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Musharraf on Trial: A Preliminary Critique of the Law of High Treason

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Abstract

The normative relationship between a *coup d'état* and high treason has hardly ever been thoroughly debated in Pakistan. Now that Musharraf's trial of high treason is underway, it seems to be an opportune time for such a debate. The Supreme Court is expected to take the lead role in the unfolding of the debate. Already in the *Sindh Bar Association* (2009) the court has played part of the role by making some preliminary comments. One of the major comments was that Musharraf's purported coup of 2007 had resulted in violation the independence of judiciary—a principle that the court declared was part of the basic structure of the constitution and (hence) inviolable. The court further observed that a coup that violated an inviolable constitutional principle justified invocation of the law of high treason. Apparently it was a more narrowed-down approach to interpreting the high treason article in the constitution. However, did it reflect the historical and theoretical context of the law of high treason was the question that the court did not address? Accordingly, the aim of this essay is to place the law of high treason in its historical and theoretical backdrop and to note the subtle transformation that the normative relationship between a *coup d'etat* and high treason has recently undergone.

Key Words: High treason, Constitutional Order, *Coup d'état*, Revolutionary Legality, *Sindh Bar Association* (2009), Musharaf's Trial, Hans Kelsen, Carl Schmitt.

Introduction: The High Treason Case Against Musharraf

On March 21, 2011, in a statement, Chief Justice of Pakistan, Iftikhar M. Chaudary, took pride in saying that four years ago the judges successfully resisted the validation of President General Pervaiz Musharraf's *coup d'etat* (of November 3, 2007). The resistance that C. J. Chaudary initiated snowballed into a large-scale lawyers movement. Within a year the movement was able to topple Musharraf from presidency. Recalling the success of the resistance, the Chief Justice claimed: "Steps taken in the past [i.e., military *coups d'état* and validations by earlier benches of the Court] resulted in

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martial laws, but this trend must end now and there is need to put the record straight. Now there will only be the rule of law and supremacy of the Constitution in the country"("No Room Now for Adventurism: Court," 2011). Moreover, he alluded that those who engaged in the disruption of the constitution (1973) can be tried for the crime of high treason in accordance with Article 6.

A more official version of this allusion can be found in the *cause célèbre*, *Sindh Bar Association* (2009). In this case, C. J. Chaudary ruled that the proclamation of emergency and promulgation of the PCO, which put the constitution in abeyance, were "unconstitutional, unauthorized, without any legal basis, hence, without any legal consequences"(*Constitutional Petition No. 9 of 2009*, 2009). Thus Chaudary alludes to the possibility of charging Musharraf for high treason. However, this case was not specifically a high treason case against Musharraf, therefore, C. J. Chaudary was constrained to convict or pronounce punishment. In line with Article 6, he preferred to leave the question of convicting Musharraf to the parliament. The constitution gives authority to the parliament to initiate and decide on the cases of high treason, and that it does so by passing a law.

However, Article 6 is explained further by the 1973 High Treason (Punishment) Act. The Act is enacted on September 26, 1973, a month and half after the ordaining of the constitution, as a supplement to the Article 6. It stipulates punishment for persons guilty of high treason. The punishment is life imprisonment or death. However, the Act has two other significant juridical dimensions. First, it provides that courts can take cognizance of the offences of high treason. Second, that they will do so on the request from the federal government. Accordingly, a petition filed by Pakistan Muslim League-Nawaz (PML-N) during Pakistan People Party's (PPP) government was turned down by the Supreme Court. From the second dimension of the High Treason Act mentioned above, it becomes clear that the petitions of the offences of high treason can be brought to the superior courts. However, still much depends on the courts, how will they interpret the Act, especially in relation to Article 6 of the constitution. Nevertheless, by vesting the power of initiation of high treason cases in the federal government, the Act clearly limits the right to petition of the opposition as well as of the common people.

The election of 2013 has brought PML-N into government. Interestingly, Musharraf came to run in the election but was placed under house arrest. Now it has to be seen whether PML-N takes the challenge of trying Musharraf. The trial is expected to raise some of the difficult constitutional history and theory questions. For instance, what is the historical and juridical basis of the law of

high treason? How to justify the relationship between high treason and capital sentence?

In this article, I primarily focus on constitutional history and theory questions. The article is divided into four sections. In the first section, I explore how the concept and law of high treason enters in Pakistan's constitutional discourse. In the second section I give a broader historical and theoretical development of the concept and law of high treason. In the third section, I highlight the relationship between the concepts of the constitution and high treason in Pakistan. Finally, I take up Musharraf's high treason case and point to the adverse precedents that make it considerably challenging. My general conclusion is that the law of high treason is flawed, historically because it is based on feudal and authoritarian baggage, theoretically because the relationship between the concepts of constitution and high treason is nebulous and arbitrary, and practically because punitive sanction cannot guarantee democracy.

B. Legal Background of Law of High Treason in Pakistan

The judicial history of the law of high treason in Pakistan can be traced back to the 1958 *cause celebre*, *Dosso*. In this case, the Court was faced with a *coup d'état* of the then President Iskandar Mirza, who abrogated the constitution and invited the army commander to take control of the government. The constitutional disruption thus raised the question of legal validity of the new regime, which the Court deemed necessary to answering. One of the primary assumption that the Court puts forward was that a successful *coup d'état* or victorious revolution is a law-creating fact, while a failed *coup d'état* or revolution high treason. In Court's own words:

a) "a victorious revolution or a successful *coup d'état* is an internationally recognized legal method of changing a constitution";
b) intervention should be "an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution… [A] change is, in law, a revolution if it annuls the Constitution and the annulment is effective";
c) but if the abrupt political change is not successful, "those who sponsor or organize it are judged by the existing Constitution as guilty of the crime of treason."(*Dosso*, 1958, pp. 538–539)

Answering the question of disruption of the constitutional order, however, was not a matter of simple adjudication on the basis of a given positive law, but instead had to be based on some theory. The court chose the legal theory of one of the leading liberal constitutionalists in the 20th century, Hans Kelsen.

Kelsen developed his ideas of liberal constitutionalism, or, more technically, legal positivism, in the early part of the turbulent 20th century in the continental Europe. In early 1940s he moved to the United States where he "reformulate[d]" his ideas, especially to take into account the Common Law context (Kelsen, 1945, p. xiii). The two new volumes that he published portend to articulate pure and general theories of law. In his earlier volume, *General Theory of Law* (1945), Kelsen writes:

> If they [revolutionaries] succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order…[But]…If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm. (Kelsen, 1945, p. xiii)

Kelsen theorizes, what he thinks is, international custom as valid basis of positive law. The Supreme Court of Pakistan applies his theorization without much questioning. In fact, his theory is quoted generously in the decision. However, the decision sparks a prolonged judicial debate, which leaves its impact on the future constitution making. Some of Kelsen's concepts for instance, that of *Grundnorm*, hierarchical structure of legal system, and the doctrine of high treason, reverberate in constitutional debates and cases to date (*Dosso*, 1958).

