The Rule of Law Reform and Judicial Education in Pakistan

Search for a Model[*]

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Abstract

The article investigates the intrinsic and instrumental roles of judicial education in broader contours of the rule of law theory and reform practice in a developing country. It focuses on: firstly, the relationship between judicial education and the rule of law theory and reform practice; secondly, whether and how judicial education can promote the rule of law; and third, the challenges to a successful judicial education in strengthening the rule of law. Examining Pakistan as a case study, the article explores challenges to judicial education in Pakistan and critically assesses Pakistan's rule of law reform efforts to overcome those challenges. Evidence shows that key challenges to judicial education in Pakistan are lack of a national judicial educational vision and a well thought out policy, coordinated efforts to training needs assessment, curriculum and faculty, research and learning best practices, as means of development and innovation. Of special concern is the role of judicial education in promoting the rule of law to address security issues embedded in (bad) governance. The article finds that in view of its initial limited success, the judicial academy of Pakistan's terrorism-hit Khyber Pakhtunkhwa (KP) province may play a role model to improve judicial services and thereby help promote the rule of law in a post-conflict society.

Keywords: judicial education, rule of law reform, Khyber Pakhtunkhwa, militancy, Pakistan.

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A Introduction

Judicial education is emerging as a relatively new area of academic knowledge, including research, generally across the world and particularly in Pakistan. Despite some initial resistance, it appears to be gaining universal acceptability. While it starts off with ensuring judicial competency, in many jurisdictions, especially developing countries, it has embraced wider issues, such as governance, peace, development, human rights, and the rule of law. In many developing countries, judicial reforms are pursued under the rubric of the rule of law ('law and development' and 'law and justice sector reform'), of which judicial education is a significant component.[1] In these reforms, two reasons explain the significance of judicial education: first, "[j]udicial education is emerging as a coherent and distinctive discipline of professional development", and second, "the institutional recognition of the need for and benefits"[2] of judicial education is an instrument of promoting social governance, the rule of law, and human rights.A third reason for additional value of the judicial education is its role in a society moving from conflict to peace. Pakistan, particularly its northwestern Khyber Pakhtunkhwa (KP) province, is an illustrative example in point.

What relationship has judicial education got with the rule of law theory and the rule of law reform practice in a developing country that faces challenges in establishing the rule of law and ensuring security for its people? Whether and how judicial education can promote the rule of law and thereby contribute to the rule of law and security? What challenges is judicial education facing in becoming an efficient and effective instrument of contribution to the rule of law and peace building?

This article argues that judicial education and the rule of law are interrelated and interdependent on each other. It also argues that the rule of law reform may promote judicial education and thereby the rule of law itself. Examining Pakistan as a case study, the article argues that judicial education may play a significant role in addressing both the institutional ('thin') and broader ('thick') challenges of the rule of law, provided its judicial training schools are able to overcome some pressing immediate- and long-term challenges, such as a national judicial educational vision and a well-thought-out policy, embracing coordinated efforts, research, and learning best practices, as means of development and innovation. In this article, of special concern is the role of judicial education as an instrument of promoting the rule of law in addressing security issues, particularly when it appears to be embedded in (bad) governance. The article examines the case of Pakistan's Khyber Pakhtunkhwa (KP) province. The case of KP judicial education adds a novel dimension to the role of a justice system in a post-conflict society.

1 For example, Cambodia, Vietnam, the Philippines, Mongolia, Palestine, and Haiti. Since the late 1990s, the Asian Development Bank alone supported some 59 judicial reform projects aimed at promotion of the rule of law. *See* L. Arymtage, 'Judicial Education as an Agent of Leadership and Change', *The PHILJA Judicial Journal*, Vol. 5, 2003, p. 1, at 5 [Armytage 2003]; L. Armytage, *Reforming Justice*, Cambridge, Cambridge University Press 2012; arguing that 'judicial reform should promote justice'.

2 *Ibid.*

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The KP and Pakistan's Federally Administered Tribal Areas (FATA),[3] bordering Afghanistan, were the hard hit in the more-than-a-decade-old war against terrorism. Several parts of the KP were devastated by terrorist attacks and swept by extremist thinking. In the KP's Swat valley – a picturesque tourist destination (officially called the Provincially Administered Tribal Areas/Malakand division which comprises of seven districts) – an actual Taliban insurgency broke out in 2007.[4] With the exception of one, namely, the Chitral district, all other districts were engulfed by the insurgency. A 2010 report of the Asian Development Bank (ADB) submitted to the government of Pakistan noted the following reasons for the insurgency:

> Years of regional instability underpinned by decades of poor governance have shaped the crisis unraveling in the north western border areas of Pakistan. Marginalisation and inequity are sustained in the [FATA] through current legislation, and in both FATA and [KP] by underdevelopment. Militants in FATA and KP have exploited frustrations resulting from decades of weak governance, corruption and wide ranging socio economic deficits...aggravating high levels of vulnerability.[5]

The insurgency has prompted an unusual academic interest from a cross section of academia. A detailed discussion about the causes of the insurgency is out of the scope of this article. However, a review of the literature reflects that most commentators agree on the failure of the state institutions to deliver basic services,

3 According to Art. 1(2) of the 1973 Constitution of Pakistan, the Federally Administered Tribal Areas (FATA) is a part of Pakistan. Chapter 3 of Part XII of the Constitution (Arts. 246 and 247) deals with definition and administration of the tribal areas. The FATA includes, firstly, the tribal areas of Bajaur, Khyber, Kurram, Mohmand, Orakzai, North Waziristan, and South Waziristan and, secondly, the tribal areas adjoining the districts of Bannu, Dera Ismail Khan, Kohat, Lakki Marwat, Peshawar, and Tank. It is under the executive authority of the federation. No law is to apply in FATA unless the President of Pakistan so directs. The President may, with respect to any matter, make regulations for the peace and good government of the FATA or any part thereof. The jurisdictions of the Supreme Court of Pakistan and of a provincial High Court are barred unless the parliament passes a law for doing so.

4 Like the FATA, Provincially Administered Tribal Areas (PATA) is also constitutionally defined in Art. 246. For the purpose of the KP, the PATA "means the districts of Chitral, Dir and Swat (which includes Kalam), [the Tribal Area in Kohistan district,] Malakand Protected Area, the Tribal Area adjoining [Mansehra] district and the former State of Amb [.]" In the KP, a major part of PATA is situated in Malakand division, which comprises of the districts of Chitral, Buner, Dir Lower, Dir Upper, Malakand Agency, Shangla, and Swat. Swat is the administrative capital of Malakand division. A division is an administrative unit comprising of one or more districts. According to Art 247, the executive of authority of a province extends to PATA. In order that a law is to apply in PATA, the governor of the province is to issue a direction. PATA now falls under the jurisdictions of the Supreme Court and of a provincial High Court.

5 *See* Asian Development Bank (ADB), '"Pakistan": Post-Conflict Needs Assessment', Technical Assistance Consultant's Report, Project # 43535-012, September 2010 (PCNA Report); available at <www.adb.org/projects/documents/pcna-khyber-pakhtunkhwa-and-federally-administered-tribal-areas-tacr> (last accessed 21 August 2013).

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notable among them, the justice service.[6] Reference to a few views may seem appropriate. One commentator said that Malakand had "a broken judicial system [and] poor governance".[7] Another commentator argued that since the merger of the Swat State's merger in Pakistan in 1969, the government though extended Pakistani laws to Swat, but separate judicial system in Swat, it "did not deliver effective judicial services".[8] A third one argued that there was "more a manifestation of the growing disgruntlement with the existing administrative and judicial system".[9]

After successful peace efforts in 2009, a law called the *Shari Nizam-e-Adl Regulation* was introduced in the Malakand division. The FATA, however, remained tense, despite some sporadic peace efforts because of the limited administrative control by the federal government, presence of armed forces, and persistent US drone attacks. Peace efforts, however, continued there. Since 2010-2011, many international and bilateral donors have come forward with the rule of law reform in the KP, particularly in the Malakand division and the FATA. Judicial education is a key component of the reform. Fortunately, the establishment of a judicial

