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The *Social Science and Policy Bulletin* is published quarterly by the School of Humanities, Social Sciences and Law at LUMS. It provides a forum for debate on the economic and socio-political issues pertaining to the formulation and conduct of public policy as well as its impact. The Bulletin aims to disseminate, to a wider audience, high quality research and policy-oriented work being done by social scientists. The editors of the Bulletin welcome short essays, either analytical or quantitative, that are relevant as well as intellectually stimulating.

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Editors' Note

The legislative space in Pakistan has been monopolized by presidential decree. This is true not only for the substantial periods during which the political process has been hostage to dictatorial military rule, but interestingly also for the interregna expectantly referred to as periods of democratic transition. The notion and practice of rule by decree is an important example of the continuity of colonial structures in present-day post-colonial states. Under the Government of India Act 1935 that Pakistan inherited as its first constitutional dispensation, the Governor-General had enormous legislative powers as well as prerogatives. The attempts to transition away from this 'vice-regal system' towards a parliamentary-style democracy — first in the 1950's and then again in the 1970's — were either abortive or largely ineffective.

With the passage of the 18th Amendment in 2010, there now seems to be a much more visible political consensus on a parliamentary form of government, with the President retaining only a formal, titular constitutional role. Certainly, the arbitrary powers of the President over the executive and the legislature, including the power to unilaterally dissolve elected assemblies, have been considerably diluted. However, this does not mean that the President no longer has any real lawmaking powers independent of the legislature. The 1973 Constitution, both before and after the 18th Amendment, has preserved the practice of rule by decree in the form of the presidential power to make law through legislative instruments known as ordinances. Not only does the bulk of lawmaking in Pakistan continue to be done unilaterally by the President to meet all sorts of exigencies, the timeframe for application of ordinances can be extended indefinitely in the absence of express rejection by the legislature.

This has obvious repercussions for a representative government. In the first article of this issue, Zulfiqar Hameed points to some serious fallouts of the lack of timely, well-deliberated, and evidence-based legislation to counter terrorist offences in Pakistan. Hameed describes how various facets of 'terrorism', including the use of weapons of mass destruction, the nature of targets, the multiplicity of terrorist groups, the possibility of orchestrating terrorist acts through geographically remote areas, etc., have changed dramatically in the past few years without any corresponding enhancement in the legislative response to these new challenges. One wonders whether, even if an ordinance were to fill a supposed legislative vacuum in the circumstances, the relevant legal framework and its implementation would benefit from a process that lacks input from a wide base of stakeholders.

The second article by Saroop Ijaz highlights a broader institutional consequence of a long history of non-representative and incompetent legislative responses to governance issues — namely, the current clash between the judiciary and the executive-legislature. Ijaz emphasizes the need for 'judicial minimalism' in order to provide greater deliberative space for the political process to weigh and prioritize policy concerns and to build public consensus on contentious issues. As part of this process of democratization, perhaps we must also revisit the question of rule by decree and its anti-democratic potential.

The third article by Khalid Mir raises a theme that is as germane to economic analysis and policy as it is to any other disciplinary or policy domain — the theme of 'ethics'. Mir asks if it isn't wise for us to think of policies in terms of whether they are ethical ('fair, right, or just') instead of efficient, and likewise whether we should re-conceptualize our politicians, bureaucrats, and citizens as being driven by ethical considerations apart from self-interested motivations. Infusing economic theory and practice with the "language of politics and ethics", as Mir says, will allow us to better appreciate what we look for in a 'good society'.

The Anti-Terrorism Law of Pakistan: Need for Reform

By Zulfiqar Hameed

Pakistan has been in the eye of a storm of terrorist attacks that have damaged it in many ways during the last five years. There are a myriad of reasons for this exacerbated trend of attacks and the response to these attacks has not been as vigorous as it should have been. Part of the reason is deficiencies in prevailing laws dealing with terrorist acts.

There has been a metamorphosis in the phenomenon of terrorism due to several reasons, including geo-strategic considerations, ineffectiveness of the criminal justice system as a deterrent for terrorism, non-resolution of underlying issues leading to conflict, and the State-citizen relationship in Pakistan. The focus of this article is on the perceived ineffectiveness of the criminal justice system.

This article argues that the enervated response to the current threat of terrorism, both in terms of law enforcement and adjudication, stems in large part from the legislative framework within which the criminal justice system operates. It is, hence, essential to look at the areas in need of reform and suggest changes in order to ensure an effective legislative response, keeping in view comparative developments in other countries.

The existing anti-terrorism regime

The primary counterterrorism law of Pakistan, The Anti-Terrorism Act 1997 (hereinafter, the 'Act'), is a federal statute that was enacted in August 1997 and adopted by the provinces at the same time.[1] It was enacted in the backdrop of heightened terrorist attacks in the 1990s and was intended as specialized legislation to expedite the process of adjudication of cases of ethnic and sectarian terrorism. The Act established Special Courts with additional powers and a much lighter workload with summary procedure to ensure quick disposal of terrorism cases. It laid down wide, albeit nebulous, definitions for 'terrorism' and 'terrorist acts', provided some additional powers to the law enforcement agencies, and enhanced the punishments for such acts.

However, it appears in hindsight that the Act has not produced the desired results and has not proved to be an effective legislative response to the threat of terrorism. The specter of terrorism has been haunting Pakistan for the last five years with renewed force and a ferocious intensity not seen in the past, and has left the law struggling to cope with the new challenges posed by these developments. An analysis of terrorist activities in the last three years shows an exponential increase in the number of incidents and casualties.[2] For the period between 1974 and 2007 (33 years), the number of incidents was 2,590 with an average of 78.5 incidents per year. In comparison, in just the three years between 2008 and 2010, the number of incidents tallied to 1,929 with an average of 643 incidents per year. The average number of incidents per year has increased more than eight times when we compare the two periods. In the first period, the number of people killed and wounded in terrorist incidents was 5,840 and 11,597, respectively (with an average of 177 people killed and 351 injured each year during this 33 year period). During the latter period between 2008 and 2010, the number of people killed and wounded, respectively, was 4,286 and 8,264. This translates to an average of 1,429 killed and 2,755 wounded each year during this three year period. Thus, the average number of people killed and wounded in

terrorist incidents per year has increased eight times — proportionate with the increase in the number of incidents per year. This data clearly demonstrates that the incidence of terrorist acts has increased immensely during the years after 2007 and underscores the importance of an effective response.

Changed milieu

Several characteristics marked the phenomenon of terrorism in the 1990s. Firstly, terrorist attacks were motivated by ethnic and sectarian hatred. Secondly, they generally targeted important personalities from the law enforcement agencies or the opposing sectarian or ethnic group and took the form of murders or murderous attacks. Thirdly, the perpetrators were mostly alone, even though in some cases they were assisted by a small group. Fourthly, the weapons used were firearms such as handguns and semi-automatic rifles. Finally, the area of operation was limited or was, at least geographically, not very vast.

