Pakistan.⁷⁰⁷

It should be highlighted here that the category of 'Islamic narrative' (in the singular) used here is radically different from 'Islamic law' in the wider sense, and this is one of the main critiques that the current study presents. Scholars argue that the dynamics of Islam's historical and dialectical evolution meant that 'unity in diversity'⁷⁰⁸ and differences of opinions became cornerstones of Islamic jurisprudence. This is precisely what is exhibited by concepts such as *Ikhtilaf* ('the tolerated diversity of human opinion')⁷⁰⁹ and the presence of multiple schools of thought (*madhahib*) in Islamic jurisprudence. The 'narrative' discussed here, however, as it exists in the context of Pakistan, ignores or hides this diversity and attempts to present Islam as a single set of rules and practises and presents the idea of conformity as one of its key goals. As discussed previously, it is this narrative that is being problematised in the course of this

⁷⁰⁵ For a detailed survey conducted on participant opinions about local mechanisms of justice, see Foqia Sadiq Khan, 'Quest for Justice: Judicial System in Pakistan' (The Network Publications, Islamabad, Pakistan 2004).

⁷⁰⁶ The viewpoint of the Islamic religious groups was discussed above on the topic of Constituent Assembly debates; see Chapter 2.

⁷⁰⁷ See, Section 1, Chapter 2.

⁷⁰⁸ Shaheen Sardar Ali, 'Cyberspace as Emerging Muslim Discursive Space? Online Fatawa on Women and Gender relations and its impact on Muslim Family Law Norms' (2010) 24(3) *International Journal of Law, Policy and Family* 338, 340.

⁷⁰⁹ Werner Menski, 'Law as a Kite: Managing Legal Pluralism in the context of Islamic Finance' in Valentino Cattelan (ed.) *Islamic Finance in Europe* (Edward Elgar, Cheltenham 2013) 74.

study. The discussion will return to identify the roots of this present manifestation in Chapter 8.

The turn to an Islamic narrative, and its struggle with the inherited constitutional and common law traditions, commenced right after Pakistan's independence, and has been gaining momentum ever since. Martin Lau, in his illuminating work on *The Role of Islam in the Legal System of Pakistan*, discusses an intriguing case brought before a Sessions Court in Pakistan in 1950.⁷¹⁰ The case concerned a criminal matter in which six people were accused of assaulting two landowners, an allegation disputed by the defence. Though the details of the case are not available in the Law Reports, it is recorded that the Magistrate and the advocates for the prosecution and the defence settled on an unusual method to reach a decision.⁷¹¹ It was decided that the accused would take an oath of innocence before the crowd gathered outside the Court, and the prosecution agreed that such an oath would be sufficient to prove the innocence of the accused.⁷¹² Two of the accused, instead of swearing an oath, pleaded guilty as 'they feared the wrath of God' for a false denial of their guilt.⁷¹³ The statement given by the Magistrate to justify this unusual approach adopted for the trial deserves to be quoted at length:

I am quite alive to the fact that the procedure adopted by me is wholly unwarranted. I however feel that it is high time we ceased to sit merely as courts of law. For the sake of equity and justice we should have no hesitation in brushing aside the formal restrictions imposed by the

⁷¹⁰ Martin Lau (2006) (n 97) 10-11.

⁷¹¹ Ibid. 10-11.

⁷¹² Ibid. 10.

⁷¹³ Ibid.

British-made law. *The God law* which we Pakistanis must and shall eventually follow demands vehemently that justice and equity should be our sole and only aim, and in achieving this God-made law knows no procedural restrictions and formalities.⁷¹⁴

This adoption of the concept of ‘God-made law’ in place of established common law procedures to reach a conclusion was rejected by the superior courts.⁷¹⁵ The Chief Justice of the Lahore High Court in the Criminal Revision Division case, disapproved and reprimanded the ‘Magistrate’s reliance on a religious oath’ and ordered a re-trial.⁷¹⁶ However, the legal discourse has changed significantly in the following decades, as the Islamic narrative has gained ascendancy. In a 2012 judgement, the Supreme Court reiterated the approach it has adopted in a number of other cases ‘that the exercise of [any governmental] authority shall be informed and circumscribed by the principles of Islam.’⁷¹⁷ This shift in the language of the courts has occurred in conjunction with the transformation of the wider societal perceptions in the country. In 2012, the Pew Global Attitudes Survey of six Muslim majority countries reported that 82% respondents in Pakistan expressed the opinion that laws in the country should ‘strictly’ follow Islamic sources and injunctions.⁷¹⁸ Significantly, none of the respondents in the particular study supported the view that laws should not follow the Islamic code.⁷¹⁹ This is in contrast to the secular and anti-

⁷¹⁴ Ibid.

⁷¹⁵ Ibid.

⁷¹⁶ The Chief Justice of the Lahore High Court stated that the Magistrate ‘is a complete misfit in the judicial system and a menace to the administration of criminal justice. It will be dangerous in the extreme to entrust him with any criminal case or trial under the law in force.’ *ibid.* 10.

⁷¹⁷ *Workers’ Party Pakistan case* (n 587).

⁷¹⁸ *Pew Research Center* (2012) (n 535) 18.

⁷¹⁹ Ibid.

theocratic⁷²⁰ notion of law and the state espoused by Jinnah at the time of independence. Prior to elaborating further on such manifestations of the Islamic narrative on law within the wider public discourse, there is a need to briefly consider its link to natural law conceptions.

5.3. A note on Islamic Narrative and 'Natural Justice'

It is important to mention here that this study does not entail a detailed analysis of Islamic theology, of natural law theories, or the link between the two paradigms. Notwithstanding their importance, the expansive nature of these spheres of discussion⁷²¹ takes them beyond the scope of the current enquiry.⁷²² Nevertheless, with religion considered as 'a perennial manifestation of natural law'⁷²³ especially in the case of Pakistan's socio-legal realities,⁷²⁴ it is important to at least acknowledge the link between Islamic narrative on law in Pakistan and natural law arguments.

⁷²⁰ G. W. Choudhury (1955) (n 137) 590.

⁷²¹ For an insightful discussion on Islamic natural law traditions, see Anver M. Emon, *Islamic Natural Law Theories* (Oxford University Press, Oxford 2010). Emon argues that rather than approaching Islamic law through the natural law categories of Roman and Christian traditions, the Islamic jurisprudence should be considered through its own terminologies. Ibid. 190-191. He uses the distinction of Soft Natural Law and Hard Natural Law to engage with the propositions offered by classical jurists of Islam, with the two positions marking different positions in terms of the relation between Islamic Scriptures and the contingency of Nature. Ibid. 124. For an account of natural law jurisprudence through history, see Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge University Press, Cambridge 1996).

⁷²² Emon argues that the primary natural law debate in Islamic jurisprudence was between the two rival schools of theology, Mu'tazilites and Ash'arites. For an introduction to this theological and jurisprudential disputes, see Anver M. Emon, 'Natural Law and Natural Rights in Islamic Law' (2004) 20 (2) *Journal of Law and Religion* 351.

⁷²³ Werner Menski (2010) (n 96) 46.

⁷²⁴ Ibid. 51-52.

In terms of legal-theoretical debates, the assertions of Islamic narrative (and of Islamic law, to an even greater extent) bear a striking resemblance to the traditional natural law approaches. The propositions that emerged from the traditional natural law perspective had been predominantly occupied with reconciling the notions of morality with positive law, of sovereign assertion with the 'ideal'⁷²⁵ or 'divine'.⁷²⁶ By appealing to an idea of natural justice that lay beyond its manifestation in the sovereign assertion, it was argued that this ideal justice could be revealed (through scriptures, for instance)⁷²⁷ and which could be reached through the use of human reason.⁷²⁸ With the diversity of theoretical positions linked to this approach, gathered over several centuries, one of the threads that run through these perspectives is the emphasis on the inadequacy of posited law.⁷²⁹ Law, and particularly man-made law in the context of theological natural law positions, is seen as distant to the ideas of justice; there is a gap between the actuality of law and notions of the ideal that either lay behind the law, or stand to challenge it.⁷³⁰ This perpetual void between sovereign assertion and justice creates opportunities for absolutism and injustice. This is the conceptual background where the most common phrase

⁷²⁵ Pound stated that there were two facets in which the foundation of natural law lied: One was revelation, which linked it to theological debates; while the other was discovery through reason. Roscoe Pound, 'Revival of Natural Law' (1942) 17 (4) *Notre Dame Lawyer* 287, 290.

⁷²⁶ Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, Connecticut 1954) 27; see also, Brian Bix, *Jurisprudence: Theory and Context* (Sweet and Maxwell, London 2009) 68.

⁷²⁷ *Roscoe Pound* (1942) (n 725) 290.

⁷²⁸ *Knud Haakonssen* (1996) (n 721) 4.

⁷²⁹ Although John Finnis and the recent natural law theorists take a multitude of different approaches within natural law jurisprudence. For Finnis's re-articulation of the terminology of morality, through a proposition of 'basic values', see John Finnis, *Natural Law and Natural Rights* (2nd edn Oxford University Press, New York 2011).

⁷³⁰ For a discussion of the ideal notions of justice and actual manifestations of law, see *Raza Saeed* (2013) (n 246). See also, Neil McCormick, 'The Ideal and the Actual of Law and Society' in John Tasioulas (ed) *Law, Values and Social Practices* (Ashgate, London 1997); *Jayan Nayar* (2013) (n 94).

linked with natural justice emerges from: *lex iniusta non est lex* ('an unjust law is not law'), which is generally attributed to Thomas Aquinas.⁷³¹ Norman Kertzman, through an examination of Aquinas's writings on natural law, argues against the incorrect attribution of this statement to Aquinas and presents a more nuanced picture.⁷³² He argues that Aquinas's real assertion was that a 'tyrannical law, since it is not in accord with reason' is 'not unconditionally... a law but is, rather, a *perversion of law*... it has the nature of law only in the sense that it is a dictate of someone who presides over subjects.'⁷³³ I will return to this point presently.

The preceding chapter saw a discussion on how the superior courts in Pakistan have expressly imported positivist legal-theoretical ideas to justify their reasoning and decisions in particular cases.⁷³⁴ It is intriguing to observe that there are some glimpses of natural law arguments within the judgements of the courts. In the Asma Jillani case, while retracting its previous reading of Kelsen as incorrect, the Supreme Court expressly deliberated on natural law jurisprudence and noted that positivist legal-theoretical arguments, particularly the one put forward by Kelsen, were '[d]iametrically opposed to the theory of natural law'.⁷³⁵ Moreover, although a number of judgements of the superior

⁷³¹ Brian Bix (2009) (n 725) 70.

⁷³² Norman Kertzman, 'Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' (1988) 33 (1) *American Journal of Jurisprudence* 99.

⁷³³ Ibid. 114-115.

⁷³⁴ Tracing the limits of the Dominant Legal Narrative in Pakistan on page 144.

⁷³⁵ Asma Jillani case (n 661).

courts⁷³⁶ have specifically discussed the concept of 'natural justice' in the sense of procedural fairness,⁷³⁷ the same terminology has also been employed to convey the conceptions of natural law. In *Haji Nizam Khan Case*, the Lahore High Court declared that

All expressions like natural, universal, rational, humane, moral, substantial, fundamental 'justice'; justice; natural laws; laws of God; natural or human jurisprudence; general principles of humanity; general law; equity; natural equity; fairplay; conscience; good conscience; and propriety/prudence shall have meanings and shades as available in Islamic philosophy and jurisprudence.⁷³⁸

It then considered the generic idea of natural law, and stated that 'the foreign and for that matter western ideas in this behalf would be relevant for beneficial purpose of comparison (sic.)... [but if] such an idea is in conflict with Islam it shall be rejected.'⁷³⁹ The Federal Shariat Court has also noted that the code of conduct and duties of the judges are derived from religious injunctions, 'since these rules are based on natural and eternal justice and emanate from the Most High, they are not susceptible of any change with the change of circumstances or time....'⁷⁴⁰

⁷³⁶ See, for instance, *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 CS 879); also, *Supreme Court Bar Association v. the Federation of Pakistan and others* (PLD 2002 SC 939).

⁷³⁷ Although semantically similar, the terms 'natural law' and 'natural justice' are different concepts, with the latter referring to procedural fairness. It is said to include two basic concepts – *audi alteram partem* ('hear the other side') and *nemo debet esse iudex in propria sua causa or nemo iudex in re* ('no man should be judge of his own cause'). Frederick F. Schauer, 'English Natural Justice and American Due Process: An Analytical Comparison' (1976) 18 *William and Mary Law Review* 47, 48. These two concepts were considered at length by the Supreme Court in the *Sindh High Court Bar Association* case (n 736).

⁷³⁸ *Haji Nizam Khan v. Additional District Judge, Lyallpur, and others* (1976 PLD LHC 930).

⁷³⁹ *Ibid.*

⁷⁴⁰ Federal Shariat Court, 'FSC Annual Report 2010' (Islamabad, Pakistan 2010) 1.

Similarly, in the famous National Reconciliation Ordinance judgement in 2009, one Justice of the Supreme Court delved into the broader issue of human existence and argued that the 'body of human being otherwise consists of two parts. Body along with the elements and "Rooh – spirit".'⁷⁴¹ In a turn that resonates with the natural law jurisprudence, he then applied this duality to expound his reading of the Constitution, in which the Preamble (Objectives Resolution) acts as the soul for the Constitution, without which the whole charter will be lifeless.⁷⁴² In the same case, one of the appointed Amici Curiae presented a lengthy treatise on natural law, which the Court included at length in its judgement, and it warrants inclusion

...there is no definition of man; even the Allah Almighty has said that the creation, which is being sent to this globe, is flawed, and is a blend of two great positive and negative reservoirs of instincts; one instinct is goodness, the good, the tranquillity, peace; and the other is greed, lust, bloodshed etc.; so the man is beautiful combination of both. ... [A] philosopher has rightly said that "law is necessity of the man" because he can't discipline himself; he can't undertake his own examination; man is such a creature that he needs three instincts, i.e. instinct of preservation, instinct of peace and the instinct of law, which compel him to travel on the path of law. ... [T]he morality of law has two aspects to be assumed as *sine qua non*; one is internal voice of a human being and the other is external voice i.e. conduct of a human being; these two can be called as a soul, conscience, discipline, etc. of human being; as the same are contemporaneous not simultaneous; naturally embodied in the human being, who is to be tested on these touchstones.⁷⁴³

Albeit, emerging from within the Islamic narrative, it should be said that such remarkable treatise emerging from the Supreme Court's case law are not too distinct from the arguments that have come to be associated with the Western

⁷⁴¹ *Dr. Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265).

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

natural law jurisprudence. However, notwithstanding the significance of such debates between sovereign assertion and conceptions of immanent justice in western jurisprudence as well as the jurisprudence of Pakistan's courts, it should be noted that this subject matter often has devastating consequences for the socio-legal realities of the country. The same idea of a higher and divine law that supersedes any state or man-made law, discussed above in relation to Thomas Aquinas's ideas, manifests itself in the mainstream religious (mainly Islamic) morality in Pakistan and is employed by those who demand the imposition of Shariah in the country.⁷⁴⁴ In the struggle that we witness in Pakistan today between Islamic narrative and state-oriented law (as well as human rights discourse), the rhetoric of natural law and positive law is eerily evident.

The assassination of the sitting Governor of the Punjab province, Salman Taseer, in January 2011 provides us with an illustration of this. In 2010, Taseer had expressed the need for a public review of the controversial Blasphemy Laws of Pakistan,⁷⁴⁵ in relation to the case of Aasiya Bibi who was charged with an alleged desecration of the Quran.⁷⁴⁶ Taseer was killed a few days later by his own bodyguard, who claimed that his duty to Islam and the sanctity of the Prophet (PBUH) was greater than any law of the state. Although convicted by

⁷⁴⁴ See, for instance, the rhetoric of Red Mosque's students in *Farida Shaheed* (2010) (n 288) 862-863.

⁷⁴⁵ See, Islam and Penal Laws in Chapter 3, above. For an overview of the issues surrounding Blasphemy Laws, see *Osama Siddique and Zahra Hayat* (2008) (n 416); *Raza Saeed* (2013) (n 246).

⁷⁴⁶ Human Rights Commission of Pakistan, *State of Human Rights in 2012* (HRCP, Lahore, Pakistan 2013) 112.

the courts, there was an outpouring of support for Qadri.⁷⁴⁷ In an intriguing turn of events, while Qadri was celebrated as a soldier of Islam for defying mortal law to preserve his belief, the judge who sentenced him was forced to flee the country after receiving threats against his life.⁷⁴⁸ A few weeks later, this incident was followed by the assassination of Shahbaz Bhatti, a minority rights campaigner and a Minister of the Federal Cabinet, on the same issue.⁷⁴⁹ The supporters of the Blasphemy Law use the notions of a higher duty to argue their cause and incite vigilante justice.

A troubling fact is that the instances mentioned above are not isolated incidents. In a case reported in December 2012 in the province of Sindh, a mob set upon a man said to be intellectually disabled, beat him to death and then burned his body.⁷⁵⁰ The allegation levelled against him was that he had desecrated the Quran. And the fact that the victim was taken from police custody where he was held under that charge,⁷⁵¹ is testament to the logic that is at play in such instances – that in matters related to Islam, the executive authority of the state and the limits of posited law can be transcended. There have been numerous other such instances of religion-inspired mob violence reported from around the country in recent years.⁷⁵² This attitude towards law and religion was even

⁷⁴⁷ Robert D. Lamb and Sadika Hameed (2012) (n 91) 50.

⁷⁴⁸ C. Christine Fair, 'Pakistan in 2011: Ten Years of the "War on Terror"' (2012) 52 (1) *Asian Survey* 100, 108-109.

⁷⁴⁹ *Human Rights Commission of Pakistan* (2013) (n 78) 112.

⁷⁵⁰ Al Jazeera, 'Pakistan mob burns man for 'blasphemy'' (Al Jazeera 22 December 2012) <<http://m.aljazeera.com/story/20121222114547753697>> last accessed 7 September 2013.

⁷⁵¹ Ibid.

⁷⁵² Dawn, 'Timeline: Accused under the Blasphemy Law' *Dawn* (18 August 2013) <<http://www.dawn.com/news/750512/timeline-accused-under-the-blasphemy-law>> last accessed 28 August 2013.

propounded by a sitting judge of the Lahore High Court, who had claimed in 1997 that those accused of blasphemy should be killed by the public before their cases could reach the courts.⁷⁵³ Such incidents are evidence of the increasing strength of the Islamic narrative in the society, which is then also reflected in legal discourse. The section below will provide further evidence of the Islamic narrative on law, highlighting some further problems that emerge from it.

5.4. An Islamic *Grundnorm*

The Islamic narrative on law has been locked in a struggle for dominance with the State's inherited legal and constitution frameworks since the time of Pakistan's independence. The main assertion that can be discerned from this narrative harks back to the nature of the pre-independence struggle. By claiming that Pakistan was created in the name of Islam,⁷⁵⁴ it assumes that any problems that beset the country's socio-legal situation are a consequence of un-Islamic practises and laws and, consequently, an Islamisation of the laws will necessarily lead to their resolution.⁷⁵⁵

⁷⁵³ Although this statement was later retracted by the Supreme Court, it was not personally retracted by the judge in question. Iftikhar H. Malik, 'Religious Minorities in Pakistan' (Minority Rights Group International, London 2002) 24.

⁷⁵⁴ *Ilhan Niaz* (2010) (n 134) 64-68.

⁷⁵⁵ See, for instance, the argument that even the struggle between military authoritarianism and political governments is because of western values, *Khurshid Ahmad* (2000) (n 102).

As discussed in Chapter 2, while Jinnah claimed that the country would be based on democratic ideals and that religion is ‘not the business of the state’,⁷⁵⁶ Liaquat Ali Khan, Pakistan’s first Prime Minister, stated before the Constituent Assembly in 1949 that

the State is not to play the part of a neutral observer, wherein the Muslims may be merely free to profess and practise their religion, because such an attitude on the part of the State would be the very negation of the ideals which promoted the demand of Pakistan, and it is these ideals which should be the cornerstone of the State which we want to build. The State will create such conditions as are conducive to the building up of a truly Islamic society, which means that the State will have to play a positive part in this effort.⁷⁵⁷

This uncertainty and oscillation between religious and secular ideals was also manifested in the constitutional developments of the country.⁷⁵⁸ While the 1956 Constitution declared Pakistan to be an Islamic Republic,⁷⁵⁹ the 1962 Constitution amended the official title to Republic of Pakistan, omitting any express connotations of the State’s linkages with Islam.⁷⁶⁰ In one of its judgements of that time, the Supreme Court declared that Islamic law could not be used to override or strike down any legal or constitutional provision that might be deemed repugnant to it.⁷⁶¹ This was further endorsed in 1973 by the Chief Justice of the Supreme Court who categorically stated that the Objectives Resolution of 1949, despite being the Preamble of the Constitution, could not ‘control the Constitution’ and that it served the ‘same purpose as any other

⁷⁵⁶ *Muhammad Ali Jinnah* (n 218).

⁷⁵⁷ *Tanzilur-Rahman* (1996) (n 136) 6-7.

⁷⁵⁸ See Chapter 2 on page 82.

⁷⁵⁹ The Constitution of the Islamic Republic of Pakistan, 1956.

⁷⁶⁰ The Constitution of the Islamic Republic of Pakistan, 1962, promulgated during the military regime of General Ayub Khan.

⁷⁶¹ *Tanbir Ahmad Siddiky v. Province of East Pakistan and others* (PLD 1968 SC 185).

preamble serves... [that] it may be looked at to ascertain the true intent [of the legislators]’.⁷⁶² In this judgement, the Court argued that the ‘*Grundnorm*’ of the country – that is ‘the spirit and the fundamental norms of the constitutional concept of Pakistan’ – lies beyond the Objectives Resolution or even the abstract religious conceptions of law.⁷⁶³

The ascendancy of the Islamic narrative on law coupled with the political needs of the time, however, radically changed this perspective in the following years. The 1973 Constitution reverted the official title of the State back to Islamic Republic of Pakistan.⁷⁶⁴ It also proclaimed, for the first time in the country’s history, Islam as the ‘State Religion’.⁷⁶⁵ During Zia’s Islamisation campaign in the 1980s, the Objectives Resolution was made a substantive and justiciable part of the Constitution.⁷⁶⁶ This changed the claimed *spirit of constitutional concepts*, and a senior Judge of the Supreme Court wrote in 1987 that ‘henceforth any measure which conflicted with “the ideology, aim and the final object of the country and the nation” could be questioned.’⁷⁶⁷ Another Justice of the Supreme Court remarked that the Objectives Resolution should be considered as a ‘Supra Constitutional document,’⁷⁶⁸ in a radical contrast to its previous approach. Similarly, in the *Asma Jillani case*, the Supreme Court declared that any law in conflict with the Resolution or Islamic injunctions

⁷⁶² State vs. Zia-ur-Rahman (PLD 1973 S.C. 49)

⁷⁶³ Ibid.

⁷⁶⁴ Article 1 of the Constitution of the Islamic Republic of Pakistan, 1973.

⁷⁶⁵ Ibid. Article 2.

⁷⁶⁶ Ibid. By virtue of Article 2A.

⁷⁶⁷ Justice Nasim Hasan Shah, “The Objectives Resolution: its impact on the administration of justice in Pakistan” (PLD 1987 S.C. Journal 186-187) quoted in *Tanzilur-Rahman* (1996) (n 136) 76.

⁷⁶⁸ Zia-ur-Rahman vs. State (PLD 1986 Lah.428)

could be struck down.⁷⁶⁹ The Constitution of Pakistan currently in force expressly mentions that the State is duty bound to ensure an 'Islamic way of life'⁷⁷⁰ and to bring laws in conformity with Islamic Injunctions.⁷⁷¹ Even the Oaths listed in the Constitution for Presidential and Prime Ministerial offices include provisions to ensure that the office holders will 'strive to preserve the Islamic Ideology which is the basis for the creation of Pakistan.'⁷⁷²

The ascendancy of the Islamic discourse and, as a consequence, the Islamisation of the legal and constitutional framework of the country during 1980s have already been extensively discussed in Chapter 3,⁷⁷³ and the prominence of this narrative has been visible since then. For instance, in 1990 the Chief Justice (Acting) of Sindh High Court stated in a judgement that after the constitutional measures adopted during General Zia's regime, 'the decisions of the Courts are to be based on the injunctions of Islamic Law [which] has become the rule of decision in particularly all matters (sic).'⁷⁷⁴ Through his extensive study of post-independence case law in Pakistan, Lau argues that the judiciary has played a crucial role in the Islamisation of the laws in Pakistan, primarily to increase the sphere of its own authority.⁷⁷⁵ However, as the preceding discussion has shown, the ascendancy of the Islamic narrative on law in

⁷⁶⁹ Asma Jilani case (n 661).

⁷⁷⁰ Article 31 of the 1973 Constitution.

⁷⁷¹ Ibid. Article 227.

⁷⁷² Ibid. Annexes for Article 42 and 43.

⁷⁷³ See, *On Religion and State Law: A brief history of Islamisation of laws, 1973-1999* on page 73.

⁷⁷⁴ *Farhat Jaleel and others v. Province of Sindh and others* (PLD 1990 Karachi 342).

⁷⁷⁵ *Martin Lau* (2006) (n 97).

Pakistan is not limited to the judiciary, but has increased concurrently with the rise of the Islamic discourse within the society.

A 2012 Pew survey of perceptions in Muslim majority countries, reported that 62% of the respondents in Pakistan considered that Islam played a large role in the overall political life of the country (this trend was up from 46% only two years ago).⁷⁷⁶ Scholars of Pakistan's history of Islamisation have been examining the intensification of Islamic narrative in relation to different facets of the state and society.⁷⁷⁷ Similarly, educationalists in the country recognise and have campaigned against the Islamisation of education for several decades now, and argue that the 'text books in schools and universities of Pakistan teach [the] country [about] an ideological state created for Islam.'⁷⁷⁸ In this backdrop, the Islamic narrative on law holds such prominence in the socio-political and legal discourse that it has effectively come to be recognised as the ideological foundation of legal and constitutional frameworks.⁷⁷⁹

5.5. Pakistan's socio-legal context and the challenges for Islamic Narrative

The preceding discussion has briefly highlighted the engagement between traditional natural law approaches and some aspects of the Islamic narrative on

⁷⁷⁶ *Pew Research Center* (2012) (n 535).

⁷⁷⁷ See, for instance, on the link between Islam and military in Pakistan, *Aasim Sajjad Akhtar, Asha Amirali and Muhammad Ali Raza* (2006) (n 237).

⁷⁷⁸ Muhammad Imtiaz Zafar, 'Can Pakistan be a secular state?' (2013) 28 (1) *South Asian Studies* 165, 165.

⁷⁷⁹ See, *An Islamic Grundnorm* on page 195.

law as it exists in Pakistan.⁷⁸⁰ In an argument that holds similarity with traditional natural law jurisprudence, the Islamic narrative looks to sources of legality other than law of the state, granting sovereignty to a Supreme Being,⁷⁸¹ linking the source of law to divine revelations.⁷⁸² It has been argued that this insistence of differentiating between sovereign assertion and transcendent morality that, in the case of Pakistan is ultimately linked to a particular interpretation of Islamic injunctions, results in difficulties for religious minorities. The issues surrounding the country's Blasphemy laws,⁷⁸³ and the instances of mob justice that this generates, is a key example in this regard.

However, even if we divest Islamic narrative on law from the sphere of natural law jurisprudence and consider it at its own merit, it brings to the fore several challenges for this perspective. One of the major issues for the Islamic narrative on law is that Islamic law, in its current form in Pakistan, cannot disregard its roots in the same colonial history and logic that it denounces.⁷⁸⁴ This undermines the critique of alienation that this perspective levels against the dominant legal system and on which its foundational claim is based. It will be elaborated in Chapter 8 that the British colonial state radically transformed the nature of religious laws that existed in the region, and the appropriation of these normativities led to their 'fossilisation' and ossification.⁷⁸⁵ The problems

⁷⁸⁰ See, A note on Islamic Narrative and 'Natural Justice' on page 188.

⁷⁸¹ Preamble of the Constitution of the Islamic Republic of Pakistan, 1973.

⁷⁸² See, A note on Islamic Narrative and 'Natural Justice' on page 188.

⁷⁸³ *Osama Siddique and Zahra Hayat* (2008) (n 416).

⁷⁸⁴ This will be elaborated further in Chapter 8 on page 251.

⁷⁸⁵ Shaheen Sardar Ali, 'Overlapping Discursive Terrains of Culture, Law and Women's Rights: An Exploratory Study on Legal Pluralism at Play in Pakistan' in Jennifer Bennett (ed) *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007) 78.

of translation and an orientalist approach played a major role in the institution and modification of Islamic law and its associated perspectives in the region.⁷⁸⁶ This narrative is dismissive of any other normative system that, according to this perspective, does not represent the true practises and principles of Islam. Therefore, the central critique on which the Islamic narrative is based undermines and contradicts its own assertions in the context of Pakistan.