6 On the eve of partition of India in 1947, Malakand consisted of three princely states, namely, Chitral, Dir, and Swat. Their rulers were called as *Mehtar* (Chitral), *Nawab* (Dir), and *Wali* (Swat). They all merged in Pakistan by 1969. They are adjacent to each other. Chitral has largely remained politically calm and culturally and linguistically distinct. Dir and Swat remained politically active. Together, they constitute PATA and administratively as Malakand division (comprising seven districts: Buner, Chitral, Dir Lower, Dir Upper, Malakand Agency, Shangla, and Swat). Dir Upper remained capital of former Dir State. Saidu Sharif remained the capital city of Swat State and is also the administrative capital of Malakand division. Since the merger, the area remained under the Frontier Crimes Regulation, 1902. The legal and judicial system in Malakand division is one and the same, and public perception about it also appears to be similar across the whole division, although no straightforward presumptions could be made. In 1975, two regulations, one civil the other criminal, were introduced, which remained in force till 1994. The PATA Regulation, 1994, was introduced following the 1994 Supreme Court decision which declared the erstwhile two PATA Regulations of 1975, as unconstitutional. After the Court's decision, a religious group called *Tehrik-e-Nifaz-e-Shariat-e-Muhammadi* (TNSM), led by Maulana Sufi Muhammad, launched widespread protests for introduction of Islamic law in Malakand. The 1994 Regulation was introduced in response to those protests. In 1999, another Regulation – the Nizam-e-Adl Regulation – was introduced. Both laws provided a scope for jirga through mediation subject to agreement of the parties. Currently, since 2009, the Shari Nizam-e-Adl Regulation, 2009, has been enforced in Malakand, following a peace deal between the government of the KP and the Taliban. Swat, being the administrative capital of Malakand division since the merger in Pakistan, occupies a central position in the entire region. Also being a tourist spot, it is well developed, culturally diverse, and commercially vibrant. As compared to other areas, it comprises a mix of both urban and rural settlements. Even after merger in Pakistan, Dir Upper could not flourish significantly. Lying on the main Chitral road, it borders Bajaur Agency (part of Federally Administered Tribal Areas (FATA)) and Afghanistan's Kunar province.

7 R. Zafar, 'Development and the Battle for Swat', *Al-Nakhlah*, The Fletcher School-Tufts University, United States, Spring 2011, pp. 1-10, at 5.

8 Sultan-i-Rome, 'Crisis and Reconciliation in Swat', *Pakistaniat: A Journal of Pakistan Studies*, Vol. 3, No. 1, 2011, pp. 53-79, at 57.

9 O. Siddique, 'The Other Pakistan: Special Law, Diminished Citizenship and the Gathering Storm', pp. 1-37, at 17, available at <http://ssrn.com/abstract=2185535> (last accessed 03 August 2013). Other studies recently conducted include, K. Aziz, *Swat: The Main Causes of the Breakdown of Governance and Rise of Militancy*, Regional Institute of Policy Research & Training, 2010.

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academy coincided with the initiation of the reform. The article also argues that the KPJA may play a role model for other judicial training schools as well as a catalyst in the peace process by undertaking the responsibility of making specific though limited contributions, to the rule of law through a comprehensive and diverse educational programme, awareness, and research.

Section B of the article seeks to develop a working definition of and justification of judicial education, generally, and with reference to Pakistan, particularly. A discussion on definition of judicial education seems to be important because in the Asian context, including Pakistan, the scope of judicial education is expanding to other justice sector actors and as an agent of social change. As regards justification, in most common law jurisdictions, initially judicial training faced some resistance. The reasons for resistance need to be explored generally and discussed in the context of rule of law challenges in Pakistan. It will be seen that while in Pakistan no clear-cut resistance was put to judicial education, formal efforts to establish judicial training schools faced what may be called an institutional inertia. Section C mainly focuses on the relationship between judicial education and the rule of law in a developing country, grappling with establishment of the rule of law in relation to peace building. It seeks to review key philosophical works of the rule of law literature in order to see how it informs the rule of law reform practice. A theoretical understanding of the rule of law itself as well as in relation to the rule of law reform practice will be helpful in exploring the link between judicial education and the rule of law. Next, in Section D, it will be investigated how to harness the potentials of judicial education for the rule of law by surveying the challenges it faces in Pakistan and how to address those challenges. Finally, Section E will examine the role of the recently established KP judicial training school in contributing, firstly, to the rule of law and peace building in the KP through competency-based learning, research, and innovation and, secondly, to a broader national efforts for improving judicial education. As will be argued, the KP judicial academy makes a good case study for the reason that it shares with the FATA and Afghanistan a common ethnicity (Pakhtun/Pashtun), geography, language, and culture and religion. As the peacemaking efforts are afoot in the region, judicial education is likely to play a significant role in buttressing an efficient and effective rule of law, in the KP as well as in the FATA. Given its relative success in overcoming certain key challenges, the role of the KPJA will be examined to ascertain if it could be a role model. Section F contains conclusion of the discussion.

It merits mention here that the primary responsibility of establishing the rule of law lies with the state. Judicial education, it is argued, may contribute to the establishment of the rule of law. It will be argued that the significance of judicial education for the rule of law is immense for both thin and thick conceptions of the rule of law.

B Definition and Justification of Judicial Education

I Definition

In its common parlance, the word judicial education is freely used to denote educational capacity building of judges. A review of relevant literature shows that many scholars have understood it in terms of its role and objectives. Armytage, for example, argues that in the specific context of the rule of law in Asia, judicial education is "emergingas an agent of leadership and change".[10] The Indiana Judicial Education Centre notes that "the overall goal of judicial education is to enhance the performance of the judicial system as a whole by continuously improving the personal and professional competence of all persons performing judicial functions".[11] Starting from the objective of judicial education, Judge Sandra Oxner has delved deeper into definitional issue. She argues that "the objective of judicial education is to support an impartial, competent, efficient, and effective judiciary".[12] Seeking to be more articulate, Judge Oxner further argues, "[j]udicial education is a term used to include collegial judicial meetings to discuss education topics (international, national, regional, and local) and all professional information received by the judge" through any medium, such as"print, audio, video, computer disk, online, or electronic".[13] Judge Oxner divides judicial education into, first, "pre-service or orientation program[me]s" and, second, "continuing judicial education and professional growth training".[14] She counts four levels of judicial education: learning skills, understanding new laws, new intellectual approach in exercising judicial discretion, and bringing attitudinal change aimed at social accountability.[15] Judge Oxner's definition is enumerative and is concerned with the scope of judicial education. Law reform literature shows that judicial education is no more confined to judges. Evidence from many jurisdictions shows that judicial education includes other justice sector personnel, such as court staff, lawyers, prosecutors, police investigators, probation officers, and mediators.[16] As will be discussed in Section D of this article, Pakistan is also a good example of having what may be called an all-inclusive judicial education system.

10 *Ibid.*, p. 8.

11 *See*, for example, The Indiana Judicial Education Centre: <www.in.gov/judiciary/center/2412.htm> (last accessed 20 April 2014).

12 Judge S.E. Oxner, 'Judicial Education', *The Philja Judicial Journal*, Vol. 15, No. 5, 2003, pp. 32-47, at 36.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 L. Hammergren, 'Judicial Training and Justice Reform', *USAID*, 1998, p. 27; argues that in Latin American countries (Costa Rica, El Salvador, Guatemala, and Panama) diverse groups, such as, legal "professionals, judges, prosecutors, and other sector officials obviously benefit from continual training and education, but from the standpoint of customer satisfaction, certain kinds of knowledge, skills, and attitudes are more important and thus warrant greater emphasis" (Hammergren 1998). *See* also EU, 'Project Report: Training of Judges' (Eastern Partnership Enhancing Judicial Reform in Eastern Partnership Countries Working Group on "Professional Judicial System"), *Strasbourg*, 2012. The report examining the status of judicial education in Armenia, Azerbaijan, Georgia, and Ukraine reflects that other justice sector actors are also part of judicial training.

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Arguably, judicial education may better be understood as a kind of adult education.[17] According to Darkenwald and Meriam, "[a]dult education is a process whereby persons whose major social roles are characteristics of adult status undertake systematic and sustained learning activities for the purpose of bringing about changes in knowledge, attitudes, values or skills".[18] In a more technical sense, Knowels has defined adult education as "a set of organized activities carried on by a wide variety of institutions for the accomplishment of specific educational objectives".[19] In view of the above, judicial education, a kind of adult education, may be defined as a set of organized activities for enhancement of personal and professional competence of judges and other justice sector actors, reflecting on learning skills, improving knowledge, bringing about a positive attitudinal change, and setting values. Commentators argue that adult education of professionals is, however, different from general adult education, relating to job description, and requires "a separate body of knowledge, inquiry, research and practice".[20] Thus, judges, as professionals, will participate in continuing judicial education for reasons specific to the nature and demands of their job.[21] Key reasons noted are judicial competence, collegial interaction, and professional perspective.[22] As noted above, in Asia, judicial education has assumed the role of an agent of change and leadership in context of the rule of law. The significance of this aspect of judicial education will be explained in this article. In many common law countries, the idea of judicial education initially faced some resistance, leading to some philosophical debates.

II Justification

The need for judicial education appears to be no longer a contested notion. Numerous states have established judicial educational institutes. Some states, for example, India and Pakistan, have now set up such institutions even at the regional level.[23] While the developed countries like Australia and UK have now established regular judicial education systems, the idea of the need for such education remained controversial in those countries. In a seminal work, Livingstone Armytage critically examines the opposing views in the debate and argues how it seems to have been resolved. It may be clarified that the views of Armytage are Australia-specific. However, the debate, being academic, is equally significant for other jurisdictions, too. As will be seen later in this article, in developing coun-

17 S.B. Merriam & R.G. Brockett, *The Profession and Practice of Adult Education*, San Francisco, John Wiley & Sons Inc. 2007. *See* also L. Armytage, 'The Need for Continuing Judicial Education', *University of New South Wales Law Journal*, Vol. 16, No. 2, 1993, pp. 536-584, at 556, 560; linking adult education research to judges' continuing judicial education (Armytage 1993).