In juxtaposition, the terrorist threat in the post 9/11 scenario has evolved so much that it has become quite distinguishable from the earlier phenomenon of sectarian terrorism. The differences are many and varied. To begin with, the recent terrorist attacks have been mostly suicide attacks or, in some cases, remote bombings with targets on a much bigger scale. During the period 1973 to 2007, in attacks involving firearms, an average of 4.3 persons were killed and wounded per incident; in attacks involving explosives an average of 9.4 persons were killed and injured per incident; and in suicide bombing incidents the average number of persons killed and wounded was 42 per incident, ten times the number involving firearms. Further, the weapon of choice for terrorists has changed from firearms to explosives. During the years between 1995 and 1997, the number of incidents involving firearms was in the hundreds, while explosives were used in less than 20 incidents per year during this period. However, in the years after 2005, explosives have dominated the scene of terrorism, with more than a hundred incidents involving explosives in 2006 and more than 175 incidents involving explosives during the year 2007. Thirdly, the lethality of the attacks has increased manifold resulting, at times, in hundreds of casualties. Whereas the number of people killed and wounded per incident was two in 1995, this figure rose to 15 in 2007. Fourthly, during the years after 2006, the top target has been military forces, followed by police and educational institutions. Fifthly, the groups involved in the attacks are much larger in size as compared to the past, and are assisted by networks that in some cases may be national, if not international, with considerable financial resources at their disposal. Lastly, in some cases, there have been widespread armed insurgencies with whole areas being temporarily under the control of terrorist elements and with supporting groups being spread over hundreds of miles to provide planning, support, sanctuary, and other assistance to the actual perpetrators.

Inadequate legal response

At the time of the framing of the Act, these evolving threats had obviously not been foreseen. The Act was meant primarily to counter the threats of a limited, sectarian terrorist phenomenon. As a consequence, there has been limited success in punishing the culprits through the criminal justice system. There are several reasons for this failure, but one of the most important is the fact that the law on the subject has not been updated to respond to the evolving threat of terrorism. An additional reason is the want of exactitude in legal provisions. The loose definitions of 'terrorism' and 'terrorist act' have resulted in considerable ambiguity and misapplication of the Act in many cases. Numerous murder and attempted murder cases, which can and should ordinarily be covered by the general criminal law under the Pakistan Penal Code (PPC), have been registered under the Act whenever some sensationalism has been attached to the surrounding circumstances. This has been possible due to the vague wording of the Act. However, in many such cases, the real motive appears to be a wish on the part of the complainants or the police to ensure a higher legal sanction with the possibility of more severe punishment under the Act. Some new categories of offences, like throwing acid on women and kidnapping for ransom, have been added to the Act because of this desire for a stricter penalty

for these offences.

An indirect consequence of the liberal application of the Act is that real acts of terrorism involving weapons of mass destruction (which should be covered under the Act) receive less stringent treatment than required for such heinous acts. A better approach would be to exclude from the ambit of the Act those offences which are already adequately covered by the PPC — such as murder and attempted murder — and to introduce special legislation for distinct offences like acid throwing on women with provision for higher punishments and stricter procedural safeguards. This would result in better prosecution under the Act for more heinous acts of terrorism, thus enhancing the deterrent effect of the Act.

Areas requiring reform

This section identifies five areas that are particularly inadequate in terms of the legislative framework required to deal with the evolving trends in, and nature of, terrorist threats.

Defining new offences: There is a need to revise the Act to incorporate new types of crimes that have emerged in the last five years. Following are the issues that need special emphasis in this respect:

1) New types of crimes that need to be included in, and comprehensively defined by, the Act include a suicide attack, conspiracy or planning for a suicide attack, suicide bombing, armed insurgency, and planning to cause widespread disaffection against the State. In addition, the definitions of 'terrorism' and 'terrorist act' also need to be improved so that any attack attempting to, or resulting in, mass destruction or widespread damage falls within their ambit. Further, a special section on 'weapons of mass destruction' needs to be introduced along the lines of U.S. law which defines such attacks in a separate category to reinforce both their different nature and the gravity of consequences.[3]

2) The Act does not provide for a special category of federal offences unlike the laws in the U.S. which have such categories.[4] Crossing provincial boundaries for an act of terrorism, transportation of explosives,[5] and planning acts of terrorism through use of explosives across provincial boundaries are examples of the kinds of terrorist acts that should be placed under the umbrella of a new category of federal offences in the Act. These offences should not be limited to investigation by provincial police forces since it is not possible for a province to take cognizance of an inter-provincial chain of events.

3) There is a need to create a strict liability offence for possession of a minimum quantity of explosives and for harboring people with such explosives. Although the Act already provides a presumption of proof against the accused for possession of explosive substances, it should also include a distinct offence for possession of such materials *per se*. A relevant example is the strict liability crime of possession of narcotics under the Control of Narcotic Substances Act of 1997 (CNSA).[6] The CNSA increases the penalty in tandem with the quantity of narcotics possessed. This scheme should be replicated for the possession of explosives. The U.S. Federal Sentencing Guidelines also take a similar approach in increasing the level of punishment.[7] For example, if the possession of one kilogram of high explosive entails a punishment of imprisonment of up to five years, possession of more than ten kilograms may result in life imprisonment or the death sentence. In fact, one can reasonably argue that possession of explosives is a much more heinous offence than possession of narcotics due to a much higher potential for causing damage to society.

4) A special category of offences for attacks on security installations, armed forces, and law enforcement agencies and their facilities should be created. Any symbol of national importance should be included in this category. Attacks on the Sri Lankan cricket team, General Headquarters, Mehran Naval Base, Police Academies in Manawan and Sargodha, and

Federal Investigation Agency (FIA) buildings underscore the importance of having such a separate category. The U.S. law incorporates such special categories like attacking, kidnapping, or assassination of the President,[8] the Vice President, or any member of the staff of the President or the Vice President.

5) There is no provision in the Act for attacks on highly sensitive installations or infrastructure.[9] There is a need to create a special category of offences covering attempts to take over or damage an installation or building related to national security like nuclear installations and installations critical to national infrastructure like dams, transmission wires, pipelines, etc.

6) The specter of attacks using chemical,[10] biological,[11] or unconventional weapons has haunted several countries in the world in the recent past. A separate provision needs to be made for such attacks.

7) Recoveries of explosives and weapons are covered under the Explosive Substances Act 1908[12] and the Pakistan Arms Ordinance 1965,[13] respectively, and are not offences under the Act. This implies that possession of arms, even if they are high caliber or automatic weapons, is only punished by limited imprisonment or modest fines. Historically, the courts have been very reluctant in awarding punishments under the Arms Ordinance and this tradition carries over even to cases that are registered under the Act. Therefore, possession of arms in relation to terrorist acts does not result in a sufficiently heavy penalty. Similarly, the Explosive Substances Act is an antiquated law that does not adequately provide for new types of explosives and modes of preparation. There is a need for the Act to define the new offences regarding possession of weapons and explosives connected with terrorism, thus modifying provisions in the old legislation.

Enhancing penalties: There are several offences which are either not adequately treated or do not entail sufficient penalties in the Act. These include:

1) The possession of some types of explosives should entail exemplary punishments like the death penalty. These include suicide vests, anti-personnel mines, rocket propelled grenades, rockets, anti-aircraft guns, etc. Such increments of penalties would ensure a measure of deterrence that is much needed in the circumstances.

2) Possession of larger amounts of explosives and weapons should entail higher penalties. In addition, as mentioned previously, there is a need to convert offences of possession to strict liability crimes under the Act, provided they are sufficiently linked to a terrorist plan or attack.

3) Attacks on persons or places having national symbolic significance, defence-related facilities, and nationally important installations or infrastructure, including nuclear facilities, should entail special penalties, with a minimum punishment of life imprisonment and a maximum punishment of death. Such penalties can also be extended to the unauthorized possession of nuclear, chemical, or biological weapons.