A different bench of the Court in the 1972 *Jilani* case declined to accept Kelsen's theory, especially the principle of efficacy or revolutionary legality (*Jilani*, 1972). However, whether knowingly or unknowingly, the Court accepted and, in effect, strongly emphasized the doctrine of high treason. But for practical purposes the Court reasserted it in retroactive terms: "As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers" (*Asma Jilani v. Government of Punjab*, 1972, (Yaqub Ali, J.)). Wary of the existential threat of coups, the constitution makers put enough store on the Court's advice. Thus as they make the new constitution next year (1973), they incorporate the law of high treason in Article 6. The Article reads:

> Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of

> force or show of force or by other unconstitutional means shall be guilty of high treason.

In order to supplement the Article 6, especially to pronounce punishment, the parliament on September 26, 1973, drafts the High Treason (Punishment) Act (Act LXVIII of 1973). According to this Act anyone who "committed an act of abrogation or subversion of a constitution in force in Pakistan at any time since the twenty-third day of March, 1956," when the first Republic was declared, or committed acts defined in Article 6 "shall be punishable with death or imprisonment for life." The Act also provides for the procedure for trial in the courts, thus implying that high treason cases are not sole jurisdiction of the parliament. The Act reads: "No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by a person authorized by the Federal Government in this behalf."

I find it worthwhile to add a few lines on the political and social backdrop in which the law of high treason pushes its way into the constitution. *Jilani* had curtailed martial law powers now exercised by a popularly elected head of State, Zulfiqar Ali Bhutto. Bhutto, after assuming power in late 1971, showed no scruples to extending the martial law imposed on the country in early 1969 by a military commander, General Yahya Khan. *Jilani* had condemned Khan's martial law as usurpation of power, but interestingly Bhutto's extension of the same was not condemned in similar fashion. On the other hand, the thrust of the decision was thought to be a strong punitive warning to the Army generals who might plot future *coups d'état*. Bhutto felt encouraged. He began to seriously think of transforming the warning in the decision into a constitutional law. Then such a law would not only bulwark the constitution, but also his personal ambition for absolute political power.

Bhutto swiftly purged the top brass of the military that had counseled Yahya Khan. Lieutenant-General Gul Hassan was appointed the new Commander-in-Chief and Air Marshal Rahim Khan chief of Air Force. However, Bhutto suspected the loyalty of the two ambitious commanders, and therefore, after few months on March 3, 1972, forced them to resign. "The two officers had not actively plotted against him, but their record suggested that they might"(Taseer, 1980, p. 148). Bhutto had come to believe that if there was any threat to his government, it was not any political party, movement, or bureaucracy, but the Army. Thus he concluded that browbeating the Army was *sine qua non* to both his political survival and dominance.

Bhutto got an opportunity next year. On March 30, 1973, Ministry of Defense, headed by himself, unraveled a plot of coup d'état. Two retired officers—Brigadier (Retd.) F.B. Ali and Colonel (Retd.) Abdul Aleem Afridi—were

accused and brought before a special military court presided over by Major-General Muhammad Ziaul Haq. The accused however filed a petition in Lahore High Court and later an appeal in the Supreme Court against their trial by way of a court martial. They argued that a) they were retired officers and hence ordinary citizens; b) they should be tried in a civil court because they have a right of security of person and equal protection of law; and lastly that c) military courts did not follow procedures and norms necessary for a fair judicial trial. The courts turned down their appeal ruling that ordinances III and IV of 1967 under which the said martial court was set up were valid positive laws, especially because the ordinances were subsequently approved by the National Assembly. The court also declared that a trial by a martial court did not violate Fundamental Rights. Moreover, the argument that certain procedures and norms of civil courts were not followed was not viable justification to strike down the martial courts. The Court concluded: "the prevention of the subversion of loyalty of a member of defence services of Pakistan was as essential" (Khan, 2005, p. 521) Accordingly, the trial of the accused in the martial court proceeded. It is worth noticing that Bhutto closely kept track of the case proceedings (Taseer, 1980, p. 150).

With some generals cooperating, Bhutto apparently succeeded in overcoming the threat of a *coup d'état*. However, he went about the menace only indirectly and diplomatically. Thus addressing the cadets at Pakistan's Military Academy at Kakul next month, he justified his maneuvers by carefully choosing his words: "You are not playthings to be used and exploited for selfish ambitions. You are the custodians of our frontiers…the sword-arm of our defence"(Wolpert, 1993, p. 214). A year earlier he had coined the phrase "bonapartic influence," for those generals who exhibited inclinations to intervene in the troubled politics of the country"(Wolpert, 1993, p. 184). Bhutto thought and determined that such influence has to be rooted out. His efforts at rooting out bonapartic influence, however, were not disinterested. As is well known now "what he wanted was absolute power," at cost of tolerance for other political parties and movements (Ziring, 1980, p. 181). This factor more than any other has twice impelled the military to intervene.

Feudal politicians dominated the politics of the 1970s, and Bhutto was a giant among them. In the name of democracy, he had the feudal politicians agree that bonapartic influence must be rooted out. However, they could not stop the *feudal influence* from taking its place. Feudal lords, over generations, had become professional politicians, and along with them they brought the feudal characteristics of intolerance, mistrust, punitive mentality, and exclusionary contest for power. In the predominantly agrarian economy, they possessed from medium to large-scale estates in the countryside where more than 2/3rd of the population subsisted. Much of the peasantry was bonded through

generations of debts, and resistance was quelled with strict measures.

Though Bhutto was a feudal lord, he ascended to power by raising populist slogans that had rallied the peasantry behind him. Populist forces, middle class unrest, and peasant revolution were brewing hard in the state run virtually without a constitution. Bhutto recognized that people had decided to assert their popular sovereignty. The challenge for him however was not how to help them assert it, but how to manipulate it at a moment when the stage for a new social contract was ready so that he could retain the personal power and balance the cracking feudal authority with fledgling popular sovereignty. The solution Bhutto proposed was a new constitution, which would assume the sacred and sovereign status. It would be inviolable and for all times to come. And Article 6 was to guarantee the constitution from both external disruption—by military coups—and internal subversion—the attempts at amending the system by the dissenting political forces. To achieve personal power, Bhutto elevated the executive beyond checks and balances of other branches. The judiciary was not yet separated from the executive and the Fifth Amendment further reduced its challenging power. In the words of one political historian, the constitution did "not obscure Bhutto's efforts at forming a totalitarian system, something his predecessors considered but rejected as unsound"(Ziring, 1980, p. 191).

Despite Article 6 and the High Treason Act, Bhutto could not halt the much-feared Army *coup d'état*. On July 5, 1977 General Zia, who had presided over the high treason case of F.B. Ali and as such attracted Bhutto's attention, himself committed high treason. Initially, Zia promised to hold fresh elections in 90 days and restore democracy but Bhutto is said of being "rude and insulting" to him (Khan, 2005, p. 581). When Bhutto threatened Zia of the offence of high treason, the latter withdrew his promise of elections or relinquishing power. Instead of guaranteeing democracy, Article 6 had closed the door shut on it for a decade. Haq died in an air crash in 1988. His death seals the possibility of initiating a high treason case against him.