In its fossilised form, the Islamic narrative betrays the same tendencies of centralism and alienation that it denounces in the mainstream and ‘secular’ legal traditions,⁷⁸⁷ which marks a second difficulty that emerges from this perspective. The isolationist and exclusive notion of the Islamic narrative on law necessarily links the legal and constitutional frameworks of the country with a particular ideology.⁷⁸⁸ Through its attempts to capture the state for the enforcement of Shariah, the Islamic narrative necessarily challenges the wider concepts of citizenship and equality. As discussed in Chapter 3, the imposition of a particular ideology on the legal and constitutional system has resulted in the ‘legal and constitutional’⁷⁸⁹ marginalisation of the *Ahmadi* community in Pakistan. The adherents of this sect are *constitutionally* barred from using slogans, images and practises of Muslims⁷⁹⁰ and someone who even ‘poses himself as Muslim’ is liable for criminal punishment.⁷⁹¹ The theological and religious debate about the beliefs of the *Ahmadi* community is not something

⁷⁸⁶ Michael Anderson (1993) (n 481) 214.

⁷⁸⁷ Shaheen Sardar Ali (2007) (n 785) 78.

⁷⁸⁸ As discussed in Chapter 3 on page 103, on page 107, and on page 112 and the preceding discussion in the current chapter.

⁷⁸⁹ See page 112.

⁷⁹⁰ Article 298 of the Pakistan Penal Code (Act XLV) of 1860.

⁷⁹¹ Ibid. Article 298(C).

that is being debated here. While the Constitution asserts itself to be against prejudice based on religion, colour, caste, creed or gender, the Islamic narrative radically undermines the state's relationship with its citizens.

Finally, the Islamic law narrative and its alliance with the state continues to be problematic in terms of the politics of the country. Its association with the armed forces of the country has resulted in political instability,⁷⁹² while its manifestation as militancy has led to increased violence and lawlessness in the country.⁷⁹³ The hard-lined religious political parties and militant organisations base their struggles on the assertion of Islamisation of the state law. They call for a complete dismantlement of the state in its current form, and abolition of all forms of democratic governance which is considered to be un-Islamic. The cases of Red Mosque⁷⁹⁴ and the issues surrounding the establishment of a parallel legal system through Sharia Nizam-e-Adl Ordinance⁷⁹⁵ are testament to this militant and violent assertion of the Islamic narrative. Despite the problems associated with this, however, its growth is both visible and troubling for the future of the country.

5.6. Concluding remarks

The preceding discussion traced the contours of Islamic narrative on law in Pakistan. It considered its manifestation as natural law and, more importantly,

⁷⁹² See, Chapter 2, On Religion and State Law: A brief history of Islamisation of laws, 1973-1999 on page 73.

⁷⁹³ See, page 138.

⁷⁹⁴ See, page 87.

⁷⁹⁵ See, Islamic law, Judicature and parallel mechanisms of Justice on page 107.

its link to the constitutional and legal frameworks of the country. In the past few decades, the judiciary has increasingly embedded itself in the Islamic discourse and considers it as the ideological foundation of the overall legal system. However, the rise of the Islamic narrative is not limited to the judicial sphere, and is reflected in the wider political and social discourse as well. It has also been discussed in the chapter that the Islamic narrative and its assertion on a particular ideology gives way to militancy, violence and the marginalisation of minorities in the country.

Furthermore, one significant argument presented above is that this perspective ignores its roots in the colonial history of the region, and betrays the same colonial logic that is portrayed by the legal system of the state. It is dismissive of all other normative ideas that it perceives as unrepresentative of the principles of Islam. This argument will be further developed in Chapter 8. In the following chapter, the discussion will now turn to the other narrative that emerges from a critique of alienation presented against the dominant legal system. It takes the discussion towards pluralistic approach to law, and emphasises the role of the traditional normative systems in the country.

Chapter 6: Local Responses to an Alien Law: Legal Pluralism and Popular Legality

6.1. Chapter Synopsis

The previous two chapters outlined the two prominent narratives of law that exist in Pakistan. Chapter 4 discussed the dominant narrative on law in Pakistan that focusses exclusively on state authored law as its subject matter,⁷⁹⁶ while the preceding chapter highlighted the Islamic narrative of law that emanates from a critique of alienation levelled against the dominant perspective.⁷⁹⁷ It was argued that the critique of foreign or alien nature of dominant law leads towards assertions by local narratives that claim to represent the traditions and beliefs of the people of the country, with the Islamic narrative emerging as its primary consequence.⁷⁹⁸ The current chapter discusses the second local narrative that emerges from the critique of alien law, which shifts the focus towards indigenous and local forms of legal and normative orderings. This *Narrative of Legal Pluralism* is frequently challenged by state law through declaration of illegality,⁷⁹⁹ and the human rights discourse further supports these declarations. However, despite denunciations by the dominant legal system, the importance of a pluralistic approach to Pakistan's socio-legal terrain lies in the fact that the local mechanisms of justice are followed by a large

⁷⁹⁶ See, Tracing the limits of the Dominant Legal Narrative in Pakistan on page 144.

⁷⁹⁷ See, Local Responses to an 'Alien Law': The Islamic Narrative of Law in Pakistan on page 180.

⁷⁹⁸ See, 'A burden on the soul is alien law' on page 181.

⁷⁹⁹ See, Traditional Law and Informal Courts on page 115.

section of the country's populace.⁸⁰⁰ Their appeal lies not just in their traditional and historical linkages with the region (as discussed in Chapter 3), but also in their role as alternative forums to state courts.⁸⁰¹

The current chapter first presents the narrative that exists in Pakistan around the local legal and normative systems, and then discusses some key theoretical perspectives linked with this approach. It conducts a dialogue between the socio-legal tapestry of Pakistan and some leading perspectives of legal pluralism. It will also introduce the idea of 'coloniality', which will be expanded on in Chapter 8 to offer a more nuanced narrative of law in Pakistan. The last section will conclude the chapter by giving a call for caution against an issue of romanticism and idealisation⁸⁰² that runs through both the academic as well as the general discourse on plurality. This notion assumes an inherent beneficial nature of pluralistic systems, mainly because of their historical and traditional linkages,⁸⁰³ and because of their existence outside the state-oriented legal frameworks. However, as the case of Pakistan suggests, the local normative orderings may be just as repressive and reactionary,⁸⁰⁴ if not more, than any centralised system they stand in contrast to. Another argument that flows from this is that in post-colonial societies such as Pakistan, centuries of colonial rule have significantly tainted, (re)constructed and co-opted even those systems that

⁸⁰⁰ *Nasira Iqbal* (2007) (n 99)106.

⁸⁰¹ *Muhammad Azam Chaudhary* (1999) (n 99) 71, 77.

⁸⁰² *Boaventura De Sousa Santos* (2002) (n 692) 91.

⁸⁰³ See, *Traditional Law and Informal Courts* on page 115.

⁸⁰⁴ *Boaventura De Sousa Santos* (2002) (n 692) 91.

lie outside the formal legal structures.⁸⁰⁵ Statements of a true historical legal legacy, then, can serve rhetorical purposes, but these assertions do not hold true in substance.

6.2. 'The Law of the People'

A critique of the foreign nature of mainstream legal system in Pakistan centres on two arguments. First, emphasising the colonial history of the dominant legal and juridical systems, this notion underscores the alien nature of State laws and the Constitution in relation to the legal traditions of the region.⁸⁰⁶ Second, thus disputing the legitimacy of the inherited and dominant legal system, this perspective shifts focus towards the identification and assertion of representative, native and 'familiar'⁸⁰⁷ legal ordering. The Islamic narrative of law employs this critique to take the discourse towards a conception of law based on Islamic injunctions which, it claims, represent the beliefs of the members of the society as well as the true ethos behind the creation of Pakistan. Emanating from the same critique of the dominant legal framework and narrative, the *Narrative of Legal Pluralism* adopts a different approach and brings to the fore the prevalence and significance of the multiple normative and legal orders that exist in Pakistan.

⁸⁰⁵ Shaheen Sardar Ali and Javaid Rehman (2001) (n 115) 51-55.

⁸⁰⁶ See, on page 181.

⁸⁰⁷ Hans Lindahl (2013) (n 703) 42.

At the heart of this pluralistic narrative of law lies the assertion that 'law is much more than State law'.⁸⁰⁸ In its application to the socio-legal tapestry of Pakistan, it highlights that the traditional and alternative mechanisms of justice have existed in the region since before the current State came into existence, or even before the advent of the British colonial regime in the Indian sub-continent.⁸⁰⁹ As discussed in Chapter 3, there are accounts of *jirgas* and *panchayats* operating in the region from as far back as the early eighteenth⁸¹⁰ and nineteenth centuries.⁸¹¹ While the British colonial regime largely replaced these traditional systems with its own local administrative setup, these were formally re-instituted in those instances where they could fulfil the needs of the colonial government.⁸¹² The case of *Official Jirga* formalised through the Frontier Crimes Regulations (FCR) 1901 is a relevant example in this regard.⁸¹³ In the post-independence era, the State of Pakistan continued this selective approach towards local tribunals. While *jirgas* under direction of the Commissioners of Tribal Areas are given official status in the regions governed through the FCR,⁸¹⁴ the formal legal system does not grant legal recognition to any other instance of local tribunals, and considers them as unconstitutional.⁸¹⁵

⁸⁰⁸ Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification' *European Journal of Legal Studies* <<http://cadmus.eui.eu/handle/1814/6852>> last accessed 18 January 2012, 1.

⁸⁰⁹ Shaheen Sardar Ali (1999) (n 99) 187.

⁸¹⁰ Robert Nichols (2001) (n 467) 4.

⁸¹¹ Shaheen Sardar Ali (1999) (n 99) 187.

⁸¹² Shaheen Sardar Ali and Javaid Rehman (2001) (n 115) 94.

⁸¹³ The Frontier Crimes Regulation, 1901.

⁸¹⁴ Ibid.

⁸¹⁵ See, for instance, Shazia v. SHO (n 1).

However, despite the proclamations of illegality, the proponents of these normative orderings as well as socio-legal scholars highlight their significance and prevalence in Pakistan's socio-legal terrain. Azam Chaudhary, through his anthropological study of law in Pakistan's rural villages, goes as far as calling the traditional law and local tribunals the dominant system of law in Pakistan.⁸¹⁶ Building on the issue of alienation of people from the state-oriented legal system, it is claimed by some sections of the society that the law of the state 'is not the law of the people'.⁸¹⁷ Justice Nasira Iqbal, though arguing that these customary tribunals 'are often illegal on the standard of Common law and Sharia Law principles',⁸¹⁸ concedes the prevalence of local mechanisms of justice in rural areas.⁸¹⁹ A 2004 research study conducted by the Sustainable Development Policy Institute (SDPI) in twenty-six villages in four districts of Punjab pointed out that

there was a very high level of satisfaction expressed with justice provided by the *jirga* or *panchayat* system and of one hundred and eighteen respondents, 79 % said they would continue to use the *jirga* system in the future. Fairness (31.5 %), speediness (30.6%), and expense (26 %) were the reasons cited for this confidence in the traditional system of justice.⁸²⁰

Based on such assertions, Shaheen Sardar Ali writes that as "formal" laws are not the sole regulatory norms' in Pakistan, it is important to look towards other 'parallel legal systems (which are often informal and based on customary

⁸¹⁶ Muhammad Azam Chaudhary (2009) (n 420) 101.

⁸¹⁷ Adamson Hoebel (1965) (n 421) 45.

⁸¹⁸ Nasira Iqbal (2007) (n 99) 106.

⁸¹⁹ Ibid.

⁸²⁰ Samar Minallah (2006) (n 423) 2. For a detailed report of this study, see Foqia Sadiq Khan (2004) (n 705) 42.

norms) working alongside the black letter law and regulations.’⁸²¹ This acknowledgement of the significance of traditional justice mechanisms is occasionally echoed in the mainstream media and legal fraternity as well. A former judge of the High Court stated in 2012 that the ‘efficient use of centuries old (sic.) *Jirga* and *Panchayat* system in the Pakistani society for resolution of all sort of disputes within the communities and tribes is a proof of the success of Mediation and Alternative Dispute Resolution (ADR) mechanisms.’⁸²² Similarly, at a conference organised by the SDPI, one of the foremost research organisations in the country, participants voiced that ‘*jirgas* and *panchayats* need to be reconciled with modern realities... to ensure transparency, accuracy and greater success in the system.’⁸²³ Even the Chief Justice of Pakistan is reported to have stated in 2010 that the country ‘still needs the local methods of dispute resolution such as *jirga* and *panchayat* for ensuring speedy justice in small offences,’ though he acknowledged that these mechanisms have become problematic ‘as they could not keep pace with the demands of time, the newly emerging human rights, norms of equity, equality and non-discrimination.’⁸²⁴ The new ADR projects emerging in the country in different areas of law also acknowledge the ‘familiarity’ of the Pakistani society to traditional and

⁸²¹ *Shaheen Sardar Ali* (1999) (n 99) 170.

⁸²² *LJCP* (2012) (n 547) 302.

⁸²³ The Express Tribune, ‘Dispute settlement: Experts underscore alternative modes’ (Islamabad, Pakistan 12 December 2013)

<<http://pakistan.worldnewsviews.com/2013/12/12/dispute-settlement-experts-underscore-alternative-modes/>> last accessed 13 December 2013.

⁸²⁴ The Nation, ‘CJP stresses *jirga*, *panchayat*’s role’ *The Nation* (Lahore, Pakistan 30 April 2010) <<http://www.nation.com.pk/politics/30-Apr-2010/CJP-stresses-jirga-panchayats-role>> last accessed 07 January 2013.

alternate forms of dispute resolution, and aim towards '[benefitting] from that familiarity' in establishing different methods of dispute resolution.⁸²⁵

However, even with the persistence and appeal of these traditional mechanisms of justice, the rising human rights concerns mean that there is a conflict between the pluralist narrative of law and the perspectives that assert the exclusivity of the state-authored law. Notwithstanding the statements by the members of the superior judiciary cited above, the formal legal system,⁸²⁶ rights activists and political commentators generally denounce the continuation of the traditional normative orderings, both on account of their existence as a parallel judicial system as well as their perceived incompatibility with human rights.⁸²⁷ They argue that the traditional and local normative orderings reflect the skewed structures of power, patriarchy, misogyny and religious totalitarianism.⁸²⁸ There have been numerous instances in which the rulings and the conduct of the local courts have resulted in the persecution of women and the marginalised communities.⁸²⁹ Based on this, human rights activists argue that in Pakistan, 'women have always become (sic.) victims of such parallel judicial systems and weak implementation of laws.'⁸³⁰ They also argue that the 'ruling class is responsible for the continuance of *panchayat* and *jirga*

⁸²⁵ *Investment Climate Advisory Services in Middle East and North Africa* (n 632).

⁸²⁶ For instance, see *Shazia v. SHO* (n 1).

⁸²⁷ *Rabia Ali* (2001) (n 443 25).

⁸²⁸ *Saima Jasam* (2009) (n 452) 2.

⁸²⁹ Some of the instances have been discussed in Chapter 3, in the section on Traditional law. See, page 115.

⁸³⁰ The Express Tribune, 'Rights' activists urge SC to ban jirga system' *The Express Tribune* (Islamabad, Pakistan 31 May 2012) <<http://tribune.com.pk/story/386606/parallel-courts-rights-activists-urge-sc-to-ban-jirga-system/>> last accessed 12 September 2013.

justice system which is parallel to the prevailing judicial system,⁸³¹ and that these systems are 'hardly based on system of justice (sic).'⁸³² It is due to such assertions and human rights violations, that the Sindh High Court declared all *jirgas* and *panchayats* to be illegal.⁸³³

To conceptualise the place of the local and traditional orderings in Pakistan's socio-legal terrain, and to understand the wider conflict between these mechanisms and the state-oriented legal system, it is important to turn to the academic discourse on legal pluralism that has been considering such issues for the past several decades. But prior to that, there is a need to address some concerns that readily emerge from any discussion on legal pluralism. Any argument for a move away from the exclusive focus on state law to include other legal and normative orderings as units of analysis raises two vital questions: Why should the normative systems under consideration be examined through the language of law?⁸³⁴ And, what are the benefits that emerge from a focus on non-state systems of law? In relation to the first question, it is necessary to point out that any focus on non-state legal or normative orderings, especially in the context of Pakistan, is not merely born of academic or social scientific need to create novel categories. Rather, as explained in Chapter 3, a vast number of individuals living in Pakistan adhere to traditional normative orderings and follow them as valid legal mechanisms and

⁸³¹ Ali Shan Shah and Shahnaz Tariq, 'Implications of Parallel Judicial System (Panchayat and Jirga) on Society' (2013) 2 (2) *Asian Journal of Social Sciences & Humanities* 200, 201.

⁸³² Ibid. 204.

⁸³³ Mst. Shazia v. SHO (n 1)

⁸³⁴ Some critics of Legal Pluralism, such as Tamanaha argue that the subject matter of pluralism lies outside the domain of law. See, for instance, Brian Z. Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (1993) 20 (2) *Journal of Law and Society* 192.

viable alternatives to the legal recourse provided by the State.⁸³⁵ The presence of non-state or informal systems of law is a matter of fact and therefore an approach to law that allows us to include and analyse them, rather than exclude them, becomes a necessary step towards a contextual understanding of Pakistan's socio-legal tapestry. Moreover, amongst all the different narratives of law in Pakistan identified in this thesis, it is only the pluralistic perspective that enables an engagement with the traditional justice systems on their own terms.

In relation to the issue of the benefits of the pluralistic approach, it should be acknowledged that there may be no intrinsic or inherent advantages of focussing on non-state normative or legal systems. Indeed, there is actually a need to be cautious against the romantic notions of some form of timeless and pure traditional orderings. Boaventura De Sousa Santos warns against the 'romantic bias' of conceptions of pluralistic analysis of law and society, and points out that 'there are instances of legal pluralism that are quite reactionary'.⁸³⁶ Nevertheless, there is an important reason why this approach is significant. It allows us to focus on the (perceived) aims of systems of law and justice, rather than an exclusive emphasis on the dominant institutions. This approach compels us to realise that, just as there is no intrinsic benefit of focussing on non-state normative orderings, there is no inherent advantage of vesting in the state the exclusive authority to author valid law.⁸³⁷ If the generally claimed purpose of the dominant legal and juridical systems is to

⁸³⁵ See, Chapter 3, Traditional Law and Informal Courts on page 115.

⁸³⁶ *Boaventura De Sousa Santos* (2002) (n 692) 91.

⁸³⁷ See, *Jayan Nayar* (2007) (n 28).

provide justice to its subjects, any system that is deficient on this account should be reconsidered and re-evaluated. Roger Cotterrell eloquently argues for this re-emphasis on sociology and pluralistic versions of law, when he writes that

...there is now an urgent need to examine how far and in what ways legal doctrine and its use can be linked more closely to the demands and requirements of individual citizens arising from their everyday social experience. We need to ask how far law, considered as deliberately constructed regulation, can be reclaimed from a kind of social isolation as an instrument of abstract policies only indirectly reflecting individual moral experience of many citizens. We need to consider law not only in 'top-down' terms...[we ought] to think of it equally as something that might grow spontaneously out of everyday conditions of social interaction, and might provide a part of the cement that gives moral meaning to social existence.⁸³⁸

This re-evaluation of law in society, born mainly of disenchantment both with mainstream legal orders as well as mainstream legal narratives, provides the foundational concerns of the pluralistic approach to law. It is in this vein that the paradigm of legal pluralism has gained ascendancy. Since the 1970s, legal pluralism 'has become the key concept of post-modern view of law'⁸³⁹ and provides an alternative viewpoint to understand the law-society-state equation. Yilmaz considers legal pluralism a significant addition to legal analysis that accepts 'a more complex relation between law and society', as law is conceptualised 'not located entirely in the state.'⁸⁴⁰ Some theorists have gone so far as to claim that 'Law everywhere is fundamentally pluralist in character' and

⁸³⁸ Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, Oxford 2005) 307.

⁸³⁹ Brian Z. Tamanaha (2000) (n 26) 296.

⁸⁴⁰ Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Ashgate, Aldershot 2005) 2.

that '[t]oday, this pluralism is so commonly accepted that it can be assumed'.⁸⁴¹ Despite this acknowledgement, however, legal pluralism cannot be understood as a single theory; it is rather an umbrella term for a group of theories, standpoints, sociological approaches to law and critiques of legal analysis. These propositions present varied conceptions of the meaning(s) of law, its boundaries, the organisation of normative and legal structures in a society, and the means to analyse them. This essentially creates a situation where we can now observe a 'plurality of legal pluralisms'⁸⁴² rather than one holistic theory, and some of these perspectives will be discussed below.

6.3. 'Law is much more than State Law': The Plurality of Legal Pluralisms

Like other paradigms in the field of socio-legal analysis, a precise definition of pluralism or popular law is difficult to arrive at because, as Abel points out, the 'boundaries of the phenomenon are constantly shifting as new institutions are created or old ones recharacterised'.⁸⁴³ Despite the variances between these trends, at the very heart of these perspectives is the 'very basic idea that law is much more than state law.'⁸⁴⁴ They highlight the inadequacy of the state-oriented positivistic notions of law in grasping the complex realities of social existence. Santos notes that, at its very basic, legal pluralism 'concerns the idea

⁸⁴¹ Brian Z. Tamanaha (2000) (n 26) 297.

⁸⁴² Ibid.

⁸⁴³ Richard L. Abel, 'Introduction: The Politics of Informal Justice' in Richard L. Abel (ed) *The Politics of Informal Justice* (Academic Press, London 1982) 2.

⁸⁴⁴ Baudouin Dupret (2007) (n 808) 1.

that more than one legal system operate in a polity'.⁸⁴⁵ He posits pluralism as a counter to the legal positivistic approach, which has turned into a 'hegemonic (i.e. commonsensical) thesis about law, state legal centralism or exclusivism'.⁸⁴⁶ Sally Engle Merry, writing about mediation in non-industrial societies, argues that 'the formality of the courts, their adherence to an adversary model, their strict rules of procedure, and their reliance on adjudications render them inappropriate for handling many kinds of interpersonal quarrels arising in ongoing social relationships'.⁸⁴⁷ Popular law and pluralism carries this critique of positivistic and centralist notions of law further as a way of distinguishing itself from the general characteristics of state-led formal law, defining itself through its negation. For instance, Abel argues that this informal form of law 'is less a positive ideal than a set of loosely associated aversions to characteristics of formal justice'.⁸⁴⁸ He offers the parameters of informal and popular law in the same terms, in which popular law can be characterised as being

unofficial (dissociated from state power), noncoercive (dependent on rhetoric rather than force), nonbureaucratic, decentralised, relatively undifferentiated, and non-professional; its substantive and procedural rules are imprecise, unwritten, demotic, flexible, ad hoc, and particularistic.⁸⁴⁹

Some of the aspects of informal justice identified by Abel are evident in the local tribunals in Pakistan as, despite the substantive and structural fluidity of these

⁸⁴⁵ *Boaventura De Sousa Santos* (2002) (n 692) 89.

⁸⁴⁶ *Ibid.* 90.

⁸⁴⁷ Sally Engle Merry, 'The Social Organisation of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America' in Richard L. Abel (ed) *The Politics of Informal Justice* (Academic Press, London 1982) 17.

⁸⁴⁸ *Richard L. Abel* (1982) (n 843) 2.

⁸⁴⁹ *Ibid.* 2

different forms of traditional courts,⁸⁵⁰ they are generally unofficial, decentralised and devoid of a fixed bureaucratic structure. However, while communal and rhetorical reprimands do form a mechanism of enforcement for these structures, coercion and severe punishments are also often relied upon.⁸⁵¹ This element of coercion and harsh punishments is the main issue that brings these traditional systems into conflict with the mainstream legal structures and the rights-based narrative within the society.⁸⁵² The need, therefore, is not to conceive of these systems as diametrical opposites to the state-oriented legal systems, but approach them as different in their own right.

In his 1986 paper, which has become one of the key and originary sources for the discussion of legal pluralism, Griffiths analyses some of the key characteristics of pluralism. He argues that legal pluralism is a characteristic of society and a category of societal analysis, rather than being a category of law. Griffiths advances the same notion, which Vanderlinden later supported, that in order for pluralism to exist, 'more than one law must be present'.⁸⁵³ He bases his conception of pluralism on Sally Falk Moore's proposition (discussed below), though he rejects her differentiation between law and social fields as a 'last-minute lapse into legal centralism.'⁸⁵⁴ To propose his own reading of pluralism, Griffiths writes:

⁸⁵⁰ *Muhammad Azam Chaudhary* (1999) (n 420) 85.

⁸⁵¹ *Ibid.*

⁸⁵² *The Express Tribune* (31 May 2012) (n 830).

⁸⁵³ *John Griffiths* (1986) (n 688) 38.

⁸⁵⁴ *Ibid.*

Legal pluralism is a concomitant of social pluralism: *the legal organization of society is congruent with its social organization*. “Legal Pluralism” refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping “semi-autonomous social fields”, which, it may be added, is in practise a dynamic condition.⁸⁵⁵

He also considers pluralism to be an ‘omnipresent, normal situation in human society’.⁸⁵⁶ In this ubiquitous pluralistic legal situation, ‘law and legal institutions are not all subsumable within one “system” but have their own sources in the self-regulatory activities of all the multifarious social fields present...’.⁸⁵⁷ Griffiths differentiates between definition of pluralism in the *weak sense*, where multiple normative orders are considered to owe their existence and recognition to state law, and the *strong sense*, where no such need for recognition exists between multiple normative orderings.⁸⁵⁸ This notion of pluralism through weak and strong definitions is also applicable to the conception put forward by Masaji Chiba. Chiba takes a different approach to understand this phenomenon and creates a differentiation between official and unofficial law,⁸⁵⁹ where unofficial law is one that has not been authorised by the sovereign or state authorities, but is followed in practise.⁸⁶⁰ Significant as these propositions are, the argument that the current study makes is that this distinction of categories such as official or unofficial laws, and weak or strong pluralism, reflects the same epistemic distinction that lies at the heart of the

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid. 39.

⁸⁵⁷ Ibid. 39.

⁸⁵⁸ Ibid. 8.

⁸⁵⁹ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge 2006) 124-126; also, *Werner Menski* (2010) (n 96) 43.

⁸⁶⁰ *Werner Menski* (2006) (n 859) 124-126.

distinction between formal and informal systems of law. Through this categorisation, while the formal systems are included within the ambit of law, the informal systems are reduced to be something other than law. It is this 'Weberian antinomy' that generates the 'false antinomies of popular justice'⁸⁶¹ in the first place, therefore, is unable to provide us a way to comprehend the socio-legal architecture of Pakistan, and the place of traditional or popular forms of justice within it.

Santos takes us a step further in this regard. To study situations such as Pakistan's socio-legal terrain, he employs the terminology of *plurality of legal orders* rather than legal pluralism.⁸⁶² He asserts that although the time-space of the nation-state has become the most dominant category of the modern era, it is not the only time-space that law operates in. He presents a 'conception of socio-legal fields operating in multi-layered time-spaces',⁸⁶³ which affect the individual simultaneously. He terms this overlapping and interpenetrating system of legal orderings *interlegality*.⁸⁶⁴ Santos asserts that we 'live in a time of porous legality or of legal porosity, [with] multiple networks of legal orders forcing us to constant transitions and trespassing'.⁸⁶⁵ The concept of *interlegality* recognises the different strengths and symmetries of legal and normative orders, while also acknowledging their dynamic engagement with each other. But this engagement is not always conciliatory or hierarchical. The

⁸⁶¹ Alan Norrie, *Law and the Beautiful Soul* (The GlassHouse Press, London 2005) 36.

⁸⁶² Boaventura De Sousa Santos (2002) (n 692) 89-97.

⁸⁶³ Ibid. 437.

⁸⁶⁴ Ibid.

⁸⁶⁵ Ibid.

contact zones, where these normative orders encounter and conflict with each other, are spheres where 'rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other, giving rise to hybrid legal and political constellations.'⁸⁶⁶

In this sense, *interlegality* is one of the perspectives of legal pluralistic approach that gives us an insight into the engagement between multiple legal orderings in Pakistan. The socio-legal tapestry of Pakistan, considered from this angle, presents an *interlegal* 'terrain of contestation'.⁸⁶⁷ In this terrain, dominant law, Islamic law, traditional law and colonial law exist simultaneously in a multi-layered time-space, come into conflict, and struggle for domination and survival.⁸⁶⁸ The Islamic laws within Pakistan's legal and constitutional frameworks,⁸⁶⁹ the oscillation between religious and secular notions of law, the institution of Official *Jirgas* coupled with the declarations of illegality against local tribunals in general,⁸⁷⁰ can be considered as instances of the contact zones of this interlegal ordering. The significance of the insights offered by Santos's conception of plurality granted, there are two questions that it does not provide an adequate explanation for. First, even if it is acknowledged that within this interlegal space the state law plays a dominant role because of the

⁸⁶⁶ Ibid. 472.

⁸⁶⁷ Balakrishnan Rajagopal (2005) (n 5) 183.

⁸⁶⁸ See, Pakistan's Socio-Legal Tapestry and the Narratives of Law on page 142.

⁸⁶⁹ See, Islam and the Constitution on page 103.

⁸⁷⁰ See, page 1.

'hegemony'⁸⁷¹ of positivist conception of law, it does not necessarily explain the perverse and colonial nature of the state in Pakistan. Second, the ascendancy of the Islamic narrative on law provides evidence for similar *hegemonic* characteristics that inhere within this discourse which, arguably, emerge from somewhere outside the time-space of the state. In order to understand these issues further, there are some other conceptions within pluralist paradigm that might enable us to build on the idea of interlegality.