4) Penalties for all newly defined offences should be stricter, with clearly delineated legislative guidelines for minimum punishments in order to ensure deterrence.

5) The Act should make provision for compulsory confiscation, in favour of the State, of all properties of persons convicted of terrorist attacks, with further penalties for repeat offenders under the Act.

Assistance, aid, and abetment in terrorism: Terrorist acts, in their modern form, require the active collaboration and assistance of several perpetrators for achieving their goals. Similarly, in the absence of an enabling environment in terms of people and resources, terrorist acts have a slim chance of success. However, the Act fails to sufficiently take into account these

attending circumstances of recruiting and radicalizing people, collecting financial resources, and aiding and abetting a particular act of terrorism. Therefore:

1) Penalties attached to offences dealing with facilitating terrorism should be much harsher. Acts like training suicide bombers, imparting training in preparation of explosives, weapons training, and harbouring terrorists, are some examples of offences in this category. Similarly, propagation and dissemination of ideas or literature leading to terrorism should also warrant more serious penalties.

2) There is a need to extend the scope of the Act to areas like Federally Administered Tribal Areas (FATA).

3) There is no provision for providing assistance from within Pakistan to international agencies for acts of international terrorism with links to Pakistan. A provision needs to be made with a prescribed mechanism for such assistance.

4) The area of terrorism financing has received a lot of attention worldwide but has largely been neglected in Pakistan. The sources of terrorism financing need to be identified and appropriate provisions need to be made for each source. One of the most obvious sources is donations by individuals or organizations. In several countries' laws,[14] such financing, even if done recklessly, is an offence under the law and entails serious penalties. Money laundering and proceeds from crimes have to be expressly dealt with by the Act.

Powers of law enforcement and investigative agencies: Effective investigations by law enforcement agencies and adjudication of cases by courts are hampered due to a lack of legal powers, which are critical as a result of changes in technology and in the nature of terrorism.

1) There is a need to provide powers to the police and other investigative agencies like the FIA or the Counter Terrorism Department (CTD) for the monitoring and surveillance of persons, financial transactions, and money flows in connection with terrorism. Compulsory reporting and sharing with law enforcement agencies of all relevant information needs to be made mandatory for all financial institutions.

2) Technical monitoring, wire tapping, and other technical facilities for the police need to be regulated and provided for through a legal framework. There has to be a mechanism for obtaining warrants for these activities from the Special Courts under the Act for these purposes. An example of a similar kind of legal framework is the Foreign Intelligence Surveillance Act of 1978[15] in the U.S. which regulates the process for these activities.

3) The police or any other investigating agency acting under the Act should be able to request and obtain information regarding travel, residence, telephone calls, financial transactions, or any other relevant information from any source about any named person. Even though the law, in theory, has given some powers in this respect to the police, in practice these powers are limited and require several authorizations, thus considerably delaying the process of investigation. Clear powers need to be conferred upon the investigation agencies for expedited investigation.

4) There is a need for an effective victim and witness protection program under the Act. The police and the courts should be empowered to 'take all necessary steps' to ensure that the victims and witnesses are effectively protected in trials of terrorism. These steps could involve image and voice distortion, closed sessions, hidden identity of witnesses, and any other measures considered necessary and expedient in the interest of justice and the protection of witnesses.

5) The Special Courts under the Act should have the power to conduct trials *incognito*, in appropriate circumstances, in order to protect the identity of

the judges, investigating officers and witnesses. This means that where circumstances warrant, the government should be able to authorize a trial which does not involve the judge and witnesses being visible to the accused, and is conducted either through one-way video conferencing or one-way glass partition. This is especially relevant in cases where a jail trial is thought expedient.

Procedural issues: Procedural bottlenecks impede the successful prosecution and conviction in terrorism cases. The provisions contained in the law of evidence and court rules require revision vis-à-vis the changes in terrorist activities. Hence:

1) There is a need to amend the law of evidence as well as the Act to make the testimony of police officers admissible in evidence. This is the case in many countries around the world, and is especially important in the context of terrorism cases where witnesses are not forthcoming due to fear and where oral testimony is given a lot of importance. The Act has already made admissible as evidence a confessional statement in front of an officer of the level of Superintendent of Police. However, necessary amendments are needed in the law of evidence, specifically in the *Qanoon-e-Shahadat* Order, to take care of the substantive law in addition to the amendments in the Act itself. Further, there is a need to amend the law to make circumstantial evidence admissible in terrorism cases.

2) Safeguards need to be built into the Act to ensure that it is not misused. A much more precise definition of 'terrorist act' and circumstances where it can be applied need to be provided in the Act to preclude the possibility of abuse. Prior permission, in writing, of the gazetted police officer concerned for registering a case under the Act may be made a legal requirement in order to provide an additional safeguard against abuse of the Act.

3) Pakistan's traditional criminal law gives a lot of importance to physical presence of the perpetrators at the scene of the crime. The nature of terrorism and more particularly of suicide bombing is such that the presence of all perpetrators on the scene of the crime is an impossibility. An additional complicating factor is the fact that the main perpetrator, the suicide bomber, dies in the act. The person planning the act of terrorism may be in a remote location. It stands to reason that such a person should be the main accused in a case like this. In these circumstances there is a need to devise a mechanism to do away with the requirement of physical presence at the scene of the crime. There is also a need to move away from the approach of connecting the persons present at the scene of crime to the persons planning the act of terrorism. In such circumstances, the standard of proof required in the *Qanoon-e-Shahadat* Order should be relaxed and circumstantial evidence should be made admissible. This is important especially if per-petrators in remote locations are to be brought into the net of the law.

It is with changes like the ones proposed above that the law on anti-terrorism in Pakistan would come at par with international best practices and be sufficiently robust to counter the menace of terrorism in Pakistan.

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For U.S. anti-terrorism law sources, see<http://jurist.law.pitt.edu/terrorism/terrorism3.htm>

For Australian anti-terrorism laws, see <http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument>

For the Australian Parliament's Guide on anti-terrorism laws in Australia and other important countries with references to international treaties as well as practices around the globe, see <http://www.aph.gov.au/library/intguide/law/terrorism.htm>

For international treaties and other legal instruments on anti-terrorism, see <http://www.un.org/terrorism/instruments.shtml and http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml>

Notes

[1]Act No. XXVII of 1997 promulgated through publication in Gazette of Pakistan Extraordinary Part I on August 20, 1997.

[2]The data on incidents of terrorism in Pakistan has primarily been taken from the Global Terrorism Database (GTD), an open source database maintained at the University of Maryland's National Consortium for Study of Terrorism and Responses to Terrorism (START).

[3]Title 18 US Code Chapter 113B deals with terrorism and contains a detailed treatment of the subject. 'Weapons of mass destruction' have been specifically defined in § 2332a.

[4]Title 18 US Code Chapter 113B makes use of the power to regulate inter-state commerce provided under §1958(b)(2) of the Code to create a federal crime of using, threatening or planning to use, or transporting weapons of mass destruction across state boundaries. The federal government not only has federal jurisdiction in such matters but has extra territorial jurisdiction for any act of domestic or international terrorism.

[5]Title 18 US Code, § 844(d) and (n) deal with transportation of explosives inside as well as outside state boundaries in the U.S.