18 Darkenwald & Merriam, *Adult Education: Foundations of Practice*, New York, Harper Collins1982, p. 9.

19 Knowles, *The Modern Practice of Adult Education: From Pedagogy to Andragogy*, New York, Association Press 1980, p. 25.

20 Armytage 1993, p. 557.

21 *Ibid.*, p. 561.

22 *Ibid.*, pp. 561-562.

23 India has a National Judicial Academy situated in Bhopal, and one each in its 22 states. *See* at <www.nja.nic.in/> (last accessed 4 May 2012).

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tries, judicial education, in addition to ensuring competency of the judiciary itself, has also to address diverse challenges– for example, the response of law and justice institutions to security, development, and respect for human rights. A brief description of the debate would be useful to put the case of Pakistan in proper context.

In the United States (US) a judicial education system is in place for the last about 50 years.[24] Judicial education in the United States is "the most effective, and perhaps an indispensable, means of enhancing the fair and efficient administration of justice".[25] In the UK, the idea of formal judicial education was suggested by Lord Bridge (the Bridge report) in 1974. The Bridge report, Armytage notes, underlined "the need for a more formalized approach to judicial induction".[26] In Australia, Justice Michael Kirby, the then Chairman of the Australian Law Commission, put forward the suggestion in 1983. The idea was justified for several reasons: "rapid change in the law, to provide a more self-critical approach to judicial functions, to promote greater awareness of the need for principled and conceptual thinking". The Australian view was thus guided by a dynamic, inward looking, and innovative approach.

The idea was opposed by Lord Hailsham in the UK and Justice Dowsett in Australia. The former argued that judges learn through experience. The latter argued that a systemized judicial education will endanger judicial independence.[27] Dowsett categorically opposed the following of the US example, arguing that the selection process of judges is different in the two countries.[28] Samuel, another judge, supported Dowsett and made additional objection, contending that certain deficiencies, such as 'technical equipment, experience and character', should be addressed at the time of selection and not through training.[29]

Armytage examines that the thrust of the debate swung in favour of the need for formal judicial education. Judges Kennedy and Wood (Australia) and Judge Richardson (New Zealand) recognized that judicial education will not deride, but reinforce judicial independence; improve specific judicial skills, like sentencing, appraisal of evidence, and computer know-how, and social and behavioural qualities; and sensitize judges to their role in a changing social and economic environment.[30] It was also recognized that no matter how much well experienced lawyers may be, playing a persuasive role, their elevation to the bench changes the nature of their responsibilities, involving an evaluative role.[31] Judge Wood also avowed that the need for formal judicial education was strongly accepted in the United

24 The US National Judicial College was set up in 1963. Spain and France established their judicial schools in 1944 and 1953, respectively. *See* Dr. C. Thomas, 'Review of Judicial Training and Education in Other Jurisdictions', May 2006 (Thomas 2006); available at <www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf> (last accessed4 May 2012).

25 Armytage 1993, p. 542.

26 *Ibid.*, p. 543.

27 *Ibid.*, p. 544.

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*, p. 546.

31 *Ibid.*, p. 545.

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States, Canada, and the UK.[32] Armytage proposes to resolve the debate by shifting the thrust of that debate from "the need to remedy deficiency to the need for ongoing professional development".[33]

It was seen above that the judicial recruitment process and need for professional development in Australia were key reasons for judicial education. These reasons, in addition to others, are advanced in other countries to justify judicial education. A 2006 report prepared for the UK Judicial Studies Board has reviewed judicial training in a range of both common law and civil law countries, covering Austria, Australia, Canada, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal, and the United States. The report notes that in developed countries, the need of judicial training is seen to be spurred by a variety of reasons: significant changes in the process of judicial recruitment, ever-growing court dockets, more complex laws, and legal issues.[34]

One may argue that the same reasons may exist in a developing country, like Pakistan. Take, for example, the issue of judicial appointment in Pakistan. The issue of judicial appointments is highly controversial, particularly after the recent18th and 19th Constitutional Amendments.[35] During the tenure of the former Chief Justice Choudhry, 126 judges were appointed in the higher courts; most of these appointments are said to be driven by favouritism and nepotism.[36] This raises an issue, not only of lack of capacity, but also a decline in the quality of judicial performance, and gnaws away public confidence in the institution. Judges appointed to subordinate courts have some provision of training; for those appointed to higher courts, none exists at all. Pakistan has now five judicial academies: one at the federal level and one each in the four provinces. There is no evidence of training for higher court judges in Pakistan. Commentators argue that in many developing countries:

> [T]raining is often limited to lower level judges and administrative staff because the upper ranks of the hierarchy claim to be adequately prepared. This is unfortunate, whatever the claim's validity. Where the upper levels of the bench don't participate, their decisions and actions can undermine the effects of an otherwise successful training program.[37]

Moreover, given the mounting caseload in the higher courts, the need for training, for example, in case management and quality of judicial reasoning, becomes more pronounced. Furthermore, some emerging legal issues, for example, cybercrimes and environmental protection, require high-quality judicial expertise. Law

32 *Ibid.*, p. 546.

33 *Ibid.*, pp. 548-549.

34 Thomas 2006, p. 11.

35 *See* A. Iqbal, 'The Process of Judicial Appointments under the Constitution of 1973', *The Journal of Humanities and Social Sciences*, Vol. XX, No. 1, 2012, pp. 15-28; *See* also O. Siddique, 'Judicial Appointment and Accountability: A Flawed Debate', *The Friday Times*, 12 March 2010.

36 H. Malik, '"Ineffective" Role in Appointment of Judges to Superior Courts: Parliamentary Committee Invites Lawyers for Consultations', *Daily Times*, 23 December 2013.

37 Hammergren 1998, p. 12.

practice in Pakistan is predominantly limited to civil litigation and ordinary criminal cases. Because of general lack of capacity building and research environment for lawyers, there is always a wide room for training of lawyers. As was argued by the proponents of judicial education in Australia, elevation to the position of a higher court judge requires training because of the change of role that a lawyer assumes in the event of becoming of a judge. In a nutshell, the mere experience at the bar, no matter how rich it may be, is no substitute for a proper capacity building essential for judgeship.

Developing countries have other peculiar problems, such as weak democratic institutions, poverty, inequality, poor governance, corruption, and lack of quality legal education. These problems are indeed complex, given the transition of these societies to stable democracies. Referring to Pakistan, Fukuyama argues that with democratic institutions weakened by social inequality, "groups with questionable commitment to liberal democracy have gained adherents because they are seen as providing social services and catering to the needs of the poor".[38] This situation arose in parts of Pakistan's KP province (Malakand division) when during an insurgency (2007-2009), the Taliban established their own brand of police stations and courts. The slogan of the insurgents' 'speedy justice', in the words of a Pakistani commentator, is quite interesting [!].[39] Obviously, it raises an accusing finger to the efficiency of the justice sector institutions in terms of its efficient response to the situation. Judicial education thus may be seen as an effective tool not only to ensure efficiency in order to "address mounting consumer dissatisfaction with judicial services"[40] but also to help establish the rule of law. In order to properly ground judicial education in the rule of law matrix, it is necessary to have an understanding of the theoretical framework of the rule of law.

C Link between the Rule of Law and Judicial Education

I Definition and Thin and Thick Conceptions of the Rule of Law

The conceptual clarity of the rule of law is a subject of ongoing academic debate. One commentator has rightly said that the rule of law is "an exceedingly elusive notion" giving rise to a "rampant divergence of understanding...everyone is for it but has contrasting convictions about what it is".[41] Political theorists, jurists,

38 F. Fukuyama, 'Dealing with Inequality', *Journal of Democracy*, Vol. 22, No. 3, 2011, pp 79-89, at 80.

39 *See* O. Siddique, 'Approaches to Legal and Judicial Reform in Pakistan: Post Colonial Inertia and the Paucity of Imagination in Times of Turmoil and Change', Development Policy Research Centre, Lahore University of Management Sciences Working Paper 4, pp. 1-70, at 8; available at <www.dprc.lums.edu.pk> (last accessed 3 March 2012) [Siddique 2012]. For a view on the rule of law as an essential element for development, particularly in the Asian context, *see*, for example, M. Woo-Cuming, 'The Rule of Law, Legal Traditions, and Economic Growth in East Asia', World Institute for Development Economics Research Paper No. 2006/53.