Sally Falk Moore's conception of pluralism, which has been 'unanimously applauded among legal pluralists for having provided the *locus* of law in socio-legal research,' leads the discussion in a different direction.⁸⁷² Moore focuses on the sociology of society rather than law as the starting point for legal pluralism. She argues against the narrow conception of law in which law is considered an instrument for social engineering.⁸⁷³ In this narrow version, law is 'abstracted from the social context in which it exists, and is spoken of as it were an entity capable of controlling that context.'⁸⁷⁴ As the locus of law lies in the society, Moore contends that it is necessary that both are examined together. Through her analysis of different case studies, she makes an argument for focussing on *semi-autonomous social fields*, which are ubiquitous in both 'tribal' as well as complex societies, as the main unit of anthropological and socio-legal analysis.⁸⁷⁵

⁸⁷¹ Boaventura De Sousa Santos (2002) (n 692) 90.

⁸⁷² Baudouin Dupret (2007) (n 808) 5.

⁸⁷³ Sally Falk Moore (1973) (n 620) 719.

⁸⁷⁴ Ibid.

⁸⁷⁵ Ibid. 720.

Moore writes that in any society, there exist multiple semi-autonomous social fields 'to which the individual belongs'.⁸⁷⁶ The nature and boundaries of these social fields are not defined by their structure, but through the 'processual characteristics' of producing rules and ensuring compliance to them.⁸⁷⁷ She argues that these social fields 'have their own customs and rules and the means of coercing or inducing compliance' – a 'legal order' in the Weberian sense.⁸⁷⁸ The boundaries of these social fields may be aligned with corporates (groups of individuals), or a complex 'unending' chain of corporates, which are connected, interdependent, as well as open to influences from the wider society. The interdependence of these social fields, as well as their openness to the larger societal setting, determines their relative possibilities and degrees of autonomy. Moore recognises the centrality of state in the modern legal order, and concedes that as 'the law of the sovereign states is hierarchical in form, no social field within a modern polity could be absolutely autonomous from a legal point of view.'⁸⁷⁹ However, she maintains that state law is just one among several factors that guide the behaviour of subjects – the totality of normative rules that govern individual and collective action include law, but are at the same time far greater than it. Against Hoebel's position of force, or the threat of force, forming the distinction between law and norms, she asserts that 'though the formal legal institutions may enjoy a near monopoly on the legitimate use of force, they

⁸⁷⁶ Ibid. 721.

⁸⁷⁷ Ibid. 722.

⁸⁷⁸ Ibid. 721.

⁸⁷⁹ Ibid. 742.

cannot be said to have a monopoly of any kind on the other various forms of effective coercion or effective inducement.’⁸⁸⁰

There are three main facets of Moore’s conception of pluralism that Dupret identifies: First, the identification of social fields as the main bodies of social control and normative ordering; second, the possibility of the overlapping of these fields in that an individual may belong to several social fields simultaneously; and third, the ‘capacity of resistance’ to maintain their normativity by resisting outside (even legal) influences.⁸⁸¹ This perhaps provides us a useful way to conceptualise the role of the traditional orderings within the socio-legal terrain of Pakistan. Dupret points out that despite the identification of social fields as the main units of sociological analysis, Moore’s model maintains the distinction between law and other societal normative orderings. I argue, however, that this conception provides us within an effective way to comprehend the encounter between contested legalities. Moore’s idea of semi-autonomous social fields includes the concession (theoretically) of a ‘complete domination’ of these social fields by outside influences, the most significant of which are the proclamations emerging from the hierarchical form of modern state law.⁸⁸² The varied normative orderings, then, either remain *non-legal*, or the authority to accept them as legal normativities remains vested in the state law. This is the case in relation to Pakistan’s socio-legal tapestry, where the dominant legal system either declares alternate justice mechanisms

⁸⁸⁰ Ibid. 721.

⁸⁸¹ Baudouin Dupret (2007) (n 808) 5.

⁸⁸² Sally Falk Moore (1973) (n 620) 742.

as illegal, or co-opts them in limited geographical and normative spaces for its own benefit. The identification of these alternate and local tribunals as semi-autonomous systems, then, is only beneficial until they enter into a conflict with the dominant legality that possesses the language and resources to proclaim their illegality.

Expanding on this encounter between traditional or popular forms of justice and the dominant law, Vanderlinden argues that what necessarily differentiates law from other social fields is its 'hegemonic ambition' – the tendency of law, particularly law based on positivistic and centralist conception – to impose its own normative structure on other social fields.⁸⁸³ Sally Engle Merry has termed the same inclination of law as its inherent 'coloniality'.⁸⁸⁴ According to Vanderlinden, the legal system of the state, when confronted with 'rival legal orders', attempts to subsume them through the label of legal pluralism 'in order to conceal the inevitable failure of its totalitarian ideal.'⁸⁸⁵ This allows the state to maintain its 'monopoly of regulatory order' in principle, as it allows the existence of other normative orders by virtue of its own 'toleration or recognition'.⁸⁸⁶ He contends that legal pluralism, then, highlights the failure of the state system to fully realise 'its totalitarian ambition', and the dominant law

⁸⁸³ Jacques Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 28 *Journal of Legal Pluralism* 149, 153.

⁸⁸⁴ Sally Engle Merry (1982) (n.

⁸⁸⁵ Jacques Vanderlinden (1989) (n 883) 153.

⁸⁸⁶ Ibid.

endeavours to mask it by acknowledging the existence of other legal orderings, albeit in a 'subordinate or inferior' position.⁸⁸⁷

I argue that considering the socio-legal tapestry of Pakistan from this perspective of 'Coloniality' provides us a useful insight into the engagement between dominant and local mechanisms of justice. The socio-legal tapestry of Pakistan presents an *interlegal terrain of contestation*, with the dominant legal system necessarily differentiated by other normative and legal orderings by virtue of its nature of Coloniality and hegemony. Albeit approaching it from a different lens, these ideas of Coloniality and totality will be discussed at length in Chapter 8. It will be argued that these notions can provide us an alternative narrative to understand the socio-legal particularities of Pakistan, by explaining the logic that grips both the state as well as competing notions of law in the country.

6.4. The Romanticism of Plurality and Concluding remarks

Apart from a consensus on assertions that law is more than the law of the state,⁸⁸⁸ and that other normative structures should be included in legal analysis, or indeed be considered as instances of law, the theoretical propositions of legal pluralism offer divergent perspectives. This is why critics of pluralistic legal analysis, such as Brian Tamanaha or Baudouin Dupret, argue against this approach and assert that the definitional problems of pluralism,

⁸⁸⁷ Ibid.

⁸⁸⁸ Baudouin Dupret (2007) (n 808) 1.

rather than helping legal analysis by clarifying the nature of law, actually confound it.⁸⁸⁹ Despite the lack of consensus on concepts and definitional problems, legal pluralism nevertheless provides us with key insights into the legal architecture of situations such as Pakistan's. This is a key reason why this study has adopted a course of 'methodological pluralism'⁸⁹⁰ to approach the socio-legal tapestry of Pakistan.

The dominant legal narrative and positivistic (or centralist) understanding of law either willingly excludes, or is unable to recognise, the multiple forms of legal orderings that exist in the socio-legal terrain of Pakistan.⁸⁹¹ Legal pluralism allows us to observe and analyse the notions of traditional, non-formal, colonial, and religious structures of law on par with state-oriented law, by adopting a sociological approach to law. It argues that without looking at the society in question, and without understanding it in its own terms, any grand narrative or understanding of law will remain lacking.⁸⁹² Tamanaha and Dupret, despite offering divergent critiques of pluralism for its elusive definitions of law, also agree on this approach.⁸⁹³ They assert that law should be understood on the terms of the participants and subjects of legal orderings. This is the approach taken by this examination whereby the context of Pakistan with all its multiple complexities of legal framework serves as the footing to comprehend law and legal analyses. Through this approach, we are able to unseat state law

⁸⁸⁹ See, generally *Brian Z. Tamanaha* (2000) (n 26); *Baudouin Dupret* (2007) (n 808).

⁸⁹⁰ *Werner Menski* (n 709) 74.

⁸⁹¹ See, Chapter 4, The Exclusivity and Singularity of Law and Justice on page 151.

⁸⁹² *Roger Cotterrell* (2005) (n 838) 307.

⁸⁹³ See, generally *Brian Z. Tamanaha* (2000) (n 26); *Baudouin Dupret* (2007) (n 808).

from its dominant and complacent position, and move the focus towards the needs of the individual. This is why Santos notes that it is important to highlight the 'political claims' and the political project of legal pluralism, which gets left behind in definitional and analytical discussions.⁸⁹⁴ A focus on legal orders other than state law is key to (re)discover and highlight the 'emancipatory potential of law'.⁸⁹⁵ As echoed in Cotterrell's approach cited above, it is important to reclaim law from its top-down and instrumental versions and align it to the social experiences of individuals.

At the same time, however, there is a need for caution against the romantic notions of pluralism, as it carries a 'normative connotation, in that whatever is designated by it must be good because it is pluralistic' and, tautologically, better than monistic or non-pluralist conceptions of law.⁸⁹⁶ The pluralist narrative of law, as a reaction to state centralism, accepts or prefers any *spontaneous* or *rooted* system of law that may exist in a society. However, as discussed in this study, some of the traditional and non-formal structures of law that exist in Pakistan are just as, if not more, patriarchal and repressive as the state law. The narrative of pluralism, as it exists in Pakistan, fails to conceive of 'pluralism as a political project'⁸⁹⁷ and, because of this, assumes a reactionary stance. It defines non-state normative and legal systems in opposition to state-law, not acknowledging that some of the pluralistic structures are deeply problematic, misogynistic, intolerant, and embedded within the feudal traditions that

⁸⁹⁴ Boaventura De Sousa Santos (2002) (n 692) 90.

⁸⁹⁵ Ibid. 85.

⁸⁹⁶ Ibid. 89.

⁸⁹⁷ Ibid. 90.

pervade the society.⁸⁹⁸ This is the reason why the primary challenges against non-formal systems of law emerge from the discourses on human rights and social justice. And this romanticised notion of pluralistic orderings is the main weakness of legal pluralistic approach in the context of Pakistan. This narrative is unable to translate the political and critical concepts of legal pluralism from academic discourse into legal discussions. And it is largely because of this that it proves unable to counter the arguments presented by human rights and state-law narratives that criticise the human rights abuses inflicted by local tribunals.

The notion of idealisation of pluralist approach to law is also linked with another significant issue that emerges from the very critique of alienation from which the assertion of pluralism emanates in the context of Pakistan. While it denounces the dominant legal system of being an alien imposition and a colonial inheritance, the local tribunals as they exist in Pakistan cannot be separated from their own colonial histories. In this sense, while a *turn* by the people to alternative and local justice mechanisms can be understood and appreciated, a *return* may not be possible, owing to the interceding two hundred years of colonial rule that altered their nature irrevocably.

⁸⁹⁸ See, generally, *Rabia Ali* (2001) (n 443); *Saima Jasam* (2009) (n 452).

Chapter 7: Approaching Law through Rights: Human Rights Narrative in Pakistan

7.1. Chapter Synopsis

Building on the discussion of multiple narratives of law prevalent in Pakistan, this chapter discusses the Human Rights discourse on law as it exists in the country. Gaining prominence amongst civil society organisations and even the judiciary and the legal fraternity, the human rights narrative has become one of the most important lenses through which the functions, institutions and deficiencies of law are understood and approached within this context. Through a discussion of this approach to law, the argument presented in this chapter is that the human rights narrative, in its relation to the socio-legal context of Pakistan, falls prey to some of the same contradictions that it attempts to denounce within other perspectives on law.

I argue that there are four key paradoxes and challenges that the human rights narrative faces vis-à-vis Pakistan's socio-legal context. First, the human rights narrative vehemently challenges the traditional legal and normative orderings, and highlights their conflict with constitutional freedoms and modern notions of rights. However, by claiming the illegality of all legal structures that emanate from outside state authority, this approach to law reduces the already limited avenues available to those sections of the populace that are generally at the receiving end of human rights violations. Second, while it challenges the patriarchal and misogynistic tendencies within the local mechanisms of justice

and state law, the solutions proposed by this perspective remain centred on the state. In this manner, it strengthens the focus on state-oriented law and is unable to transcend this dominant narrative. Third, the human rights discourse and language are perceived as foreign, which generates both a sense of distrust and a communication gap between rights organisations and the people. Fourth, in an attempt to bridge this divide, the human rights approach comes into interplay with the pervasive religious narrative – an encounter in which both the paradigms denounce, but also attempt to co-opt, each other. This paradox, while widening the approach of the rights discourse, simultaneously limits its appeal for some marginalised groups and communities.

The discussion will return to these identified contradictions and paradoxes in the latter half of the current chapter, prior to which the following sections will demonstrate and elaborate on the presence and shape of the human rights narrative on law in Pakistan.

7.2. Pakistan in an ‘Age of Human Rights’

In the past sixty years, Human Rights discourse has emerged, both within Pakistan and around the globe, as the leading paradigm to challenge the state, its institutions, practises and laws, vis-à-vis their bearing on the individual subject. It has become the ‘dominant language for justice claims of both social

movements and states’;⁸⁹⁹ it has come to be considered as the main language of mediation between the states and its subjects; the ‘anchor of political ethics’,⁹⁰⁰ the new social contract. Born in a post-holocaust and post-Second World War era, the human rights standards are now claimed by some to be ‘almost universally accepted, at least in word, or as ideal standards’.⁹⁰¹ Noting this continuing ascendancy, Baxi writes that ‘no preceding century has been privileged to witness a profusion of human rights enunciations on a global scale’.⁹⁰² Because of this, he terms the current period, starting from the second half of the twentieth century, as the ‘Age of Human Rights’.⁹⁰³

In this Age of Human Rights, then, everyone is said to be ‘entitled’ to ‘rights’ by virtue of being ‘human’.⁹⁰⁴ With the claim that this paradigm is based on ‘core [human] principles like dignity, equality and respect’,⁹⁰⁵ these values are considered to be the cornerstone of international human rights treaties and frameworks that state-signatories are expected to abide by.⁹⁰⁶ The continued prominence of these treaties and norms has given rise to what Donnelly terms

⁸⁹⁹ Vasuki Nesiah, 'The Rise and Fall of the Human Rights Empire' 28 June 2012 <http://fpif.org/the_rise_and_fall_of_the_human_rights_empire/> last accessed 7 May 2013.

⁹⁰⁰ Ibid.

⁹⁰¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003) 1.

⁹⁰² Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law & Contemporary Problems* 125, 125-169.

⁹⁰³ Ibid.

⁹⁰⁴ Jack Donnelly (2003) (n 901) 7-8.

⁹⁰⁵ Equality and Human Rights Commission, 'What are Human Rights?' (Equality and Human Rights Commission <<http://www.equalityhumanrights.com/human-rights/what-are-human-rights/>> last accessed 7 May 2013.

⁹⁰⁶ For instance, the International Covenant on Civil and Political Rights states that the rights enshrined in the Covenant emerge from 'the inherent dignity of the human person.' The Universal Declaration of Human Rights claims that 'all human beings are born free and equal in dignity and rights'. Article 1, UDHR, GA Res. 217 A (III), 10 December 1948, A/810 at 71.

the ‘international normative universality’ of human rights.⁹⁰⁷ He argues this case on the basis that ‘three quarters of the world’s states have undertaken international legal obligations to implement these rights by becoming parties to the International Human Rights Covenants, and almost all other nations have otherwise expressed approval and commitment to their content’.⁹⁰⁸ One perspective that takes this approach even further argues for an integral link between human rights and *jus cogens* or peremptory norms of International Law, to which all states are expected to adhere to, regardless of whether they are signatories to a particular treaty or any other instrument. In this vein, Bianchi argues that ‘to think of both human rights and *jus cogens* at the same time is an almost natural intellectual reflex.’⁹⁰⁹

Pakistan is a prime example of a country gripped in the rise of the human rights discourse, though it has historically had an ambivalent relationship with human rights covenants and discourses. Despite the assertions of its poor human rights record of recent years based on the difficulties faced by women, ethnic and religious minorities, and marginalised communities,⁹¹⁰ it was one of the original 48 signatories of the Universal Declaration of Human Rights (UDHR). Signed in 1948, the UDHR is one of the most prominent instruments within the regime of international human rights law and its 30 Articles advocate equality for all

⁹⁰⁷ Jack Donnelly (2003) (n 901) 2.

⁹⁰⁸ Ibid. 1.

⁹⁰⁹ Andrea Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 (3) *The European Journal of International Law* 491, 495.

⁹¹⁰ See, for instance, HRCP’s 2013 State of Human Rights Report. *Human Rights Commission of Pakistan* (2013) (n 78).

humans regardless of race, gender, colour, creed or religion.⁹¹¹ Significantly, while Saudi Arabia had initially refused to sign the UDHR on the basis that the conception of rights enumerated in the document conflicted with Islamic Law principles, Pakistan not only adopted the opposite view, but also criticised Saudi Arabia's interpretation of Islamic Law.⁹¹² Since then, however, the legal and political situation has meant that the human rights of citizens have had a troubled relationship with the priorities of subsequent Pakistan governments. The human rights situation faced by the country, as briefly discussed in the previous chapters, is dire at the very least.

Amnesty International and Human Rights Watch, among two of the most prominent international human rights advocacy organisations, have repeatedly condemned the persecution of minorities, enforced disappearances by security forces, violence faced by women, the use of armed force in Balochistan province and tribal areas, and the plight of civilians and displaced people in Pakistan.⁹¹³ The Ministry of Law, Justice and Human Rights, in a report submitted to the Parliament in September 2013, noted 8,648 incidents of human rights violations reported between January 2012 and September 2013.⁹¹⁴ The accounts by human rights organisations, however, present a situation far graver

⁹¹¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

⁹¹² Daniel E. Price, *Islamic Political Culture, Democracy and Human Rights: A Comparative Study* (Praeger Publishers, Westport, USA 1999) 163.

⁹¹³ Human Rights Watch, 'World Report 2013: Events of 2012' (Human Rights Watch, New York 2013) 47-52; Amnesty International, 'The State of the World's Human Rights' (Amnesty International, London 2013) 201-203.

⁹¹⁴ APP, 'Over 8,500 human rights violations reported in 20 months' *Dawn* (Islamabad, Pakistan 30 September 2013) <<http://www.dawn.com/news/1046467/over-8500-human-rights-violations-reported-in-20-months>> last accessed 30 September 2013.

than the ones contained in official accounts. The Asian Human Rights Commission, in its report issued in 2013, claimed death of or injury to over 15,500 people through drone attacks and clashes between government and militant groups, and the death of 6,982 people in religious, sectarian or political violence.⁹¹⁵ The Human Rights Commission of Pakistan (HRCP), the most prominent human rights advocacy group in the country, in its 2012 Annual Report noted 213 incidents of sectarian violence in which 583 people were killed and 853 injured.⁹¹⁶ Pakistan Body Count, an independent group documenting the incidences of violence in the country, reported that 21,559 people have been killed or injured in suicide attacks in the country since 1995, with over 3,000 killed between 2006 and 2013.⁹¹⁷ Pakistan is also considered one of the most dangerous countries for journalists and human rights activists,⁹¹⁸ which contributes to the differing accounts and estimates of human rights violations in the country. It is in this backdrop of human rights atrocities that the narrative of human rights has gained prominence in Pakistan.

The ascendancy of the human rights discourse in Pakistan has had two major and interlinked consequences for the country: First the increase in the number of human rights oriented Non-Governmental Organisations (NGOs) and civil society groups; second, the rise of the human rights narrative on law which is

⁹¹⁵ Asian Human Rights Commission, 'Pakistan: Country has Turned into a Killing Field' (Relief Web 2013) <<http://reliefweb.int/sites/reliefweb.int/files/resources/AHRC-SPR-005-2013-HRRpt-Pakistan.pdf>> last accessed 10 January 2014.

⁹¹⁶ *Human Rights Commission of Pakistan* (2013) (n 78) 6.

⁹¹⁷ Pakistan Body Count, 'Analytics' 2011) <<http://pakistanbodycount.org/analytics>> last accessed 26 December 2013.

⁹¹⁸ Ali Dayan Hasan, 'Commentary: Attacks on Journalists and Rights Defenders in Pakistan' *The Friday Times* (Pakistan <<http://www.hrw.org/news/2012/06/08/commentary-attacks-journalists-and-rights-defenders-pakistan>> last accessed 11 May 2013.

given impetus by, but is not limited to, the human rights and civil society organisations. Alongside the global rise of international human rights NGOs as 'the critical link between a government's violation of human rights and the activation of international pressure',⁹¹⁹ Pakistan has seen a plethora of human rights organisations emerging in the past two decades. A study conducted at the turn of the millennium, by the Social Policy & Development Centre and Johns Hopkins University's Centre for Civil Society, estimated that there were approximately more than 45,000 non-profit organisations working in Pakistan at the time.⁹²⁰ Out of these approximately 17.5% operate in the areas of Civic Rights and Advocacy⁹²¹ – this constitutes a group of about 8,000 organisations.

Alongside the proliferation of human rights NGOs, international donor funding for developmental causes has also poured in. In 2009, the United States Congress authorised non-military aid of up to US\$1.5 billion annually for five years, for social and economic development in Pakistan.⁹²² US Economic Related Assistance (which includes human rights funding, food aid, and development assistance, among other foci) to Pakistan between 2002 and 2012 has totalled more than US\$7.8 billion.⁹²³ Pakistan has also received development and economic aid from other countries and multilateral organisations. In 2011

⁹¹⁹ James Meernik and others, 'The Impact of Human Rights Organizations on Naming and Shaming Campaigns' (2012) 56 (2) *Journal of Conflict Resolution* 233, 240.

⁹²⁰ Aisha Ghaus-Pasha, Haroon Jamal and Muhammad Asif Iqbal, *Dimensions of the nonprofit sector in Pakistan* (Social Policy and Development Centre, 2002) 12.

⁹²¹ Ibid.

⁹²² Susan B. Epstein and K. Alan Kronstadt, 'Pakistan: U.S. Foreign Assistance' (2013) 6.

⁹²³ Ibid. This is in contrast with the aid of US\$0.7 million and US\$2.7 million given to Pakistan by the US in 1947 and 1951 respectively. Murad Ali, 'US Aid to Pakistan and Democracy' (Institute of Policy Studies 2009) <<http://www.ips.org.pk/security-and-foreign-policy/1080-us-aid-to-pakistan-and-democracy.html>> last accessed 4 december 2013.

alone, the total Official Development Assistance received by the country amounted to US\$4.15 billion, with World Bank, United Kingdom, Japan, and institutions of the European Union being the major donors along with the US.⁹²⁴ Due to unavailability of data, a breakdown of figures on how much of this funding has been spent on human rights projects and advocacy is not available. However, it is evident that the increase in human rights violations in the country and the rise in human rights organisations and international funding mark the ascendancy of both the human rights narrative, as well as its subject matter.

7.3. The Human Rights Narrative on Law in Pakistan

The prominence of the human rights narrative, particularly its approach to frame issues of law in rights terminologies, has grown alongside the number of civil society organisations in Pakistan. This narrative establishes the link between human rights and law, and asserts that the key responsibility of the state and its legal frameworks and institutions is to ensure the provision and protection of the human rights of its citizens.⁹²⁵ This perspective conceives of law as a vehicle for human rights, and frames its duties and deficiencies, responsibilities and limitations, from this lens. The prominence and the adoption of this narrative which reflects a global trend can be witnessed both at

⁹²⁴ Centre for Global Development, 'Aid to Pakistan by the Numbers' (Centre for Global Development <<http://www.cgdev.org/page/aid-pakistan-numbers>> last accessed 7 December 2013).

⁹²⁵ The News (10 September 2011) (n 583).

the level of human rights activists and organisations, as well as within the legal fraternity of the country.

The local and foreign NGOs repeatedly challenge the state on inadequate provision of amenities and lack of protection for minorities and civil rights. One local NGO, in its official statement on the Human Rights Day 2013, asserted that the instances of human rights violation 'are widespread due to the failures of... the country's institutional framework, in particular, key institutions of the rule of law: the police, prosecution and judiciary.'⁹²⁶ The Asian Human Rights Commission's 2013 report stated that the absence of 'rule of law and the impotency of the courts has made Pakistan a killing field.'⁹²⁷ HRCP mentioned in its 2012 Annual Report that the year brought 'many challenges where Pakistan did not prove equal to the task.'⁹²⁸ HRCP also condemned the 'cycle of violence and the utter breakdown of law and order' in Karachi and other cities, and urged the government to 'urgently find a way out.'⁹²⁹ Other organisations operating in this sphere have also asserted the importance of legal mechanisms as a 'major tool in promoting and protecting human rights,'⁹³⁰ and that the State's 'lack of ability to deliver justice... violates human rights [and] basic human needs.'⁹³¹ These organisations urge the state to save the legal system

⁹²⁶ Ali Raza Khan Jatui, 'A Statement by the People Society For Justice Pakistan on Human Rights Day' (Pakistan 2013).

⁹²⁷ *Asian Human Rights Commission* (2013) (n 915).

⁹²⁸ *Human Rights Commission of Pakistan* (2013) (n 78) 1-3.

⁹²⁹ *Ibid.* 334

⁹³⁰ Human Rights Monitor, 'Collection and compilation of data on incidents of violence against civil and human rights in Hazara Region' (HRM and Sungi Development Foundation, Islamabad, Pakistan 2011) 3.

⁹³¹ Sustainable Development Policy Institute, *Governance* (Sustainable Development Policy Institute, Pakistan).

from becoming a 'travesty of itself,'⁹³² and work towards the creation of 'a rights-respecting government that abides by the rule of law and restores the public's faith in democratic institutions.'⁹³³

This narrative of human rights to approach the problems with the frameworks and implementation of law, as well as the issues of women's and minority rights and *lawlessness*, has also become embedded in the language of the legal fraternity. In 2006, the incumbent President of the Pakistan Supreme Court Bar Association said in his speech during the International Judicial Conference that 'there is a need to institutionalize the role of the Bar in the struggle for human rights.'⁹³⁴ He also argued that 'given the volume of human rights abuses and the vulnerability of the victims in Pakistan, the role of the Bar and its members must go beyond the traditional role.'⁹³⁵ A Justice of the Supreme Court stated in the same conference that the 'courts in Pakistan in general and superior Courts in particular are the main operational source of protection of fundamental rights of people.'⁹³⁶ The language and working of the superior courts in Pakistan depict the same rising prominence of the human rights narrative. The Supreme Court of Pakistan considers that human rights are already enshrined in the

⁹³² *Human Rights Monitor* (2011) (n 930) 3.

⁹³³ Ekklesia, 'Pakistani government urged to protect religious minorities' *Pakistan Christian Post* (Pakistan 12 December 2013) <<http://www.pakistanchristianpost.com/headlinenews.php?hnewsid=4626>> last accessed 12 December 2013.

⁹³⁴ Malik Muhammad Qayyum, 'The Role of the Bar in Protection of Human Rights in Pakistan' (International Judicial Conference) 6.

⁹³⁵ *Ibid.* 9.

⁹³⁶ Muhammad Nawaz Abbasi, 'Domestic application of Human Rights norms' (International Judicial Conference) 10.

Constitution as Fundamental Rights,⁹³⁷ and in 2009 there was a separate Human Rights Cell established within the Supreme Court.⁹³⁸ It is significant that in the second and third years of its establishment (April 2010 to December 2011), about 90,000 applications were received and registered by the Cell.⁹³⁹ An International Commission of Jurists (ICJ) report states that the Human Rights Cell 'instituted and disposed of over 160,000 applications' between 2009 and 2012.⁹⁴⁰ This includes incidences of kidnapping, honour crimes, acid attacks, land grabs, corruption and extortion, illegal appointments in the government and miscarriage of justice.⁹⁴¹

The Supreme Court's exercise of Original Jurisdiction (Suo Motu) under Article 184(3) though has been a major method through which the Court has attempted to enforce human rights and check the excesses of state and non-state actors.⁹⁴² The Chief Justice of Pakistan in his judgement on a Suo Motu notice in 2011 said that the 'basic human rights of life, liberty and enjoyment of one's property have been recognized nationally as well as internationally.'⁹⁴³ In 2013, the Court received 250 petitions for Suo Motu notice daily, compared to 450 applications received in the whole of 2004.⁹⁴⁴ The ICJ, however, has criticised the inconsistent and discretionary approach of the SC in the exercise

⁹³⁷ *Human Rights Cell* (2010/11) (n 320) 132.

⁹³⁸ *Ibid.*

⁹³⁹ *Ibid.*

⁹⁴⁰ Reema Omer, 'Authority without Accountability: the search for justice in Pakistan' (Geneva, Switzerland 2013) 56.

⁹⁴¹ Supreme Court of Pakistan, 'Annual Report: January 2012 to March 2013' (Supreme Court of Pakistan, Islamabad 2013) 131.

⁹⁴² Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁹⁴³ Suo Motu Case No. 16 of 2011 (Supreme Court of Pakistan).

⁹⁴⁴ *Reema Omer* (2013) (n 940) 14.

of original jurisdiction, stating that the cases taken up by the Court often revolve around issues that gain prominence in the local media, but do not necessarily represent the gravest instances of human rights abuses.⁹⁴⁵ Charles Kennedy argues that through steps such as the establishment of the Human Rights Cell, the Supreme Court 'has in effect assumed the role of a powerful federal ombudsman identifying and attempting to right the wrongs of individuals caught up in the injustices of the system.'⁹⁴⁶ The Chief Justice of Pakistan endorsed this approach when he stated at the 2012 inaugural session of the South Asia Conference on Environmental Justice that 'strengthening democratic institutions, socio-economic development, safeguarding human rights and protection of environment are indeed the core values of every society'.⁹⁴⁷

7.4. Human Rights Narrative and the Socio-Legal Tapestry of Pakistan

The human rights discourse has served the significant purpose of highlighting the plight of the marginalised communities in Pakistan, and has become the dominant language through which the state's (in)actions are challenged. Its narrative on law has emphasised the importance of the role of the state and its legal frameworks and institutions in ensuring and protecting the rights of

⁹⁴⁵ Ibid. 15.