[6]Act No XXV of 1997 promulgated on July 11, 1997. Section 9 of this Act prescribes differing levels of punishment varying with the quantity of narcotic substance or drug possessed or transported, etc.

[7]US Sentencing Guidelines § 2 K 1.3(b)(1)(c). Any offence of unlawful receipt, possession, transportation and prohibited transactions of explosives involves an enhancement of punishment in accordance with the increasing weight of the explosives.

[8]Title 18 US Code Chapter 84 § 1751. The penalty for causing death of any of the persons in the said section is the punishment of death or life imprisonment with fine. The penalties for lesser offences like kidnapping or attempts at kidnapping, etc., are life imprisonment or imprisonment of up to ten years.

[9]Title 18 US Code § 2332f deals with bombings of places of public use, government buildings, public transportation systems and infrastructure facilities, and prescribes death or imprisonment for life as punishment for such an offence.

[10]Title 18 US Code Chapter 11B. This entire chapter deals with offences related to chemical weapons and prescribes punishments of death or imprisonment for life for causing death of any person under such offences.

[11]Title 18 US Code, Chapter 10. Offences relating to the development, production, stockpiling, transfer, acquisition, retention, possession or any attempt thereto, entail a punishment of imprisonment for life with any amount of fine.

[12]Act VI of 1908 promulgated on June 8, 1908.

[13]Act XX of 1965 promulgated on June 8, 1965.

[14]Australian Criminal Code Act 1995 as amended, Division 103 deals with terrorism financing and makes purposeful or reckless financing of terrorist activities an offence punishable with life imprisonment. Title 18 US Code § 2339C prohibits terrorism financing and makes the offence punishable with imprisonment of up to 20 years. Canadian Criminal Code Sections 83.02, 83.03 and 83.04 deal with terrorism financing and make offences like collection or possession of property for use in terrorism, etc., punishable with imprisonment of up to ten years. The 'International Convention for the Suppression

of the Financing of Terrorism,' adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, is also a possible source of guidance for dealing with terrorism financing.

[15]Foreign Intelligence Surveillance Act 1978 as amended in 2008, and 50 US Code 1801 *et seq*.

Judicial Populism and Democracy

By Saroop Ijaz

Historically, the Supreme Court of Pakistan has been a dormant player in the institutional conflict between oftentimes a *de facto* executive and representative government, only coming into play once the struggle for power is over to formally validate the victor's takeover of government. In cases relating to the dissolution of the assemblies in the 1990's under article 58(2)(b) of the 1973 Constitution (the 'Constitution'), the Army as well as the President have almost always come out as the winners, with the Supreme Court granting *post facto* legal ratification. The traditional pattern of the Court's acquiescence to the *de facto* winner of the power struggle has become untenable after the restoration of the Superior Courts[1] on 16th March, 2009. The Court has now assumed a considerably more 'active' posture, and has sought to assert itself and compete for control over the central decision-making process. The objective of this article is, firstly, to demonstrate through examples this tendency of the post-restoration Superior Courts of Pakistan and, secondly, to argue that by overreaching into the domains of the political branches of government, the Courts are essentially doing a disservice to the evolution of representative democracy. Embedded within these two contentions, are questions about whether the Supreme Court possesses sufficient institutional capacity to deliver on patently political issues which it seeks to adjudicate upon and whether it is normatively desirable in a democratic set-up to develop such capacity within the Courts. I contend that recent examples of the Supreme Court's infringement of the spheres of power of other branches of government demonstrate not only a theoretical breach of the Court's constitutional role but also adversely impact the evolution of democracy in Pakistan.

Judicial minimalism

The theoretical framework of the present analysis draws from the theory of 'judicial minimalism', most notably proposed by Sunstein (1999) who explains the concept in the following terms:

> A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation, and responsiveness. It allows continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values. To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments.

The implicit argument in the above excerpt is the notion that debate and deliberation are values in themselves, regardless of the conclusions. The Superior Courts in Pakistan have consistently put a higher value on achieving substantive ends rather than furthering the process of 'democratic deliberation'. The unavoidable consequence of an end-driven approach is the superimposition of values and objectives that the Courts deem appropriate

for the people. The primary caveat to such a proposition is that judges do not have the mandate to undertake such an endeavor, primarily because they are unelected and insulated from direct repercussions of public opinion. In terms of the larger political scheme, the de-emphasis on democratic deliberation severely undermines the basic notion of separation of powers (Sunstein, 1999). A pronouncement from the Court has the effect of introducing a formal conclusion, often at an early stage, and hence constrains the discourse in the public sphere.

The genesis of the current phase of judicial activism can most tangibly be traced back to the *Lawyers' Movement* which was initially started to provide the requisite support, both on political and moral grounds, to the judges of the Superior Courts deposed by General Musharraf. The Movement provided an opportunity for the judges to make public speeches which were, by the very nature of the conflict, bound to be political and also had the semblance of public support behind them (Malik, 2008). When the judges were subsequently restored, they retained a feeling of being representatives of the public and hence developed a sense of entitlement, or, as some harsher critics may be inclined to put it, self-righteousness. In the aftermath of the Movement, the Supreme Court has interpreted judicial independence as a fundamentally adversarial institutional quality, while presuming the parliament and executive to be hostile, malicious, or inept.

An in-depth exploration of the causal link between these two factors — judicial independence as an adversarial concept and the perception that the political branches of government deserve condemnation — is beyond the scope of this article. Nevertheless, applying the Occam's razor, the contention does seem to hold some merit. The sharp rise in the incidence of *suo motu* cases in the Supreme Court based on reports in the media is one indicator of this inclination. At the same time, the Supreme Court has gradually lessened the emphasis on the definitional aspects of the two requirements of 'fundamental right' and 'public importance' — essential for invoking the original jurisdiction of the apex Court — to effectively counter any allegations that the Court's exercise of *suo motu* jurisdiction is purely discretionary.

Eighteenth Amendment and overruling the people

The most pronounced example of this interventionist approach can be found in the case concerning the constitutionality of the 18th Amendment to the Constitution (the 'Amendment').[2] The Amendment was perhaps the most exhaustive constitutional amendment exercise conducted by the parliament in Pakistan. The removal of the President's power to dissolve the National Assembly, a new process of judicial appointments, and the abolition of the concurrent legislative list were amongst the seminal changes brought about by the Amendment. Equally significantly, the Amendment was passed unanimously by both houses of parliament. The Supreme Court stopped short of declaring the Amendment unconstitutional. Yet, in holding the challenge to the constitutionality of a constitutional amendment to be maintainable without discussing at any great length the long and consistent line of precedents establishing that such questions were not justiciable, the Court opened the door for future overruling of constitutional amendments. To put it simply, the argument for challenging the validity of the Amendment was that it violated the 'basic structure' of the Constitution. The most recent precedent on the point was in 2005 with the Supreme Court judgment in the *Pakistan Lawyers Forum*[3] in which a five-member full bench of the Court re-examined the basic structure argument exhaustively. The Court observed that "it has repeatedly been held in numerous cases that this Court does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds". The Court conclusively and unambiguously ruled on the matter by observing that:

> The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and

> Article 8), but by the body politic, i.e., the people of Pakistan. (para. 56)

The approach of the Court in that particular precedent was closely aligned to Sunstein's notion of minimalism and the ultimate decision-making power resting in the public domain. Yet, the unmistakable slant of the Supreme Court in the 18th Amendment case was that the judiciary was competent to strike down the Amendment but chose not to. During the proceedings, the Chief Justice asked the question, originally posited rhetorically as *dicta* by the then Chief Justice Ajmal Mian in the case of *Wukala Mahaz*,[4] whether

> [i]f the Parliament by a Constitutional Amendment makes Pakistan as a secular State, though Pakistan is founded as an Islamic Ideological State, can it be argued that this Court will have no power to examine the vires of such an amendment.