In October 1999 history repeats itself. General Pervaiz Musharraf in a *coup d'état* suspends the constitution and removes the PML-N government. The fear of Article 6 once again blocks the possibility of the revival of democracy. And Musharraf rules the country for nearly a decade before succumbing to the Lawyers' movement. After the fall of Musharraf, the parliament in 2010 passes the 18th Amendment, which makes considerable changes to the Article 6. Instead of deleting the Article, its scope is further increased. In the first clause of the Article that defines the offence of high treason, two more phrases are added--"suspends" and "holds in abeyance." The clause now reads:

> Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason. (*Constitution [Eighteenth] Amendment Act,* 2010)

Furthermore, the Amendment adds one new clause to the article, which provides that the act of high treason or a *coup d'état* "shall not be validated by any court including the Supreme Court and a High Court". The legal implications of this clause deserve a separate essay. However, it should suffice to mention here that the clause has finally decided on the debate whether the courts should directly take up the question of the validity of a regime or engage in validating the acts done by the regime, for instance, by the application of the doctrine of state necessity. The clause decides in favor of the latter. In *Dosso* (1958) the court decides according to the former position, while in *Bhutto* 1977 according to the latter. In *Zafar Ali Shah* (2000) the Court apparently takes both positions. Nevertheless, it can be questioned, does the clause go to reducing the (judicial) power of the courts or to save them from confronting a dictatorial regime? Furthermore, the primary question remains unresolved: when in wake of a *coup d'état,* as Article 6 is suspended and judges are required to take fresh oath on a provisional constitutional order, how will this clause be made justiciable? The practical answer to it, if any, is to be searched in the political arena than in the judicial one: a revolution against the *coup d'état*, just as lawyer's movement amply demonstrates.

C. High Treason Constitutional Theory and History

The Court's choice of Kelsen's general theory of law and state for explaining the disruption of constitutional order and validation of the new regime was justified on the basis that it is a logical, analytical, and liberal theory. However, can the doctrine of high treason, which comes along with it and becomes *sine qua non* for the defense of the constitutional order, be justified on the same grounds? We shall see this in a moment, as I turn to the historical development of the doctrine. However, at this stage I deem it important to give some evidence that Kelsen's, and, in general, German constitutional theory influenced Pakistani law of high treason. Interestingly, such evidence can be easily furnished by a simple juxtaposition of the German law of high treason with that of the Anglo-American one.

According to the latter, high treason includes acts of personal disloyalty to the state, and are committed during or in relation to war. Thus the American constitution in Article 3, Section 3, terms following acts as high treason: a)

levying war against the United States, and b) allying with enemy and giving aid and comfort to them. In England, along with these two acts of disloyalty, killing or compassing the killing of the monarch and the heirs to throne is regarded as high treason.

On the other hand, in Germany high treason is not associated with the acts of levying war or those committed during war. Rather the high treason acts are committed during peacetime and are associated with two primary objects: the territorial state and the constitutional order. Hence, the German Criminal Code of 1998 in article 81 provides that anyone who "undertakes with force or through threat of force" 1) "to undermine the continued existence of the Federal Republic of Germany" or 2) "to change the constitutional order based on the Basic Law of the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years." Moreover, Article 83 adds an additional provision such that "specific treasonous undertaking against the federal government shall be punished with imprisonment from one year to ten years, [and] in less serious cases with imprisonment from one year to five years" (*Criminal Code (Strafgesetzbuch, StGB)*, 1998). The history of this additional provision dates back to the Code of 1934 that provided for death penalty or imprisonment for not less than five years for anyone who undertakes to deprive the President, the Chancellor or any member of the government of his constitutional powers or the exercise of the same. This provision in fact made it easier for the party in power to convict anyone "without the necessity of showing that the fundamental subversion of the constitution [was] intended" (Preuss, 1935, p. 212). The primary two objects of high treason however remain intact in the 1934 Code. Article 80 reads:

> Whoever undertakes by force or by threat of force to annex the territory of the Reich in whole or in part to a foreign state, or to separate from the Reich a territory belonging to the Reich, shall be punished with death.
> Whoever undertakes by force or by threat of force to alter the constitution of the Reich shall be punished in like manner. (Quoted in Preuss, 1935, p. 211)

Before the enforcement of the 1934 Code, high treason clauses can be found in the two proposed statutes of Reichstag of 1926 (Article 85) and of 1917 (Article 86) that stipulated: "Whoever changes the Reich *Constitution* or that of a Land with violence or threat of violence" (Quoted in Schmitt, 2008, p. 165). The precursor of these statutes, and the penal codes, is the German Reich's Criminal Code of 1871, which relates the offence of high treason to violently changing the constitution: "Whoever endeavors to violently change the constitution of the German Federation or of a federal state"(Schmitt, 2008, pp.

164–5). If traced further back, the first formal formulation of the law of high treason in Germany goes to the 1794 General State Law for the Prussian States (part II, 27, 92). It provides high treason as an undertaking that "is directed toward a violent transformation of the state constitution"(Schmitt, 2008, p. 165).

It is in the backdrop of this codification exercise that Kelsen gives his doctrine of high treason. What is significant to notice however is that the codification was not of some pre-existing "custom," a factor that makes one of the cornerstones of Kelsen's legal theory (Kelsen, 1945, pp. 30, 128, 369). Rather the codification was to compile and uniformly enforce various individual and dispersed over time and space decrees of princes and emperors of the Holy Roman Empire of the German Nation. The codification defined and limited the objects of high treason. Before the codification exercise began, the late medieval understanding took almost any act of defying authority and breaking a rule as high treason—an understanding that resonated with the one in England and France. For instance the 1532 penal decree of the German Emperor Charles V, in Article 127, says: "whoever incites dangerous, illegal, and malicious rebellion of the common people against authorities in a territory or city shall, according to the circumstances of his misdoings, be punished with decapitation or flogging and shall, in all cases, be exiled from the territory or city in which he incited rebellion" (Quoted in Blickle, 1986, p. 88).

Kelsen does not further define, explain and limit the concept of high treason, and for this we shall turn to his contemporary and intellectual rival, Carl Schmitt, in a moment. However, he has two original dimensions of the concept, which are not provided or contemplated by the above German laws. First, the German legal order does not contemplate that a successful *coup d'état* or revolution can assume the law-creating authority. This would of course contravene the purpose of law. Second, and more significant for our purposes, he defines the status of a constitution and elevates it to that of sovereign. This is a crucial political and theoretical assumption. One of its immediate impacts is that with it the relationship or proportionality between breaking the supreme law and the supreme punishment could resume its historical justification.