⁹⁴⁶ Charles H. Kennedy (2012) (n 72) 158.

⁹⁴⁷ Iftikhar Muhammad Chaudhry, 'Special Address by Chief Justice' *South Asia Conference on Environmental Justice*
[http://ceej.pk/cms/docs/SAEJ/1%20Inaugural%20Session/5%20Special%20Address%20\(HCJ%20Iftikhar%20Muhammad%20Ch\).pdf](http://ceej.pk/cms/docs/SAEJ/1%20Inaugural%20Session/5%20Special%20Address%20(HCJ%20Iftikhar%20Muhammad%20Ch).pdf) last accessed 24 March 2012.

citizens. However, when this perspective is examined in its relation to the socio-legal tapestry of Pakistan, it brings to the fore several paradoxes and contradictions that not only affect the efficacy of the wider human rights discourse, but also reveal its limitations in understanding the dynamics of the wider socio-legal terrain.

The primary difficulty that emerges from the interplay between human rights narrative and Pakistan's socio-legal architecture is the inability of the former to understand the appeal and the dynamics of the local and traditional mechanisms of justice.⁹⁴⁸ The human rights narrative on law stands opposed to the local legal and normative orderings that exist in the country. NGOs and activists working in this sphere have increasingly challenged traditional courts and customary laws for violation of basic human rights,⁹⁴⁹ and provide impetus for questioning the legality of local courts. Notable organisations such as HRCP argue that it is the state's obligation to its citizens to 'save them from falling for a [normative] regime that may save them some time and a few pennies but all this at the cost of justice.'⁹⁵⁰ At present, a petition from the National Commission on the Status of Women (NCSW) is pending before the Supreme Court of Pakistan requesting a judgement of illegality against the traditional courts and tribunals, which is likely to have far reaching consequences.⁹⁵¹

⁹⁴⁸ For a study of participants' perspectives with regards to their reasons for choosing the local mechanisms of justice, see *Foqia Sadiq Khan* (2004) (n 705).

⁹⁴⁹ *Human Rights Commission of Pakistan* (2013) (n 78) 170-173.

⁹⁵⁰ *Asma Jahangir* (2009) (n 397).

⁹⁵¹ Tahira Noor, *Pakistan: Supreme Court takes petition against Jirga system for regular hearing* (National Commission on the Status of Women, Pakistan 2012)

<<http://www.ncsw.gov.pk/enews/07newsletter.pdf>> last accessed 24 September 2013.

Human Rights organisations further argue that the patriarchy, misogyny, and skewed religious conceptions that lie behind the traditional tribunals, and behind the Pakistani (particularly rural) society as a whole, render the traditional courts unable to deal with women judiciously.⁹⁵² Women are considered a 'property' of the men in their tribes and families, and are exchanged, married or sold to settle disputes within community groupings.⁹⁵³ Moreover, the issue of honour killings also emerges from these problematic power structures, as it is considered the prerogative of the men of a particular family or tribe to decide on what the *honour* of the family is tied to, and women are generally the ones who suffer for violating these notions.⁹⁵⁴ The same issues are raised in relation to protection of marginalised groups and treatment of political dissidents and insurgents, when it is argued that traditional norms, religious customs and political aims determine what kind of treatment is meted out to particular individuals or groups.⁹⁵⁵ In this light, activists urge the state not only to safeguard the rights of individuals, but also to 'change the mind-set (tribal, feudal and macho) of men'.⁹⁵⁶

However, the insistence of the human rights narrative on declaration of illegality against all normative and legal structures outside the state's juridical system raises more problems than it solves. The shunning of absolutely all

⁹⁵² *Rabia Ali* (2001) (n 443) 33-34.

⁹⁵³ *Ibid.* 20.

⁹⁵⁴ *Justice Saleem Akhtar and others* (2009) (n 420) 31-32.

⁹⁵⁵ The legal frameworks laid down by Frontier Crimes Regulation and Actions in Aid of Civil Power Ordinance are relevant examples in this regard.

⁹⁵⁶ Peerzada Salman, 'Seminar on honour killing: 'Changing mindset govt's responsibility'' *Dawn* (Pakistan 09 July 2010) <<http://www.pakistanpressfoundation.org/media-events/14761/>> last accessed 15 March 2013.

forms of pluralistic structures creates room for further injustices faced by those who are already marginalised within the society. The assertion of illegality against all local mechanisms of justice disregards the fact that the appeal of this system partially lies in the inefficacy of the state legal institutions to provide inexpensive and speedy justice to its citizens, especially those who are at the lowest economic, social and political strata.⁹⁵⁷ Granted that the problems of patriarchy, misogyny and intolerance are embedded within some traditional tribunals, it is important to highlight that a large section of the populace reverts to these structures due to a gulf between them and the formal legal system.⁹⁵⁸ The formal legal system either fails to provide justice and respite to people on occasions, or fails to reduce their sense of alienation and remoteness.

The case of *Khwaindo Tolana* is a relevant example in this regard. As briefly mentioned in Chapter 3, this was the first women's Jirga organised in Swat by a group of women activists to highlight the plight of two women who were allegedly murdered by their in-laws.⁹⁵⁹ The male dominated informal tribunals as well as the state courts and law enforcement organisations proved incapable or unwilling to help the victims in pursuing their cause. The *Khwaindo Tolana* served as an avenue to indict both the alleged perpetrators of the acts as well as the legal structures the women were subject to.⁹⁶⁰ Its symbolic value is

⁹⁵⁷ See, *Foqia Sadiq Khan* (2004) (n 705).

⁹⁵⁸ *Muhammad Azam Chaudhary* (1999) (n 420) 77.

⁹⁵⁹ Orla Guerin, 'Pakistani women use *jirga* to fight for rights' (Pakistan 25 July 2013) <<http://www.bbc.co.uk/news/world-asia-23453243>> last accessed 12 November 2013; Syed Mohammad Ali (09 August 2013) (n 478); A. Majeed, 'Pakistan's Women-Only Jirga Fights for Equal Rights' *Newsweek Pakistan* (11 July 2013) <<http://newsweekpakistan.com/pakistans-women-only-jirga-fights-for-equal-rights/>> last accessed 12 November 2013.

⁹⁶⁰ A. Majeed (11 July 2013) (n 959).

therefore significant, more so than any material or official redress the women may now be able to acquire through the use of state legal frameworks. This view, however, was not shared by some human rights activists. Tahira Abdullah, one of the most prominent rights activists in the country, said: 'I don't see it as more than a gimmick.... Who is going to listen to these women? The men with the Kalashnikovs? The Taliban who are anti-women? The patriarchal culture that we have?'⁹⁶¹ She also asserted that the 'Jirga system is totally illegal, and has been declared illegal by the Supreme Court of Pakistan. It can *never* be just. There are several extremely notorious cases where we have noticed that women do not get justice from *jirgas*, neither do non-Muslims.'⁹⁶² But I argue that for those who are not given justice by the state institutions and are barred from any other avenues to pursue redress, a closing down of even the possibility of searching for alternative forms of law presents a grave problem.

The inability of the human rights narrative on law to recognise the appeal of local justice systems is not the only problem that this perspective presents. Following on from the previous point, while the human rights approach denounces the patriarchy prevalent in local tribunals and indigenous law as well as the state, its only proposed solution is the strengthening of the state.⁹⁶³ By directing the demands for greater rights protection towards the state, it furthers the Hobbesian state narrative and remains within the dominant narrative on law in Pakistan. This presents the major paradox of the narrative –

⁹⁶¹ Orla Guerin (25 July 2013) (n 959).

⁹⁶² Ibid.

⁹⁶³ Ali Raza Khan Jatoui (2013) (n 926).

while it recognises that it is the state along with its legal and juridical set-up which violates the rights of some communities of its citizens, it also calls for the state to provide and protect its citizens' rights, and dissolve the normative orders that exist outside the established laws of the state.⁹⁶⁴ This is primarily because the human rights discourse, on the whole, is unable to divest itself from the confines of the traditional notion of sovereignty, and this is reflected in the case of Pakistan as well. Žižek writes that in the current day and age, human rights movements 'rely on state apparatuses, which are not only the addressee of their demands, but also provide the framework for their activity'.⁹⁶⁵ Owing to their challenge to, but also dependence on, the conceptions linked to the state,⁹⁶⁶ the human rights narrative serves to strengthen the state-oriented approach to law and co-opts the languages and means of resistance that lie outside it.

Costas Douzinas's critique of the wider discourse of human rights is apt here. He asserts that 'human rights are an ideology with a moral inflection. They are supposed to be above politics, a neutral, rational, natural discourse and practise and a "moral trump card"'.⁹⁶⁷ For Douzinas, it is the neutrality and apolitical nature of human rights that is the problem, by virtue of which this discourse is unwilling to challenge the political strength of the state. Tracing a history of human rights, he considers the Christianisation of Classical Natural Rights Theory, and the emergence of state-led legal authority and Legal Positivism as

⁹⁶⁴ The Express Tribune (31 May 2012) (n 830).

⁹⁶⁵ Slavoj Žižek, *In Defence of Lost Causes* (Verso, London) 371.

⁹⁶⁶ Ibid.

⁹⁶⁷ Costas Douzinas, *The End of Human Rights* (Hart Publishing, Oxford 2000) 11.

the precursors of the contemporary paradigm.⁹⁶⁸ Christianisation is said to have created the 'individual' as the subject of natural rights, while legal positivism removed God from natural rights and installed the state in its stead.⁹⁶⁹ Human Rights thus became the rights of an individual by virtue of his social contract with the state – a contract which the state could decide to revoke in its interest. He also traces the genealogy of the 'Right to Protest' and struggle as the precursor of the human rights and social contract theory. This Right to Protest, however, gradually declined between the French and American Revolutions and the twentieth century, while it was completely removed from the picture when the Universal Declaration of Human Rights and the subsequent covenants were prepared and signed.⁹⁷⁰ Douzinas writes that the 'prime function' of contemporary human rights, therefore, is 'to construct the individual person as a subject (of law)',⁹⁷¹ where the subject's entire existence as a subject depends on the state's will, while at the same time he is disempowered by removal of any (*non-legal*) avenues of struggle and protest. To address the state on the violation of his rights, he needs to communicate through the language of human rights. It recognises that the state has been unable to safeguard the rights of individuals, but at the same time it only presents the option of lobbying the state to do more. It looks towards the reform of the state's mechanisms, procedures and structures, not recognising that advocacy alone may not be able to reform the state, as it is intricately embedded in the local and global power structures that benefit from the status quo.

⁹⁶⁸ Ibid. 11.

⁹⁶⁹ Ibid.

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid. 7.

I argue that despite its strength in highlighting issues of human suffering and denial of rights, human rights discourse, especially in Pakistan's case, does not offer a holistic critique of the structures of law and mechanisms of power. The organisations working in this arena challenge the state for failure to fulfil its obligations towards its subjects, but they look toward the state as the ultimate guardian of rights and freedom. The power structures, patriarchy, feudalism, religious conceptions and misogyny that are cited as criticisms of the traditional tribunals, formulate a problematic part of the state's framework as well.⁹⁷² There have been numerous instances in which members of provincial and national legislatures have been found to be involved in instances of honour killings or exchange or trade of women to settle disputes.⁹⁷³ Moreover, some of the grave instances of human rights abuses have the State as the main perpetrator behind them. The forced disappearances and the excesses of military personnel in Balochistan province and the tribal areas are carried out under state's authority.⁹⁷⁴ Furthermore, human rights organisations also argue for state to bring the people of the tribal regions (constitutional exteriority) into the net of citizenship and afford them more human rights. Considering that the rights of minorities, women and people involved in different struggles within Pakistan are not effectively safeguarded by the state, bringing the people of the tribal areas into the citizenship net will not necessarily resolve the problems of

⁹⁷² Pratiksha Baxi, Shirin M. Rai and Shaheen Sardar Ali, 'Legacies of Common Law: 'Crimes of Honour' in India and Pakistan' (2006) 27 (7) *Third World Quarterly* 1239, 1249.

⁹⁷³ Dawn (31 March 2009) (n 474).

⁹⁷⁴ See, generally, Adeel Khan (2003) (n 74). The recent discovery of mass graves in Balochistan is a relevant example in this regard. It is believed that the graves holds bodies of 'missing persons' from Balochistan, and the matter is currently sub judice.

lawlessness and suffering. If the State is seen as a contributor to the human rights abuses, no mere assertion of human rights obligation would completely rectify the situation.

In addition to the two paradoxes discussed above, there are another two significant challenges that the human rights narrative faces in the context of Pakistan's socio-legal setup. First, the human rights language and discourse is perceived as alien to the people, a large section of whom believe it to be a narrative borrowed from western academic and legal discourse.⁹⁷⁵ Human rights organisations challenging the state and traditional tribunals and normative customs prevailing in Pakistan are often branded as organisations that are foreign-funded.⁹⁷⁶ Human rights and development NGOs are accused of trying to fulfil a 'western agenda',⁹⁷⁷ and there is recognition of the resultant 'trust deficit'⁹⁷⁸ even within the NGO community. It is argued that not just the wider public, but even the activists associated with the development and human rights sectors consider 'human rights and democracy as a Western Agenda.'⁹⁷⁹ In its 2009 report on *Human Rights Reporting in Pakistani Media*, the Pakistan Institute for Peace Studies claimed that this perspective was reflected by 'many journalists' as well, who considered 'human rights as anti-Islam' and bearer of

⁹⁷⁵ Farida Shaheed (2010) (n 288) 862-863.

⁹⁷⁶ Ibid.

⁹⁷⁷ Uzma Tahir, *Space for NGOs in Pakistan* (Actionaid, Pakistan 2013).

⁹⁷⁸ Ibid.

⁹⁷⁹ Samson Salamat, 'Civil Society of Pakistan: Contribution, Impact, Challenges and Way Forward'

<<http://www.chrepak.org/downloads/Civil%20Society%20in%20Pakistan%20Presentation.pdf>> last accessed 12 January 2014.

foreign culture and values.⁹⁸⁰ This is not too dissimilar to the wider critique of human rights discourse, which challenges the paradigm based on its historical and geographical particularity. Critics argue that the initial list of rights and values they were based on emerged from a specific moment of world history, and is inextricably tied to its geographical and cultural origins. Scholars also question the claimed universality of human rights.⁹⁸¹ They argue that while it is evident that not all members of humanity are afforded equal rights in practise, even the categories used at the theoretical level – terms like ‘human’, ‘rights’, ‘citizen’ – are either unclear, or selectively defined and applied to suit the needs of power.⁹⁸²

However, in relation to Pakistan’s socio-legal tapestry, this critique takes a different turn. While it signifies a gulf between the human rights discourse and the language of resistance adopted within the country, the critique of the particular origins of human rights discourse is appropriated in larger conspiracy theories. Promotion of the rights of women and minorities is considered a conspiracy against the cultural and religious values, and several rights activists have paid the price for this with their lives.⁹⁸³ A sitting Member

⁹⁸⁰ Safdar Sial, 'Human Rights Reporting in Pakistani Media' (2009) 2 (1) *Conflict and Peace Studies* 1, 8.

⁹⁸¹ Sam Adelman, 'Between the Scylla of Sovereignty and the Charybdis of Human Rights: The pitfalls of Development in pursuit of Justice' (2008) 2 *Human Rights and International Legal Discourse* 17, 29.

⁹⁸² Ibid. 30-33.

⁹⁸³ Farida Afridi, Executive Director of Sawera (a women’s rights organisation based in North-western region) and Zarteef Khan (a coordinator at HRCP) were murdered in 2012 and 2011 respectively, for promoting women’s rights in FATA regions. Myra Imran, 'Safety of human rights defenders, particularly women demanded' *The News* (Islamabad, Pakistan) <<http://www.thenews.com.pk/Todays-News-6-124577-Safety-of-human-rights-defendersparticularly-women-demanded>> last accessed 05 May 2013.

of the National Assembly of Punjab province had publicly claimed that the Mukhtar Mai case (discussed in Chapter 2), highlighted by human rights groups, was 'a conspiracy to defame Pakistan and Islam', propagated to earn foreign aid.⁹⁸⁴ This same sentiment was expressed by Pervez Musharraf, then President of Pakistan, when he called such incidents a 'money-making concern' and denounced the situation by saying that 'A lot of people say that if you want to go abroad and get a visa for Canada or citizenship and be a millionaire, get yourself raped.'⁹⁸⁵

Finally, emerging from the previous point, in an attempt to narrow the gulf between the human rights discourse and the people of the country, the human rights discourse is often co-opted by the Islamic narrative. Despite the two positions generally adopting oppositional stances,⁹⁸⁶ this appropriation is apparent in the human rights narrative within the legal fraternity more than the narrative of the NGOs. Judges and lawyers have often associated the constitutional guarantees and human rights to the rights present within the Islamic religious discourse, some accounts of which have already been discussed in the previous chapters.

⁹⁸⁴ Usman Manzoor, 'Dasti praises SC verdict in Mukhtaran Mai case' <<http://www.pakistangendernews.org/dasti-praises-sc-verdict-in-mukhtaran-mai-case/>> last accessed 15 July 2013.

⁹⁸⁵ BBC News, 'Outrage at Musharraf's rape remarks' <http://news.bbc.co.uk/1/hi/world/south_asia/4251536.stm> last accessed 17 May 2013.

⁹⁸⁶ *Farida Shaheed* (2010) (n 288) 861-863.

7.5. Conclusion

The human rights discourse, and its associated narrative on law, have become increasingly prominent in Pakistan in the past few decades. The existence of this narrative is evident not only in NGO and activist accounts, but has also become visible in the language of the judiciary and the wider legal fraternity. However, one consequence that emerges from the human rights narrative on law is the insistence on disputing the legality of any alternative forms of justice that exist in the society outside the authority of the state. It has been emphasised in this chapter that this approach inadvertently acts to further marginalise those sections of the society which do not have recourse to mainstream legal institutions. The chapter also sought to identify some other key issues that come to the fore when the human rights narrative is considered in the context of Pakistan's socio-legal tapestry. Building on the identification, analysis and critique of the four prominent narratives of law in Pakistan as offered in this and the preceding three chapters, the discussion will now move towards a different approach and discuss an alternate way through which the socio-legal problems of Pakistan could be analysed and understood.

Chapter 8: Towards an Alternate Narrative: (Re)reading the Socio-Legal Tapestry of Pakistan

This chapter builds on the foregoing discussion about the questions and contradictions that emerge from a critical analysis of the multiple frameworks and narratives of law, in relation to their ability to account for the particularities of Pakistan's socio-legal tapestry. As the final substantive chapter of the dissertation, it returns to the issues raised heretofore, and presents an alternative view to frame them. By looking at the colonial foundation of the country's socio-legal terrain, this chapter develops the idea of *Coloniality in Law*, as distinct from the historical event of colonialism. It is argued here that through understanding the principles and logics of Coloniality, we can move towards a more nuanced narrative of the problems of Pakistan's legal architecture, while also opening avenues for de-colonial approaches and resistance.

8.1. Reconsidering Law in the Context of Pakistan: Foundational questions

The current study has thus far developed two significant arguments in relation to Pakistan's socio-legal situation and analysis. One, it has outlined and discussed the various prominent facets of the country's legal architecture to formulate and present, what the thesis terms as, Pakistan's socio-legal

tapestry.⁹⁸⁷ It has considered the historical and conceptual trajectories of some of the multiple legal and normative structures that prevail in the country, their interplay and encounters, as well as their limitations and problems, as the key to comprehend law in the context of the country. The bifurcation between legal and political discourses, and between legalistic accounts and sociological examinations, has meant that most analyses of law in Pakistan focus exclusively on selected segments of the tapestry, at the expense of considering their place within the wider terrain.⁹⁸⁸ By examining the various notions and manifestations of law together, this study has presented the case for a holistic approach to law, which is the necessary prerequisite to understand the difficulties that the law, state and the wider society of the country are faced with.

It has been argued that any wider examination of law in Pakistan has to take account of the struggle for constitutional and judicial dominance between the inherited colonial law, common law and Islamic law, which has dominated the constitutional and legal history of the country, and which is very much evident today.⁹⁸⁹ Moreover, this struggle has to be approached in conjunction with the existence of traditional and community courts, the legal anomaly of tribal areas, and the ascendance of 'lawlessness' – facets that are perceived as anomalies in mainstream legal discourse and, as a consequence, either left out of legal discourse or included primarily as obstacles that need to be overcome through

⁹⁸⁷ Chapter 3 on page 96.

⁹⁸⁸ Previously discussed on page 42.

⁹⁸⁹ Page 142.

the (re)assertion of pre-existing frames of analysis.⁹⁹⁰ The strict legal expositions and isolationist standpoints that have largely dominated the country's (socio)legal analyses tend to restrict their gaze on the structures that neatly fall within the seams of their pre-defined categories. This study asserts, however, that unless the multiple tendencies, foci and structures of legality are approached together, this restricted 'gaze'⁹⁹¹ can only offer partial understanding of issues, and will only lead to blind propositions.

The other significant argument of the current study emerged from this expansion of the subject matter of (socio)legal analysis. It has been argued throughout the course of the foregoing discussion that a shift in the understanding of what constitutes law in the context of Pakistan logically leads towards a (re)consideration of the lenses and narratives generally employed to examine law. Abstractions and theoretical conceptions are crucial in enabling us to grasp the Pakistani legal system in a more comprehensive manner, and resolve or at least recognise its contradictions, though they may be trapped within their own contradictions. The discussions in the previous four chapters have underscored the various limitations that different prominent narratives to law, as well as their underlying theoretical conceptions, are faced with when they are applied to the legal realities of the context in consideration. The dominant legal narrative and the legal positivistic approach, through their

⁹⁹⁰ Page 138.

⁹⁹¹ Gaze and its role in not just witnessing or observing the subject, but also in the creation of the subject itself is widely discussed in critical theory and psychoanalysis. As Lacan writes, 'What determines me, at the most profound level, in the visible is the gaze that is outside. It is through the gaze that I enter light and it is from the gaze that that I receive its effects.' Quoted in Janne Seppänen, *The Power of the Gaze: An Introduction to Visual Literacy* (P. Lang, New York 2006) 76.

exclusive focus on state law, are unable to recognise the multiple legal realities and normative orderings that exist both within and outside the state-oriented legal frameworks.⁹⁹² Moreover, the insistence on the prevalent conception of law – a stronger state, greater ‘writ of the government’ and undisputed assertion of Sovereignty – ignores the fact that some of the contradictions that the society is faced with have been supported by the State.⁹⁹³ But the narratives that aim to counter or amend the dominant narrative of law present their own difficulties. The Islamic law narrative denounces the alien nature of the inherited legal and constitutional traditions, and claims to represent the ideological foundation of Pakistan. However, it proves unable to divest itself from its own colonial heritage, or respond to the assertions that it is becoming more exclusionary and comes into conflict with the ideas of citizenship and democracy, no matter how weak they are in the context of Pakistan.⁹⁹⁴

The assertion on traditional normative orders and legal pluralism also emerges from the critique of dominant legal system as a foreign imposition. Positing a strong challenge to legal-centralism, this narrative highlights the existence of alternative normative orderings that have historically existed in the region, and are still the fora of choice for a great section of the populace.⁹⁹⁵ But this narrative comes under fierce criticism due to the repressive nature of some of these alternative justice mechanisms, and provides only limited insights on the conflicts between multiple legalities. The models of informal justice attempt to

⁹⁹² See, Problematising the Dominant Narrative on Law in Pakistan on page 161.

⁹⁹³ Page 161.

⁹⁹⁴ Page 202.

⁹⁹⁵ See, Traditional Law and Informal Courts on page 115.

create or recognise alternative methods of approaching and administering law, but they remain within the confines of the dominant legality and primarily aim to address issues of immediacy and access. The human rights narrative of law has also gained prominence in the country and has become embedded in both the language of the courts as well as in wider legal and political discourse. It highlights the suffering of the people and challenges the patriarchal and misogynist tendencies present in both the dominant as well as alternative justice systems. However, its demands are generally aimed towards achieving greater safeguards from the state, and it has to ultimately rely for redress on the same system that it criticises as deficient.⁹⁹⁶

The purpose behind the two above-mentioned contributions to Pakistan's socio-legal (and, in some ways, political) discourse is both to make a case for new avenues of context-specific legal analysis, as well as to create possibilities for it. The problems that the country faces and the suffering that its people experience create an urgent need to recognise the deficiencies, both in our conceptualisation of law in the country's context, as well as the narratives, perspectives, theories and ideologies that we employ to approach it. This is the necessary first step if our goal is the (re)formation of the legal and normative orders to make them more accountable to the people, and more responsive towards their suffering. This critique and acceptance of limitations, albeit necessary, is not sufficient, for it displaces that which we have held dear till now; it creates a vacuum in the place of the perspectives it challenges. This, I

⁹⁹⁶ See, Human Rights Narrative and the Socio-Legal Tapestry of Pakistan on page 239.

argue, is the most pressing task for those engaged in the analyses of legal, social and political spheres of Pakistan. The identification of the complexity of Pakistan's socio-legal tapestry, the recognition of contradictions present in the prevalent narratives to law in the country, as well as the inadequacies of mainstream theoretical propositions on law to comprehend the legal realities of this region, create the need to search for alternative narratives and context-specific theoretical conceptions. As the horizons of our understanding are found to be imperfect, we must search for new horizons and possibilities.⁹⁹⁷ The sections below will begin this pursuit for alternative ways of comprehending Pakistan's socio-legal situation, by offering a more nuanced narrative of law in the context of Pakistan.

However, any alternative narrative that might enable to us to comprehend the multiple facets of Pakistan's legal architecture in a different light needs to address the questions raised by the previous section of the current examination. The foregoing discussion has identified the following key issues that the narratives discussed are unable to explain adequately:

- There is a need to uncover or discover the role and the nature of the post-independence State and its authored law in the socio-legal setup of the country. This poses the question of recognising the historical trajectory of Pakistan's State and dominant legal system, as well as the issue of whether it

⁹⁹⁷ This is the only logical goal to aim for, in response to 'strong questions' that challenge 'the societal and epistemological paradigm that has shaped the current horizon of possibilities.' *Boaventura De Sousa Santos* (2009) (n 692) 3.

can and should be explained in any terms other than the 'weak state' terminology commonly employed in political discourses.

- The previous point is linked with the issue of the perceived and pervasive problem of lawlessness, which has significantly affected the legitimacy of the State before its citizens. The discussed narratives to law (except perhaps for pluralism) primarily assert that the problems of violence and insecurity emerge from an absence of law and the unwillingness of the State authorities, and that a stronger and wider reach of the legal and juridical instruments would resolve the problems.
- There is also the matter of the ascendancy of Islamic narrative of law that has gained such momentum in the recent decades that it has brought a major shift in the nature of the State and the society. The Islamic perspective of law has been in constant struggle with the dominant legal system and its inherited secular/common law tradition, and it is vital to recognise the importance of this conflict within the socio-legal terrain.
- The issue of recognition of the existence of multiple legal and normative orderings that exist in different localities in Pakistan and are, by some accounts, the prevalent legality in the country, is one that eludes the dominant narrative. These orderings play both an emancipatory and a repressive role, but their existence, although downplayed by the State, cannot be ignored as these normative systems are followed by a large

section of the country's population. These mechanisms often come into conflict with the state-authored legal order, which either subsumes them or declares them as illegal. How can any narrative on law recognise the plurality as well as the conflict between the various legal systems?

- The matter of the tribal regions of the country which are governed directly through executive authority, and to which the writ of the parliament and the judiciary does not extend, creates an unavoidable anomaly for the dominant narrative on law. These areas exist as a lacuna within the constitutional and legal framework of Pakistan, and to the inhabitants of these regions, the fundamental rights and constitutional guarantees do not apply. If the problems that Pakistan is faced with can be addressed through the extension and strengthening of legal instruments and institutions, why is the State adamant on maintaining the tribal regions as a legal and constitutional *exteriority*?
- Finally, and most significantly, the task is to resolve these issues in *favour* of the people. There is an urgent and pressing need to bring recognition of suffering to the heart of the legal and legal-theoretical discussions, so that possibilities for their alleviation may be opened. This may appear to some as an abstract ideal, but this is precisely what has guided the current study.

In order to acquire greater clarity on these questions and move towards a more nuanced narrative on law in Pakistan, we have to begin from the common

thread that seams across (most of) these questions, i.e., the historical legacy of colonialism.

8.2. Colonialism and Pakistan's Socio-Legal terrain

To reiterate, the socio-legal situation of Pakistan presents a complex tapestry, which emerges from the interplay, encounter and struggle between its various facets – common law, colonial law, Islamic law, traditional law, as well as laws applicable in the Tribal Regions. Disparate as these appear to be, a thread that runs through all of these manifestations of legality and normativity is their shared colonial history. Some of the most evident rifts and tensions within the legal terrain today can be traced to what transpired in the region before the country itself was born. It was the colonial history that set events in motion and it is therefore the pertinent starting point for any wider analysis of Pakistan's socio-legal setup.