Though the statement is certainly *dicta*, it is indicative of a very deep-seated sense of entitlement and visualization of the Court as the moral compass of society. Even the general idea that the Court can adjudicate and possibly overrule the consensus of both houses of parliament — the only tangible indicator of the will of the people — is not one which sits comfortably with the notion of popular democracy. In this particular case there is a strong argument for the application of the principle of judicial minimalism and its logical extension that judges should concern themselves with adjudicating the particular dispute at hand, and not engage in broad theorizing affecting people who are not party to the dispute. In doing so, judges would promote deliberative democracy by encouraging the political branches (and society as a whole) to debate core issues to arrive at a more sustainable consensus. It would also be a welcome recognition on their part that in an embryonic democracy like Pakistan, plagued as it is by ethical and political uncertainty, the Courts may not always have the best or the ultimate answers to all the questions.

The 18th Amendment judgment displays a compromise between the judiciary and the parliament to maintain the equilibrium and distribution of available political capital. The nature of a negotiation of this form is political, and hence is not in complete congruity with the aspect of judicial independence which entails insulation from political wrangling. It is impossible for any judiciary to operate in a vacuum and ignore the historical narrative leading up to that moment. The Amendment was a breakthrough in terms of democratic ideals with a rare and exhaustive debate conducted inside and outside of the parliament, given a young democratic system. An attempt to undermine the moral and political authority of such a parliament is conceivably regressive, insofar as being unnervingly similar to the reasons accorded for military interventions in the past.

National Reconciliation Ordinance

The second major case displaying this line of reasoning was the National Reconciliation Ordinance (NRO) case.[5] The question before the Supreme Court was relatively straightforward in legal terms, i.e. whether the NRO was a valid piece of legislation. The NRO was an ordinance passed in 2007 by the then President Musharraf granting selective immunity to political officials charged with criminal offences in cases initiated at or after a particular date. The nominal legal objective of the NRO was to grant immunity from conviction to those who faced politically-motivated criminal charges. However, the practical consequence was that a majority of the beneficiaries under the NRO belonged to the ruling coalition, including President Asif Ali Zardari. The Court responded with a 287-page judgment. The arguments considered and documented were as diverse as the policies of Caliph Umar to the alleged designs of the C.I.A., amongst others. The evidence produced and considered by the Court was derived from equally disparate sources, ranging from the Holy Quran to 'the Way of the World' by Ron Suskind. One of the judges narrated in a captivating manner the history of the Subcontinent from the time of the Mughal Emperor Aurangzeb to the present, and in the process reproduced a speech made by Lord Macaulay on the floor of the British Parliament in 1835, as well as excerpts from the *Shahabnama*, Sheikh Saadi, Rumi's *Masnevy,* and other sources, making it a fascinating read. However,

this did not detract from the fact that most of the stimulating facts had little or no bearing to the formal legal issue at hand — namely, the constitutionality of the NRO. The Supreme Court had the constitutional power to strike down the NRO, and rightfully did so. Nonetheless, one needs to be mindful of the unintended adverse consequences of its decisions especially when the area involves a highly contentious question and has received and continues to receive sustained democratic attention. In such areas, the Courts should be cognizant of the real possibility that, even relying on their own deepest convictions, they may err.

One example of the expansive nature of the Supreme Court's pronouncement is the discussion in the NRO judgment pertaining to article 62(f) of the Constitution. Article 62 lays down the qualifications for members of parliament; sub-section (f) stipulates in particular that these political representatives should be "sagacious, righteous and non-profligate and honest and *ameen*". The Supreme Court restrained itself from conclusively ruling on the question of eligibility of members of parliament. However, in light of the fact that the Court presumed to discuss article 62(f) as a justiciable issue in the NRO judgment, it appears that the candidature of any member of parliament (as well as the President) is now open for the Court's review.

Given that article 62(f) outlines a broad ethical principle in open-ended terms that individuals are likely to interpret in multiple ways, the role of the judiciary should not be to curtail pluralist narratives in order to impose its own subjective interpretation. This also raises another obvious question as to why the Supreme Court, in the first place, chose to discuss the qualifications for members of parliament (and/or the President), when the question before it pertained to the constitutionality of a particular piece of legislation.

Judicial activism and freedom of expression: The ban on Facebook and YouTube

In the United States, freedom of expression has traditionally been at the core of most debates regarding the nature and extent of engagement of the Supreme Court in the public sphere (Barack, 2006). In contrast, last year the Lahore High Court decided to impose a ban on Facebook, YouTube, and Google, amongst other websites, through an interim order premised on the argument that these websites contained blasphemous content. The facts leading to the controversy were that caricatures of the Prophet Muhammad were published in a newspaper in Denmark and were subsequently disseminated on the internet and could be accessed through the aforementioned websites. The ban was subsequently lifted, but the case remained pending before the High Court for some time. The ostensibly blasphemous content on these websites generated public discourse regarding the scope and boundaries of freedom of speech. However, before the debate could take off, engaging the public and reaching a social consensus, the High Court stepped in. Any subsequent debate thus had to contend with the possibility of contempt proceedings on the basis that public comment on the matter was *sub judice*. The matter is still pending before the Lahore High Court. The notion of the Court being the arbiter of what information is fit to be considered by the public as a surrogate for reaching social consensus is anti-democratic or, at the very least, constitutes an attempt at controlled democracy.

Judicial control of the economy

The current post-restoration wave of 'judicial activism' has also seen the Superior Courts venture into the sphere of pure economic policy. The most glaring example of this is the assumption of *suo motu* jurisdiction by the Lahore High Court of the sugar crisis in the Punjab. The immediate cause of the crisis was an acute shortage of sugar in the province leading to a sharp rise in sugar prices. The High Court proceeded to fix the price ceiling of sugar at PKR 40 per kilogram.[6] The basic fallacy in the exercise was the attempt to perform a function which was clearly beyond the Court's jurisdiction. The price fixing resulted in a considerably more acute shortage of sugar due to the failure of the producers to profitably sell the commodity at the price mandated by the Court. Hence, even those consumers who were willing to pay a more competitive market price were denied the opportunity to do so, since selling

sugar at a higher price would have been in direct contravention of a court order and hence illegal. The failure of the Court to take into consideration market forces resulted in exacerbating the crisis it sought to alleviate. Even if one is to disregard the undesirability of the action, the episode also highlights the impossibility of such a Herculean task. The Court cannot be reasonably expected to understand market dynamics and spearhead an effort to steer the economy. A similar example arose when the Supreme Court granted an injunction against the levy and collection of a carbon tax, which had the consequence of temporarily denying the Federal Government a collection of PKR 120 billion.[7] The Supreme Court cannot act impervious to the economic consequences of its decisions, especially when the matters under consideration require sophisticated expertise in economic affairs. The Court's involvement in the economic sphere also demonstrates the gulf between its objectives and the possession of sufficient 'institutional capacity'. The Court has no means at its disposal to either comprehensively ascertain the market situation or, perhaps more significantly, enforce an order such as the fixing of commodity prices. The primary recourse available to the Court to coercively enforce a policy order is contempt of court, which is extremely inadequate, especially when used against the State itself. The intervention of the Court often has the consequence of precluding a serious attempt at the formulation of a sustainable economic policy.