Historically the concept of high treason has held a close relationship with the concept of sovereignty—especially the person of the sovereign. In Roman and medieval European laws, an attack on the person of sovereign was deemed as the commission of high treason. The Roman Lex Julia Majestatis of Augustus Caesar, for instance, provides:

> He who shall meditate the death of those illustrious men who assist at our councils; likewise of the senators (for they are a part of ourself) or lastly of any of our companions in arms; shall forasmuch as he is guilty of treason, perish by the sword, and all his goods be confiscated; for the law will punish the intention, and the perpetration of the crime with equal severity… (Cod. 9, 8,5). (Quoted in Steinhaus, 1955, p. 254)

The medieval English Treason Act of 1351 makes the killing or an attempt to killing of the King or his heirs as primary object of high treason. Similarly, in France regicide remained one of the primary objects of high treason. And the punishment meted out to those who committed or attempted high treason was always severe. The case of Robert-Francois Dameins for attempted regicide in the mid 18th century aptly illustrates the severity of sanction behind the law (See generally, Cuttler, 2003).

In modern times, beginning from the 17th century, the concept of high treason gradually dissociates itself from the person of sovereign, although not completely from the concept of sovereignty. Hence, as several new subjects of sovereignty emerge—for instance, the republic, parliament/congress, constitution, nation, flag—they become possible objects of high treason. But the new objects also make the definition and application of the concept of high treason problematic. The dissociation of the concept of high treason from the person of sovereign takes place at a time when, in England and continental Europe, the struggle to take apart the "two bodies" of the king had reached its height. The process of dissociation renders an important job: it lays unambiguous the difference of ratio between the act and the crime, and the crime and punishment (killing : Homicide :: regicide : torture/ Death). The obvious purpose of the law of high treason thus seems to be to give special aura to that crime and thereby justify the proportionality between crime and the capital punishment.

The central theoretical question to return to, especially in the backdrop of the dissociation thesis mentioned above, is how the constitution assumes sovereign status and thus becomes the object of the medieval crime of high treason and the punishment associated with it? In other words, while homicide justified capital sentence, how does the disruption of constitutional order justify the same punishment? We can find a plausible answer to this question in the constitutional theory of Kelsen's intellectual rival, Carl Schmitt. In his book, *Constitutional Theory*, Schmitt writes that one of the major political questions posed by the 1830 July Revolution in France was whether King or the people should exercise the sovereign power of constitution-making. However, "[t]he advocates of the liberal Rechtsstaat sought to evade the alternative, either sovereignty and the king's constitution-making power or sovereignty and the

people's constitution-making power, and they spoke of a 'sovereignty of the constitution'" (Schmitt, 2008, p. 104). In Germany the 1848 revolution concluded on a compromise between the King and the people in order to allow for both royal government and popular assembly. "A dualistic intermediary condition thus results" (Schmitt, 2008, p. 105). Interestingly, the advocates of liberal constitutionalism of the time claimed, albeit falsely, that such dualistic political form represented "sovereignty of the constitution"(Schmitt, 2008, p. 104). Similarly the ascendant organismic theory of the state, according to Schmitt, proposed another position, which nevertheless "corresponded fully to the liberal method." It said that the king was "only an 'organ' of the state and that neither the prince nor the people but instead the state as an 'organism' is sovereign"(Schmitt, 2008, pp. 106).

These two arguments are clearly reflected in the 1934 and 1998 versions of the law of high treason in the German Penal Codes, which take territorial state and constitution as the two primary objects. Theoretically the latter argument was similar to the assumption of constitution as the sovereign, primarily because in both cases people as the subject of sovereign power were ignored. This juridical understanding of bourgeois liberal advocates, Schmitt chastises, "passed as 'positivism'" and that "the empty husk of this type of liberalism sought to conserve itself for a time in Kelsen' 'normative state theory"(Schmitt, 2008, p. 106).

In Kelsen's legal positivism we find an attempt to harness both the aspirations of the advocates of liberal constitutionalism—to elevate constitution to the status of sovereign—and those of the proponents of the 19th century state theory—to see the state as sovereign organism. Kelsen does this by proposing, as Schmitt puts in following simple equation, constitution=state (Schmitt, 2008, p. 63). In Kelsen's own words, which are in effect result of his analytical methodology, the term state or the political concept of the state is a mere hypostatization, which he aims to dissolve. Kelsen writes that his theory of law "shows that the State as a social order must necessarily be identical with the law or, at least, with a specific, a relatively centralized legal order." Moreover, "[j]ust as the pure theory of law eliminates the dualism of law and justice and the dualism of objective and subjective law, so it abolishes the dualism of law and State." He goes on to claim his pure theory is a monistic theory that "shows that the State imagined as a personal being is, at best, nothing but the personification of the national legal order"(Kelsen, 1945, p. xvi).

Constitution is thus understood as a norm, in fact the highest norm. Above a constitution can be only a legal-logical supposition, a *Grundnorm*. All other norms derive their reason of validity from and are traceable to the constitution.

However Schmitt critiques this understanding: "In one such meaning of the word, the state becomes a legal order that rests on the constitution as basic norm, in other words, on a unity of legal norms. In this instance, the word 'constitution' denotes a unity and totality"(Schmitt, 2008, pp. 62–63).[1] Schmitt further critiques:

> The constitution is the state, because the state is treated as something genuinely imperative that corresponds to norms, and one sees in the state only a system of norms, a 'legal' order, which does not actually exist, though it is valid in normative terms. The legal order, nonetheless, establishes an absolute concept of the constitution because a closed, systematic unity of norms is implemented and rendered equivalent to the state. Therefore, it is also possible to designate the constitution as 'sovereign' in this sense, although that is in itself an unclear form of expression. (Schmitt, 2008, p. 63)

From Schmitt's critique of Kelsen, what stands out is the assumption that building any case of high treason will depend on how a constitution is conceptualized. For courts to decide on the cases of high treason, it will not suffice to merely point to a factual incidence of disruption of the sovereign constitution, but also to explain the juridical theory (and history) upon which the constitution is based. This is in effect an enormous task, but only such a task should suffice to justify capital sentence for high treason, which is after all a political crime.

Schmitt's own conceptualization of constitution suggests that he puts higher premium on the building of a case of high treason. His argument projects on two stages. On the first stage, he contends that high treason is defined as "an attack on the constitution, [and] not on the individual constitutional law" (Schmitt, 2008, p. 81). He also writes that there is a general consensus on this interpretation in the German criminal law literature (Schmitt, 2008, p. 165).[2] The inference of such an interpretation has two dimensions: first, a constitution is a monistic whole (--a complete decision--) and hence different from individual constitutional laws whose infraction should not constitute a high treason. Second, that not all provisions of constitution are equal in terms of their importance (Schmitt, 2008, p. 165). This graded understanding, in the judicial context of Pakistan is well established as the doctrine of basic structure, to which I return in a moment. According to Schmitt, high treason is thus an undertaking directed to alter or overturn the most important constitutional provisions, which are "the foundations of political life." He quotes German Reich Court to this effect: "objects of attack are only those components of the constitution that form the *foundations of the state's political life*, and this is certainly without regard for whether or not their regulation

occurs directly in the constitutional document" (Schmitt, 2008, p. 165, original emphasis).