40 Armytage 2003, at 8.

41 B. Tamanaha, 'A Concise Guide to the Rule of Law', St. Johns University School of Law, Legal Studies Research Paper Series # 07-0082, September 2007 (Tamanaha 2007), pp. 1-20; available at <www.ssrn.com> (last accessed 26 June 2013).

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development experts, and development organizations have defined the rule of law. A rich body of literature has thus developed on the rule of law. While the conceptual debate is complex, the scholarship has determined two conceptions of the rule of the law: first, 'thin' (or formal/narrow) and, second, 'thick' (informal/substantive/broader). The former is concerned with the manner in which the law is introduced, the clarity of its content, and the law being prospective.[42] The latter takes a broader view of the rule of law, addressing whether the law is just and good or unjust or bad. As will be discussed, substantive conception of rule of law seeks to create a link of the law and justice institutions with promotion of democracy, human rights, and development, creating a goal-oriented role. Both conceptions may be discussed in a greater detail.

1 Thin Conception

Dicey, who coined the phrase 'rule of law', may be said to have thought the rule of law as a thin or formal conception.[43] Dicey argued that no one is to be punished without a pre-existing law; only ordinary courts shall hear the cases, and government officials shall have no discretion to impose limit on individual liberty.[44] He further argued that all citizens are equal before ordinary law and that only ordinary courts should have jurisdiction over citizens.[45] Hayek, another pioneer theorist also favoured thin conception of the rule of law, defining the rule of law in the following words:

> Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced before-hand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstance and to plan one's individual affairs on the basis of this knowledge.[46]

The minimal characteristics of formal concept of rule of law are: "law must be set forth in advance (prospective), be made public, be general, be clear, be stable and certain and be applied to everyone according to its terms".[47] More precisely, Hayek summarizes three main features of the rule of law: "the laws must be general, equal and certain".[48]

As Tamanaha argues, both Dicey and Hayek had warned that the establishment of a social welfare state militates against the rule of law.[49] Dicey saw the threat in the form of expanding administrative discretion vested in government

42 *See* P. Craig, 'Formal and Substantive Conceptions of the Rule of Law', *Public Law*, 1997, p. 467.
43 A.V. Dicey, *An Introduction to the Study of Law of Constitution*, p. 110.
44 For elaboration of Dicey's views, *see* B. Tamanaha, *On the Rule of Law: History, Politics Theory*, Cambridge, Cambridge University Press 2004, p. 63 (Tamanaha 2004).
45 Tamanaha 2004, p. 64. *See* also B. Tamanaha, 'The History and Elements of the Rule of Law', *Singapore Journal of Legal Studies*, 2012, p. 232 (Tamanaha 2012).
46 F. Hayek, *The Road to Serfdom*, Chicago, University of Chicago Press 1944, p. 80.
47 Tamanaha 2007, p. 3.
48 Hayek, *The Political Idea of the Rule of Law*, Cairo, National Bank of Egypt 1955, p. 34.
49 Tamanaha 2004, p. 64.

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officials through laws, which ordinary courts could not review.[50] Nor were the courts competent to carry out a judicial review of administrative action owing to courts' lack of expertise in administrative matters.[51] Hayek, on the other hand, argued that in order to work efficiently, modern government needs to exercise discretion.[52] However, the exercise of discretion must conform to the rule of law's three general requirements of generality, equality, and certainty.[53] But Hayek's conception still remains to be thin in nature as he sees distributive justice, human rights, and democracy as antithetical to the rule of law.[54] Raz, another advocate of thin or formal conception of rule of law, argues:

> [T]he rule of law is just one of virtues which a legal system may possess and by which it is to be judged. It is not be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.

Raz further elaborates, "[i]t is said that the rule of law means that the government actions must be authorized by law".[55] In the words of Tamanaha 'thin' concept of rule of law "requires that government and citizens are bound by and act consistent to the law".[56] Tamanaha and Carothers have labelled this as 'rule *by* law'.[57] It follows that government itself (notably its officials) also must abide the law.

Lord Bingham explains 'thin' concept of rule of law, arguing that "all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts".[58] Two additional points are gleaned from Lord Bingham's statement: firstly, everyone should be entitled to the benefits of law, and, secondly, laws should be publicly applied in the courts. The second characteristic ensures transparency and predictability of law. It lends strength to the administration of legal justice and enhances public confidence in courts. A critical question, however, is that should the mere compliance of citizens and government functionaries with laws be seen as rule of law. Raz argues that "a legal system based on the denial of human right, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution...will be immeasurably worse... [though will be in] conformity to the rule of law".[59]

50 *Ibid.*, p. 65.
51 *Ibid.*, p. 67.
52 *Ibid.*, p. 71.
53 *Ibid.*
54 *Ibid.*
55 Raz, 'The Rule of Law and its Virtue', *in The Authority of Law*, Oxford, Clarendon 1979, pp. 211-229, at 213 (Raz 1979).
56 Tamanaha 2007, p. 3.
57 Tamanaha 2004, p. 92 (emphasis in original); T. Carothers, 'The Rule of Law Revival', *Foreign Affairs*, Vol. 77, No. 2, 1998, p. 95 (Carothers 1998).
58 L. Bingham, 'The Rule of Law', *Judicial Studies Institute Journal*, Vol. 1, 2008, pp. 121-144, at 124 Bingham 2008).
59 Raz 1979, pp. 225-226.

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Commentators argue that clarity, publicity, certainty, and prospectivity of law promote liberty as they enable individual to plan her activities in advance.[60] They are, however, divided on whether the rule of law is a moral good. Fuller was of the view that the formal rule of law is a moral good.[61] Raz argued that it is morally neutral. Depending on the intention of an individual, Raz argues that like a knife the rule of law could be used for a good or bad purpose.[62] Tamanaha argues:

> [F]ormal legality as moral in itself can have hazardous consequences for a populace...any moral evaluation of the law, any determination of whether it generates a moral obligation of compliance on the part of citizens, must also consider the moral implication of the content of the rules and their effects.[63]

2 Thick Conception

This brings our discussion to the informal or substantive (and broader) conception of the rule of law. In addition to the elements of formal conception, it adds diverse areas, such as human rights, development, and democracy, to the conception of the rule of law. Protection and promotion of individual rights is seen as the most common aspect of the substantive conception of the rule of law.[64] The individual rights theory is advanced by Dworkin. Dworkin argues that citizens have moral and political rights. These rights should be recognized in positive law. The recognition of these rights will enable them to be enforced by individual through a specific mechanism, such as judicial institutions. "The rule of law on this conception is the ideal of the rule by an accurate public conception of individual rights.It does not distinguish...between the rule of law and substantive justice".

Some scholars have taken issue with the role of judicial institutions (courts) and its impact on democracy. J. Waldron, for example, argues that citizens will show their concern with the fairness and integrity of the democratic process, not with courts, that grant individual rights to them.[65] Elaborating Waldron's view, Ringer argues that societal objectives contained in thick conception require democratic deliberation; judges and lawyer should not be given great powers to settle such "highly divisive question of moral importance".[66] Dworkin, on the other

60 J. Waldron, *The Concept and Rule of Law*, 2008, available at <www.ssrn.com/abstract=1273005>.

61 L.L. Fuller, *The Morality of Law*, 2nd revised edn, New Haven, Yale University Press 1969, p. 209.

62 Raz 1979, pp. 225-226.

63 Tamanaha 2004, p. 96.

64 *Ibid.*, p. 103.

65 J. Waldron, 'Rights and Majorities: Rousseau Revisited', *Liberal Rights*, 1993, pp. 417-418. *See* also J. Waldron, 'The Concept and the Rule of Law', New York University School of Law, Public Law and Legal Theory Research Paper Series Working Paper 8-50, *Georgia Law Review*, 2008, available at <www.ssrn.com>; 'The Rule of Law and the Importance of Procedure', New York University School of Law, Public Law and Legal Theory Research Paper Series Working Paper 10-73, 2010 (Waldron 2010).

66 T. Ringer, 'Development, Reform and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and Its Place in Development Theory and Practice (Note)', *Yale Human Rights & Development Law Journal*, 2007, pp. 193-194 (Ringer 2007).

hand, argues that judges and lawyers interpret the law handed down by legislature through a democratic process. Dworkin's rights theory faces another question: judges have their own subjective views.[67] Dworkin disagrees, arguing that judges apply the overarching political principle, which reflects the interest of the community. It follows that the court is also a political institution of a liberal state. Tamanaha comments that in a country where democracy is failing, the role of the judges assumes greater importance in furthering the political principles underlying the polity. Even the invalidation of law violating individual rights also supports democracy. This is very much true of Pakistan. The Islamic concept of state, protection of fundamental rights, and an independent judiciary are key salient features of Pakistan's 1973 Constitution. The judiciary has the power to strike down a law that infringes the Islamic character of the state and/or the fundamental rights guaranteed in the constitution. As Tamanaha argues, "judges' views will be shaped by the surrounding society and the legal culture".[68] This, however, necessitates that judges in Pakistan must have expansive knowledge and deep insight about complex issues underlying the rule of law. If judges lack such a capacity, they may not prove helpful in achieving the rule of law.