The fact that the remnants of the colonial legal system still exist within the state-law system has been widely acknowledged, and has also been examined previously in this dissertation.⁹⁹⁸ The commercial and mercantile laws, codes of civil and criminal procedures and even the penal code in force today are largely a reformulation of the laws that the British Indian government implemented in the sub-continent.⁹⁹⁹ Though these have gone through significant changes in the post-independence period – the most prominent among them being the

⁹⁹⁸ Page 128.

⁹⁹⁹ *Martin Lau* (1994) (n 327) 6.

Islamisation of laws campaign during the Zia regime¹⁰⁰⁰ – the basic foundation of the laws and legal institutions laid during the colonial era is unmistakably evident. As mentioned previously, even the controversial Blasphemy laws of the country reveal a religious (and majoritarian) modification of the provisions laid out in the penal code that Pakistan inherited at the time of independence.¹⁰⁰¹ The case of the (legal) framework that governs the Tribal Areas is another case that has been extensively examined above.¹⁰⁰² Born from the British colonial state's need to safeguard its Indian Empire from the *Pushtun* tribes in the North West as well as the Russian Empire, these laws were mainly instituted to implement the 'threefold Frontier' policy to keep the colonies protected and the tribes in control.¹⁰⁰³ The principle that was adopted at the time – that is, to *legally* create a territory where the executive authority and the criminal sanctions of the State may reach, but not the rights and guarantees that may be afforded to its subjects – may have been a novel and successful experiment (from the vantage point of the Empire) at the time.¹⁰⁰⁴ The fact that this legal framework¹⁰⁰⁵ has been continued by the post-independence State till today¹⁰⁰⁶ demonstrates that it is not only the legal formulations of colonialism that the State inherited, but also the logics and principles that provided the very foundation for such rules. I will return to this issue of colonial logic below.

¹⁰⁰⁰ See, generally, *Charles H. Kennedy* (1990) (n 244); *Martin Lau* (2006) (n 97); *Rubya Mehdi* (1994) (n 97).

¹⁰⁰¹ *Raza Saeed* (2013) (n 246).

¹⁰⁰² See, *Colonial Law and the Tribal Regions* on page 128.

¹⁰⁰³ *George Nathaniel Curzon* (n 504).

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ *Frontier Crimes Regulations, 1901*

¹⁰⁰⁶ *Shaheen Sardar Ali and Javaid Rehman* (2001) (n 115) 47.

The influence of colonialism, however, runs much deeper than the mentioned instances of prevalent laws. It not only provided the legal frameworks that are by and large in place today but, more significantly, laid the terrain in which the struggles of the socio-legal sphere are now panning out. This terrain, based on the categorisation of people, the classification of cultures, and the identification of norms, as applied by the colonial administrators, marked the course that the legal and normative orders have taken since then. It was this *knowledge* that 'both enabled colonial conquest and was [in turn] produced by it.'¹⁰⁰⁷ In its desire to define and control the *other* it had encountered, the colonial enterprise established classifications of religion, culture and castes, which became reified with the passage of time.¹⁰⁰⁸ As Dirks argues, 'representation in the colonial context was violent; classification a totalising form of control.'¹⁰⁰⁹ Randeria writes that despite the assertions of modernity, nationalism and homogenisation in the metropolis, the colonies were marked by differentiation and enumeration.¹⁰¹⁰ The impact of this 'production of difference' continued after independence, so that 'religious communities [in the Indian sub-continent] as we know them today are very much a product of enumeration, classification and categorisation by the colonial state.'¹⁰¹¹ This writing and recording of differences 'to make sense of the multiplicity of cultural norms' led not only to the 'fossilisation of [a particular form of] culture,'¹⁰¹² but led to the

¹⁰⁰⁷ Nicholas B. Dirks, 'Introduction: Colonialism and Culture' in Nicholas B. Dirks (ed) *Colonialism and Culture* (University of Michigan Press, Ann Arbor, Michigan 1992) 3.

¹⁰⁰⁸ Ibid. 3-5.

¹⁰⁰⁹ Ibid. 5

¹⁰¹⁰ *Shalini Randeria* (2006) (n 25) 226.

¹⁰¹¹ Ibid.

¹⁰¹² *Shaheen Sardar Ali* (2007) (n 785) 78.

appropriation, classification and transformation of the legal and normative orders as well.

Through the lens of their own rules and conceptions of law, the colonial administrators and gazetteers judged, appropriated or denounced the existent traditional, legal and normative orderings.¹⁰¹³ The most substantial move was perhaps the shift in the nature of religious laws and customary norms from personal to territorial. The Imperial Gazetteer of India, first published in 1881 (with the new edition cited here published in 1909), noted that the 'indigenous law of India is personal'¹⁰¹⁴ and then went on to classify this law between two major groups: the Hindu and Muhammadan. Based on this knowledge, it then moves further to state that at the advent of the British in India

[T]he natural consequence would have been their [colonial administrators'] submission to Native law. But there was, in the first place, no *lex loci* to govern the new comers, for the idea of a territorial, as opposed to a personal law, is of European and modern origin, and the Shastras and Koran alike know no local limits, but bind individuals united only by a common faith.¹⁰¹⁵

The initial tendency of the British colonial administration was to 'make their law public and territorial,'¹⁰¹⁶ which would apply equally to natives and colonial incomers. This approach was later renounced by the British Parliament's

¹⁰¹³ Calling the Gazetteer 'the new bible' for the colonial state, Shaheen Ali writes that 'British [Officials] travelled the length and breadth of the country, from village to village, gathering people to question them on what their culture was, and compiling notes, later published (as Gazetteers). The crucial question to pose here is: who were the participants and informants in these culture-gathering meetings? It was no doubt, the male elite, excluding working classes, minority groups and women.' Ibid. 78.

¹⁰¹⁴ H. W. C. Carnduff (1909) (n 483) 126.

¹⁰¹⁵ Ibid. 127.

¹⁰¹⁶ Ibid. 127

Declaratory Act of 1780, which ruled that ‘as against a Hindu, the Hindu law and usage, and as against a Muhammadan the laws and customs of Islam, should be applied.’¹⁰¹⁷ However, notwithstanding the problems with the very decision and power to determine the applicability of laws in such a manner, the colonial *knowledge* of the so-called laws and customs of Hindus and Muhammadans was itself problematic. Scholars maintain that the assumption that Muslims and Hindus (a category which also included Sikhs and Jains) were ‘homogenous communities following uniform laws’ created a ‘legal fiction’¹⁰¹⁸ that, coupled with the strict rooting of these laws in scriptures, lead to ‘the Brahminisation and Islamisation of laws.’¹⁰¹⁹ There are certainly those who praise the colonial law for removing ‘the angularities of the law of Islam’ and bringing it ‘in line with the modern notions of social justice.’¹⁰²⁰ The British accounts of the time themselves mention that the interests of modernity, equity and justice created the ‘impossibility of allowing the crude penal law of the Musلمان system to be followed... and here also radical alterations were made.’¹⁰²¹ The Imperial Gazetteer acknowledges that

Owing to the influence of Western jurisprudence, to the case-law emanating from the courts established and moulded on English models, to the advance of enlightened ideas, and to the progress of education, the rules of the Shastras and the Koran have gradually been *altered* and relaxed.¹⁰²²

¹⁰¹⁷ Ibid. 127.

¹⁰¹⁸ An echo of the assertion of ‘legal fiction’ asserted by the dominant narrative of law, discussed above. *Peter Fitzpatrick* (2004) (n 490) 566.

¹⁰¹⁹ Flavia Agnes, quoted in Shaheen Sardar Ali, ‘Conceptualising Islamic Law, CEDAW, and Women’s Human Rights in Plural Legal Settings’ (New Delhi 2006) 95.

¹⁰²⁰ Asaf A. A. Fyzee, ‘Muhammadan Law in India’ (1963) 5 (4) *Comparative Studies in Society and History* 401, 413.

¹⁰²¹ *H. W. C. Carnduff* (1909) (n 483) 144.

¹⁰²² Ibid. 128 (emphasis added).

But such perspectives ignore or hide the very injustice, inequality and 'epistemic violence'¹⁰²³ that lies at the heart of this classificatory enterprise. The codification, appropriation and 'removal of angularities'¹⁰²⁴ in existing laws and customs was not an exercise in advancing justice, but served as an aid to conquest and domination. It led both to the fossilisation of religion, culture, customs and norms, as well as to their impoverishment. The understanding of Islamic principles applied by British Indian courts and administrators mainly stemmed from translations of selected texts, which disregarded the diversity of opinions, schools of thought and sects within Islam. Anderson writes that the textual foundation of Anglo-Muhammadan law was primarily based on just three texts translated during the eighteenth and nineteenth centuries – the *al-Hidaya* (a compilation of texts from the *Hanafi* school of Islamic jurisprudence); *al-Sirajiyya* (which covered inheritance issues); and Baillie's *A Digest of Moohammudan Law*, which included abbreviations and portions of Shi'a jurisprudence and *Fatwa Alamgiri* (the seventeenth century anthology of Shariah law, mainly based on Hanafi jurisprudence, compiled during Aurangzeb's Empire).¹⁰²⁵ Some errors in the translations were discovered during the nineteenth century, but were never incorporated in the English versions.¹⁰²⁶ The appropriation of Islamic law by the colonial legal framework divested it of the complexity of its perspectives, the multiplicity of outlooks and

¹⁰²³ To borrow a term from Spivak. See, Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan Education, Basingstoke 1988) 82-84.

¹⁰²⁴ Asaf A. A. Fyzee (1963) (n 1020) 413.

¹⁰²⁵ Michael Anderson (1993) (n 481) 214.

¹⁰²⁶ Ibid.

the differences of opinion. Based on this, Ali asserts that 'by codifying Islamic law, the rich variation and flexibility in interpreting the religious text in Islam was lost and is a burden carried over to the post-colonial era.'¹⁰²⁷

The translation, codification and appropriation generated and embedded 'an essentialist, static Islam incapable of change from within,'¹⁰²⁸ which marked the trajectory of the understanding and application of Islamic law in the region even post-independence. Colonialism transformed a 'living law'¹⁰²⁹ into ossified conceptions perpetually geared towards the past; it distorted the 'law of the jurists' that was free from the idea of binding precedents and was predisposed to 'respond to its immediate social context'¹⁰³⁰ to a stagnant and fossilised version of itself. But this appropriation and mutilation was not just limited to Islamic or Hindu or any other religious conception of law. A similar move was evident in relation to customary law and local mechanisms of justice.¹⁰³¹

In the pre-colonial India, 'there were innumerable, overlapping local jurisdictions and many groups enjoyed one or another degree of autonomy in administering law to themselves.'¹⁰³² These groupings did not relate to any single mode of classification, and religion, caste, culture, geography and locality

¹⁰²⁷ *Shaheen Sardar Ali* (2006) (n 1019) 267.

¹⁰²⁸ *Michael Anderson* (1993) (n 483) 214.

¹⁰²⁹ 'Living law' as the 'inner order of associations'; Eugen Ehrlich quoted in Peter Fitzpatrick, 'Law and Societies' (1984) 22 (1) *Osgoode Hall Law Journal* 115116; or 'living law' as the 'law that lives in citizens' experience', as opposed to formal and state-centred legal systems, Roger Cotterrell, 'Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies' in Marc Hertogh (ed) *Living Law: Reconsidering Eugen Ehrlich* (Hart Publishing, Oxford 2009) 77.

¹⁰³⁰ *Osama Siddique* (2013) (n 98) 62.

¹⁰³¹ See, *Traditional Law and Informal Courts* on page 115.

¹⁰³² Marc Galanter, 'The Displacement of Traditional Law in Modern India' (1968) 24 (4) *Journal of Social Issues* 65, 66.

all played different roles in constructing their own legal and normative spheres.

Galanter states that

The relation of the “highest” and most authoritative parts of the legal system to the “lower” end of the system was not that of superior to subordinate in a bureaucratic hierarchy.... Instead of systematic imposition, of “higher” law on lesser tribunals, there was a general diffusion by filtering down (and occasionally up) of ideas and techniques by conscious imitation and by movement of personnel.¹⁰³³

With the advent of the British, these local systems of justice, some of which were considered to be in a ‘remarkably high state of organisation’¹⁰³⁴ and equated to Athenian democracy,¹⁰³⁵ underwent radical transformation. Galanter, notwithstanding his praise for the unification and modernisation of Indian customary law by the colonial regime, highlights three major changes that the local and customary systems underwent.¹⁰³⁶ These entailed the shift in the administration of indigenous law from informal to formal court, restrictions on the geographical and substantive remits of the informal courts, and the transformation of the local norms through their application by the state courts.¹⁰³⁷ Shah writes that through this appropriation, scripting and application based on common law method, the custom itself went through major changes as ‘the British imperialists narrativised, defined and codified custom and formalised the informal.’¹⁰³⁸ But this ossification of another aspect of the sub-continental *living law* was not the only outcome of the colonial

¹⁰³³ Ibid. 67

¹⁰³⁴ Elphinstone, quote in *Shaheen Sardar Ali* (1999) (n 99) 187.

¹⁰³⁵ Ibid.

¹⁰³⁶ *Marc Galanter* (1968) (n 1032) 68.

¹⁰³⁷ Ibid. 69.

¹⁰³⁸ *Nafisa Shah* (2007) (n 115) 138.

encounter, as the local customary systems were co-opted further in the interest of the empire. While curtailed and even outlawed in some areas of the colony, where they were actively replaced by state courts, the tribunals such as *jirgas* were effectively incorporated into some regions for the control and exclusion of the local communities.¹⁰³⁹ Laws, such as the Frontier Crimes Regulations, instituted the category of official *jirgas* that operated at the behest of the state to apply (state authorised version of) customary law, and acted as the main judicial body within the tribal regions, as discussed in detail in the previous chapters.¹⁰⁴⁰

Colonialism, then, lays the very terrain on which the legal architecture of Pakistan stands; it pervades the very fabric on which the socio-legal tapestry of the country is formed. While the continuation of colonial laws is evident within the formal legal system and common law tradition, this historical legacy also lies at the foundation of customary or traditional orderings, the Islamic conception of law currently dominant in Pakistan, and the laws applicable in the Tribal Areas.

8.3. From Colonialism to Coloniality

The recognition that the major contradictions and struggles within the socio-legal sphere of Pakistan are born out of colonialism moves the analysis forward, but only to a limited extent. Although it is necessary to acknowledge the role of

¹⁰³⁹ *Shaheen Sardar Ali and Javaid Rehman* (2001) (n 115) 92.

¹⁰⁴⁰ See, *Traditional Law and Informal Courts* on page 115.

the colonial legacy in the context of law, 'Where do we go from here?' is the question that emerges from this and requires due attention. I argue that the recognition and problematisation of the colonial legacy of law in Pakistan, and indeed other post-colonial countries, can mainly lead to three divergent options. One possibility is to continue with the existing state of affairs and the narratives employed to understand them, though acknowledging their troubled histories; reforming them to address the situation, tweaking and tuning them to respond to the generally perceived problems, if that lies within the larger interests of the state. This, however, is a false choice.¹⁰⁴¹ Given the situation, the detrimental effects of the current structures and narratives for the people, the 'ubiquitous suffering'¹⁰⁴² that haunts day to day living in the country,¹⁰⁴³ opting for status quo is not really an option if the situation is considered from the vantage point of the country's larger populace.

Another course that emerges from the above question is that an admission of the problematic legacy of colonialism should lead to its cancellation, and to a reversal of its laws, institutions and impact. Its call is to radically 'transform and abrupt' the colonial legal legacy, 'severing the past from the present.'¹⁰⁴⁴ This

¹⁰⁴¹ *Jayan Nayar* (2013) (n 94) 64.

¹⁰⁴² As Upendra Baxi argues, 'Suffering is ubiquitous to the point of being natural'. *Upendra Baxi* (1998) (n, 131. He even criticises the grammar of the current human rights discourse that 'dissipate human and social suffering, at times to a point of social illegibility.' Upendra Baxi, *The Future of Human Rights* (Oxford University Press, New Delhi 2006) xvi. For an exposition of the conceptual category of suffering and its engagement with the western philosophical discourse, see *Jayan Nayar* (2013) (n 94).

¹⁰⁴³ See, The need to examine Pakistan's Legal Tapestry on page 6.

¹⁰⁴⁴ Matthew C. R. Craven, *The decolonization of international law: State Succession and the Law of Treaties* (Oxford monographs in international law, Oxford University Press, Oxford UK ; New York 2007) 19. Craven identifies these first two modes of decolonisation (evolution and radical transformation) in relation to International Law, and its post-colonial manifestation.

argument is for *de-colonisation* of the socio-legal terrain as a return to the local, traditional, and indigenous. As discussed in chapters 5 and 6, this position is adopted by the Islamic and plural-legal narratives to law in Pakistan to denounce the *alien law* and assert the significance of their own legal modalities. However, appealing as it may or even does seem, it is far more problematic than it appears in the first instance. As considered previously in this chapter, colonialism implemented not just its own version of formal law in the region, but radically transformed the nature of the indigenous, cultural, religious and local normative orders. In the modern manifestation, the local, traditional and religious systems and narratives of law as they exist in Pakistan are colonial formations.¹⁰⁴⁵ And given that their modern origins are rooted in colonial history, no religious, local or cultural ordering can claim to be pure and truly indigenous. The idea, then, of a romanticised *pre-colonial* mode of legality or normativity to which a return could be made is a 'myth'¹⁰⁴⁶ and a fallacy. And this romanticised fallacy ignores, both the radical transformation that the region's existing normative and legal systems underwent, but also the fact that these systems themselves were and are rooted in their own respective modes of exclusion, patriarchy, coercion and repression. The religious and local mechanisms of justice that we see today, therefore, cannot be considered manifestations of the pre-colonial, or as viable reference points for de-colonisation. Moreover, even if the de-colonisation to the pre-colonial is accepted in principle, where does the search for a truly pure and indigenous

¹⁰⁴⁵ Page 259.

¹⁰⁴⁶ Myth is used here in the sense in which Peter Fitzpatrick proposes it, as 'the world of limits which captures those within it.' Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, London 1992) 24.

system in Pakistan end? Should it move beyond the British Crown's reign to preceding centuries of Muslim Empires, as even these were external influences at one point in time, or perhaps even beyond that? Any romanticised notion of pre-colonial religious and customary laws as untainted and unadulterated systems representing the true ethos of the society and beliefs of the people serves the purpose of rhetoric well, but it does not offer any concrete possibilities of de-colonisation of law. Colonialism as a historical phenomenon, without doubt, has played a significant role in shaping the socio-legal terrain of Pakistan; but while this history provides us a suitable starting point of analysis, it also restricts the options that can be undertaken to resolve this issue.

Finally, and significantly, the most viable option then is to interpret the socio-legal context of Pakistan and the idea of colonialism and law differently; to think of new avenues to read, analyse and (re)form the legal realities of the country.¹⁰⁴⁷ If a *return* to the pre-colonial is not possible, can we move towards some conception or formulation of law in this context that is 'de-colonial'?¹⁰⁴⁸ From this perspective, it is the identifiable facets of colonial law – judgement of/on the *other*; appropriation of knowledge and norms;¹⁰⁴⁹ unaccountability; systems based on alienation of those it purports to govern; aligning of state

¹⁰⁴⁷ See, generally, *Jayan Nayar* (2007) (n 28); Amita Dhanda and Archana Parashar, 'Decolonisation of Legal Knowledge: Whose Responsibility?' in Amita Dhanda and Archana Parashar (eds), *Decolonisation of Legal Knowledge* (Routledge, Abingdon 2009); *Boaventura De Sousa Santos* (2002) (n 692).

¹⁰⁴⁸ Walter D. Mignolo, 'Geopolitics of sensing and knowing: On (de)coloniality, border thinking, and epistemic disobedience' (2013) 1 (1) *Confero: Essays on Education, Philosophy and Politics* 129.

¹⁰⁴⁹ Page 259.

with the interests of specific groups, classes and personalities – that need to be recognised and challenged.

Divesting these notions of colonial law and Coloniality from the actual historical event of colonialism changes the mode of our analysis. I argue that in this approach it is not colonialism within the legal frameworks that is to be problematised and challenged, but *Coloniality*.¹⁰⁵⁰ Taking a lead from Walter Mignolo¹⁰⁵¹ and Anibal Quijano,¹⁰⁵² the assertion here is that Coloniality can be approached as an abstract idea, with colonialism(s) mainly appearing as its historical manifestation. Proposing this idea in the framework of knowledge, modernity/rationality and European/Western domination, Quijano argues that Coloniality 'is still the most general form of domination in the world today, even after colonialism as an explicit political order was destroyed.'¹⁰⁵³ Linking Coloniality to modernity, he maintains that they are mutually constitutive¹⁰⁵⁴ and this duality, in the Eurocentric experience in relation to the rest of the world, represented a 'specific rationality or perspective of knowledge that was made globally hegemonic' that colonised and overwhelmed other conceptions, formulations, knowledges and people.¹⁰⁵⁵ Coloniality, and therefore colonialism that stemmed from it, was not only a political act of conquest or domination, but

¹⁰⁵⁰ Quijano was the first theorist who coined the terminology of Coloniality of Power, and applied it to the Latin American situation. See, *Anibal Quijano* (2000) (n 12).

¹⁰⁵¹ See, on the topic of Coloniality and related issues, Walter D. Mignolo, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (2009) 26 (7-8) *Theory Culture Society* 159

¹⁰⁵² See, *Anibal Quijano* (2007) (n 12).

¹⁰⁵³ Ibid. 170.

¹⁰⁵⁴ *Anibal Quijano* (2000) (n 12) 548.

¹⁰⁵⁵ Ibid. 549.

involved a 'cognitive model'¹⁰⁵⁶ both for the colonisers as well as the colonised, that was based on racial, cultural, temporal, historical and systemic differentiation.¹⁰⁵⁷ This is similar to Boaventura Santos's consideration of colonialism as an epistemologically hegemonic project that, he argues, generated an 'abyssal divide' between the coloniser and the colonised.¹⁰⁵⁸ Santos contends that the abyssal thinking that lies at the heart of modernity and colonialism continues in the post-colonial era and that, in addition to dividing the colonial and the colonised, it renders the latter absent and invisible, 'not existing in any relevant or comprehensible way of being.'¹⁰⁵⁹ Taking Coloniality both as the form and logic of domination, Quijano employs this category to describe, not just the occurrences during colonialism, but also the power disparity, hegemony and global inequality that prevails in the post-colonial era.¹⁰⁶⁰ Based on this, Escobar writes that Coloniality as an idea 'incorporates colonialism and imperialism but goes beyond them; this is why coloniality did not end with the end of colonialism... but was rearticulated....'¹⁰⁶¹

The importance of considering the idea of Coloniality, its global materialisation in the post-colonial period and its manifestation in terms of Pakistan's situation in the world affairs certainly requires much consideration and extensive

¹⁰⁵⁶ Ibid. 552

¹⁰⁵⁷ Anibal Quijano (2007) (n 12) 171-173. This follows the same basic idea of colonial categorisation and appropriation of culture, knowledge, religion and laws, discussed previously in this chapter.

¹⁰⁵⁸ Boaventura De Sousa Santos, 'A Non-Occidental West? Learned Ignorance and Ecology of Knowledge' (2009) 26 (7-8) *Theory Culture Society* 103, 113-114.

¹⁰⁵⁹ Boaventura De Sousa Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX (1) *Review Fernand Braudel Center* 45, 45.

¹⁰⁶⁰ Anibal Quijano (2007) (n 12) 176-178.

¹⁰⁶¹ Arturo Escobar, 'Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalisation Social Movements' (2004) 25 (1) *Third World Quarterly* 207, 219.

examination. This, although a worthwhile endeavour, lies beyond the scope of the current study. However, I want to draw on and apply the notion of Coloniality as it manifests itself within the realm of Pakistan's socio-legal architecture. This requires us to approach Coloniality as a 'totalitarian'¹⁰⁶² conception that encounters other knowledges, rationalities and systems, and asserts itself as the truth. Mignolo argues that taken in the sense of a totality, Coloniality represents a conception 'that negates, excludes, occludes the difference and the possibilities of other totalities.'¹⁰⁶³ This notion of Coloniality, which Mignolo considers as *Ego-logy*¹⁰⁶⁴ (a rational, paradigmatic and historical solipsism), appears as 'engulfing and at the same time defensive and exclusionary.'¹⁰⁶⁵ It is this idea of Coloniality as a totalitarian notion that provides us with a different insight to understand Pakistan's socio-legal tapestry in a more nuanced manner. In this argument, Coloniality emerges as a systemic tendency which can be present in systems other than those emerging from the European traditions of modernity/rationality, though the totalitarian characteristics remain present. Much has been said here as well as in other accounts about the use of law for colonisation, and the resultant modifications in the nature of legal and normative orders of the colonies in the process.¹⁰⁶⁶ However, divesting Coloniality from colonialism and approaching it as a totality that *negates and excludes difference and the possibility of other totalities*¹⁰⁶⁷

¹⁰⁶² Walter D. Mignolo (2007) (n 105) 451.

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Ibid. 459-460.

¹⁰⁶⁵ Ibid. 451.

¹⁰⁶⁶ See Colonialism and Pakistan's Socio-Legal terrain on page 259.

¹⁰⁶⁷ Walter D. Mignolo (2007) (n 105) 451.

permits us to focus on *Coloniality in Law*¹⁰⁶⁸ that, I argue, grips the socio-legal terrain of Pakistan (and arguably other post-colonial countries).

Before moving further, it should be highlighted that the claim made here, may overlap, but is also significantly different from the ideas of post-independence continuities that have been debated in post-colonial literature, especially in relation to South Asian and African countries.¹⁰⁶⁹ The crucial difference is that a recognition of post-colonial and historical continuities¹⁰⁷⁰ focusses more on material manifestations rather than the logics that govern these continuities, which the framework of Coloniality transcends. Moreover, the recognition of continuities does not offer a framework to move beyond this recognition, and is entrapped within the same conundrums discussed previously in this chapter. The notion of Coloniality has been adopted here to move beyond these weaknesses.

8.4. Coloniality in Law: Of Logic, Form and Rationalities

We have already seen how colonialism employed the instrumentality of law to impose its particular rationality and knowledge on the Indian sub-continent –

¹⁰⁶⁸ I have used the term *Coloniality in Law* rather than *Coloniality of Law*, because the latter term implies a necessary and hegemonic link between law and coloniality, from which there may be no exit. *Coloniality in Law* is used primarily to argue that there may be a way to recognise and approach any emancipatory potential within law.

¹⁰⁶⁹ See, for instance, Katharine Adeney, 'Constitutional Centring: Nation Formation and Consociational Federalism in India and Pakistan' (2002) 40 (3) *Commonwealth & Comparative Politics* 8; Richard Higgott, 'Structural dependence and decolonisation in a West African land-locked state: Niger' (1980) 7 (17) *Review of African Political Economy* 43.

¹⁰⁷⁰ See, Introduction in John Dunn, *West African States, Failure and Promise: A study in comparative politics* (Cambridge University Press, Cambridge 1978).

the cognitive element that was both a necessity and a corollary of conquest.¹⁰⁷¹ In this process, the legal frameworks that existed in the region prior to the colonial arrival also underwent a radical shift. But the introduction of Coloniality in the region did not end with the so-termed decolonisation movements of the first half of the twentieth century. The idea of Coloniality, once tied to the instrumentality of law and the state, carried over to the post-independence period. Quijano, Mignolo and others primarily argue that what lies at the heart of this continued domination are global power structures and the Eurocentric paradigm.¹⁰⁷² I argue, however, that this idea needs to be developed further in relation to its engagement with law. To function, and indeed to continue, Coloniality and colonialism required an alignment of internal systems, in addition to those external ones that the theorists of Coloniality have identified. But despite the significance of the concept of Coloniality in the post-colonial decades, and the despite the centrality of law's instrumentality in achieving this, theorists working within this particular sphere have not developed the link further. This study expands on this association between Coloniality and law, and argues that Coloniality and colonialism, through their link to the instrumentality of law and the state, introduced three major tendencies within the socio-legal terrain of the sub-continent, the identification of which provides us with a better understanding of the predicaments and complexities of Pakistan's socio-legal tapestry. I argue that these relate to the introduction of Colonial Logic, the Transformation of

¹⁰⁷¹ *Nicholas B. Dirks* (1992) (n 1007) 3.

¹⁰⁷² *Anibal Quijano* (2000) (n 12); *Anibal Quijano* (2007) (n 12).

Rationality and the Fetishisation of Legal Form, and I will discuss these in relation to Pakistan's socio-legal context.

8.4.1. The introduction of the Colonial Logic

The first tendency that emerged from the nexus between Coloniality and law was that the structure and frameworks of law (and the state) were embedded with the *Colonial Logic*. Scholars have used this terminology to depict a variety of methods and occurrences linked with the colonial enterprise, including the 'colonial logic of subordination and appropriation',¹⁰⁷³ and the mutually constitutive colonial logic of distinction between the traditional/primitive and the modern,¹⁰⁷⁴ and the 'logic of coloniality' that provides the 'foundational structure' of Modernity and Western civilisation.¹⁰⁷⁵ Borrowing from such insights, I am employing this term in a specific manner to highlight the instrumentality of law. The argument here is that this colonial logic introduced two different facets into the nature of law in the sub-continent. First, this logic embedded within the dominant legal and political instruments the notion of distinction between the governors and the governed; between the colonial and the natives; between the modern, civilised and legal on one hand, and 'savages

¹⁰⁷³ Brenna Bhandar, 'Plasticity and Post-Colonial Recognition: 'Owning, Knowing and Being'*' (2011) 22 (3) *Law and Critique* 227, 237.