Suo motu notice of violence in Karachi

Recently, the Supreme Court decided to take *suo motu* notice of the violence in Karachi and summoned what it considered to be stakeholders in the matter.[8] The Court is responsible for adjudicating upon any murder appeals appearing before it in its appellate jurisdiction; but to tackle a general condition of lawlessness and violence is *prima facie* beyond its mandate. Again, in this particular example, the realization that the canvass has been spread too broad and the lack of effective Court resources, either to gather information on the ground realities or pass an enforceable order, cannot escape one's attention. The violence in Karachi is a product of the interaction of various diverse, historical factors such as ethnic composition of the population, rural-urban migration, and urban town planning, amongst others. Hence, it is in no way susceptible to an ahistoric formalized institutional pronouncement by a body of judges who are both geographically and politically removed from the particular ground realities. For the Court to intervene in a top-down fashion was not only ineffective but likely to worsen the situation, since the generalized policy recommendations that the Court inevitably resorted to were vulnerable to being used selectively as justification by any of the actors. An example was the recommendation given by the Court to depoliticize the police force without any admissible empirical data or mechanism, thus opening the door for discretionary employment terminations and new employments by the local administration. It would be fair to assert that the Supreme Court did not sincerely believe that it would be able to put an end to the continuing violence by a single judgment. Here, we are once again confronted with the Supreme Court's tendency of being 'populist', and hence the compulsion to act in face of an apparent national crisis even where there is no legal or constitutional issue involved.

'Memogate'

The most current display of the Supreme Court's propensity for taking cognizance of matters *prima facie* not falling in its domain is the 'Memogate' case.[9] The case hinges upon a memorandum ostensibly written by the previous Pakistani Ambassador to the United States — Hussain Haqqani — asking for assistance in formulating and implementing a new national security arrangement for Pakistan. Essentially, the issue at stake is whether Haqqani and other officers of government implicated in the planning and writing of the memorandum are guilty of the offence of high treason. This is an example of a matter involving an overt structural and institutional struggle for power between the Army and the Federal Government with no constitutional or legal issue in contention. The form and substance of the episode clearly highlights the trajectory that judicial activism in Pakistan has adopted. Notwithstanding the clear compromise of the perception of its neutrality, the Supreme Court was probably inclined to adopt an adversarial

political posture because of its assessment that such a move would help it garner and consolidate public support.

It might be of some assistance to contrast the approach of Pakistan's Supreme Court with the classic and oldest formulation of the political question doctrine by the then Chief Justice Marshall of the United States Supreme Court in *Marbury v. Madison*:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.[10]

In contrast, the Superior Courts of Pakistan have repeatedly created the impression that they do not perceive their power to be derived from constitutional or jurisprudential foundations, but rather some intangible and vague notion of public legitimacy. The emphasis on presidential immunity in the 'Memogate' case, which was not the core issue in the dispute, lends credence to this view. Tangential deliberation of this kind not only presents a challenge to the perception of neutrality but also to the broader notion of trichotomy of powers. The matter remains pending before a judicial commission specially constituted for this purpose, and hence constrains and limits other legitimate political fora — like the parallel parliamentary committee — from investigating the memo issue or giving an authoritative opinion on the issue.

Concluding remarks

The Superior Courts have to display restraint and allow space for political and social conflicts to be debated and resolved in a participatory manner. The precedent of unelected individuals making decisions for the people and not allowing them the opportunity to make their own mistakes or learn from them is undemocratic. It is also highly reminiscent of the Courts' political alignment with military dictators in the past. A pre-requisite of moving towards judicial restraint is a change in the political frame through which the Courts view the other institutions of the government as being adversarial and competing for a certain fixed quantity of power. The failure of the legal and political system in Pakistan has largely been a failure to evolve a sustainable model of institutional governance, primarily attributable to a fixation with individuals. The Superior Courts need to caution themselves against this obviously non-workable tendency.

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Notes

[1]I use the term 'Superior Courts' to refer to the Supreme Court and the five High Courts as a collective, and the generic term 'Court' to refer to the Supreme Court of Pakistan.
[2]Nadeem Ahmad v. Federation of Pakistan, PLD 2010 SC 1165.
[3]Pakistan Lawyers Forum v. Federation of Pakistan, PLD 2005 SC 719.
[4]*Wukala Mahaz Barai Tahaffuz Dastoor* v. Federation of Pakistan, PLD 1998 SC 1263.
[5]National Reconciliation Ordinance case, PLD 2010 SC 406.
[6]Abdul Quddus Mughal v. Mian Manzoor Ahmad Watto, Minister for Industries and Production, Islamabad, 2010 YLR 975; and Abdul Quddus Mughal v. Federal Government through Secretary Finance, Islamabad, 2010 YLR 360.
[7]Engineer Iqbal Zaffar Jhagra v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Government of Pakistan, Islamabad, 2009 SCMR 1399.
[8]*Watan* Party v. Federation of Pakistan, PLD 2011 SC 997.
[9]The Supreme Court order on the maintainability of the 'Memo' case has not been reported yet, but can be read at the Supreme Court website at <http://www.supremecourt.gov. pk/web/user_files/File/Const.P.77 2011[MemoScandal]dt.30. 12.2011.pdf>
[10]Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Ethics and Economics

By Khalid Mir

"But ethical forces are among those of which the economist has to take account."
— Alfred Marshall (1898)

Since the financial crisis there has been a lot of head scratching as to why economists were so inept at predicting it.[1] The Nobel laureate economist Paul Krugman summarizes one viewpoint when he says that for much of the last thirty years macroeconomics was "spectacularly useless" (2008). That criticism has brought to the surface, and dovetailed with, other criticisms of economic theory as a discipline, ones that go beyond agents' imperfect knowledge, questions of methodology, or the mere lack of predictability of economic models. They touch, instead, on foundational behavioural issues such as: are economic actors always rational (consistent) or can they be myopic or sometimes guided by 'animal spirits'?

Another set of questions to emerge, though, has been: how markets are related to ethics, both in theory and in practice, and how they ought to be. For example, are agents' decisions sometimes motivated by ethical considerations such as what is fair, what is 'right', a sense of sympathy or kindness, notions of duty, commitment and responsibility to other people? Can we take a step back and reflect on, as well as judge and refine, our desires and our goals? In short, can we avoid being "rational fools" (Sen, 1977)?[2]

Of course, there are other ways, not connected with ethics, in which economic theory might become richer, more complex, and arguably more realistic. David Colander (2010) has recently written how in the future economists will need to understand psychology, history, anthropology, as well as ethics — a comment that echoes Keynes's views some eighty years ago.[3] It is true that in some sense economics has already been doing that for the last twenty years with developments in behavioural economics and the growing interest in the role of institutions, culture, identity, ethnicity, geography, power, social capital, and history. However there are still serious questions about the nature and scope of any genuine inter-disciplinary approach. Keeping that in mind, we could also ask whether a broader approach to economic theory should include ethics, and that question itself is intimately linked to deeper and more fundamental practical questions: how should we organize our societies and what is a 'good life' or a 'good society'?