The rights theory is further supported by contemporary rule of law scholars. Lord Bingham argues that "the law must afford adequate protection of fundamental human rights".[69] Disagreeing with Raz, Lord Bingham argues that a "state which savagely repressed or persecuted sections of its people could not...be regarded as observing the rule of law".[70] The Universal Declaration of Human Rights (UDHR), 1948, states that "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". Commenting on thin conception of the rule of law, Tamanaha s that mere adherence to legal rules is something that one must be *wary* of:

> [W]hen the law enforces an authoritarian order, or when the law imposes an alien, or antagonistic set of values on the populace, or when the law is used by one group within society to oppress another, the law can be a fearsome weapon. Fidelity to the rule of law in these circumstances serves to enhance legally enforced oppression.[71]

Tamanaha makes two more very pertinent points while cautioning about the rule of law. First, in a situation explained above, when there is a clash between legal and social norms, the rule of law will be weak.[72] Second, the rule of law may lead to the 'rule of judges (or lawyers)', leading to 'judicialization of politics', or politi-

67 Tamanaha 2004, p. 106.

68 *Ibid.*, p. 107.

69 Bingham 2008, p. 131.

70 The importance of human rights in judicial education will be further discussed in the last section part of this article.

71 Tamanaha 2007, p. 18.

72 *Ibid.*

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cization of judiciary.[73] Both these cautions are significantly relevant to Pakistan. Pakistan's legal and judicial system is mainly a colonial legacy. There is a general perception that the law in Pakistan is an alien entity and does not reflect the social norm. The judiciary is also seen to be playing a highly politicized role. On the one hand, the judiciary appears to be playing an active role in social and economic development through public interest litigation.[74] On the other hand, the judiciary is seen as interfering in state's policy domain – an area which neither falls in the remit of its constitutional powers nor has got the expertise in policy making, implementation, and evaluation. These two cautions will be further examined in section D.

The fact, however, remains crucial that an independent judiciary is a basic building block of the rule of law. The minimum requirements of an independent judiciary, Tamanaha states, are "adequate material resources: functional buildings, competent staff, [and] access to legal resources, reasonable salaries, and job security".[75] This paper argues that in this seemingly inexhaustive list, competent staff creates a scope for comprehensive and state-of-the-art continuing judicial education to help establish rule of law. It further argues that in Pakistan, judicial education shall aim at a mix of thin and thick conceptions of the rule of law. Judicial education is also a variable of the rule of law reform pursued by development organizations. It is pertinent to examine how certain organizations define the rule of law from a development perspective.

3 *Definitions by International Organizations*

International organizations, such as the World Bank, the International Monetary Fund (IMF), the UNDP, and the Asian Development Bank (ADB), to name a few, have been using the rule of law as a principle goal of their development policies. Inspired and instructed by the philosophical debate on the rule of law, these organizations have also defined the concept. The definitions of these organizations seek to focus on practical implications. Abrief review of such definitions demonstrates that they reflect both thin and thick conceptions of the rule of law.

The World Bank emphasizes that rule of law is of fundamental importance for development. In order that the rule of law will prevail, the Bank sets out the following tests:

> (1) the government itself is bound by the law; (2) every person in society its treated equally under the law; (3) the human dignity of each individual is recognized and protected by the law; (4) justice is accessible to all. The rule of law requires legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy.[76]

73 *Ibid.*, p. 19.

74 *See* generally, S.A. Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf', *Law & Social Inquiry*, Vol. 35, No. 4, 2010, p. 985.

75 Tamanaha 2007, p. 19.

76 World Bank, 'Initiative in Legal and Judicial Reform', Washington DC, 2004, pp. 3-4.

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The UN has defined the ruler of law in several documents. A 2013 report of the Secretary General, for example, notes that "laws must be publicly promulgated, equally enforced and independently adjudicated and consistent with international human rights norms and standards".[77] To this, a 2004 report adds:

> [The rule of law] requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[78]

These two UN definitions, too, contain elements of both thin and thick conceptions. While the above-noted definitions by the World Bank and the UN reflect elements of thin conception, they add significant elements of thick conception. They are fair law, promotion of growth and elimination of poverty (the World Bank), and consistency with international human rights standards and participation in decision-making (the UN).

In a recent speech, the President of the ADB observed that the "[r]ule of law primarily refers to having a comprehensive and transparent framework of law by which all persons and entities must abide – including the government itself. The Rule of Law also means competent, reliable and fair enforcement of law".[79] This definition appears to focus more on thin rather than thick conception.

The EU does not offer any specific definition of the rule of law. Commentators argue that some EU officials do not think that a definition of the rule of law is desirable.[80] However, in its several policy documents, the EU has highlighted the objectives of its rule of law. Such objectives include concern for human rights, access to justice, an independent judiciary, fighting corruption, strengthening of democratic institutions, good governance, and a long-term goal of development.[81] The EU's definition is 'vague and inconsistent'. Nonetheless, it reflects 'thick' and 'substantive' conceptions.[82]

77 Report of the UN Secretary General, 'Strengthening and Coordinating United Nations Rule of Law Activities', A/68/213, p. 10.

78 Report of the UN Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', S/2004/616, p. 3.

79 Keynote addressed by ADB President T. Nakaoon 10 June 2013, available at <www.adb.org> (last accessed 16 May 2014).

80 O. Burlyuk, 'An Ambitious Failure: Conceptualising the EU Approach to Rule of Law Promotion (in Ukraine)', *The Hague Journal on the Rule of Law*, Vol. 6, 2014, pp. 26-46, at 27 (Burlyuk 2014).

81 L. Pech, 'Rule of Law as a Guiding Principle of European Union's External Action', *CLEER Working Paper Series*, 2012; available at <http://ssrn.com/abstract=1944865>. "The World Justice Project® (WJP) is an independent, multidisciplinary organization working to advance the rule of law around the world. The rule of law provides the foundation for communities of opportunity and equity – communities that offer sustainable economic development, accountable government, and respect for fundamental rights". *See* complete information about the World Justice Project at <http://worldjusticeproject.org/> (last accessed 14 July 2014).

82 Burlyuk 2014, p. 27; *Ibid.*, p. 14.

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001004

According to the World Justice Project (WJP), the rule of law is a system in which:

> (1) the government and its officials and agents are accountable under the law; (2) the laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property; (3) the process by which the laws are enacted, administered, and enforced; is accessible, fair, and efficient; and (4) access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[83]

Like the World Bank's and the UN's definitions, WJP's definition includes protection of human rights. Of great significance in the latter is a reference to the number and adequate resources of the judiciary and a proper reflection of the community in the judiciary. In 2010, the WJP developed a nine-point rule of law index: limited government, absence of corruption, order and security, fundamental rights; open government, effective regulatory enforcement, access to civil justice, effective criminal justice, and informal justice. Building on the theoretical foundations of the rule of law concept, the WJP sought to explore "the ingredients of the rule of law in terms of specific outcomes that are informative of the extent to which these principles are observed in practice and that policy makers might want to influence".[84] Many commentators have noted that adding too many things to the rule of law agenda ultimately means nothing at all.[85] Examining the World Bank's rule of law reform efforts, one commentator has noted that the major difficulty is how to translate the rule of law as a philosophical notion into a practical reality in developing countries.[86] In order to overcome this challenge, a law and development movement was started in the 1960s and 1970s.

II Law and Development Movement

The movement was started by American legal academics. Seeking to use law reform as an instrument of development in developing countries, the movement focused on bringing about a change in law and justice institutions. The movement carved a central role for lawyers and judges – as social engineers – to bring about a

83 J.C. Botero & A. Ponce, 'Measuring the Rule of Law', The World Justice Project-Working Paper Series, Working Paper No. 001, p. 2.

84 *Ibid.*

85 Carothers 1998, p. 3; Ringer 2007, p. 193.

86 G. Barron, 'The World Bank & the Rule of Law', Development Studies Institute, London School of Economics and Political Science, 2005, Working Paper # 05-70, p. 3; available at <www.lse.ac.uk/depts/destin> (Barron 2005).

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social change.[87] It proceeded on the assumption that the lawyers and the judiciary in developing countries are poorly educated. Thus, reform in legal education was seen as the starting point of the movement. In order to professionally strengthen the bar and bench, training programmes were organized for judges and lawyers. The guiding principle was to enable judges and lawyers to realize the role of law in the process of development.