¹⁰⁷⁴ Walter D. Mignolo, 'Enduring Enchantment: Secularism and the Epistemic Privileges of Modernity' in Purushottama Bilimoria and Andrew B. Irvine (eds), *Postcolonial Philosophy of Religion* (Springer Netherlands, 2009), 287; also, Fitzpatrick's argument about the distinction between 'lawless savages' and modern law, quoted in Sinkwan Cheng, 'The Female Body as a Post-Colonial Site of Political Protest: The Hunger Strikers versus the Labor Strikers in Forster's *A Passage to India*' in Sinkwan Cheng (ed) *Law, Justice, and Power: Between Reason and Will* (Stanford University Press, Stanford, California 2004) 116 & 127.

¹⁰⁷⁵ Walter Mignolo, *The Darker side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press, Durham 2011) 13-16.

in their state of lawless “anarchy”¹⁰⁷⁶ on the other. Such distinctions clearly marked the place of law within the larger scheme – it emanated and served the colonial, and civilised and ordered the native. Through this, the legal system was geared towards serving the purpose of power rather than those it governed.¹⁰⁷⁷ Second, as a corollary, this logic instituted within the legal frameworks the idea of self-preservation of this asymmetrical system at the expense of those that were subject to it.¹⁰⁷⁸ Indeed, the survival of the colonial enterprise depended on its efforts at self-preservation. At the time of the British colonial rule, the colonial state and the law served the purposes of conquest, domination and extraction; in the post-independence period, they have continued to operate under the same colonial logic,¹⁰⁷⁹ and have been focussed on self-preservation, dominance of particular institutions (such as the military),¹⁰⁸⁰ protection of personal interests and clientelism.

I argue that this colonial logic – the remoteness of the legal system from the people, and the idea of self-preservation of the law and institutions of the State at the expense of the people – underlies the post-colonial situation of Pakistan. It is this colonial logic that has resulted in the estrangement of people from the institutions of law and the state, which then invites a critique of alienation.¹⁰⁸¹ One of the most relevant examples of the continuation of this colonial relation between the people and the state comes from the Constitution. The State *defines*

¹⁰⁷⁶ Fitzpatrick uses this phrase in the context of the colonial encounter in the Americas. *Peter Fitzpatrick* (1992) (n 1046) 80.

¹⁰⁷⁷ *Shaheen Sardar Ali and Javaid Rehman* (2001) (n 115) 12.

¹⁰⁷⁸ See, *Colonialism and Pakistan's Socio-Legal Terrain*, on page 259.

¹⁰⁷⁹ With the Frontier Crimes Regulations an appropriate example in this regard.

¹⁰⁸⁰ See, *Hassan-Askari Rizvi* (1988) (n 187).

¹⁰⁸¹ See, 'A burden on the soul is alien law' on page 181.

itself in the Constitution, not as a representative of the people, but as a revenue extraction body. Article 7 of the Constitution states:

The State means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess.¹⁰⁸²

It is acknowledged that the phrasing of this Article is such that a different reading that emerges from it would imply a distinction between the State at the level of the Federation and Legislature and the State at the level of local revenue collecting authorities. However, the fact remains that the State perceives itself, even if at the local level, as not a representative of the people, but rather as a structure aimed towards revenue extraction. It is contended here that this notion of the state is an extension of the rationale on which the British colonial administration was built. Moreover, once it assumes the role of an authority divested from representation of the people, it becomes caught in a self-referential cycle of continuation and self-preservation. If its existence and legitimacy does not rely on representing its subjects, then the state exists despite them; it constitutes itself, and ensures its own survival. It is argued here that this is the logic that has dictated the practise of the state and its legal formulations in the post-independence history of Pakistan.

This provides us different insights into some of the key issues in relation to Pakistan's socio-legal setup. The constant spate of Martial Law regimes

¹⁰⁸² Article 7 of the 1973 Constitution.

implemented to save the country from unruly political parties and democracy is one manifestation of the colonial logic. Importantly, the continuation of this logic also presents a different angle to understand the rationale behind the legal issues related to law in the Tribal regions of the country.¹⁰⁸³ The British colonial state's need was to institute the Frontier as a barrier against the expanding Russian Empire, for which it created an 'Imperial reasoning that included conceptions of subject, frontier, "their country", and British dominion.'¹⁰⁸⁴ Similarly, the post-independence Pakistani State had no impetus to include the people of this region into the 'dominion'¹⁰⁸⁵ as 'subjects'. Moreover, as discussed previously, the Tribal regions have played a key role in the State's overall strategy of countering its perceived enemies by proxy. The nexus between Islamic discourse and 'exceptional'¹⁰⁸⁶ legal status of the Tribal regions provided ready tools for the State to assist the US-led efforts to counter the Soviet invasion of Afghanistan.¹⁰⁸⁷ While this has resulted in the continuation of the legal status of this region as an 'exteriority',¹⁰⁸⁸ it has also contributed to the rise in Islamic narrative as well as the issues of lawlessness and militancy in the country. This is the primary reason why it has been asserted previously that the State as it is currently formulated in Pakistan, generates the societal contradictions that are evident today. Any narrative that calls for a strengthening of the State as a solution to these issues ignores the role of the State in perpetuating these problems in the first place. In this view, the notions

¹⁰⁸³ See, Colonial Law and the Tribal Regions on page 128.

¹⁰⁸⁴ *Robert Nichols* (2001) (n 467) 174.

¹⁰⁸⁵ *State v. Dosso* (n 190)

¹⁰⁸⁶ *Giorgio Agamben* (1998) (n 491) 18.

¹⁰⁸⁷ Page 73.

¹⁰⁸⁸ See footnotes 490-494.

of the weakening or failure of the State appear problematic, as the State is still holding true to its foundational logics.

8.4.2. The Transformation of Rationalities

The second tendency that Coloniality introduced within the socio-legal system of the region was the *co-optation or transformation* of not just existent legal systems,¹⁰⁸⁹ but also the *rationalities* that lay at their foundation.¹⁰⁹⁰ It altered the inter-personal laws to territorial ones;¹⁰⁹¹ it reduced customary, religious and traditional legal norms, based on a diversity of opinions, into strict textual modes of law.¹⁰⁹² While scholars argue that this change in the rationalities of law can be traced to the 'unfinished project of Modernity',¹⁰⁹³ a detailed discussion on Modernity/Rationality link is beyond the scope of this study. However, it is contended here that territorial, static and fossilised¹⁰⁹⁴ nature of law that was introduced in the sub-continent has now become so embedded within the socio-legal terrain of the country, that Quijano and Mignolo's linking (or limitation) of Coloniality to Eurocentric rationalities requires a reconsideration. Grosfoguel, for instance, writes that 'unlike other traditions of knowledge, the western is a point of view that does not assume itself as a point of view.'¹⁰⁹⁵ However, looking at the Islamic narrative in Pakistan, this seems like a romanticised notion of non-Western traditions of knowledge. The

¹⁰⁸⁹ Page 274.

¹⁰⁹⁰ Page 262.

¹⁰⁹¹ Ibid.

¹⁰⁹² Ibid.

¹⁰⁹³ Werner Menski (2010) (n 96) 46.

¹⁰⁹⁴ Page 262.

¹⁰⁹⁵ Ramón Grosfoguel, 'A Decolonial Approach to Political-Economy: Transmodernity, Border Thinking and Global Coloniality' (2009) 6 *KULT* 10, 11.

propagation by the Eurocentric civilisation of a particular *Ego-logical* perspective,¹⁰⁹⁶ has although been dominant, it is not the only instance where Coloniality is visible today. Other claims to ultimate truth or universal beliefs stem from the same principle and carry the same motivation. They too adopt the mantle of eternal truths, and refuse to consider themselves as merely points of views.¹⁰⁹⁷

This clash of rival rationalities provides us a more nuanced insight into the conflict and contestation between competing legal and normative orderings in Pakistan. As discussed previously, one of the major crises that has dominated the constitutional and legal developments in Pakistan is related to its identity.¹⁰⁹⁸ Claimed to represent a new homeland for the Muslims of the Indian sub-continent, the country's legal and constitutional frameworks could never shape this idea into a viable working charter. While Islam proved to be the most potent symbol that could give a semblance of unity to this 'inoperative community',¹⁰⁹⁹ whether this was meant to translated into a democratic or a theocratic state is still an unresolved question. The ambiguity of this notion has had major impacts on the legal architecture, as it has created room for the rise of the Islamic legal and militant discourse. Religious political parties and militant groups assert that the country was founded in the name of Islam¹¹⁰⁰ and through political manoeuvring, and outright violence in some instances,

¹⁰⁹⁶ *Walter D. Mignolo* (2007) (n 105) 459-460.

¹⁰⁹⁷ *Ramón Grosfoguel* (2009) (n 1097) 11.

¹⁰⁹⁸ A History of Legal Uncertainty: Post-Independence Turmoil in Pakistan on page 50.

¹⁰⁹⁹ *Jean-Luc Nancy* (1991) (n 142).

¹¹⁰⁰ See, Local Responses to an 'Alien Law': The Islamic Narrative of Law in Pakistan on on page 180.

these groups have proved successful in making the Islamic narrative as a competing and strong facet of Pakistan's legal context.

This is the reason why I argue that what lies at the heart of the struggle between secular law and Islamic law, between mainstream legal frameworks and that which stands to challenge them, is the struggle of rival conceptions based on Coloniality and totalitarian notions of law. The engendering of colonial rationalities in the sub-continent has meant that the socio-legal system of Pakistan is caught within two rival totalitarian notions: One notion is that which emerges from the dominant legal system inherited from the colonial state; while the other is the Islamic notion of law which was adopted to provide a semblance of identity to the country. Both of these totalitarian conceptions struggle to gain greater control of the state, and deny the possibility of existence, not just to each other, but also to local mechanisms of justice and the marginalised sections of the society. A corollary of this is that the law of Pakistan presents not a harmonious pluralistic system of multiple normative orders, but an uncertain and violent amalgam of common law, secularism or even religious law. The socio-legal terrain of Pakistan, therefore, presents more a case of *contested legalities* rather than interlegality.¹¹⁰¹ The Coloniality and totality embedded in the mainstream legal narrative as well as the Islamic discourse has dominated the legal history of Pakistan, and will continue on this path unless their foundational paradigms are challenged. In this vein, I argue that it is not the assertions of either of these two narratives that can resolve the

¹¹⁰¹ For discussion on Santos's proposition of interlegality, see page 218.

difficulties faced by the people of the country, but rather a de-colonial deconstruction of the two.¹¹⁰² With the acknowledgement that this requires considerable further analysis, this study provides a step in this direction.

8.4.3. The Fetishisation of the Legal Form

Finally, one of the more significant tendencies that Coloniality introduced within the socio-legal terrain of the sub-continent was the co-optation and transformation of the legal and normative forms that previously existed in the region. The *Fetishisation of Legal Form*,¹¹⁰³ primarily aimed towards a reproduction of the European model of law and the state, meant that preference was given to a particular form of legal ordering, from the vantage of point of which, other systems were judged.¹¹⁰⁴ It was the legal structures, procedures and categories of knowledge introduced by the colonial regime that took precedence over any substance that lies at the heart of the dominant or any other normative system.¹¹⁰⁵ This Fetishisation of the legal form meant that even at the moment of decolonisation, the state, its institutions and legal codes were adopted and continued without much modification.

I argue that it is this precedence afforded to the form of law that lies at the core of the struggle between traditional normative orderings and state-oriented law.

¹¹⁰² Borrowing an insight from Mignolo. *Walter D. Mignolo* (2007) (n 105).

¹¹⁰³ For a discussion on Fetishism of Law in general, see John L. Comaroff and Jean Comaroff, 'Reflections on the Anthropology of Law, Governance and Sovereignty' in Franz von Benda-Beckman, Keebet von Benda-Beckman and Julia Eckert (eds), *Rules of Law and Laws of Ruling: On the Governance of Law* (Ashgate, Farnham 2009)

¹¹⁰⁴ See, text to note 1014.

¹¹⁰⁵ Ibid.

Foucault provides us with an insight into how this struggle manifests itself, not just in the sub-continent, but in the history of Europe itself. In his discussion with Maoist rebels, transcribed in *Power/Knowledge*, Foucault argues that law and courts are not the embodiment of popular justice, rather their 'historical function is to ensnare it, control it and to strangle it, by re-inscribing it within institutions which are typical of a state apparatus'.¹¹⁰⁶ Presenting a genealogical sketch of the history of courts in Europe in the Middle Ages, Foucault problematises the fiscalisation of the Judicial System which made the administration of justice into a 'profitable' enterprise,¹¹⁰⁷ and the coupling of the judicial system with institutions of power (feudals, monarchs) and armed force, through which the profitable enterprise was maintained.¹¹⁰⁸ Based on these factors, Foucault argues, an 'embryonic state judicial apparatus' emerged in France in the fourteenth century. He writes:

There thus sprang up a "judicial" order which had the appearance of the expression of public power: an arbitrator both neutral and with authority, of whom the task was both to "justly" resolve disputes and to exercise "authority" in the maintenance of public order. It was on these foundations, of social struggles, the levying of taxes and the concentration of armed force, that the judicial apparatus was erected.¹¹⁰⁹

Advancing this critique as the backdrop of popular law, Foucault considers law and the judicial system as a state apparatus and an instrument of class domination, and a practise 'necessarily alien' to popular legality.¹¹¹⁰

Remarkably resonant with the critique of formal legal system that emerges

¹¹⁰⁶ Michel Foucault (1980) (n 61) 1.

¹¹⁰⁷ Ibid. 4.

¹¹⁰⁸ Ibid. 5.

¹¹⁰⁹ Ibid. 6.

¹¹¹⁰ Ibid. 8-9.

from the country, this assertion or Fetishisation of a particular form of law was embedded in the sub-continent, through which the interpersonal laws were transformed into those of a territorial nature;¹¹¹¹ the diverse was turned into monolithic; the oral traditions were turned into textual codes;¹¹¹² and consequently, the notions of 'living law' became 'fossilised.'¹¹¹³ And this struggle between the 'the world of legal texts in which the academic, the reformer, the politician, gather to promise equality, justice, prosperity, security, for all'¹¹¹⁴ and the 'world of violence'¹¹¹⁵ on the other informs us of the present-day conflict between dominant law and local mechanisms of justice.

8.5. Concluding Remarks: The search for De-Coloniality

The foregoing discussion in this chapter has attempted to present a more nuanced narrative to approach and understand the socio-legal tapestry of Pakistan. It has been argued above the colonialism, and Coloniality form the very terrain on which the contestations of the multiple normative and legal order now occurs. Through this lens of Coloniality and its link with the instrumentality of law, the discussion highlighted three different tendencies that were introduced in the legal system of the sub-continent, which were later inherited by Pakistan. These were the notions of Colonial Logic, Transformation of Rationalities and the Fetishisation of the Legal Form.

¹¹¹¹ *H. W. C. Carnduff* (1909) (n 483) 126.

¹¹¹² See note 1029.

¹¹¹³ *Shaheen Sardar Ali* (2007) (n 785) 78.

¹¹¹⁴ *Jayan Nayar* (2007) (n 28).

¹¹¹⁵ *Ibid.*

Based on this framework, the discussion then presented some alternate insights into the questions that the socio-legal tapestry of Pakistan raises, as mentioned previously in this chapter. It has been argued that the problems associated with the nature of the State in Pakistan are linked with the institution of the colonial logic, by virtue of which the State is predisposed to alienation and geared towards its self-preservation. Moreover, it was argued that the conflict between Islamic law and mainstream legal system is a struggle for dominance between two rival colonialities. Furthermore, the issues linked with the legal exception of the Tribal areas, and the denunciations of illegality against traditional normative orderings, can also be understood as a function of the Coloniality portrayed by law in Pakistan.

This leads us to the last point that has guided this enquiry – how to include people’s suffering and the possibility of resistance within the narrative on law? This is where the Coloniality in law framework allows us to go further than the prevalent narratives to law. Mignolo asserts that approaching the idea of hegemony, of knowledge as well as its material manifestations, through Coloniality and its totalitarian nature opens up the door to its examination, critique and restructuring from the outside.¹¹¹⁶ This is a possibility that, he argues, post-colonialism and post-modernity do not offer, as they remain part of the internal critique of colonialism, modernity and Eurocentrism.¹¹¹⁷ Conceptualising the situation in these terms does not ‘lead necessarily to post-

¹¹¹⁶ *Walter D. Mignolo* (2007) (n 105) 451.

¹¹¹⁷ *Ibid.*

coloniality, but to de-coloniality.’¹¹¹⁸ De-coloniality requires the consideration of other knowledges, other rationalities, other forms, as it essentially ‘starts from other sources.’¹¹¹⁹ This idea of de-coloniality, then, marks the most urgent and pressing task for socio-legal scholars of Pakistan today. The need of the time, in this sense, is to understand law through alternative lenses – as part of ‘ecology of knowledges’,¹¹²⁰ a ‘decolonisation of legal imagination’¹¹²¹ or a ‘de-linking’ from the dominant narratives and systems ‘as an epistemic de-colonisation’.¹¹²²

The purpose of this chapter, and indeed of this entire dissertation, has not been to propose another totalising theory to replace the theories critiqued previously. The task was to move towards a more nuanced narrative to approach the legal realities of Pakistan; to construct an alternative lens that might enable us to read the situation in a different way, frame the issues and problems in an atypical manner, which might enable us to lead to different solutions than the ones generally propounded by mainstream narratives. The current study, having argued the necessity for such propositions and having opened the door for context-specific theoretical formulations, acts only as a step towards this course.

¹¹¹⁸ Ibid. 452

¹¹¹⁹ Ibid.

¹¹²⁰ See, generally, *Boaventura De Sousa Santos* (2009) (n 1058).

¹¹²¹ *Jayan Nayar* (2007) (n 28).

¹¹²² *Walter D. Mignolo* (2007) (n 105) 453.

One of the most potent directions that may be examined further to identify a de-colonial approach to law is to look towards experiments to law conceived by people on the ground. The recent case of *Khwaindo Tolana* (Circle of Sisters) as Pakistan's first women's *Jirga*, which has been discussed previously,¹¹²³ is a relevant example in this regard. It provides an example of how local mechanisms of justice may be used by marginalised groups to move beyond the forms and procedures of dominant law, as well as beyond the patriarchal confines of local normative orderings. Its value, albeit symbolic, challenges our categories of law and our notions of justice. It is towards such steps that the focus of socio-legal and legal-theoretical discussions should lie, for it is these attempts towards de-coloniality that can help us surpass our limitations, assumptions and preconceptions, and enable us to find ways to resolve the problems that the socio-legal tapestry of Pakistan presents.

¹¹²³ Page 242.

III. Conclusion and Possibilities

A. A Reiteration

The primary research question that has guided the rationale and the structure for the current study is that '*how may we understand the socio-legal situation of Pakistan?*'¹¹²⁴ The complexity inherent in this question has guided the three main features of the foregoing discussion through which the examination has sought to contribute to the socio-legal study of Pakistan. These three facets relate to: Understanding the diversity and contestation that marks the terrain and the label of law in the context of Pakistan (Chapters 2 and 3); the identification and analysis of the existing prominent narratives that are employed within the country to approach law, frame its issues, and propose solutions (Chapters 4, 5, 6 and 7); and finally a reassertion of the need to examine the socio-legal terrain of Pakistan through more nuanced narratives, of which one such possibility, based on the notion of Coloniality, was introduced and discussed (Chapter 8). I will briefly reiterate the key points of the foregoing discussion below.

The subject matter for Chapters 2 and 3 related to a discussion on the complexity and contestation that is linked to the label of law in the context of Pakistan. Through a brief historical account of the legal and constitutional uncertainty that has beset Pakistan since its independence, the discussion in

¹¹²⁴ See, Main Research Question on page 37

Chapter 2 sought to highlight the precarious foundations on which the dominant legal and political frameworks, and indeed the wider socio-legal architecture, of the country stand.¹¹²⁵ Disputes about the rationale behind the creation of Pakistan, uncertainty about the nature of the state and its link with Islam, and the problematic nexus between judicial validation and military rules have marred the political situation of the country from the outset.¹¹²⁶ The incessant political upheavals, Martial Law regimes and the power struggle between political parties, armed forces and clerics brought to the fore the primary reason that stymies attempts to examine law and society in the country from a socio-legal rather than a political lens. Furthermore, the chapter also emphasised how different regimes have tried to implement their varied ideological projects in Pakistan through transformation, appropriation and abrogation of the constitutional and legal frameworks.¹¹²⁷

Chapter 3 linked this account of the history of legal uncertainty to a description and analysis of multiple normative and legal orderings that exist in Pakistan. Through a discussion on these diverse systems and tendencies of law that exist in the country – components that include common law, Islamic law, colonial law, traditional and local mechanisms of justice, as well as the notions of legal exteriority and lawlessness – a more nuanced picture of law in the context of Pakistan was presented.¹¹²⁸ It was argued that within this Socio-Legal Tapestry of the country, these different systems interact, engage, encounter and attempt

¹¹²⁵ See, A History of Legal Uncertainty: Post-Independence Turmoil in Pakistan on page 50.

¹¹²⁶ See, A History of Legal and Constitutional Uncertainty on page 51.

¹¹²⁷ See, pages 66, 73 and 82.

¹¹²⁸ See, The Socio-Legal Tapestry of Pakistan on page 96.

to dominate each other. It was argued that while the legal and constitutional frameworks play a central role within this terrain, it is only through a holistic approach of the varied legal and normative components that we can begin to understand what the context of law actually means in the case of Pakistan.

The expansion of the subject matter of this socio-legal study emphasised a need to examine the wider lenses through which law has traditionally been approached in Pakistan. In this regard, the study identified and problematised some of the most prominent narratives of law that exist in the country. It was argued that these narratives approach the legal phenomena through their own respective categories and in this sense, in addition to excluding those occurrences of law that exist outside their neat configurations, they face several challenges and paradoxes that may undermine their foundational assumptions.¹¹²⁹ It was further argued that it is only through a problematisation of these narratives and their foundational theoretical assumptions that we can move the overall socio-legal study of Pakistan forward.

In this regard, the dominant narrative of law in Pakistan, which focusses exclusively on a state-oriented legal system as its subject matter, was discussed in Chapter 4.¹¹³⁰ I argued that this narrative manifests itself in the country by linking the idea of justice to concepts such as exclusivity, administration of justice, and governance. It was further contended that the multiple assertions of this narrative can ultimately be linked to the legal positivistic understanding of

¹¹²⁹ See, Four Narratives and Four Assertions on page 42.

¹¹³⁰ See, Tracing the limits of the Dominant Legal Narrative in Pakistan on page 144.

law that governs the legal and political discourse in the country.¹¹³¹ It was discussed that this perspective is not only unable to account for the plurality of legal orderings that exist in Pakistan, but also that since its reading of the context emerges from positivistic and Hobbesian lenses, the solutions it propounds carry these tones further. The problems of law in this sense are generally argued to be the results of a weaker state caught in the vortex of lawlessness and the absence of Rule of Law – the keys of which are said to lie in a Leviathan-esque stronger state. However, it was argued that such assertions ignore the contradictions that the State itself generates in the context of Pakistan. By employing the idea of ‘perverse state formation’,¹¹³² I argued that the nature of Pakistan’s post-colonial State is such that the strengthening and widening of its writ will not resolve the problems that Pakistan is currently faced with.

Chapters 5 and 6 presented the most evident critique of the mainstream legal structures as they exist in Pakistan. Through a critique of the foreign and colonial history of the dominant legal frameworks, these perspectives argue that the law and the constitution that govern the country are alien to the region.¹¹³³ The Islamic law narrative employs this discourse to argue a need to turn towards the Islamic system of law, which it claims represents the true beliefs of the people of Pakistan as well as the motivation behind the

¹¹³¹ See, *The Dominant Narrative and Legal Positivism* on page 165.

¹¹³² See, *Jenny Pearce* (2010) (n 627).

¹¹³³ See, ‘A burden on the soul is alien law’ on page 181.

independence struggle.¹¹³⁴ The legal pluralist perspective, on the other hand, takes this cue to argue for a return to the local and indigenous mechanisms of justice.¹¹³⁵ While elaborating on the contours and some of the theoretical propositions linked with these narratives, it was argued that the most significant challenge for these two perspectives emerges from their own colonial history.¹¹³⁶ Even though these perspectives denounce the colonial link of the mainstream legal system, these narratives and the systems they advocate are themselves tainted by colonialism. Moreover, while the pluralist narrative offers us significant insights to understand the socio-legal system of Pakistan, the inability of the Islamic and pluralist narratives of law to address the concerns of women, religious minorities and marginalised communities further challenges their romanticised notions.¹¹³⁷

Chapter 7 presented the human rights narrative on law in Pakistan, which has become increasingly prominent in the legal discourse in the past few decades.¹¹³⁸ It was discussed in this chapter that the human rights narrative is not just visible with the spheres of NGOs and activists, but has also pervaded the language of the courts. Through a dialogue between this narrative and Pakistan's socio-legal context, it was argued that the most significant paradox for the human rights discourse is its insistence on the state as the panacea for all ills and, in this sense, it works to further strengthen the dominant state-

¹¹³⁴ See, *An Islamic Grundnorm* on page 195.

¹¹³⁵ See, *Local Responses to an Alien Law: Legal Pluralism and Popular Legality* on page 204.

¹¹³⁶ See, 'A burden on the soul is alien law' on page 181.

¹¹³⁷ See, *Pakistan's socio-legal context and the challenges for Islamic Narrative* on page 199.

¹¹³⁸ See, *Pakistan in an 'Age of Human Rights'* on page 229.

oriented narrative on law.¹¹³⁹ Moreover, while the challenge that human rights narrative mounts against the local and traditional justice systems on account of their human rights violations is important, an unquestioning assertion of this further reduces the options for recourse available to the already marginalised sections of the society.¹¹⁴⁰

Based on the foregoing analysis of the prominent narratives of law in the country, the subject matter for Chapter 8 entailed the need to move towards more nuanced and context-specific approaches to law to understand the particular predicament of Pakistan.¹¹⁴¹ In this regard, the role of colonialism in shaping the multiple legal systems and in laying down the socio-legal terrain in which the current events are panning out was discussed. I argued that divesting the colonial instrumentality of law from the particular historical event of colonisation, leads us to a framework of Coloniality.¹¹⁴² Examining the link between Coloniality and law, the chapter identified three different tendencies that were introduced in the region: Colonial logic, the transformation of Rationalities and the Fetishisation of legal form.¹¹⁴³ It was argued that an analysis of the socio-legal context of Pakistan from this lens, while providing us with a more nuanced understanding of the contestation between different legal orderings, also allows us to conceptualise an emancipatory potential of law. It was asserted in the study that a critique of existing lenses, and a search for

¹¹³⁹ See, Human Rights Narrative and the Socio-Legal Tapestry of Pakistan on page 239.

¹¹⁴⁰ Ibid.

¹¹⁴¹ See, Towards an Alternate Narrative: (Re)reading the Socio-Legal Tapestry of Pakistan on page 251.

¹¹⁴² See, From Colonialism to Coloniality on page 267.

¹¹⁴³ See, Coloniality in Law: Of Logic, Form and Rationalities on page 274.

alternative context-specific approaches, might enable us to move towards a resolution of some of the grave problems that the people of Pakistan are faced with.

B. Limitations and Future Directions of study

Despite presenting a holistic study of the socio-legal context of Pakistan, it should be acknowledged that no research can be completely incontestable. There are a few limitations that the foregoing examination has faced, both because of the complex nature of the subject matter, as well as the constraints of time, resources and nature of doctoral research in general.

One of the main limitations of this study is that the aforementioned constraints precluded an even more extensive discussion on the multiple constituents of the socio-legal terrain of Pakistan, as well as the multitude of narratives employed to approach them. Each of the preceding substantive chapters have the potentiality to be expanded and developed into standalone theses and studies. Indeed, not just the legal-theoretical discussions, but also some of the studies conducted on areas, such as the constitutional history of Pakistan¹¹⁴⁴ and the Islamisation of laws,¹¹⁴⁵ that I have attempted to examine in single chapters, are a testament to the possibilities of study that can be taken further. However, bringing all these varied contextual, historical, theoretical and analytical nuances together was one of the express aims of the study, in the

¹¹⁴⁴ See, for instance, *Zulfikar Khalid Maluka* (1995) (n 153); *Paula Newberg* (1995) (n 20).

¹¹⁴⁵ See, for instance, *Rubya Mehdi* (1994) (n 97); *Martin Lau* (2006) (n 97).

hope that this holistic account could prove as a platform to guide further research.

Furthermore, a key rationale of the foregoing examination was to expand the context of law as it is understood in Pakistan, and argue a case for context-specific narratives and approaches to understand and analyse law in this regard. With this argument, it is reiterated here that, given the multitude and severity of problems that the people of Pakistan are faced with, a pressing task for scholars and students of the socio-legal context of the country is to move towards imaginative ways of thinking to approach the subject. In this regard, there may be other ways of thinking about the situation, and narratives other than the one presented here may give us different insights into the present difficulties. One such alternate route is offered by the Constituent/Constituted Power debate within critical and political theories. With Antonio Negri's argument that 'to speak of constituent power is to speak of democracy',¹¹⁴⁶ and the assertion that this debate touches upon what lies at the 'heart of our understanding of the legal and political constitution of the modern state',¹¹⁴⁷ this paradigm offers a different starting point to discuss the interplay of the society, law, state and popular will.¹¹⁴⁸ Touching upon what lies at the core of our conceptions of nation, constitution, and law among others, this debate

¹¹⁴⁶ Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, Minneapolis 1999) 1.