The Good Society?

Arguably, the central story that has dominated much of mainstream political thinking and policy discussions over the last 30 years has been based on two main pillars. Firstly, that aggregate income (GDP/capita) and income growth should be maximized because, ultimately, this furthers our real ends (or what we might call 'prosperity', happiness, or well-being); and secondly, that markets are the best way of achieving those ends. It should be added that in addition to their instrumental role in promoting prosperity, markets are also considered to be important in their own right because they enhance individuals' freedoms.

It could be argued that this story is now unraveling, and for distinct reasons. In the first place, it is not at all clear whether the 'good society' is one in which well-being is maximized. It seems obvious now that at the individual

level the good life can comprise lots of different things of value (or things that we can do): freedoms, solidarity, happiness, achievements, and material, social, and spiritual 'goods'. It is questionable whether we can subsume what appear to be conceptually distinct values under the notion of 'preferences' and thereby come up with a broad notion of individual well-being that we call 'the individual good'. If that is true then we need greater ethical reflection on our ultimate values. Even if there was agreement on what we mean by well-being and 'the good' we would still have to face another ethical issue: how do we aggregate well-being over individuals, time, and states of nature? In short: why opt for 'maximization' when egalitarianism or giving priority to the most disadvantaged in society are also attractive options? This distribution question has become all the more relevant in the face of glaring inequalities, some of which are undoubtedly a result of the play of markets. It is also, however, a question that academic economists are less likely to ask since, as Atkinson (2009) acutely observes: there has been a strange 'disappearance' of welfare economics from academic textbooks and journal articles.

This idea that we need to move beyond a purely 'economic' idea of the good life was recognized by an earlier generation of economists. In fact, Keynes went as far as saying that once the problem of scarcity was resolved we could "devote our future energies to non-economic purposes".

Economic activity, then, is one amongst the many things we do[4] and the inability to see economic motivations (typically thought of as self-interested), and economic relations (contracts) as anything but a "fragment of a greater whole" (J.S. Mill, as cited in Bronk, 2009) of social reality is really inviting a form of reductionism and 'imperialism' (Lazear, 2000). As the language and practices of markets increasingly take a hold in different social aspects of our lives, we tend to talk more frequently of citizens or students as 'consumers', and to think of policies exclusively in terms of efficiency rather than whether they are fair, right, or just. The language of politics and ethics is being displaced by the language of markets.[5] So it has to be asked if it is not an impoverishment of our language and of our concepts to think, for example, of politicians, bureaucrats, and citizens as being only self-interested utility maximizers, or of the environment as a 'resource' to be exploited, or of education as simply 'human capital'.

Against this is a pluralist view: we have distinct norms and distributive (or organizing) principles in each sphere (Walzer, 1984) and that there can, therefore, be moral limits to the market. That view is related to the traditional debate around the separation of public and political realms from the market (Ignatieff, 2001) and the old political economy question that economists like Adam Smith were keenly aware of: how to sustain ('pre-modern') virtues in a purely 'commercial society'. Over and beyond that, there is a more interesting and radical idea, one that posits that the market itself is not necessarily a 'moral-free zone' since economic agents can, and sometimes do, act out of ethical considerations.

Some mainstream economists have now, of course, recognized this and posit that in some areas such as the public sector and also in labour markets with incomplete contracts, we can often be driven by other motivations such as personal excellence, loyalty, solidarity, and norms of professional conduct, as well as self-interest.[6]

We need to ask again, then, what exactly the 'good society' is and if it is anything beyond a good economy, as narrowly defined by theory: efficient markets and the rational behavior of its participants.

Our economic arrangements and our economic theory often reflect and help sustain our self-perceptions and ideas of 'the good'. However, though 'the market' may be a useful structuring metaphor for thinking about how we imagine our relations to one another — ordered, autonomous, peaceful, mutually beneficial, and productive — it does not necessarily follow that it has to be the only metaphor in our 'social imaginary' (Taylor, 2003).

Moreover, can we re-imagine market participants themselves embodying certain ethical values, ones more usually associated with friendship, fellow-feeling, and mutual assistance (Bruni, 2008)? Can we, to use a

provocative phrase, 'civilize the economy' (Benedict, 2009)? If so, that would entail a discussion of a different kind of pluralism, one that assesses the relative weight given to the self-interested and ethical motivations in the behavior of *homo economicus* himself. Such a discussion might lead us to the view, shared by economists like Phelps and Knight, that the essential character of 'economic man' is that he does not work with 'given' preferences and is far more innovative and creative than the standard textbook position allows for. Alternatively, it may lead us to the conclusion that in some cases we have to allow for the possibility that 'reasonableness' — the ability to put to one side our own goals and aspirations in the name of the common good — is a central, dominating feature of human nature. The fundamental difficulty of any such reconstructive task lies in the need to somehow encapsulate in our idea of the individual good the notion that we are both autonomous and relational beings.[7] In addition, our account of the individual good must balance subjectivist ('preferentialist') accounts of the good with more objective ones.

What other metaphor is available to us, though? Perhaps one that returns to the original meaning of the word 'economy' i.e. household management. For despite the obvious paternalistic drawbacks of 'the household' (hierarchical, exclusionary, private, etc.) there are some features of it that make it quite appealing: a life lived in common, a level of stability that allows each member to flourish, and a place where the vulnerable are cared for (Macintyre, 2001). A commonwealth and a common well-being, then, means we need to think about the meaning of 'we' without the horrors of communism or the negation of our autonomy.

Market Failures?

The second reason why the story might be unraveling is more subtle. Few would deny that markets are dynamic, promote innovation and risk-taking, provide incentives to work hard, or that they promote growth. But it could certainly be questioned whether economic growth, beyond a certain level,[8] and the expansion of what Radin calls 'market practices and rhetoric' necessarily help us achieve our ends. In fact, could it be that they are, in some instances, damaging the things we value?

The first criticism of the central story, then, suggests we think more carefully about what we mean by the individual and the common good in our economies and societies and also, therefore, how markets might embody ethical values both at the level of economic theory and practice. The second criticism, on the other hand, points to the need to examine how the narrow ('value-free') view of markets might actually be undermining certain values. If they are, do we need ethical limits on markets?[9]

How might the promotion of markets and the relentless pursuit of growth actually undermine those other values?

Five not-so-easy pieces

The evidence suggests that inequalities within countries have increased over the last 30 years (an era of globalization and market reforms).[10] It is hard to argue that equalities and social mobility are not important features of a good society. In fact, equality plays, in one way or the other, a significant role in a number of our ideas of justice and cannot, therefore, be ignored. And, of course, inequality can be related to other concepts we hold dear, such as fairness (Hutton, 2010). With nearly two billion people living on less than USD two a day and a billion living in slums, it is worth asking whether market processes exacerbate inequalities and thereby hinder growth and devalue other crucial aspects of our lives.

In fact, recent work (Wilkinson, 2010) suggests that more equal societies do much better in lots of different ways: low crime, better health and education, higher life expectancy, levels of happiness, and greater solidarity and trust as well as a deeper sense of citizenship. For developing countries, inequalities in incomes and assets often go hand in hand with inequalities in power so that they are mutually reinforcing and there is some (development) literature on how the rich subvert institutions (Shleifer, 2002). So if markets are leading to a concentration of wealth, we should expect negative

repercussions on the quality of our institutions and our lives.