The movement could run only for a few years. Its proponents found certain weaknesses. First, the movement lacked a theory and was "more professional and practical".[88] Second, the movement presupposed that developing countries are following a liberal political tradition much on the lines of the western democracies. In reality, developing countries reflected social stratification and class cleavage.[89] In developing countries, the state is not "the primary locus of social control", but often overwhelmed by "tribe, clan and local community".[90] Third, the movement visualized a uniform legal model for all countries.[91] It ignored that law varied from country to country. Fourth, courts in developing countries are "neither very independent nor very important".[92] It follows that while in theory, developing countries have independent judiciaries, in most of these countries, for resolution of private disputes, people usually resort to informal dispute resolution mechanisms. Fifth, the movement visualized "a strong, relatively centralized state" as an agent of reform.[93] The movement failed to anticipate that "when the state is captured by authoritarian groups...law will become an instrument of those who control and set the goals of the state".[94]

III Revival of the Law and Development Movement

With the fall of communism, since the 1990s, the law and development was revived. The greatest challenge was how to ensure proper functioning of a market economy. International development organizations envisioned a two-pronged rule of law programme: first, "protection for property right; third party enforcement of contracts; and a stable, crime-free environment".[95] Second, the rule of

87 *See* D.M. Trubek & M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review*, Vol. 4, 1974, pp. 1062-1102 (Trubek & Galanter 1974). Other relevant literature includes D.M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', *Yale Law Review*, Vol. 82, No. 1, 1972, pp. 1-50; A. Watson, 'Legal Transplants and Law Reform', *The Law Quarterly Review*, Vol. 92, 1976, pp. 79-84.

88 Barron 2005 at. 6; *See* also L.M. Friedmann, 'On Legal Development', *Rutgers Law Review*, Vol. 24, 1969, pp. 11-64; J.H. Merryman, 'Comparative Law and Social Change: On the Origin, Style, Decline & Revival of the Law and Development Movement', *The American Journal of Comparative Law*, Vol. 25, 1977, pp. 457-491.

89 Trubek & Galanater 1974, p. 1080.

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*, p. 1081.

93 *Ibid.*, p. 1079.

94 B. Tamanaha,'The Lessons of Law and Development Studies', *American Journal of International Law*, Vol. 89, 1995, pp. 470-486, at 474.

95 Barron 2005, p. 9; D.M. Trubek, 'The Rule of Law in Development Assistance: Past, Present and Future', *Occasional Papers*, CALE, September 2004.

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law promotes "democracy, good governance and the protection of basic human right".[96] In the 2004 edition of its Initiatives in Legal and Judicial Reform, the World Bank has noted that in recent years, it has financed some 600 projects of legal and judicial reform.[97] What are the contents of the reform? Calling it reform menu, Carothers has divided it into three types. The first type is reforming the laws themselves. It seeks revising the laws by eliminating their antiquated provisions, the focus being on effectiveness of corporate law and criminal law. The second type of reform concentrates on the competency, efficiency, and accountability of the law and justice institutions, such as judiciary, bar members, the police, prosecutors, public defenders, and prison staff. It also includes training and salaries of judges, revitalizing legal education, and encouragement of alternate dispute resolution mechanism. The type three reforms seek to increase government's compliance with law. Merit-based judicial appointments and non-interference in judicial decision-making may help in securing judicial independence. Carothers aptly suggests that success of such reforms depends on sincere leadership and change in values and attitudes.

IV The Rule of Law and Judicial Education

As noted above, legal education and training was the starting point of the old law and development movement. It is also all the same important in the post-1990s law and development movement. Carothers has included it in the type two reform of the menu referred to above. Most rule of law reform projects of the World Bank support training of all justice sector institutions, including courts and lawyers.[98] In addition to development practitioners, legal professionals, too, recognize the significance of judicial education in the rule of law. In his address to a 2011 conference on the future of judicial education, the Hon Wayne Martin, the Chief Justice of Western Australia, has explored some basic links between judicial education and the rule of law. While expressing his thoughts, Justice Martin referred to a 2009 conference on judicial education, in which a Pakistani judge said that during Pakistan's judicial crisis in 2007, the people of Pakistan raised in defence of the independence of judiciary. Justice Martin's views, therefore, are of great relevance to the relationship of judicial education with the rule of law in Pakistan – the main core of this article. A brief description of Justice Martin's arguments seems to be instructive.

Justice Martin's proposition is that judicial independence is critically dependent on public confidence in the judiciary, which, in turn, depends on a number of

96 *Ibid.*

97 World Bank, 'Initiatives in Legal and Judicial Reform', Washington DC 2004, p. 3.

98 World Bank, 'New Directions in Justice Reform', Washington DC 2012; available at <www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194_20120906024506/Rendered/PDF/706400REPLACEM0Justice0Reform0Final.pdf> (accessed 4 June 2014).

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factors.[99] First, "judges doing our jobs well and efficiently". Second, judges "being sensitive to the needs of the communities which we serve and upon our ability to effectively communicate to those communities, what we do and why.[100] Third, judges being sensitive to the social context in which we perform our duties and it require us to perform them in a way which is relevant to the communities which we serve".[101] Here, by linking judicial duties with the community which the judges serve, Justice Martin come closer to Dworkin. As discussed in Section C, Dworkin has argued that in a democratic society, judges embed the *grundnorm* of a political system while interpreting the law.

Justice Martin rather dexterously distinguishes the rule of law in the developed countries from the developing world, saying that in Australia, judges take the rule of law for granted. Elsewhere, notably, in the developing countries, judges are not lucky enough to have that luxury. Justice Martin's view resonates with that of Tamanaha; the latter has argued that judges' role become more important in a society where democratic institutions are weak.[102] As will be seen in the next part, Pakistan provides a good case in point. Justice Martin aptly advises that the safety, stability, and economic prosperity of the people across the world depend on the rule of law.[103] He maintains that "tyranny, oppression and terrorism can only be adequately met by the rule of law".[104] While an independent judiciary is the guarantor of the rule of law, it is pertinent to see how such a judiciary is to be established and preserved. Arguably, judicial education plays a crucial role in securing judicial independence. Perhaps, Justice Martin's views are too simplistic to connect judicial education with the rule of law, notably in the context of a developing country like Pakistan, with broader implications for peace, social order, and economic development within and outside that country. Justice Martin does not address these issues. This article will strive to explore the broader contours of the concept of the rule of law vis-à-vis some relevant themes of judicial education, using Pakistan as a case study. Before proceeding to the case study in the next part, it seems pertinent to have a brief critical analysis of the rule of law reform and development debate.

V The Rule of Law and Development: A Critical Analysis

Optimism prevails about the rule of law as a philosophical notion and the rule of law as a reform programme. The latter – the rule of law reform (also called the rule of law orthodoxy) – has attracted some criticism, as well. The rule of law orthodoxy refers to ideas, activities, and strategies aimed at promoting the rule of

99 Justice W. Martin, 'Future Directions in Judicial Education', Address delivered at the Supreme Court and Federal Court Judges', Conference 2011, Wellington New Zealand, pp. 3-4 (Martin 2011). Available at <www.supremecourt.wa.gov.au/_files/Future_Directions_in_Judicial_Education_January_2011_NZ.pdf> (Accessed 13 August 2013).

100 *Ibid.*

101 *Ibid.*

102 *See* Section C.

103 Martin 2011, p. 3.

104 *Ibid.*

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001004

law as a means of economic development, good governance, and poverty reduction.[105]

First, lack of a theory was the main attack on the old law and development movement. A critical study of the current law and development movement would reveal that it, too, lacks a theory. Although the current development practice (particularly that of the World Bank) appears to be well informed by a sound academic discourse on the rule of law, the reform seems to be driven by expediency rather than a theory. Articulating the need of a cogent theory, Armytage argues that rule of law reform shall promote justice (legal as well as distributive justice).[106] Second, Armytage has pinpointed that there is no well-founded consensus on how to evaluate success of the rule of law reform.[107]

Third, the rule of law reform lacks social norm. Tamanaha has argued that incompatibility between social and legal norm tends to weaken the rule of law.[108] Rosa E. Brooks has taken this built on this view, arguing that "the rule of law is fundamentally an issue of norm creation" – which development community fails to acknowledge.[109] While in its substantive conception, "the rule of law *is* culture", it is essential for the law reform pundits to know how cultures are formed and changed.[110] This may necessitate ascertaining, firstly, the cultural conditions vis-à-vis law and, secondly, the circumstance in which law is culturally accepted as legitimate and enforced and, thirdly, the role of 'outsiders' in helping create 'those conditions in a given society' (reflecting on when and how).[111]

Looking at the legal and judicial institutions of the developing world in the perspective of Rosa's view, two points may be noted. First, the legal and judicial institutions in those countries are still mostly ingrained in colonial legacy. While the ruling elite of those countries have been successfully maintaining the status quo, they have rather badly failed to develop to make those institutions efficient and effective. Second, dejection against colonial rule still persists in those countries. The efforts of the rule of law reform are seen as neocolonialism and thus resisted. Such efforts clash with the local cultural norm and are bound to fail.