¹¹⁴⁷ Illan Rua Wall, 'A different Constituent Power: Agamben and Tunisia' in Matthew Stone, Illan Rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Routledge, Oxford 2012) 46.

¹¹⁴⁸ For an overview of this debate, see Martin Loughlin, *The Idea of Public Law* (Oxford University Press, Oxford 2004); Illan Rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Routledge, Abingdon 2011).

creates a possibility to judge their manifestations in the present world. This could then offer a possible route to analyse the nature of Pakistan's pre-independence struggle, its subsequent translation into a post-colonial state, and its relation with the internal struggles since then.

Linked to this, it should be said that despite the importance of legal-theoretical insights as a means to understanding the material realities of law (in the broad sense) around us, the legal and social-scientific education in Pakistan does not equip us to adequately engage with these paradigms.¹¹⁴⁹ There is a need for students of the socio-legal context of Pakistan to move towards theoretical analysis of our assumptions. That said, legal-theoretical discussions can provide us useful expositions, but cannot be a substitute for examining material realities and the creativity that exists among communities. In this regard, some of the arguments introduced in the preceding discussion can be strengthened, or challenged, through on-ground empirical study and qualitative research. As stated in the Introduction to this thesis, I acknowledge that understanding the socio-legal context of Pakistan, its multiple constituents and divergent narratives could be a lifelong project. The current study is presented here as a first step in this direction.

¹¹⁴⁹ As Akbar Zaidi, a prominent scholar of sociology and political economy of Pakistan, argues while criticising the 'decrepit state' of social scientific scholarship in Pakistan:

'Has any Pakistani social scientist, in any of their fields in the last three decades, developed, reconstructed, reformulated, expanded upon, disputed or rejected, any theory or theoretical formulation, qua theory, or even in the specific context of Pakistan? The answer would probably be a simple "no".' S. Akbar Zaidi, 'Dismal State of Social Sciences in Pakistan' (2002) 37 (35) *Economic and Political Weekly* 3644, 3660.

Despite being a rather exaggerated account, it brings to the fore the scarcity of sociological investigations of diverse fields which is also reflected in the study of law in Pakistan.

IV. Bibliography

Books and Book Sections

Abel, R.L., 'Introduction: The Politics of Informal Justice' in Abel, Richard L. (ed) *The Politics of Informal Justice* (Academic Press, London 1982)

Agamben, G., *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, Calif. 1998)

Agha, A.S., *Military Inc.:* (Oxford University Press, Karachi, Pakistan 2007)

Ahmad, A., 'India and Pakistan' in Holt, P. M. and others (eds), *The Cambridge History of Islam: The Indian Sub-Continent, South-East Asia, Africa and the Muslim West* (Cambridge University Press, Cambridge 1977)

Ahmad, E., *Eqbal Ahmad: Confronting Empire – Interviews with David Barsamian* (South End Press, Cambridge, Massachusetts 2000)

Alavi, H., 'Ethnicity, Muslim Society, and the Pakistan Ideology' in Weiss, Anita (ed) *Islamic Reassertion in Pakistan* (Syracuse University press, Syracuse 1986)

Ali, I., *The Punjab under Imperialism, 1885-1947* (Oxford University Press, New Delhi 1988)

Ali, S.S., 'Overlapping Discursive Terrains of Culture, Law and Women's Rights: An Exploratory Study on Legal Pluralism at Play in Pakistan' in Bennett, Jennifer (ed) *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007)

Ali, S.S. and Rehman, J., *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* (Curzon, Richmond 2001)

Amin, M., *Islamization of Laws in Pakistan* (Sang-e-Meel Publications, Lahore 1989)

Anderson, M., 'Islamic Law and the Colonial Encounter in British India' in Mallat, Chibli and Connors, Jane (eds), *Islamic Family Law* (Graham & Trotman Limited, London 1993)

Austin, J., 'Lecture I' in Rumble, W. (ed) *John Austin: The Province of Jurisprudence Determined* (Cambridge University Press, Cambridge 1995)

- Banakar, R. and Travers, M., 'Theory and method in socio-legal research: Introduction' in Banakar, Reza and Travers, Max (eds), *Theory and method in socio-legal research* (Hart, Oxford 2005)
- Baxi, U., *The Future of Human Rights* (Oxford University Press, New Delhi 2006)
- Bhutto, Z.A., *My Dearest Daughter: A letter from the death cell* (2007)
- Bix, B., *Jurisprudence: Theory and Context* (Sweet and Maxwell, London 2009)
- Burke, E., *The Works of the Right Honourable Edmund Burke (Twelve Volumes)* (John C. Nimmo, London 1887)
- Carnduff, H.W.C., 'Legislation and Justice' in Risley, Herbert and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol IV* (Clarendon Press, Oxford 1909)
- Carol J. Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (The Continuum International Publishing, London 2010)
- Carr, D., *Time, Narrative, and History* (Indiana University Press, Bloomington, Indiana 1991)
- Charmaz, K., 'Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies' in Denzin, Norman K and Lincoln, Yvonna S. (eds), *The Sage Handbook of Qualitative Research* (3rd Edition edn, Sage Publications, California 2005)
- Chaudhary, M.A., *Justice in Practice: Legal Ethnography of a Pakistan Punjabi Village* (Oxford University Press, Oxford 1999)
- Cheng, S., 'The Female Body as a Post-Colonial Site of Political Protest: The Hunger Strikers versus the Labor Strikers in Forster's *A Passage to India*' in Cheng, Sinkwan (ed) *Law, Justice, and Power: Between Reason and Will* (Stanford University Press, Stanford, California 2004)
- Chevalier, J.M. and Buckles, D.J., *Participatory Action Research: Theory and Methods for Engaged Inquiry* (Routledge, Oxon 2013)
- Clarke, E.H.S., 'Afghanistan' in Risley, Herbert and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol V* (Clarendon Press, Oxford 1909)

- Clifford, J., 'On Ethnographic Authority' in Lincoln, Yvonna S. and Denzin, Norman K. (eds), *Turning Points in Qualitative Research: Tying Knots in the Handkerchief* (AltaMira Press, Walnut Creek, California 2003)
- Cohen, S.P., *The Idea of Pakistan* (Brookings Institution Press, Washington, D. C. 2004)
- Comaroff, J.L. and Comaroff, J., 'Reflections on the Anthropology of Law, Governance and Sovereignty' in Benda-Beckman, Franz von and others (eds), *Rules of Law and Laws of Ruling: On the Governance of Law* (Ashgate, Farnham 2009)
- Cotterrell, R., *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, Oxford 2005)
- , 'Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies' in Hertogh, Marc (ed) *Living Law: Reconsidering Eugen Ehrlich* (Hart Publishing, Oxford 2009)
- Craven, M.C.R., *The decolonization of international law: State Succession and the Law of Treaties* (Oxford University Press, Oxford UK ; New York 2007)
- Crooke, W., 'Religions' in Risley, Herbert and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol I* (Clarendon Press, Oxford 1909)
- Desai, A.R., *Rural Sociology in India* (Popular Prakashan, Mumbai 1969)
- Dhanda, A. and Parashar, A., 'Decolonisation of Legal Knowledge: Whose Responsibility?' in Dhanda, Amita and Parashar, Archana (eds), *Decolonisation of Legal Knowledge* (Routledge, Abingdon 2009)
- Dirks, N.B., 'Introduction: Colonialism and Culture' in Dirks, Nicholas B. (ed) *Colonialism and Culture* (University of Michigan Press, Ann Arbor, Michigan 1992)
- Donnelly, J., *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003)
- Douzinas, C., *The End of Human Rights* (Hart Publishing, Oxford 2000)

- Dunn, J., *West African States, Failure and Promise: A study in comparative politics* (Cambridge University Press, Cambridge 1978)
- Emon, A.M., *Islamic Natural Law Theories* (Oxford University Press, Oxford 2010)
- Fairclough, N., *Critical discourse analysis : the critical study of language* (2nd ed. edn Longman, Harlow 2010)
- Fine, R., *Democracy and the Rule of law: Marx's Critique of the Legal Form* (Blackburn Press, New Jersey 2002)
- Finnis, J., *Natural Law and Natural Rights* (2nd edn Oxford University Press, New York 2011)
- Fitzpatrick, P., *The Mythology of Modern Law* (Routledge, London 1992)
- Foucault, M., 'On Popular Justice: A Discussion with Maoists' in Gordon, Colin (ed) *Power/knowledge: Selected Interviews and Other Writings, 1972-1977* (Harvester Press, Brighton 1980)
- , *The Archaeology of Knowledge* (Routledge, London 2002)
- Foucault, M., Bouchard, D.F. and Simon, S., *Language, counter-memory, practice : selected essays and interviews* (Blackwell, Oxford 1977)
- Fuller, L.L., *The Law in Quest of Itself* (The Lawbook Exchange, New Jersey 1999)
- Haakonssen, K., *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge University Press, Cambridge 1996)
- Hart, H.L.A., *The Concept of Law* (Oxford University Press, New Delhi 2005)
- Harvey, D., *Cosmopolitanism and the geographies of freedom* (Columbia University Press, New York ; Chichester 2009)
- Hobbes, T., *Hobbes's Leviathan. Reprinted from the edition of 1651 (With an essay by the late W. G. Pogson Smith)* (Clarendon Press, Oxford 1909)
- Iqbal, N., 'Legal Pluralism in Pakistan and its implications on Women's Rights' in Bennett, Jennifer (ed) *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007)

- Jones, O.B., *Pakistan: Eye of the Storm* (4th edn Yale University Press, New Haven 2011)
- Kelsen, H. , *General Theory of Law and the State* (Harvard University Press, Cambridge, Mass. 1949)
- , *Pure Theory of Law. Translation from the Second German Edition by Max Knight.* (The Lawbook Exchange, New Jersey 2005)
- Kennedy, C.H., 'The Judicialization of Politics in Pakistan' in Dressel, Björn (ed) *The Judicialization of Politics in Asia* (Routledge, Oxford 2012)
- Khan, A., *Politics of Identity: Ethnic Nationalism and the State in Pakistan* (Sage Publications, New Delhi 2005)
- Lau, M., 'Introduction to the Pakistani Legal System, with special reference to the Law of Contract' in Cotran, Eugene and Mallat, Chibli (eds), *Yearbook of Islamic and Middle Eastern Law* (Kluwer Law International, London 1994)
- , *The Role of Islam in the Legal System of Pakistan* (Martinus Nijhoff Publishers, Leiden 2006)
- Lindahl, H., *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, Oxford 2013)
- Loughlin, M., *The Idea of Public Law* (Oxford University Press, Oxford 2004)
- MacCormick, N., 'The Ideal and the Actual of Law and Society' in Tasioulas, John (ed) *Law, Values and Social Practices* (Ashgate, London 1997)
- MacCormick, N. and Weinberger, O., *An Institutional Theory of Law: New Approaches to Legal Positivism* (Reidel Publishing, Dordrecht, Holland 1992)
- Maluka, Z.K., *The Myth of Constitutionalism in Pakistan* (Oxford University Press, Karachi, Pakistan 1995)
- Mazumder, R., *Indian Army and the making of Punjab* (Oxford University Press, New Delhi 2003)
- Mehdi, R., *The Islamization of the Law in Pakistan* (Curzon Press, Richmond, 1994)

- Menski, W., *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge 2006)
- , 'Law as a Kite: Managing Legal Pluralism in the context of Islamic Finance' in Valentino Cattelan (ed.) *Islamic Finance in Europe* (Edward Elgar, Cheltenham 2013) 74
- Merry, S.E., 'The Social Organisation of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America' in Abel, Richard L. (ed) *The Politics of Informal Justice* (Academic Press, London 1982)
- Mignolo, W.D., *The Darker side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press, Durham 2011)
- , 'Enduring Enchantment: Secularism and the Epistemic Privileges of Modernity' in Bilimoria, Purushottama and Irvine, AndrewB (eds), *Postcolonial Philosophy of Religion* (Springer Netherlands, 2009)
- Musharraf, P., *In the Line of Fire: A Memoir* (Simon & Schuster, London 2006)
- Nadeem, A.H., *Pakistan: The Political Economy of Lawlessness* (Oxford University Press, Karachi, Pakistan 2002)
- Nancy, J.-L., 'The Inoperative Community' in Connor, Peter (ed) *The Inoperative Community* (University of Minnesota Press, Minnesota 1991)
- Nazar, Y., *Balkanisation and Political Economy of Pakistan* (National News Agency, Karachi, Pakistan 2011)
- Negri, A., *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, Minneapolis 1999)
- Newberg, P., *Judging the State : Courts and Constitutional Politics in Pakistan* (Cambridge University Press, Cambridge 1995)
- Niaz, I., *The culture of power and governance of Pakistan, 1947-2008* (Oxford University Press, Oxford 2010)
- Nichols, R., *Settling the Frontier: Land, Law, and Society in the Peshawar Valley, 1500-1900* (Oxford University Press, Oxford 2001)
- Norrie, A., *Law and the Beautiful Soul* (The GlassHouse Press, London 2005)

- Patel, R., *Islamisation of Laws in Pakistan* (Faiza Publishers, Karachi 1986)
- Phelan, S. and Dahlberg, L., 'Discourse Theory and Critical Media Politics: An Introduction' in Dahlberg, Lincoln and Phelan, Sean (eds), *Discourse Theory and Critical Media Politics* (Palgrave Macmillan, New York 2011)
- Philippopoulos-Mihalopoulos, A., 'The Successful Failing of Legal Theory' in Dhanda, Amita and Parashar, Archana (eds), *Decolonisation of legal knowledge* (Routledge, Abingdon 2009)
- Pound, R., *An Introduction to the Philosophy of Law* (Yale University Press, Connecticut 1954)
- Price, D.E., *Islamic Political Culture, Democracy and Human Rights: A Comparative Study* (Praeger Publishers, Westport, USA 1999)
- Rajagopal, B., 'Limits of Law in counter-hegemonic globalization: The Indian Supreme Court and the Narmada Valley Struggle' in Santos, Boaventura De Sousa and Rodriguez-Garavito, Cesar (eds), *Law and Globalization from Below* (Cambridge University Press, Cambridge 2005)
- Randeria, S., 'Entangled Histories: Civil Society, Caste Solidarities and Legal Pluralism in Post-colonial India' in Keane, John (ed) *Civil Society: Berlin Perspectives* (Berghahn Books, New York 2006)
- Rizvi, H.-A., *The Military and Politics in Pakistan, 1947-86* (Konark Publishers, New Delhi, India 1988)
- Robins, N., *The Corporation that changed the World: How the East India Company shaped the Modern Multinational* (Pluto Press, London 2006)
- Santos, B.D.S., *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Butterworths LexisNexis, London 2002)
- Schmitt, C., *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press, Cambridge, Mass. 1988)
- Sebok, A.J., *Legal Positivism in American Jurisprudence* (Cambridge University Press, Cambridge 2008)

- Seppänen, J., *The Power of the Gaze: An Introduction to Visual Literacy* (P. Lang, New York 2006)
- Shah, N., 'Making of Crime, Custom and Culture: The Case of Karo Kari Killings of Upper Sindh' in Bennett, Jennifer (ed) *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007)
- Siddiqi, F.H., 'The Failed Experiment with Federalism in Pakistan (1947-1971)' in Kavalski, Emilian and Zolkos, Magdalena (eds), *Defunct Federalisms: Critical Perspectives on Federal Failure* (Ashgate, Aldershot 2008)
- Siddique, O., *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, Cambridge 2013)
- Spivak, G.C., 'Can the Subaltern Speak?' in Nelson, Cary and Grossberg, Lawrence (eds), *Marxism and the Interpretation of Culture* (Macmillan Education, Basingstoke 1988)
- Tanzilur-Rahman, *Objectives Resolution and its Impact on Pakistan Constitution and Law* (Royal Book Company, Karachi 1996)
- Wall, I.R., *Human Rights and Constituent Power: Without Model or Warranty* (Routledge, Abingdon 2011)
- , 'A different Constituent Power: Agamben and Tunisia' in Stone, Matthew and others (eds), *New Critical Legal Thinking: Law and the Political* (Routledge, Oxford 2012)
- Yilmaz, I., *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Ashgate, Aldershot 2005)
- Zizek, S., *In Defence of Lost Causes* (Verso, London 2008)

Journal Articles

- Adelman, S., 'Between the Scylla of Sovereignty and the Charybdis of Human Rights: The pitfalls of Development in pursuit of Justice' (2008) 2 *Human Rights and International Legal Discourse* 17

- Adeney, K., 'Constitutional Centring: Nation Formation and Consociational Federalism in India and Pakistan' (2002) 40 (3) *Commonwealth & Comparative Politics* 8
- Afzal-Khan, F., 'What lies beneath: Dispatch from the front lines of the Burqa Brigade' (2008) 14 (1) *Social Identities* 3
- Ahmad, K., 'Islam and Democracy: Some Conceptual and Contemporary Dimensions' (2000) 90 (1-2) *The Muslim World* 1
- Ahmed, S., 'The Theater of the Civilized Self: Edmund Burke and the East India Trials' (2002) 78 (1) *Representations* 28
- Ahmed, Z.S. and Stephan, M.J., 'Fighting for the rule of law: Civil Resistance and the Lawyers' Movement in Pakistan' (2010) 17 (3) *Democratization* 492
- Ahsan, A., 'Pakistan since Independence: An Historical Analysis' (2003) 93 (3-4) *The Muslim World* 351
- Akhtar, A.S., 'Are We Not a Working-Class Movement?' (2005) 19 (2) *Socialism and Democracy* 133
- Akhtar, A.S., Amirali, A. and Raza, M.A., 'Reading between the lines: The mullah-military alliance in Pakistan' (2006) 15 (4) *Contemporary South Asia* 383
- Ali, S.S., 'The Rights of Ethnic Minorities in Pakistan: A Legal Analysis' (1999) 6 (169-195) *International Journal on Minority and Group Rights* 169
- , 'Cyberspace as Emerging Muslim Discursive Space? Online Fatawa on Women and Gender relations and its impact on Muslim Family Law Norms' (2010) 24(3) *International Journal of Law, Policy and Family* 338, 340
- Ali, T., 'Imperial Delusions' (2005) 16 *Macalester International Journal* 29
- Bacchi, C., 'Why Study Problematizations? Making Politics Visible' (2012) 2 (1) *Open Journal of Political Science* 1
- Baxi, P., Rai, S.M. and Ali, S.S., 'Legacies of Common Law: 'crimes of honour' in India and Pakistan' (2006) 27 (7) *Third World Quarterly* 1239
- Baxi, U., 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law & Contemporary Problems* 125

- Behuria, A.K., 'The Rise of Pakistani Taliban and the Response of the State' (2007) 31 (5) *Strategic Analysis* 699
- Bhandar, B., 'Plasticity and Post-Colonial Recognition: 'Owning, Knowing and Being'*' (2011) 22 (3) *Law and Critique* 227
- Bianchi, A., 'Human Rights and the Magic of Jus Cogens' (2008) 19 (3) *The European Journal of International Law* 491
- Braithwaite, J., 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47
- Brush, S.E., 'Ahmadiyyat In Pakistan' (1955) 45 (2) *The Muslim World* 145
- Bukhari, H. and Haq, D.I., 'Democratizing political parties' (2011) July 24-30 *Weekly Tax Journal* 223
- Chaudhary, M.A., 'The Rule of Law Problems in Pakistan: An Anthropological Perspective of the Daughter's Traditional Share in the Patrimony in the Punjab' (2009) XXX (2) *Pakistan Journal of History and Culture* 101
- Cheema, M., 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamisation of Pakistan's Law' (2012) LX (4) *The American Journal of Comparative Law* 875
- Choudhury, G.W., 'Constitution-Making Dilemmas in Pakistan' (1955) 8 (4) *The Western Political Quarterly* 589
- D'Souza, R., 'Imperial Agendas, Global Solidarities and Third World Socio-legal Studies: Methodological Reflections' (2012) 49 *Osgoode Hall Law Journal* 409
- Deacon, R., 'Theory as Practice: Foucault's Concept of Problematization' (2000) 118 *Telos* 127
- Ditchfield, G.M., 'The House of Lords and the Impeachment of Warren Hastings' (1994) 13 (3) *Parliamentary History* 277
- Emon, A.M., 'Natural Law and Natural Rights in Islamic Law' (2004) 20 (2) *Journal of Law and Religion* 351
- Escobar, A., 'Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalisation Social Movements' (2004) 25 (1) *Third World Quarterly* 207

- Fair, C.C., 'Pakistan in 2011: Ten Years of the "War on Terror"' (2012) 52 (1) *Asian Survey* 100
- Fair, C.C., Kaltenthaler, K. and Miller, W.J., 'Pakistani Opposition to American Drone Strikes' (2014) 129 (1) *Political Science Quarterly* 1
- Fair, C.C., Malhotra, N. and Shapiro, J.N., 'Islam, Militancy, and Politics in Pakistan: Insights From a National Sample' (2010) 22 (4) *Terrorism and Political Violence* 495
- Fitzpatrick, P., 'Law and Societies' (1984) 22 (1) *Osgoode Hall Law Journal* 115
- , 'Dominions: Law, Literature and the Right to Death' (2004) 31 (1) *Journal of Law and Society* 142
- Fyze, A.A.A., 'Muhammadan Law in India' (1963) 5 (4) *Comparative Studies in Society and History* 401
- Galanter, M., 'The Displacement of Traditional Law in Modern India' (1968) 24 (4) *Journal of Social Issues* 65
- Garry, A., 'Intersections, Social Change and "Engaged Theories": Implications of North American Feminism' (2008) 8 *Pacific and American Studies* 99
- Ghias, S.A., 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf' (2010) 35 (4) *Law & Social Inquiry* 985
- Griffiths, J., 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1
- Grosfoguel, R., 'A Decolonial Approach to Political-Economy: Transmodernity, Border Thinking and Global Coloniality' (2009) 6 *KULT* 10
- Higgott, R., 'Structural dependence and decolonisation in a West African land - locked state: Niger' (1980) 7 (17) *Review of African Political Economy* 43
- Hoebel, A., 'Fundamental Culture Postulates and Judicial Lawmaking in Pakistan' (1965) 67 (6) *American Anthropologist, Part 2: The Ethnography of Law* 43
- Iyer, T.K.K., 'Constitutional Law in Pakistan: Kelsen in the Courts' (1973) 21 (4) *The American Journal of Comparative Law* 759

Kaur, R., 'The Second Migration: Displacement and Refugees from Rawalpindi during Partition' (2007) 14 (1) *Journal of Punjab Studies* 89

Kennedy, C.H., 'Islamization and Legal Reform in Pakistan, 1979-1989' (1990) 63 (1) *Pacific Affairs* 62

Kertzmann, N., 'Lex Inuista Non Est Lex: Laws on Trial in Aquinas' (1988) 33 (1) *American Journal of Jurisprudence* 99

Khan, A., 'Baloch Ethnic Nationalism in Pakistan: From Guerrilla War to Nowhere?' (2003) 4 (2) *Asian Ethnicity* 281

Krishan, G., 'Demography of the Punjab (1849-1947)' (2004) 11 (1) *Journal of Punjab Studies* 77

Lau, M., 'Twenty-Five Years of Hudood Ordinances - A Review' (2007) 64 (4) *Washington and Lee Law Review* 1291

Lewis, J., 'Corruption : the hidden perpetrator of under-development and vulnerability to natural hazards and disasters: the Pat Reid lecture 2010' (2011) 3 (2) *Jamba: Journal of Disaster Risk Studies* 464

Malik, A., 'Pakistan in 2012: An Assertive Judiciary in a Pre-Election Year' (2013) 53 (1) *Asian Survey* 34

Marmor, A., 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 (4) *Oxford Journal of Legal Studies* 683

Marshall, P.J., 'The making of an imperial Icon: The case of Warren Hastings' (2008) 27 (3) *The Journal of Imperial and Commonwealth History* 1

Meernik, J. and others, 'The Impact of Human Rights Organizations on Naming and Shaming Campaigns' (2012) 56 (2) *Journal of Conflict Resolution* 233

Menski, W., 'Flying kites in Pakistan: Turbulences in theory and practice' (2010) 1 (1) *Journal of Law and Social Research* 41

Mignolo, W.D., 'Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' (2007) 21 (2) *Cultural Studies* 449

---, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (2009) 26 (7-8) *Theory Culture Society* 159

---, 'Geopolitics of sensing and knowing: On (de)coloniality, border thinking, and epistemic disobedience' (2013) 1 (1) *Confero: Essays on Education, Philosophy and Politics* 129

Moore, S.F., 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 (4) *Law and Society Review* 719

Mukherjee, M., 'Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings' (2005) 23 (3) *Law and History Review* 589

Mustafa, U., 'Determinants and Implications of Major Conflicts in Pakistan' (2013) 4 (1) *Millennial Asia* 67

Nabi, A., 'The Enigma of the Crime of Cattle Theft in Colonial Sindh, 1843 - 1947' (2011) 3 (1) *Pakistan Journal of Criminology* 35

Nayar, J., 'The Politics of Hope and the Other-in-the-World: Thinking Exteriority' (2013) 24 (1) *Law and Critique* 63

Omrani, B., 'The Durand Line: History And Problems Of The Afghan-Pakistan Border' (2009) 40 (2) *Asian Affairs* 177

Pearce, J., 'Perverse state formation and securitized democracy in Latin America' (2010) 17 (2) *Democratization* 286

Pound, R., 'Revival of Natural Law' (1942) 17 (4) *Notre Dame Lawyer* 287

Quijano, A., 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 (3) *Nepentla: Views from South* 533

---, 'Coloniality and Modernity/Rationality' (2007) 21 (2-3) *Cultural Studies* 168

Qureshi, T.A., 'State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan' (2010) 35 (2) *North Carolina Journal of International Law and Commercial Regulation* 485

Rais, R.B., 'Pakistan in 1988: From Command to Conciliation Politics' (1989) 29 (2) *Asian Survey* 199

- Rehman, J., 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' (2000) 7 *International Journal on Minority and Group Rights* 139
- Saeed, R., 'Metamorphosis of the Ideals and the Actuals: Blasphemy Laws in Pakistan and the Transplantation of Justice in British India' (2013) 7 (2) *Pólemos: Journal of Law, Literature and Culture* 235
- Santos, B.D.S., 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 (3) *Journal of Law and Society* 279
- , 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX (1) *Review Fernand Braudel Center* 45
- , 'A Non-Occidentalist West? Learned Ignorance and Ecology of Knowledge' (2009) 26 (7-8) *Theory Culture Society* 103
- Sayeed, K.B., 'Pakistan's Basic Democracy' (1961) 15 (3) *The Middle East Journal* 249
- Schauer, F.F., 'English Natural Justice and American Due Process: An Analytical Comparison' (1976) 18 *William and Mary Law Review* 47
- Shah, A.S. and Tariq, S., 'Implications of Parallel Judicial System (Panchayat and Jirga) on Society' (2013) 2 (2) *Asian Journal of Social Sciences & Humanities* 200
- Shaheed, F., 'Contested Identities: Gendered Politics, Gendered Religion in Pakistan' (2010) 31 (6) *Third World Quarterly* 851
- Sial, S., 'Human Rights Reporting in Pakistani Media' (2009) 2 (1) *Conflict and Peace Studies* 1
- Siddique, O., 'The Jurisprudence of Dissolutions: Presidential Power to dissolve Assemblies under the Pakistan Constitution and its discontents' (2006) 23 (3) *Arizona Journal of International & Comparative Law* 615
- , 'Legal Education in Pakistan: The Domination of Practitioners and the "Critically Endangered" Academic' (2014) 63 (3) *Journal of Legal Education* 499

- Siddique, O. and Hayat, Z., 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan - Controversial Origins, Design Defects, and Free Speech Implications' (2008) 17 (2) *Minnesota Journal of International Law* 303
- Talbot, I., 'The Punjab under Colonialism: Order and Transformation in British India' (2007) 14 (1) *Journal of Punjab Studies* 3
- Tamanaha, B.Z., 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (1993) 20 (2) *Journal of Law and Society* 192
- , 'A Non-essentialist version of Legal Pluralism' (2000) 27 (2) *Journal of Law and Society* 296
- Thomas, G. and James, D., 'Re-inventing grounded theory: some questions about theory, ground and discovery' (2006) 32 (6) *British Educational Research Journal* 767
- Vanderlinden, J., 'Return to Legal Pluralism: Twenty Years Later' (1989) 28 *Journal of Legal Pluralism* 149
- Wilcox, W.A., 'The Pakistan Coup d'Etat of 1958' (1965) 38 (2) *Pacific Affairs* 142
- Wolf-Phillips, L., 'Constitutional Legitimacy: A study of the doctrine of necessity' (1979) 1 (4) *Third World Quarterly* 97
- Zafar, M.I., 'Can Pakistan be a secular state?' (2013) 28 (1) *South Asian Studies* 165
- Zaidi, S.A., 'Dismal State of Social Sciences in Pakistan' (2002) 37 (35) *Economic and Political Weekly* 3644
- Ziring, L., 'From Islamic Republic to Islamic State in Pakistan' (1984) 24 (9) *Asian Survey* 931

Electronic Journal Articles

- Ahmed, K., 'Pakistan and Nature of the State: Revisionism, Jihad and Governance' *Criterion Quarterly* <<http://www.criterion-quarterly.com/pakistan-and-nature-of-the-state-revisionism-jihad-and-governance/>> last accessed 18 September 2013