On the second stage, Schmitt increases further the premium on building a case of high treason. He writes in one of the later sections of *Constitutional Theory*: "High treason, therefore, is only an attack on the constitution in the positive sense"(Schmitt, 2008, p. 166). Here in the positive sense of the constitution lies the secret of the complexity of the statement. The positive sense means that a constitution is a) a politically conscious act of the constituent power (for instance, of a people), b) a decision on the type and form of political unity/existence. By the type and form of political existence Schmitt points to the Aristotelian forms of state such as monarchy, tyranny, aristocracy, polity, etc. It is in the context of these forms of state that both himself and Kelsen speak about *coup d'état* and revolution. Schmitt claims however that these forms can be interrupted and changed without harming the continuity of the state and the will to political existence of a people. To quote him:

> The constitution in the positive sense entails only conscious determination of the particular complete form, for which the political unity decides. This external form can alter itself. Fundamentally new forms can be introduced without the state ceasing to exist, more specifically, without the political unity of the people ending. (Schmitt, 2008, p. 75).

Prima facie, it can be argued that since the positive sense of the constitution means current form of political existence, high treason is then an attack on the current political form. However, this argument gets unsettled when one heeds to the fact that the form of political existence is "external" and thus alterable. What is relatively unalterable (compared to external form and note that the argument of unalterability is the same as in the first point) is the existential principle of will to political unity/existence. If this logical extrapolation is sound, then I suggest, that for Schmitt high treason is an undertaking that takes as its aim a) the principles that are the foundations of political life, b) "the political unity of the people [to] ending" or "the state ceasing to exist." Building a case of high treason then requires proving that the disruption of a constitutional order was aimed at or resulted in harming the fundamental principles of a constitution or/and the will to political unity and existence of the people (and the state).

D. Constitutional Theory and Law of High Treason in Pakistan

One of the lessons we draw from the German constitutional theory discussed above is that there is an intimate relationship between the concept of

constitution and that of the high treason, especially Schmitt's presumption that the concept of high treason comes after and derived from the concept of constitution. And since the concept of high treason is derived from the concept of the constitution, the nature of the crime of high treason and the punishment for it can only be derived and understood in the light of the constitution. In other words, the way constitution is conceptualized will determine the nature and crime of high treason. In the context of Pakistan, we find that the two constitutions of 1956 and 1962 come prior to the law of high treason that comes later in the third constitution of 1973. Moreover, it is also obvious from the cases of constitutional disruption that courts are impelled to engage in conceptualization of the constitution. For instance, the Supreme Court in *causes celebres, Dosso* (1958), *Asma Jilani* (1972), *Nusrat Bhutto* (1977), *Zafar Ali Shah* (2000), *Sindh Bar Association* (2009), among other cases, has engaged in detailed commentary on the constitutional theory underlying its decisions. The Court raises questions such as: What is a constitution? What status does it enjoy in the political life of the country? How does its disruption be justified/unjustified and validated/invalidated? The concept of high treason, in fact, is an extension or a corollary to the conceptualization of the constitution (Schmitt, 2008, p. 145). In case a disruption is not validated, then what to make of such an act? Is it a crime, and of what degree? Should it be punished? How to determine the proportionality between the crime and sentence?

Let us then figure out the relationship, if any, between the concept of the constitution and that of the high treason in Pakistan. While denouncing the latest constitutional disruption in *Sindh Bar Association*, the Supreme Court of Pakistan engages in explaining the concept of constitution and its relationship with high treason. The Court says:

> Indeed, the Constitution is an organic whole and a living document meant for all times to come. We, therefore, are of the view that the holding in abeyance of the Constitution and/or making amendments therein by any authority not mentioned in the Constitution otherwise than in accordance with the procedure prescribed in the Constitution itself, is tantamount to mutilating and/or subverting the Constitution. (*Sindh Bar Association*, 2009)

The Court goes on to refer to another case—*Al-Jehad Trust* 1996—where the conceptualization of the constitution is expressed in more clear organic terms:

> At this juncture, it may be stated that a written Constitution, is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the

> passage of time in order to keep pace with the growth of the country and its people. (*Sindh Bar Association*, 2009)

The constitution is conceptualized by developing an organic theory. It has three basic organic features: a) it is a whole, in that it is an organism; b) it is a living being, in that it has life; and c) it is for all time, in that it is immortal. Indirectly, the organic conception of the constitution plays a significant role; it elevates the constitution to the status of a living being. In this way, it prepares the ground for the next conceptual leap, if ever taken, whereby this modest theoretical semblance between the constitution and living being can be pressed to service of adjudicating the Islamic principle of life for life. Such an analogical adjudication will however face a definitional hurdle, relating to definitions of the terms abrogation, subversion, suspension and abeyance. It is obvious that each of these terms refers to a different type of constitutional incident, and consequently the implications arising from them for the constitution are different. Therefore, it is doubtful that all these incidents could equally qualify for the same high punishment stipulated by High Treason Act.

The organic concept of the constitution was too broad, partly because the Court realized that not all the provisions of the constitution could be guaranteed with immortal and immutable life. First, the court had already in several earlier decisions—*Nusrat Bhutto* 1977, *Zafar Ali Shah* 2000, *Qazi Hussain Ahmed* 2002—accepted the principle of exception or "deviation." Accordingly, the Court had validated the suspension or abeyance (and to some extent subversion) of the constitution. In fact, the Court had declared deviation, in the face of exceptional political circumstances, as "an imperative and inevitable." In *Zafar Ali Shah* the Court declared: "Fact remains that the Supreme Court is of the considered opinion that intervention by Armed Forces on 12th October, 199 was an imperative and inevitable necessity in view of exceptional circumstances prevailing at that time and, therefore, there is no valid justification for not validating extra constitutional measure of the Armed Forces" (*Syed Zafar Ali Shah Case*, 2000, pp. 1172–3). Second, the Constitution itself provides for making amendments, the procedure of which is clearly prescribed. But the Court was not ready to concede that the deviation or amending power could change or remove just any provision of the constitution. This appeared intriguing to the courts (beginnings in India then) in Pakistan that the immutability and immortality of the constitution was based on its very organic feature of mutability and mortality. In effect, they were faced with a dilemma similar to the one Schmitt was faced with in the first quarter of the last century when he took pain to prove that the constitution in its "concrete" sense could be boiled down to certain principles that are immutable. It merits quoting him in detail here:

> That "the constitution" can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decision. The German Reich cannot be transformed into an absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag. The "legislature amending the constitution" according to Art. 76 is not omnipotent at all. The manner of speaking associated with the 'all-powerful' English Parliament, which since de Lolme and Blackstone has been thoughtlessly repeated and applied to all other conceivable parliaments, has produced a great confusion. A majority decision of the English Parliament would not suffice to make England into a Soviet state. To maintain the opposite would not be a "formal way of thinking" at all. It would still be equally false whether taken politically and juristically. Only the direct, conscious will of the entire English people, not some parliamentary majority, would be able to institute such fundamental changes. (Schmitt, 2008, pp. 79–80)

Just as Schmitt boils the Weimar constitution down to certain concrete and immutable principles, e.g., republicanism, constituent power, sovereignty of the *Volk*, etc., Indian and Pakistani Courts also boil their respective constitutions down to, what they call, basic structure or salient features. The question then is whether with the conceptual transformation of the constitution, the relationship between the constitution and high treason has also undergone transformation? *Sindh Bar Association* 2009 leaves us with a hint that this relationship has undergone some transformation. Let me take a brief descriptive detour into the doctrine of basic structure to reach this point.