105 S. Golub, 'Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative', *Democracy and the Rule of Law Project*, Working Paper # 41, Carnegie Endowment for International Peace 2003, p. 7. Argues that the development practitioners need to understand 'the complex processes by which cultures are created and changed' and to answer the 'basic questions about how and when societies change, what role (if any) law can play such cultural change...and how and when outsiders (or insiders, for that matter) can promote norm change in particular direction' (footnote omitted).

106 L. Arymtage, *Reforming Justice: A Journey to Fairness in Asia*, *ibid.*, p. 2, argues that, firstly, justice in judicial context is what is known as justice according to law, administered by court through application of positive law. Secondly, 'developmental (or distributive) justice' means justice in broader sense reflecting on social, political, and economic well being of the people.

107 *Ibid.*

108 *See* Tamanaha 2007, p. 10.

109 R.E. Brooks, 'The New Imperialism: Violence, Norms, and the "Rule of Law"', *Michigan Law Review*, Vol. 101, No. 7, 2003, pp. 2276-2339, at 2285 (Brooks 2003).

110 *Ibid.*, pp. 2285-2286. From culture, Brooks means 'the widely shared myths, assumptions, behavioral patterns, customs, rituals, and social and historical understanding of a group.' *See* at 2286.

111 *Ibid.*, pp. 2286 and 2323.

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Rosa further argues that the core western concepts of the rule of law will not naturally flow from formal rule of law structure given the differences, including elements of resistance to change.[112] As will be seen in parts IV and V, judicial education shall take due consideration of this view.

Fourth, akin to the cultural perspective discussed above, is the lack of knowledge of foreign legal and development practitioners about the local culture, society, and legal system. While there has been growing emphasis on promoting the local dispute resolution mechanism (*e.g.* the alternate dispute resolution (ADR)), those are piecemeal and, in some respect, incompatible with international standards, such human rights.

D Judicial Education in Pakistan and Its Challenges

In the previous part, the significance of judicial education was discussed in the perspectives of the rule of law theory and the rule of law reform practice. In this part, the article proceeds to contextualize the Pakistan case study in both perspectives. It traces the constitutional mandate of judicial education in Pakistan, national efforts, and international donors' rule of law projects, including the current ones, aimed at improving judicial education and an assessment of such efforts and projects. The main focus of this part is to explore challenges to judicial education vis-à-vis the rule of law.

In this and the next part, judicial competency (judges doing their job well and efficiently) through continuing judicial education will be seen as serving the thin conception of the rule of law. It is argued that judicial competency plays an intrinsic role in ensuring predictability, generality, certainty, and equality. Judicial education is also understood as capacity building of all justice sector personnel. Second, judicial education is seen as playing an instrumental role in contributing to the thick conception of the rule of law, involving wider issues, such as human rights, development, and democracy (judges being sensitive to community interests). Continuing judicial education shall help justice sector personnel understand the complex nature of the twin factors and their horizontal (within and across the justice sector institutions) and vertical implications (the gradual upward benefits to the society as a political ideal) for the justice services.

I Constitutional Mandate

The constitutional mandate for judicial education could be traced in three sets of provisions in Pakistan's 1973 Constitution: the preamble, the fundamental rights and the principles of policy, and the provisions creating the judicial branch of the government.[113] First, the preamble articulates a wish list of objectives, which include, among others, guarantees citizens fundamental rights and equality

112 *Ibid.*, p. 2322.

113 *See* the 1973 Constitution of Pakistan, Part IV-The Judicature, Arts. 175-212; Part II – Fundamental Rights and Principles of Policy, Arts. 8-40; Preamble (Objectives Resolution).

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before law, protecting minorities, and establishing an independent judiciary.[114] Second, the constitution recognizes twenty-two fundamental rights (fair trial, information, and education, as the latest additions). Under the principles of policy, the state has the obligation to provide expeditious and inexpensive justice.[115] Third, the constitution creates a two-tier judiciary: first, higher judiciary, comprising the Supreme Court, High Court for each province, and the Islamabad Capital Territory and a Federal Shariat Court, and, second, subordinate courts (called District Judiciary), which works under the control and superintendence of provincial high courts.[116] The judiciary plays a significant role in the interpretation and implementation of Islamic law, fundamental rights, and municipal laws related to the principles of policy. The District Judiciary, which is the backbone of the judicature, plays a key role in helping the state fulfil its obligations in respect of many fundamental rights reflected in the national legislation. In order to help the state fulfil its constitutional obligations and implement national laws effectively, judiciary must be willing and fully capable to deliver its services and sensitivity to the needs of the community by understanding the deeper issues of the rule of law. To this end, judicial education is the need of the judiciary as a whole and of all justice sector institutions.

The need of judicial education in Pakistan was recognized as early as in 1958,[117] after a decade of independence. The First Law Commission (1958-1959) recommended an intensive practical training through attachment of new recruits with the courts of senior judges. The Second Law Reforms Commissions (1967-1970) recommended the establishment of a Judicial Academy for civil judges and magistrates.[118] However, it took about 18 years to have a national judicial school. The Federal Judicial Academy (FJA) was established in 1988 and given an autonomous status in 1997. Sind was the first province that established its Academy as early as 1993. Punjab set up its Academy in 2007, followed by Baluchistan in 2010 and the KP province in 2012. The academies of Punjab, Baluchistan, and KP, being recently created, will take time to be fully established judicial training schools. It follows that three of Pakistan's five judicial training schools can capitalize on the emerging legal scholarship and diverse experiences in judicial education to chalk out a comprehensive educational policy aimed at

114 *Ibid.* The preamble of Pakistan's constitution defines what may be called a modern Islamic state. One of its paragraphs notes that the state has to observe "the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam", enabling Muslims to order their lives according to the teachings and requirements of Islam.

115 *Ibid.* The principles of policy further require the state to ensure full participation of women in national life, create just and humane conditions of work, ensure that women and children are dealt with according to the laws which have been enacted for their rights, eradicate social evils like prostitution and gambling and protect minorities.

116 District is an administrative unit. The judges of the District Judiciary are District and Sessions Judge, Additional District and Sessions Judge, Senior Civil Judge, and Civil Judge/Judicial Magistrate. A District and Sessions Judge exercises administrative control over all as well as judicial control over the latter two categories of judges.

117 *See* the Federal Judicial Academy, Islamabad's website: <www.fja.gov.pk> (accessed 15 March 12).

118 *Ibid.*

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contributing to the rule of law. As will be shown in the next part, the KP Judicial Academy has been able to gain some initial successes by benefitting itself from latest knowledge and practice.

II Contemporary Efforts to Improve Judicial Education

1 National Efforts

Policy-level interest in judicial education is growing since the last few years. Certain policy measures are discussed below. First, the 2009 National Judicial Policy (NJP), which mainly focused on quick disposal of cases, also sought to improve judicial education by upgradation and activation of judicial academies to arrange pre- and in-service training of the judicial officers and staff and regular interaction of judges for experience sharing through seminars and workshops at provincial and national levels.

Second, Pakistan's judicial educators realized that the judicial academies have almost the same mandate for imparting pre-service orientation as well as in-service refresher training to judges, law officers and court staff, and the personnel of all associated departments. This becomes clear from a study of the statutes of all five judicial academies.[119] The statutes of only two – the Punjab and KP academies – provide for coordination with other academies, including the FJA and universities. All the academies share a common mandate for publication of research. In order to do away with the duplication of mandate with regard to judicial training, the FJA commissioned a research study in 2010.[120] The study examined the mandates of all four judicial schools, existing at that time (the KP Academy was not then in existence), and compared them with those of Canada, India, Spain, and the United States. To reduce the overlapping, the study found the Indian experience as an appropriate example of the best practice. In India, a similar problem was resolved by developing a National Judicial Education Strategy (NJES) in 2006. The study has proposed the formation of a Committee that may coordinate academic and administrative activities of the judicial academies. The proposed Committee, which is yet to be constituted, may address three interrelated objectives: allocation of work between the judicial academies to do away with duplication, systematization of the process of making judges available for training, and assessing the training needs of the judges.

Third, in 2011, the Sind Judicial Academy (SJA) organized a summit of all judicial academies.[121] It appears that the summit was an effort to explore challenges to judicial education in Pakistan and to suggest measures for addressing

119 *See* the Federal Judicial Academy, Act 1997 (section 4), the Sind Judicial Academy, Act 1993 (section 4), the Punjab Judicial Act, 2007, the Baluchistan Judicial Academy, Act 2010 (section 4), and the Khyber Pakhtunkhwa Judicial Academy, Act 2012 (section 4 (a)).

120 S.B. Mirza *et al.*, 'Research Project – I', *Streamlining the Overlapping Mandates of Judicial Academies in Pakistan*, Final Report, Federal Judicial Academy, Islamabad 2010, pp. 37-38 (with author on file).

121 While the KP Judicial Academy was not in existence at that time, a team led by the then Chief Justice of the Peshawar High Court participated in the summit. The Chief Justice also spoke on the occasion and proposed that judicial training should aim at benefit to the citizens.