Ali, M., 'US Aid to Pakistan and Democracy' (Institute of Policy Studies 2009)
<<http://www.ips.org.pk/security-and-foreign-policy/1080-us-aid-to-pakistan-and-democracy.html>> last accessed 4 december 2013

Amirali, A., 'Dispossession, Democracy, Solidarity and Community in Ireland and Pakistan' *Indymedia Ireland* <<http://www.indymedia.ie/article/61697>> last accessed 24 October 2010

Dupret, B., 'Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification' *European Journal of Legal Studies*
<<http://cadmus.eui.eu/handle/1814/6852>> last accessed 18 January 2012

Fatimi, S.Q., 'Islamic Universalism and Territorial Nationalism in Iqbal's thought' *Iqbal Review*
<<http://www.allamaiqbal.com/publications/journals/review/oct76/index.html>> last accessed 15 September 2013

Foucault, M. and Deleuze, G., 'Intellectuals and power: A conversation between Michel Foucault and Gilles Deleuze' *libcomorg*, 9 September 2006
<<http://libcom.org/library/intellectuals-power-a-conversation-between-michel-foucault-and-gilles-deleuze>> last accessed 12 February 2012

Mehdi, R., 'The Protection of Women (Criminal Laws Amendment) Act, 2006 in Pakistan' *Droit et cultures [En ligne]* 59, 1 June 2010
<<http://droitcultures.revues.org/2016>> last accessed 14 November 2013

Nayar, J., 'Peoples' Law: Decolonising Legal Imagination' *Law, Social Justice & Global Development*
<http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/nayar/> last accessed 10 June 2010

Santos, B.D.S., 'If God were a Human Rights Activist: Human Rights and the Challenge of Political Theologies' *Law, Social Justice & Global Development Journal (LGD)* <http://www.go.warwick.ac.uk/elj/lgd/2009_1/santos> last accessed 5 September 2013

Reports

'A detailed account of the proceedings in the House of Lords on the subject of the articles charged in the Impeachment of Warren Hastings', *Esq. Woodfall's Parliamentary Reports*, London, 1795

Akhtar, J.S. and others, 'Study on Informal Justice System in Pakistan' (Sindh Judicial Academy, Karachi, Pakistan 2009)

Ali, R., 'The Dark Side of Honour' (Shirkat Gah Women's Resource Centre: Women victims in Pakistan, Lahore, Pakistan 2001)

Ali, S.S., 'Conceptualising Islamic Law, CEDAW, and Women's Human Rights in Plural Legal Settings' (New Delhi 2006)

Amnesty International, 'The State of the World's Human Rights' (Amnesty International, London 2013)

Asian Human Rights Commission and Human Rights Education Forum, P., 'Recent cases of 'honour killing' in Sindh Province, Pakistan' (2004) 3 (3) *Article* 2 32

Carment, D. and Samy, Y., 'Assessing State Fragility: A Country Indicators for Foreign Policy Report' (Country Indicators for Foreign Policy, Ottawa 2012)

Epstein, S.B. and Kronstadt, K.A., 'Pakistan: U.S. Foreign Assistance' (2013)

Farooq, A., 'Mazarain People's Tribunal Declaration' (Pakistan 2005, available from the author)

Fayyaz, S., 'Responding to Terrorism: Pakistan's Anti-Terrorism Laws' (Pakistan Institute for Peace Studies, Islamabad, Pakistan 2008)

Federal Shariat Court, 'FSC Annual Report 2010' (Islamabad, Pakistan 2010)

Ghaus-Pasha, A., Jamal, H. and Iqbal, M.A., *Dimensions of the nonprofit sector in Pakistan* (Social Policy and Development Centre, 2002)

Haq, N.U. and Imtiaz, Y., 'Swat Peace Accord' (Islamabad Policy Research Institute, Islamabad, Pakistan 2009)

Hardoon, D. and Heinrich, F., 'Daily Lives and Corruption: Public Opinion in South Asia' (Transparency International, Berlin 2011)

Human Rights Cell, 'Supreme Court of Pakistan Human Rights Cell Annual Report' (Supreme Court of Pakistan, Islamabad 2010/11)

Human Rights Commission of Pakistan, 'State of Human Rights in 2012' (HRCP, Lahore, Pakistan 2013)

Human Rights Monitor, 'Collection and compilation of data on incidents of violence against civil and human rights in Hazara Region' (HRM and Sungi Development Foundation, Islamabad, Pakistan 2011)

Human Rights Watch, 'Soiled Hands: The Pakistan Army's Repression of the Punjab Farmers' Movement' (Human Rights Watch, 2004)

---, 'World Report 2013: Events of 2012' (Human Rights Watch, New York 2013)

International Bar Association, 'The Rule of Law and Human Rights in the Legal System of Pakistan' (London 1998)

Jasam, S., 'Cultural Violence, Legal Pluralism and Women Rights: A Case Study of Pakistan' (Heinrich Boll Foundation, Lahore, Pakistan 2009)

Jatoi, A.R.K., 'A Statement by the People Society For Justice Pakistan on Human Rights Day' (Pakistan 2013)

Khan, F.S., 'Quest for Justice: Judicial System in Pakistan' (The Network Publications, Islamabad, Pakistan 2004)

Lamb, R.D. and Hameed, S., 'Subnational Governance, Service Deliver, and Militancy in Pakistan' (Center for Strategic & International Studies, Washington, D. C. 2012)

Legal Empowerment of the Poor Programme, 'Voices of the Unheard: Legal Empowerment of the Poor in Pakistan' (United Nations Development Programme and Insaf Network Pakistan, Islamabad, Pakistan 2012)

Lemétayer, J., 'PAKISTAN: Half of the population is exposed to food insecurity because of bad governance and abuses' (Pakistan 2010)

- Malik, I.H., 'Religious Minorities in Pakistan' (Minority Rights Group International, London 2002)
- Omer, R., 'Authority without Accountability: the search for justice in Pakistan' (Geneva, Switzerland 2013)
- Pakistan Workers' Federation, *One Voice of Workers - Newsletter* (Pakistan Workers' Federation, Lahore, Pakistan 2009)
- Pew Research Center, 'Most Muslims Want Democracy, Personal Freedoms, and Islam in Political Life: Few Believe U.S. Backs Democracy' (Washington, D.C. 2012)
- PILDAT, 'The First 10 General Elections of Pakistan: A Story of Pakistan's Transition from Democracy Above Rule of Law to Democracy Under Rule of Law - 1970-2013' (Pakistan Institute of Legislative Development and Transparency, Islamabad, Pakistan 2013)
- Supreme Court of Pakistan, 'Annual Report: January 2012 to March 2013' (Supreme Court of Pakistan, Islamabad 2013)
- Tahir, U., *Space for NGOs in Pakistan* (Actionaid, Pakistan 2013)
- United Nations General Assembly, 'Protection of human rights and fundamental freedoms while countering terrorism - Note by the Secretary-General' (Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives, 2009)
- US Department of State, *International religious Freedom Report 2002* (Washington DC 2002)
- USAID and Management Systems International, 'Pakistan Rule of Law Assessment - Final Report' (Pakistan 2008)
- Zaidi, S.A., 'The Political Economy of Decentralization in Pakistan' (Transversal Theme "Decentralisation and Social Movements" Working Paper No 1, Islamabad, Pakistan 2005)
- Zia, M. and Butt, R., 'Pakistan NGO Alternative Report on CEDAW 2012' (Islamabad, Pakistan 2012)

Conference Papers and Proceedings

Abbasi, M.N., 'Domestic application of Human Rights norms' (International Judicial Conference)

Ali, S.S., 'Applying Islamic Criminal Justice in Plural Legal Systems: Exploring Gender-Sensitive Judicial Responses to Hudood laws in Pakistan' (International Judicial Conference, Islamabad, Pakistan, 2006)

Chaudhary, I.M., 'Address by Mr. Justice Iftikhar Muhammad Chaudhry, Hon'ble Chief Justice Of Pakistan' (New Judicial Year Ceremony, Islamabad, Pakistan, September 2012)

Chaudhry, I.M., 'Special Address by Chief Justice' *South Asia Conference on Environmental Justice*

<[http://ceej.pk/cms/docs/SAEJ/1%20Inaugural%20Session/5%20Special%20Address%20\(HCJ\)%20Iftikhar%20Muhammad%20Ch\).pdf](http://ceej.pk/cms/docs/SAEJ/1%20Inaugural%20Session/5%20Special%20Address%20(HCJ)%20Iftikhar%20Muhammad%20Ch).pdf)> last accessed 24 March 2012

Curzon, G.N., 'Lord Curzon of Kedleston (Viceroy of India 1898-1905): 1907 Romanes Lecture on the subject of Frontiers' (Oxford, 1907)

Jinnah, M.A., 'First Presidential Address to the Constituent Assembly of Pakistan ' (Karachi, 11 August 1947)

Lau, M., 'Discussion Note on Informal and formal systems of rule of law: How does the donor community approach legal pluralism?' (World Bank Headline Seminar Seminar III: Rule of Law in Fragile and Conflict-Affected Situations, London, 2009)

LJCP, 'There is but one law for all...' (International Judicial Conference, Islamabad, Pakistan, 2012)

Mahrwald, S., 'Rule of Law: The Case of Pakistan' (Rule of Law in the Islamic Republic of Pakistan, Berlin, October 2009)

Minallah, S., 'Judiciary as a Catalyst for Social Change' (International Judicial Conference, Islamabad, Pakistan, 2006)

Qayyum, M.M., 'The Role of the Bar in Protection of Human Rights in Pakistan' (International Judicial Conference)

Roy, A.G., 'Land of Five Rivers, Canal Colonies and Oceanic Flows to Southeast Asia' (Third Critical Studies Conference, Kolkata, India, 2009)

Zahid, N.A., 'The role of Legal Education in Pakistan' (1st Pakistan Judicial Academies Summit, Sindh Judicial Academy, Karachi, Pakistan, June 2011)

Newspaper Articles

AFP, 'Drone strikes against Pakistan's sovereignty: Nawaz' *Dawn* (London 20 October 2013) <<http://www.dawn.com/news/1050419/drone-strikes-against-pakistans-sovereignty-nawaz>> last accessed 20 October 2013

---, 'KPK's drive for justice' *Dawn* (Peshawar, Pakistan 29 August 2013) <<http://www.dawn.com/news/1039186/kpks-drive-for-justice>> last accessed 29 August 2013

Agencies, 'Implementation of laws ensures peace: CJ' *Pakistan Today* (Pakistan 20 October 2012) <<http://www.pakistantoday.com.pk/2012/10/20/national/implementation-of-laws-ensures-peace-cj/>> last accessed 05 June 2013

Ali, K., 'Pakistani laws prohibiting underage marriage un-Islamic: CII' *Dawn* (Islamabad, Pakistan 11 March 2014) <<http://www.dawn.com/news/1092468/pakistani-laws-prohibiting-underage-marriage-un-islamic-cii>> last accessed 11 March 2014

Ali, S.M., 'Significance of the female jirga' (Pakistan 09 August 2013) <<http://tribune.com.pk/story/588473/significance-of-the-female-jirga/>> last accessed 12 November 2013

APP, 'CII rules out DNA as primary evidence in rape cases' *Dawn* (Islamabad, Pakistan 23 September 2013) <<http://www.dawn.com/news/1044879/cii-rules-out-dna-as-primary-evidence-in-rape-cases>> last accessed 23 September 2013

---, 'Nizam-e-Adl Regulation: Police bound to submit challans within 14 days' *The Express Tribune* (17 July 2013)

<<http://tribune.com.pk/story/578158/nizam-e-adl-regulation-police-bound-to-submit-challans-within-14/>> last accessed 17 July 2013

---, 'Over 8,500 human rights violations reported in 20 months' *Dawn* (Islamabad, Pakistan 30 September 2013)

<<http://www.dawn.com/news/1046467/over-8500-human-rights-violations-reported-in-20-months>> last accessed 30 September 2013

Bandow, D., 'The Islamic Republic Of Pakistan: The World's Most Dangerous Nation Holds An Election' *Forbes* 20 May 2013

<<http://www.forbes.com/sites/doughbandow/2013/05/20/the-islamic-republic-of-pakistan-the-worlds-most-dangerous-nation-holds-an-election/>> last accessed 12 August 2013

Business Recorder, 'Experts underscore need for comprehensive survey to tackle child labour' *Business Recorder* (Pakistan 13 October 2012)

<<http://www.brecorder.com/general-news/172:pakistan/1247372:experts-underscore-need-for-comprehensive-survey-to-tackle-child-labour/?date=2012-10-13>> last accessed 14 April 2013

Cowasjee, A., 'A first step' *Dawn* (Karachi, Pakistan 02 May 2004)

<<http://www.dawn.com/news/1072875/a-first-step>> last accessed 7 September 2013

Darr, A., 'Judiciary goes native' *Dawn* (Pakistan 17 June 2013)

<<http://www.dawn.com/news/1018721/judiciary-goes-native>> last accessed 20 July 2013

Dawn, 'British law borrowed HR concepts from Islam' *Dawn* (Islamabad, Pakistan 17 September 2006)

<<http://www.dawn.com/news/210715/british-law-borrowed-hr-concepts-from-islam>> last accessed 05 January 2013

---, 'PPP MPA presides over jirga' *Dawn* (Dadu, Pakistan 31 March 2009)

<<http://www.dawn.com/news/894479/ppp-mpa-presides-over-jirga>> last accessed 15 March 2013

---, 'Court cases backlog, suffers common Pakistanis' *Dawn* (Islamabad, Pakistan 21 July 2010) <<http://archives.dawn.com/archives/144137>> last accessed 15 November 2013

---, 'Justice Jilani on 'Peace thru Law': 'Democracy is a way of life, not mere right to vote' *Dawn* (Lahore, Pakistan 20 October 2012) <<http://www.dawn.com/news/758068/justice-jilani-on-peace-thru-law-democracy-is-a-way-of-life-not-mere-right-to-vote>> last accessed 9 October 2013

---, 'LHC chief sees flaws in justice system' *Dawn* (Lahore, Pakistan 25 May 2012) <<http://www.dawn.com/news/721450/lhc-chief-sees-flaws-in-justice-system>> last accessed 02 January 2013

---, 'Karachi police arrest MQM activist in Randhawa killing' *Dawn* (1 October 2013) <<http://www.dawn.com/news/1046733/karachi-police-arrest-mqm-activist-in-randhawa-killing-case>> last accessed 2 October 2013

---, 'Past Present: The fragile state' *Dawn* (Pakistan 03 March 2013) <<http://www.dawn.com/news/789935/past-present-the-fragile-state>> last accessed 27 March 2013

---, 'Timeline: Accused under the Blasphemy Law' *Dawn* (18 August 2013) <<http://www.dawn.com/news/750512/timeline-accused-under-the-blasphemy-law>> last accessed 28 August 2013

---, 'State and non-state terrorism' *Dawn* (Pakistan 5 March 2014) <<http://www.dawn.com/news/1091119/state-and-non-state-terrorism>> last accessed 5 March 2014

Editorial, 'The farce of tribal jirgas' *The Express Tribune*, 28 May 2012 <<http://tribune.com.pk/story/385442/the-farce-of-tribal-jirgas/>> last accessed 16 July 2013

Ekklesia, 'Pakistani government urged to protect religious minorities' *Pakistan Christian Post* (Pakistan 12 December 2013) <<http://www.pakistanchristianpost.com/headlinenewsd.php?hnewsid=4626>> last accessed 12 December 2013

Gauhar, H., 'Pakistan zindabad' *Pakistan Today* (Pakistan 13 August 2011)
<<http://www.pakistantoday.com.pk/2011/08/13/comment/pakistan-zindabad/>> last accessed 19 July 2013

Guerin, O., 'Pakistani women use jirga to fight for rights' (Pakistan 25 July 2013)
<<http://www.bbc.co.uk/news/world-asia-23453243>> last accessed 12 November 2013

Harding, L., 'Call for Olmert to resign after nuclear gaffe' *The Guardian* (London 12 December)
<<http://www.guardian.co.uk/world/2006/dec/12/germany.israel>> last accessed 11 February 2013

Hasan, A.D., 'Commentary: Attacks on Journalists and Rights Defenders in Pakistan' *The Friday Times* (Pakistan
<<http://www.hrw.org/news/2012/06/08/commentary-attacks-journalists-and-rights-defenders-pakistan>> last accessed 11 May 2013

Hashmi, K., 'The power of suo motu' *The Express Tribune* (Pakistan 01 May 2012) <<http://tribune.com.pk/story/372164/the-power-of-suo-motu/>> last accessed 17 September 2013

Imran, M., 'Safety of human rights defenders, particularly women demanded' *The News* (Islamabad, Pakistan <<http://www.thenews.com.pk/Todays-News-6-124577-Safety-of-human-rights-defendersparticularly-women-demanded>> last accessed 05 May 2013

Jabri, P., 'Drone hits violate Pak sovereignty, international law' *Business Recorder* (Pakistan 20 December 2013) <<http://www.brecorder.com/top-news/1-front-top-news/149648-drone-hits-violate-pak-sovereignty-international-law.html>> last accessed 28 December 2013

Kaplan, R.D., 'The Lawless Frontier' *The Atlantic*
<<http://www.theatlantic.com/magazine/archive/2000/09/the-lawless-frontier/305296/>> last accessed 5 November 2013

Khan, A.M., 'Justice Denied' *Newsline*
 <<http://www.newslinemagazine.com/2004/12/justice-denied/>> last accessed
 25 November 2013

Khan, I.A., 'Pakistan, Azad Kashmir judiciaries join hands' *Dawn* (Islamabad, Pakistan 09 August 2013) <<http://www.dawn.com/news/1041281/pakistan-azad-kashmir-judiciaries-join-hands>> last accessed 09 August 2013

Khosa, T., 'Mandate for governance' *Dawn* (Pakistan 20 May 2013)
 <<http://m.dawn.com/news/1012413/mandate-for-governance>> last accessed
 3 July 2013

Majeed, A., 'Pakistan's Women-Only Jirga Fights for Equal Rights' *Newsweek Pakistan* (11 July 2013) <<http://newsweekpakistan.com/pakistans-women-only-jirga-fights-for-equal-rights/>> last accessed 12 November 2013

Moreau, R. and Hirsch, M., *The Most Dangerous Nation in the World Isn't Iraq. It's Pakistan*. (Newsweek, New York 2007)

Mukhtar, I., 'NA body defers PPO till next week' *The Nation* (Islamabad, Pakistan 27 March 2014) <<http://www.nation.com.pk/editors-picks/27-Mar-2014/na-body-defers-ppo-till-next-week>> last accessed 27 March 2014

Mumtaz, H., 'A collapsing contract' *Dawn* (Pakistan 24 January 2010)
 <<http://m.dawn.com/news/516022/a-collapsing-contract>> last accessed 8 May
 2013

Naeem, W., 'Hobbes' predictions: A strong ruler is needed to steer country out of crisis' *The Express Tribune* (Islamabad, Pakistan 07 September 2013)
 <<http://tribune.com.pk/story/600863/hobbes-predictions-a-strong-ruler-is-needed-to-steer-country-out-of-crisis/>> last accessed 07 September 2013

Nation, T., 'CJP stresses jirga, panchayat's role' *The Nation* (Lahore, Pakistan 30 April 2010) <<http://www.nation.com.pk/politics/30-Apr-2010/CJP-stresses-jirga-panchayats-role>> last accessed 07 January 2013

News, T., 'Peace, security are state's responsibility: CJ' *The News* (Lahore, Pakistan 10 September 2011)

<<http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=8686&Cat=13>> last accessed 14 March 2013

---, 'KPK novel mobile court kicks off' *The News* (Peshawar, Pakistan 27 July 2013) <<http://www.thenews.com.pk/article-111229-KPK-novel-mobile-court-kicks-off>> last accessed 25 August 2013

NNI, 'Rule of law vital to civilize society: CJP' *The Nation*, 9 February 2013 (Pakistan 15 July 2013) <<http://www.nation.com.pk/laure/09-Feb-2013/rule-of-law-vital-to-civilize-society-cjp>> last accessed 07 August 2013

Rais, R.B., 'Trial by Fire' *The Express Tribune* (Karachi, Pakistan 24 September 2013) <<http://tribune.com.pk/story/608168/trial-by-fire/>> last accessed 24 September 2013

Rehman, I.A., 'A dehumanised horde' *Dawn* (Pakistan 26 April 2012) <<http://www.dawn.com/news/713520/a-dehumanised-horde>> last accessed 20 December 2013

Rizvi, H.-A., 'Who is sovereign in Pakistan?' (Pakistan Today 2012) <<http://www.pakistantoday.com.pk/2012/08/01/comment/columns/who-is-sovereign-in-pakistan/>> last accessed 6 November 2012

Sahi, A., 'Pakistan: The Tenants' Struggle on Okara Military Farms - Analysis and an interview with the leader of Anjuman Mazarain Punjab' *South Asia Citizens Web* <<http://www.sacw.net/article847.html>> last accessed 15 August 2010

Salman, P., 'Seminar on honour killing: 'Changing mindset govt's responsibility'' *Dawn* (Pakistan 09 July 2010) <<http://www.pakistanpressfoundation.org/media-events/14761/>> last accessed 15 March 2013

Shah, W.A., 'Dr Shakil Afridi now to be probed for foreign links' *Dawn* (Peshawar, Pakistan 21 March 2014) <<http://www.dawn.com/news/1094553/dr-shakil-afridi-now-to-be-probed-for-foreign-links>> last accessed 21 March 2014

Sigamony, T.J., 'Inhuman punishments by jirgas are illegal: SC' *The Nation* (Pakistan 12 July 2013) <<http://www.nation.com.pk/national/12-Jul->

[2013/inhuman-punishments-by-jirgas-are-illegal-sc](#)> last accessed 20 December 2013

Taj, A., 'SCBA threatens to challenge FATA, PATA Regulations' *Pakistan Today* (Pakistan 15 August 2011)

<<http://www.pakistantoday.com.pk/2011/08/15/national/scba-threatens-to-challenge-fata-pata-regulations/>> last accessed 13 June 2013

The Express Tribune, 'Rights' activists urge SC to ban jirga system' *The Express Tribune* (Islamabad, Pakistan 31 May 2012)

<<http://tribune.com.pk/story/386606/parallel-courts-rights-activists-urge-sc-to-ban-jirga-system/>> last accessed 12 September 2013

---, 'Dispute settlement: Experts underscore alternative modes' (Islamabad, Pakistan 12 December 2013)

<<http://pakistan.worldnewsviews.com/2013/12/12/dispute-settlement-experts-underscore-alternative-modes/>> last accessed 13 December 2013

---, 'Judicial allowance: 'Should all court staff get special pay?' *The Express Tribune* (Pakistan 14 December 2013) <<http://pktimes.4com.co/tag/judicial>> last accessed 14 December 2013

Warraich, A.N., 'Crossing the fine line: There is an inverse relationship between anti-terrorism legislation and protecting civil liberties. Is there a way out?' *The News* (Pakistan 20 October 2013) <<http://jang.com.pk/thenews/oct2013-weekly/nos-20-10-2013/dia.htm#2>> last accessed 20 October 2013

Yasif, R., 'Peace through law: Weak rule of law spawns militancy, says CJP' *The Express Tribune* (Lahore, Pakistan 21 October 2012)

<<http://tribune.com.pk/story/454673/peace-through-law-weak-rule-of-law-spawns-militancy-says-cjp/>> last accessed 20 December 2013

Zia, A., 'Delusion versus reality' *The News* (Pakistan 09 December 2013)

<<http://www.thenews.com.pk/Todays-News-9-219067-Delusion-versus-reality>> last accessed 09 December 2013

Online Resources and Websites

Abdullah, B.Z., *PTI sit-in against drone strikes enters 26th day* (PTI, Khyber Pukhtoonkhwa, Pakistan 2013)

Agency for the Prohibition of Nuclear Weapons (OPANAL), 'Nuclear Weapon States' <<http://www.opanal.org/Desarme/Potencias/npowers.htm>> last accessed 11 February 2013

Al Jazeera, 'Pakistan mob burns man for 'blasphemy'' (Al Jazeera 22 December 2012) <<http://m.aljazeera.com/story/20121222114547753697>> last accessed 7 September 2013

Asian Human Rights Commission, 'Pakistan: Country has Turned into a Killing Field' (Relief Web 2013)
<<http://reliefweb.int/sites/reliefweb.int/files/resources/AHRC-SPR-005-2013-HRRpt-Pakistan.pdf>> last accessed 10 January 2014

Blétry, N., 'Pakistan's Panchayat Justice: Good Faith Arbitration or Brutal Tribal Law' <http://www.worldcrunch.com/pakistans-panchayat-justice-good-faith-arbitration-or-brutal-tribal-law/world-affairs/pakistan-039-s-panchayat-justice-good-faith-arbitration-or-brutal-tribal-law-/c1s5988/#.ULKG_qW7NII> last accessed 15 August 2013

Centre for Global Development, 'Aid to Pakistan by the Numbers' (Centre for Global Development <<http://www.cgdev.org/page/aid-pakistan-numbers>> last accessed 7 December 2013.

Commission, E.a.H.R., 'What are Human Rights?' (Equality and Human Rights Commission <<http://www.equalityhumanrights.com/human-rights/what-are-human-rights/>> last accessed 7 May 2013

Foreign Policy and The Fund for Peace, 'The Failed States Index 2013' (The Fund for Peace 2013) <<http://ffp.statesindex.org/rankings-2013-sortable>> last accessed 5 November

Geo TV, 'Government should act against illegal Jirgas: SC' <<http://www.geo.tv/article-108899-Government-should-act-against-illegal-Jirgas-SC->> last accessed 11 July 2013

Investment Climate Advisory Services in Middle East and North Africa,
'Promoting Alternative Dispute Resolution through Mediation'
<<https://www.wbginvestmentclimate.org/uploads/IFC%20ADR%20Project%20Pakistan%20Fact%20Sheet%202010.pdf>> last accessed 17 December 2013

Jahangir, A., 'HRCP sees risk to basic rights and constitution' *Human Rights Commission of Pakistan, Lahore, Pakistan, 20 February 2009*
<<http://hrcpblog.wordpress.com/2009/02/20/hrcp-sees-risk-to-basic-rights-and-constitution/>> last accessed 17 August 2013

LJCP, 'Law and Justice Commission of Pakistan' <<http://www.ljcp.gov.pk/>> last accessed 12 September 2013

Manzoor, U., 'Dasti praises SC verdict in Mukhtaran Mai case'
<<http://www.pakistangendernews.org/dasti-praises-sc-verdict-in-mukhtaran-mai-case/>> last accessed 15 July 2013

Nesiah, V., 'The Rise and Fall of the Human Rights Empire' *28 June 2012*
<http://fpif.org/the_rise_and_fall_of_the_human_rights_empire/> last accessed 7 May 2013

News, B., 'Outrage at Musharraf's rape remarks'
<http://news.bbc.co.uk/1/hi/world/south_asia/4251536.stm> last accessed 17 May 2013

Noor, T., *Pakistan: Supreme Court takes petition against Jirga system for regular hearing* (National Commission on the Status of Women, Pakistan 2012)
<<http://www.ncsw.gov.pk/enews/07newsletter.pdf>> last accessed 24 September 2013

Pakistan Body Count, 'Analytics' 2011)
<<http://pakistanbodycount.org/analytics>> last accessed 26 December 2013

Pakistan Criminal Records, 'PCR Exclusive - Weekly Crime Statistics' 5 October 2012) <<http://pakistancriminalrecords.com/2012/10/05/pcr-exclusive-weekly-crime-statistics-10/>> last accessed 16 September 2013

Parvez, A., 'Anjuman Mazarain Punjab acquired ownership rights' (Communist Workers and Peasants Party, Pakistan 2010)

<http://groups.yahoo.com/group/cmkp_pk/message/17294> last accessed 30 January 2011

Peshawar High Court, 'Judgements of Hon'ble Justice Ejaz Afzal Khan' *PHC, Peshawar, Pakistan 2011*

<http://www.peshawarhighcourt.gov.pk/judgements_ejaz_afzal_khan.php> last accessed 17 August 2013

Salamat, S., 'Civil Society of Pakistan: Contribution, Impact, Challenges and Way Forward'

<<http://www.chrepak.org/downloads/Civil%20Society%20in%20Pakistan%20Presentation.pdf>> last accessed 12 January 2014

Shams, S., 'Transparency International: Rule of law can end corruption in Pakistan' *Deutsche Welle, 6 December 2012* <<http://www.dw.de/rule-of-law-can-end-corruption-in-pakistan/a-16431781>> last accessed 17 July 2013

Shroff, K.B. and Nehra, K.S., 'Suspension and Reinstatement of the Chief Justice of Pakistan: From Judicial Crisis to Restoring Judicial Independence?' *The Library of Congress, August 2007* <<http://www.loc.gov/law/help/pakistan-justice.php>> last accessed 15 July 2013

Sustainable Development Policy Institute, *Governance* (Sustainable Development Policy Institute, Pakistan)

The Bureau of Investigative Journalism, 'Obama 2012 Pakistan strikes' (The Bureau of Investigative Journalism 2012)
<<http://www.thebureauinvestigates.com/2012/01/11/obama-2012-strikes/>>
last accessed 10 October 2012

WUNRN, 'Pakistan - News' *Women's UN Report Network, 26 January 2011*
<http://www.wunrn.com/news/2011/01_11/01_24/012411_pakistan2.htm>
last accessed 12 February 2013

Yusufzai, R., 'Analysis: Pakistan's tribal frontiers'
<http://news.bbc.co.uk/1/hi/world/south_asia/1711316.stm#story> last accessed 14 December 2001