The history of the doctrine of basic structure goes back to *Golak Nath* 1967, when the Indian Court faced with the expanding powers of the parliament ventures to defend its own power of judicial review. Both India and Pakistan owe their constitutional heritage to the British Indian Constitutional Acts of 1919, 1935, and 1947. They adopt the British parliamentary form of government that ties together the executive and parliament. With the parliamentary form, patterned on the British model, comes the concept of sovereignty of parliament. By the late 1960s the Indian parliament begins to test its sovereignty by claiming the powers to restrict fundamental rights. Later it claims to pass laws as well as constitutional amendments beyond the purview of the judiciary. However, the judiciary strikes back. In a series of cases—*Golak Nath* 1967, *Kesavananda Bharati* 1973, *Minerva Mills Ltd*. 1980, *A.K. Kaul* 1995, *Raja Ram Pal* 2007—the judiciary decides that the parliament's sovereign powers are limited and subject to judicial review. But for a compelling and successful defense the judiciary is impelled to develop a

"theory," which comes to be known as basic structure theory. The judiciary ventures to theoretically prove that neither the executive nor the parliament is sovereign. But instead the constitution is sovereign, because on the one hand all organs of the state derive their limited powers from it and on the other there are certain principles and provisions that no state institution can amend. The Court in *Minerva Mills Ltd.* 1980 rules:

> Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. […] the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. (quoted in *Sindh Bar Association*, 2009)

In Raja Ram Pal 2007 the Court repeats:

> Since British Parliament is also 'the High Court of Parliament', the action taken or decision rendered by it is not open to challenge in any court of law. This, in my opinion, is based on the doctrine that there cannot be two parallel courts […] India is a democratic and republican State having a written Constitution, which is supreme and no organ of the State (Legislature, Executive or Judiciary) can claim sovereignty or supremacy over the other. (Quoted in *Sindh Bar Association*, 2009)

In the earlier case, after discussing the functions of each organ of the state, Justice Bhagwati, claims the right of judicial review for the judiciary and classifies it as part of the basic structure:

> I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. (Quoted in *Sindh Bar Association*, 2009)

After the Indian Court, Pakistan's Supreme Court adopts and gives expression to the basic structure doctrine in several cases, e.g., *Azizullah Memon* 1993, *Al-Jehad Trust* 1996, *Mehram Ali* 1998, *Syed Zafar Ali Shah* 2000, and *Sindh Bar Association* 2009. In *Sindh Bar Association*, for instance, the Court interprets Articles 6 and 237 and rules:

> Parliament might not be able to do certain things, such as, its inability to legislate against Fundamental Rights, the Injunctions of Islam as laid down in the Holy Quran and Sunnah, etc. Therefore, Majlis-e-

> Shoora (Parliament) is not supreme over everything else as is put in the common parlance, or as it is said of the Parliament of the United Kingdom, rather it is independent of other organs of the State, but it certainly operates within certain parameters. (Quoted in *Sindh Bar Association*, 2009)

The court, however, goes a step further to restricting parliament's indemnifying legislative power, whereby it can validate ordinances, decrees, etc., of a "usurper" or a *coup d'etat* government.

> On the consideration of the above two provisions [Articles 237 and 278], Ajmal Mian, CJ, in his leading judgment in Liaquat Hussain's case, held that imposition of martial law in connection with the maintenance or restoration of order in any area in Pakistan had been done away with in the Constitution of 1973. Thus, unless Article 237 was first amended, no validation, affirmation or adoption of unconstitutional, illegal and void ab initio acts of a usurper of power could be made by Majlis-e- Shoora (Parliament), otherwise one provision would render the other redundant and nugatory. (*Sindh Bar Association*, 2009)

Again,

> Thus, so long as Article 6 is part of the Constitution, the Parliament is debarred from even condoning unconstitutional acts of a usurper, what to talk of validating, affirming and adopting the same, or deeming the same to have been made by the competent authority on any ground whatsoever. (*Sindh Bar Association*, 2009)

In this way, both Indian and Pakistani Courts defend their judicial review power by restricting the sovereign powers of their respective parliaments and elevating the constitution, especially its basic structure, to sovereign, immortal and immutable status. With this they also reach a distinct concept of subversion, that pertaining to the basic structure. Accordingly, any attempt to amend or violate the basic structure, and not just any part or provision, of the constitution will amount to subversion. With the emphasis on Article 6, in the *Sindh Bar Association*, Pakistan's Supreme Court further adds a link between the subversion and high treason. The Court says:

> As a matter of fact, Article 6 has built a stronghold around the body of the Constitution to safeguard it from any encroachment or violation from without. If each time an authority were to put it aside at his will, and do whatever he liked to do with it, that too, by the use or show of force or by other unconstitutional means, the provisions of Article 6 would be rendered redundant and nugatory, rather meaningless, which

> was not the intent, nor was the same permissible. (*Sindh Bar Association*, 2009)

Although Bar Association invokes Article 6 as a blanket safeguard for "the body of the constitution," the context of the case—the removal of judges or broadly the independence of the judiciary—is very much focused and therefore quite telling: Article 6 as a safeguard was invoked to preserve the basic structure, which has all along been the most enduring concern of the Court. A large section of the detailed decision on the basic structure, judicial review, and appointment/removal of judges clearly allude to the centrality of the judiciary's concern with the basic structure. Moreover, on earlier occasions of a *coup d'état* Article 6 was not invoked as the safeguard for the body of the constitution. In fact, in those cases the basic structure, and especially the independence of judiciary, were thought not to have been violated, even as the body of the constitution was so violated.

Just as *Jilani* 1972 was decided after the usurper had relinquished power, the *Bar Association* 2009 was decided after Musharraf had resigned from the presidency as well as the Army. Both *Jilani* and the *Sindh Bar Association* have suggested that as soon as power falls from the hand of a usurper, he be apprehended and punished. The suggestion in *Jilani* was distinct on the account that at the time of its decision the law of high treason did not exist. It only existed in the constitutional theory initiated by *Dosso*—the case *Jilani* had overruled. On the other hand, the *Sindh Bar Association* is distinct on the account that it seems to have narrowed down the scope of high treason. Given the specific circumstances, the *Sindh Bar Association* restricts the scope of high treason to attempts at disruption of the basic structure or salient features of the constitution.