When it comes to the environment, markets, technology, and growth may not be the solution so much as part of the problem. As with inequality, we need to think beyond both markets and the state with their emphasis on incentives, on the one hand, and well-defined property rights on the other. We need to consider, in addition, the ethical dimension and have a deeper notion of 'the commons'. Nowhere is this more apparent than in questions of value: how do we value, for instance, non-human beings, resources, or the welfare of future generations (Broome, 2005)? The choice of the discount rate in the latter is surely an ethical issue.[11]

A third concern is that the promotion of competition can undermine certain values, such as children's rights, independent research at universities, or altruism (Shleifer, 2004). This view ties in with the literature on the decline of social capital (Putnam, 2007) and some recent experimental literature, and can be traced back to Daniel Bell's insightful *Cultural Contradictions of Capitalism* (1996). The fundamental idea being that markets, consumerism, and commodity fetishism displace older values such as trust, hard work, the desire to pass on legacies to children, and to save for the future, with an excessive focus on 'me', hedonism, and instant gratification. This is bad in itself but also, it is argued, detrimental to the flourishing of markets since low levels of trust are likely to imply exorbitantly high transaction costs. Avner Offer's (2006) recent work reaffirms this: as we grow richer we are losing our ability to delay gratification and are therefore making myopic (irrational) choices. This has important policy implications in savings, education, and work decisions (Sunstein, 2008).

A closely related concern is that the introduction of market reforms in the public sector will result in pecuniary motivations crowding out 'other' motivations such as a sense of duty, commitment, altruism, professionalism, and impartial judgment. The argument here is that we would not want a system where there is a market for citizen's votes or public officials' decisions (Ruskin, 1986). The central values of citizenship, equity, and service are surely distinct from those of the market. Intrinsic motivation may be crowded out and we have to be wary that trust in the public services and servants can be seriously damaged by market-type ideas of accountability.[12]

And finally, to return to an old socialist theme that is still a very contemporary issue: the distinction between useful work and useless toil.[13] Does a market economy tilt the balance between life and work too much toward work, does it restructure our attitude to time itself so that 'slowness' itself is a form of resistance to 'liquid modernity'?[14] Alternatively, if markets encourage global competition, greater flexibility, short-term contracts, and rapidly evolving skills, does this lead to ever-greater job insecurities, the hollowing out of the idea of a coherent self, and to what Richard Sennett (2007) calls the 'specter of uselessness'?

Can we, in short, continue to think of labour simply as an "instrument of production" (Pope John Paul, 1981) or of work only in terms of disutility and wages as our standard economic approaches would have it? Or can we think of a different variety of capitalism, one in which we find value in the work we do?[15]

In summary, if economics is to rediscover its roots in moral philosophy, it will have to say something important about human flourishing and develop a more substantive view of what constitutes the individual and common good.

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Notes

[1]What went wrong with economics: And how the discipline should change to avoid the mistakes of the past. (2009, July 16). *The Economist*. Retrieved from http://www.economist.com/node/14031376

[2]However, also see Frankfurt, H. (1971). The freedom of the will and the concept of a person. *The Journal of Philosophy, 68*(1), 5-10.

[3]"He must be mathematician, historian, statesman, and philosopher." J.M. Keynes as cited in Morishima, M. (1984). The good and bad use of mathematics. In P. Wiles & G. Routh (Eds.), *Economics in Disarray.* Oxford: Basil Blackwell.

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[5]This is a point made by two brilliant books: M. Ignatieff. (2001). *The needs of strangers.* New York: Picador; and T. Judt. (2010). *Ill*

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[7]For an illuminating discussion of the 'I-we' perspective, see Etzioni, A. (1987). *The moral dimension: Toward a new economics*. New York: Free Press.

[8]There is significant evidence that economic growth, beyond a certain point, doesn't improve happiness levels (the 'Easterlin paradox'). See Layard, R. (2003, March 3-5). *Happiness: Has social science a clue?* Lectures delivered at Lionel Robbins memorial lectures, Centre for Economic Performance, London School of Economics, London, England. Transcripts retrieved from http://www2.lse.ac.uk/publicEvents/events/2003/20030106t1439z001.aspx

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[11]This point is explicitly mentioned in the influential report: Stern, N. (2007). *The economics of climate change: The Stern review*. New York: Cambridge University Press.

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[15]Along the lines of what MacIntyre calls 'internal goods' (MacIntyre, A. (1984). *After virtue: A study in moral theory* (2nd ed.). Notre Dame, Ind.: University of Notre Dame Press) or what Sennett calls 'craftsmanship' (Sennett, R. (2009). *The Craftsman.* New Haven, Conn.: Yale University Press).

Revealing Facts: The Gender Equation

Women comprise almost half of the population of Pakistan; yet, the general profile of men and women is still a long way from being comparable. Freedom to exercise rights and equal opportunity for both the genders is an ethical, social, and increasingly an economic concern too. It is now a widely established fact that a sustainable and high growth path cannot be achieved without tapping into this vast resource, i.e. women. It is imperative to eradicate the widespread prevalence of gender discrimination in Pakistan if women are to play a productive role in society, outside of the household. Economic, social, and political empowerment of women is the key to attaining gender equity. The table below gives the gender profile of Pakistan in comparison with other countries in the region.

Gender Disparities Profile

	India	Pakistan	Bangladesh	Nepal	Sri Lanka	Bhutan	Maldives	South Asia (weighted average)	Developing countries
Female population number (millions)									
2000	502	72	69	12.2	9.4	0.28	0.13	665T	2418T
2009	579	88	80	14.8	10.3	0.33	0.15	772T	2752T
as % of males									
2000	93	94	97	100	101	97	97	94	97
2009	94	94	98	101	103	90	98	94	97
Adult female literacy (as % of male)									
2000-01a	65	52	76	56	97	-	100	65	85
2005-08a	68	60	83	64	97	60	100	68	86
Female primary school gross enrolment (as % of male)									
2001	85	68	-	84	99	90	98	75	92
2007-09a	97	83	104	-	100	101	95	94	96
Female life expectancy (as % of male)									
2000	103	101	103	101	111	106	104	103	106
2008	105	101	103	102	111	106	104	104	106
Female economic activity rate (age 15+)(as % of male)									
2000	40	19	64	74	47	51	53	41	64
2008	41	25	70	79	46	74	75	43	65
Seats in parliament held by women (% of total)									
1999	8	2	9	3	5	2	6	7	12
2009	11	23	19	33	6	9	7	13	18
Gender Inequality Index (2008)c									
value	0.599	0.533	0.748	0.721	0.734	0.716	-	0.611	-
rank	72	59	122	112	116	110	-	-	-
Female unemployment rate (%)									
2000	4.1	15.8	3.3	10.7b	11.4	-	2.7	5.5	-
2004-09a	5.1	8.7	7	-	8.1	3.3	23.8	5.6	-

Notes: a: Data refer to most recent year available. b: Data refer to 2001. c. Gender Inequality Index: A composite measure of inequality between men and women, based on three indicators: reproductive health, empowerment, and the labour market. Inequality increases as the index moves from 0 to 1. T: trillion.

Source: MMHDC (Mehbub ul Haq Human Development Centre). (2011). *Human development in South Asia 2010/2011: Food security in South Asia*. Karachi: Oxford University Press.

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