Limiting the scope of the law of high treason, however, raises several questions. Is it an acknowledgement of the inevitability of constitutional deviations in the country? Pursuant to such an acknowledgement, has the judiciary come to realize that its actual line of defense should be the basic structure or the salient features along with the fundamental rights so as to ensure modicum of constitutionalism even in face of a deviated order? Is it the technical difficulty in adjudicating the law of high treason as it is broadly defined in Article 6? Or is it a deliberate heightening of the premium on building a case of high treason given the severe punishment associated with it? So far, the court has not been squarely faced with these questions. However, if Musharraf's case proceeds we can expect answers to some of these questions.

The Challenges of Adjudicating the Law of High Treason in Musharraf's Case

The petition against Musharraf's November 3, 2007 *coup d'état* is based on the argument that he undertook an extra-constitutional step of proclaiming emergency and issuing a Provisional Constitutional Order. Musharraf takes the extra-constitutional step at a specific time. The Court was hearing a case against his qualification for running for president. While the case proceedings were going on, surprisingly, the Court allowed the presidential election to go ahead as scheduled on October 6, 2007. However, the Court instructed that the election result should not be officially declared until the case had been decided. The constitution provides that government servants, whether in civil or military service, are not qualified to run for the office of President. Musharraf at the time of his election was the Chief of Army Staff, and hence constitutionally not eligible for Presidential office. But interestingly, Musharraf was already the incumbent President and Chief of Army Staff. He had been serving on those posts for almost half dozen years by then. In 2002, by the way of a referendum, Musharraf had gotten himself elected as the President. Referendum is not a constitutional procedure, but interestingly the Court had upheld it, and later the parliament incorporated it into the constitution by passing the 17th Amendment. This was his second election for the same office. Musharraf had used all his resources, contacts and skills of bargaining to win the election. The only hurdle was the judiciary and its nascent but growing judicial activism.

Beginning in the first quarter of 2007, the lawyers' movement gradually picked up momentum. In July a fourteen-members bench of the Supreme Court cleared presidential reference charging the Chief Justice of misconduct. The Court ordered reinstatement of the deposed Chief Justice. Musharraf feared that the reinstated Chief Justice would not write a favorable decision in his election qualification case. On the other hand, both his coercive and patronizing powers had already been exhausted. The only course left for the General-President was to resort to a *coup d'état*, proclaim emergency, issue a new constitutional order, and administer a fresh oath of loyalty to judges. To his surprise, in the evening, the Chief Justice calls a special bench of the Supreme Court. The bench passes a "restraining" order on the executive—the President and the prime minister—to stop them from taking any steps that could be prejudicial to the independence of the judiciary. Judges in large numbers refused to take oath and reverted to the resistance movement. In little over a month, Musharraf is forced to withdraw the Emergency. Meanwhile, the hitherto pro-Musharraf parties sense the changing popular mood, and switch to the side of the deposed judges. To add to Musharraf's

difficulties, the 2008 national election oust his party, Pakistan Muslim League Quaid-e- Azam (PML-Q), and brings back the two major political parties—PPP and PML-N—in the parliament. These parties, despite PPP's sympathies for Musharraf, campaign to impeach him. Now Musharraf could see that his political career had come to an end, although he still retained one last trump card, the power to dissolve assemblies. However, he chooses not to and instead resigns, but only after assurances from the new government as well as his foreign allies that he would be allowed a safe exit from politics.

It is in this backdrop that the high treason case is brought against Musharraf. The difficulty about the case, however, begins with the fact that it is based on his November 3, 2007 *coup d'état*, but it does not question the earlier *coup d'état* of October 12, 1999. The two coups are different in their objects. The object of November coup, in effect, was to subdue a defiant judiciary. The exact explanation of subduing, however, is contested by the executive and judiciary. According to President Musharraf, the November coup aimed to end the judicial activism. For instance the Proclamation of Emergency said:

> Whereas some members of the judiciary are working at cross purposes with the executive and legislature…Whereas there has been increasing interference…Whereas some Judges by overstepping the limits of judicial authority have taken over the executive and legislative functions. (Tika Khan, XXIX SCJ, 750 (2008)

While according to Chief Justice Iftikhar Chaudary the coup aimed to put the independence of the judiciary to an end.

In fact, the November coup, unlike the October coup, did not affect legislative assemblies or federal and provincial governments, but it did affect the jurisdiction of the courts. However, the dilemma the judiciary came to face was that it had validated the October coup (as well as July coup of 1977) on the touchstone of the doctrine of state necessity, but rejected to validate the November coup. Thus judiciary had left precedents that pointed to principled inconsistency in its decisions that seemed to border on arbitrariness.

Put in perspective, Musharraf had demanded of the judges of superior courts, after both coups, to take a new oath. The question that arises then is whether administering a new oath to judges on a Provisional Constitutional Order amounts to harming the independence of the judiciary or the basic structure. Here again the precedents demonstrate inconsistency. After the October coup, as *Nusrat Butto* and *Zafar Ali Shah* demonstrate, the judges readily took fresh oaths. In fact, the Supreme Court ruled that such oaths do not affect their (original) jurisdiction. For instance in Zafar Ali Shah, the Court held that

the taking of oath does not derogate from the fact that courts were established and given powers under the 1973 constitution. Moreover, the Court goes to the extent of declaring that the judges took oath to save the judiciary:

> New oath of office was taken…with a view to reiterating the well established principle that the first and the foremost duty of the Judges of the Superior Courts is to save the judicial organ of the State. (*Zafar Ali Shah*, 2000, pp. 1481–2)

Interestingly, in *Tika Khan* 2008—the case overruled by the *Sindh Bar Association* 2009—some judges who chose to take a new oath after the November coup also repeated the view established in *Nusrat Bhutto* and *Zafar Ali Shah*.

> Supreme Court would continue to exercise power of judicial review under Art. 184(3) of the Constitution to judge the validity of Proclamation of Emergency of 3.11.2007 and other Orders issued by the President/Chief of Army Staff despite the non-obstante clause in Art. 3 ousting the jurisdiction of superior Courts. (See *Tika Khan Case,* 2008, pp. 732–3)

However, after the November coup, as the *Sindh Bar Association* demonstrates, the Court rules that oath taking on a provisional constitutional order is unconstitutional, illegal and *ultra vires*.

Should violation of the basic structure be presented as the basis for Musharraf's high treason case, we again come across visible inconsistency in Courts decisions. For instance, one of the salient principles of the basic structure is parliamentary system of government. The parliamentary system envisages the election of the president by Parliament. The Court, however, validated an exception to the election principle by allowing Presidential election to take place by way of referendum, first in 1984 and then in 2002.

In order to validate the referendum, the Court constructs a unique methodological principle, that it calls the "harmonious construction." Accordingly, one provision of the constitution is harmonized with another in such a way to allow a different or desired interpretation. The Court observed:

> Mr. Syed Sharifuddin Pirzada urged that Article 41 and Article 48(6) of the Constitution, if read together and harmonized, provide plural remedies, courses and options. It may be observed that the principles for interpreting Constitutional documents as laid down by this Court are that all provisions should be read together and harmonious

> construction should be placed on such provisions so that no provision is rendered nugatory. (*Qazi Hussain Ahmed*, 2002, p. 754)

Whether knowingly or unknowingly, the Court has introduced the principle of harmonious construction, which in effect helps to circumvent the inviolable principle of basic structure. If the basic structure provisions are read with other non-basic provisions, then the latter provisions can be indirectly given preference over the former. Validation of oath taking, which purportedly compromised the independence of the judiciary, was a virtual expression of this unique methodology.

One of the major reasons on which the referendum was validated is that a referendum is a call to the popular sovereign, a direct democratic process. Hence it cannot be termed as undemocratic or unconstitutional (*Qazi Hussain Ahmed*, 2002, p. 754). Prima facie, referendum cannot be deemed as undemocratic. However, the difference between non-constitutional democracy and constitutional democracy begins when democracy is made subject to certain constitutional rules prescribed in the constitution, which are agreed upon by the popular sovereign at one time. The choices before the Court are tempting: it can adjudicate purely on the basis of given constitutional rules and as such uphold the letter of the constitution or apply harmonious construction to support direct and pure democracy. Precedents demonstrate that the Court has kept switching between the two. For instance, in Musharraf's referendum case the Court "harmonizes" Article 41 with Article 48(6) but in his presidential election case the Court was going to stick to the former Article, which spurred the coup and stopped the Court from delivering the decision.

The principled inconsistency in court decisions points to the unresolved distinction between exception and amendment regarding the basic structure. Exception, in effect, is temporary, while amendment is (relatively) permanent. From the present understanding of the doctrine of basic structure, the constitution can be amended, but not its basic structure. However, the above cases, relating to oath taking and presidential election, amply demonstrate that the court has made exceptions and claimed the right to allow (or disallow) exceptions to the basic structure. However, if the court is the final authority on deciding exceptions, then how can a principled decision be made on the cases of high treason, which are after all matters of either exception basic structure or deviation from non-basic structure provisions?

Conclusion:

German constitutional theorist, Carl Schmitt, ingeniously extrapolates how in 19th century the struggles over sovereign power between the King and the

bourgeoisie and later between the bourgeoisie and the masses result in agreements whereby the constitution is elevated to the status of sovereign. Legal positivism, as logically elaborated by Hans Kelsen, theorizes the elevation of constitution to the status of sovereign and presents it as a perfected constitutional system. Kelsen's legal positivism makes its way into Pakistan's constitutional discourse through the Supreme Court's decision in *Dosso* 1958. Edifying from Schmitt's extrapolation, I have alluded to two stages in Pakistan's constitutional history, on which the constitution is elevated to the status of sovereign. On the first stage, in early 1970s, Pakistani landed bourgeoisie-cum-political elite in the wake of the populist unrest and uprising as well as the threat of military *coups d'état* proposes the sovereignty of the constitution. The proposal that on the face of it seems commendable, however, in effect, was meant to surreptitiously preserve the political interests and powers of the landed bourgeoisie. In other words, behind the façade of constitutional democracy, feudal bourgeoisie comes to assume the state powers. It is in the backdrop of this new status of the constitution that Article 6 is introduced to bulwark against an external coup and internal subversion.

The second occasion arises when the judiciary faced with attacks on its independence from other branches of the state proposes a basic structure of the constitution and raises the same to the sovereign status. The judiciary points out that there are certain provisions in the constitution that cannot be amended by either parliament or executive. These provisions are termed as basic structure or salient features of the constitution. One of such salient features the judiciary stresses is its independence from other branches. It is worth noticing that on both stages it is some specific institutional interests that demand the elevation of the constitution to sovereign status.

Historically, the concept of sovereignty has intimately been tied to the concept of high treason. Attack on the life of a Prince always brought severe punishment. As the modern constitution assumes the status of sovereign (for instance in Germany) the old relationship between the person of sovereign and the crime of high treason is carried forward to reflect in the new relationship between the constitution and high treason. Accordingly, capital sentence and to some extent the spectacle associated with it is reincarnated. From Germany, through Kelsen, this new relationship enters Pakistani judicial and constitutional discourse, and finally supported by the feudal political interests into the constitution.

Contrary to the expectations, the law of high treason, four years after its making in 1973, fails to forestall the disruption of the constitution. Worse off, it forestalled the revival of constitutional democracy, because the threat of the

crime impelled the General to change his mind. On its part, the Supreme Court terms the disruption mere temporary deviation, and validates it as touchstone of the doctrine of necessity. Again in 1999, the Court validates another disruption on similar grounds. Accordingly, the law of high treason comes to face its virtual antithesis in the doctrine of necessity. It needs emphasizing that in both disruptions the coup makers topple parliamentary governments, but they leave the judiciary alone or carefully co-opt it. In 2007, however, Musharraf does the opposite, but eventually fails.

The decision in the *Sindh Bar Association* not only declares Musharraf's Proclamation of Emergency and Provisional constitutional Order unconstitutional and illegal, but also finds him guilty of having committed the crime of High Treason. Interestingly, the decision is starkly different from other decisions in similar cases, for instance *Nusrat Bhuttto* 1977, *Zafar Ali Shah* 2000, and *Qazi Hussain Ahmed* 2002. In the earlier decisions, the *coups d'état* are validated, but in the *Sindh Bar Association* 2009 the *coup d'état,* which according to the Court targeted the basic structure, is not validated. From these contrasting decisions what stands out is the transforming relationship between the concepts of the constitution and high treason. While the older relationship between the constitution and high treason has proved difficult to defend and uphold, the Court hopes to build and uphold a new relationship between the concept of the basic structure and high treason. However, for that relationship to establish, the Court will be called upon to explain the precedents of oath taking. Moreover, it might be called upon to explain the problematic relationship between the proportionality of capital sentence and the disruption of the basic structure, especially the independence of judiciary.

> --- It is for representatives of people to see to it that everything is in order and no body can raise his little finger when their actions are in line with fundamentals of Constitution. (ZAFAR ALI SHAH, 2000, 1172)

Notes:

1. Six years earlier in *Political Theology* Schmitt had noted, "The highest competence cannot be traceable to a person or to a sociopsychological power complex but only to the sovereign order in the unity of the system of norms. For juristic consideration there are neither real nor fictitious persons, only points of ascription"(Schmitt, 2005, p. 19).
2. Schmitt writes, "The criminal law scholarship on this issue is thoroughly of one mind." He gives examples of writings of F. van Calker, Frank, K. Binding, Count zu Dohna, and H. Anschutz.

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