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them.[122] In his inaugural address, the Chief Justice of Pakistan expressed the hope that the summit will critically examine the role of judicial academies "to make sure that they meet the present needs of the societal problems" [sic].[123] The summit explored the following key challenges:

- Lack of a national judicial educational policy
- Training needs assessment
- Curriculum development
- Funds and sustainability
- Research (on court cases and wider academic issues)
- Infrastructure (lack of proper building and facilities)
- Coordination among the academies and with other academic institutions[124]

Fourth, in recent years the Law and Justice Commission of Pakistan has organized a number international judicial conference. The 2011 conference included a theme on legal education. The 2012 and 2013 conferences also added judicial education to legal education. The group on legal and judicial education at 2012 conference recommended that judicial education should be refocused on its most important objective which is sensitizing judges and other associated professionals to the pain of the litigant and instilling in them respect for popular wisdom (a view that the Chief Justice of the Peshawar High Court underscored at the summit of the SJA[125]); time allotted for training should be increased; a national standard of judicial education may be devised; refresher courses may be organized; and serving judicial officer may be posted to academies.[126] Key recommendations of the 2013 conference included training needs assessment, prioritizing research and publication in speedy and effective justice and judicial reform policy, professional development of judges 'to keep them abreast of change', and involvement of sitting and retired judges as faculty members.

2 *International Support*

The Asian Development Bank (ADB), under its rule of law reform programme, sought to help Pakistan address the issue of judicial reform.[127] It funded a USD 350m reform – Access to Justice Program (AJP). The AJP was part of Pakistan's

122 *See* <www.sja.gos.pk/JAS/summit/summit.html> (accessed 20 July 2013).

123 Key Note Address of the Chief Justice of Pakistan, at <www.sja.gos.pk/JAS/summit/summit.html> (accessed 20 July 2013).

124 P.A. Chawla, 'Challenges Faced by Judicial Academies in Strengthening Judicial Education', available at <www.sja.gos.pk/JAS/summit/summit.html> (accessed 20 July 2013).

125 Justice E.A. Khan, 'The Challenges and Way Forward in Relation to the Judicial Academy', available at <www.sja.gos.pk/JAS/summit/summit.html> (accessed 20 July 2013). Justice Khan argued that "the trainings should be designed in such a manner to address the problems of the common man. The challenge is not to inform the trainees but to polish their personalities in such a manner that they apply the theory for benefit of public. An efficient judicial officer might know the theory, the procedure and technicalities of a law but how to effectively resolve the collective problems related with administration of justice and how to give relief to the individual is a far cry".

126 Report on International Judicial Conference, 2012, Islamabad, Pakistan, p. 68.

127 *See* L. Armytage, 'Judicial Reform in Asia Case Study of ADB's Experience: 1990-2007', *Hague Journal on the Rule of Law*, Vol. 3, 2011, p. 70, at 72.

Poverty Reduction Strategy Paper (PRSP), 2001.[128] The PRSP linked AJP to the rule of law:

> The Government recognizes that judicial, legal and police reforms are essential to establish the rule of law and enforcement of contracts that will stimulate economic growth and encourage private investment—both local and foreign.[129]

It was the first donor intervention in Pakistan's justice sector. Earlier, as many as eight local reform commissions were constituted.[130] But those were failed for several reasons: piecemeal, narrow and limited in scope, repetitive, and lacking in implementation.[131] Comprehensive reform was thus needed. The AJP was based on extensive research studies conducted by the ADB.[132] The AJP was basically a pro-poor programme, which addressed the issues of vulnerability, access to justice, and entitlements.[133] Linking justice to poverty, the AJP justified the creation of an enabling environment for improving the delivery of the justice services to the vulnerable poor. The AJP underlined the need of in-service training. Various capacity building programmes were conducted, notable among them, were case management techniques, training courses on gender sensitization, and training-of-trainer programme on curriculum development for the faculty members of the Federal Judicial Academy (FJA).

128 *See* Government of Pakistan, 'Accelerating Economic Growth and Reducing Poverty: The Road Ahead', *Poverty Reduction Strategy Paper*, Ministry of Finance, December 2003, para. 1.1. Text available at <www.moe.gov.pk/prsps_03.pdf> (last accessed 24 March, 2007) [Pakistan PRSP]. Judicial reforms were part of the governance reforms titled "Pillar Two: Improving Governance and Devolution." The PRSP links judicial reforms to the governance issues. The government acknowledges the governance crisis and proposes to address this issue in different ways, such as, among others, devolution of power to the grass roots level, improved access to justice, and participation in decision making process, transparency and accountability.

129 *See Ibid.*, para. 5.106.

130 Those reform were: 1) the Law Reform Commission of 1958, (2) the Law Reform Commission of 1967-1970, (3) the Hamood-ur-Rahman Commission of 1974, (4) the Law Commission for Recommending Measures for Speedy Disposal of Civil Litigation of 1978, (5) the Secretaries' Committee of 1979, (6) the Salahuddin Ahmad Committee of 1980, (7) the Committee on Islamisation of Laws and Establishment of Qazi Courts of 1980, and (8) the Commission on the Reform of Civil Law of 1993.

131 Siddique 2012, p. 24.

132 They were ADB, 1997, *Technical Assistance to the Islamic Republic of Pakistan for Strengthening Government Legal Services an Subordinate Judiciary*, Manila; 1998, *Technical Assistance to the Islamic Republic of Pakistan for Legal and Judicial Reform Project*, Manila; 2000, *Technical Assistance to the Islamic Republic of Pakistan for Strengthening Institutional Capacity of Legal and Judicial Reform*, Manila; 2001, Report And Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Program, Manila.

133 The AJP was part of the governance reforms of Pakistan's Poverty Reduction Strategy Papers, 2001.

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III An Assessment of Contemporary Efforts

A critical assessment of these contemporary efforts seems pertinent to explore whether they are likely to move forward and with what implications for strengthening the instrumental role of judicial education for the rule of law in Pakistan. A fundamental shortcoming of all contemporary efforts is that they lack a vision for judicial education in Pakistan. The suggestion of the 2012 judicial conference, for example, that judges should be sensitized to the pain of the litigant, is not enough as it is absurd and general. As observed in Section C (Thick Conception), Tamanaha has argued that rule of law promoters have to be cautioned about two aspects: first, clash between social and legal norm and, second, judicialization of politics. As regards the former, the state itself has to respect and obey law[134] (discussed in Section C). Next, the state, and not the judiciary alone, has to undertake measures aimed at mainstreaming respect for law in the cultural fabric of the society. It has to be ensured that law crops up from the soil and represents the views of the people of the soil, responds to their expectations, and guides the behaviour of the people. Indeed, this is a complex process and requires an unflinching political will of the state, in the first instance.

As regards the latter, 'judicialization of politics' or politicization of judiciary tends to harm the rule of law. The reason is that it leads to the rule by lawyers and judges. Arguably, contemporary efforts are failing to pay heed to these two cautions in their efforts to establish the rule of law in Pakistan.

For two reasons the NJP makes minimal contribution to the 'thin' conception of the rule of law. First, it focuses on time-bound disposal of cases. In other words, it emphasizes efficient case management. Second, the NJP's treatment of judicial education is very general and vague. While judicial academies are already functioning (activated), it is not clear what is meant by the word up-gradation of such academies. Similarly, the idea of conducting seminars and workshops at the national and provincial level, for the purpose of experience sharing, is not followed up regularly. Since 2009, with exception of international judicial conference, no such seminar has ever been organized. Case and court management techniques necessary for a time-bound disposal plan are not included in the themes of international judicial conferences. Its inclusion in the conference would have created opportunity for academic discussion with likely implications of practical importance.

The study on streamlining overlapping mandates is timely as well as enlightening, timely for the reason that two provinces (Baluchistan and KP) have established their academies very recently and enlightening because they may prove helpful in steering judicial education in the right direction through coordination and cooperation among all the academies of the country. However, the scope of

134 *See* Carothers 1998, p. 4. Argues that "[t]he primary obstacles to [rule of law] reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure. Even the new generation of politicians arising out of the political transitions of recent years, are reluctant to support reforms that create competing centers of authority beyond their control".

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the study was very limited: the extent of the overlaps in the mandate of the academies and searching ways to minimize them. On balance, project II of the study makes a few very important suggestions. They are a mechanism of in-court training to overcome the difficulty of sparing judges for formal academy-based training, extension of teaching methodology from conventional lecture-based learning, focus on improvements in writing skills and the use of computers, incentivization of training (linking training to promotions of judges), and focus on research.[135] The study may be assessed as having the potential to contribute to the 'thin' conception of the rule of law.

The SJA's 2011 summit has made two important contributions; both to thin and thick formulation of the rule of law. First, the summit was able to score out key challenges to judicial education – an area that may thinly contribute to the rule of law. The summit was the first serious effort of a diagnostic nature. Indeed, the challenges noted in B.1 specify the areas in which judicial education should work, at least, as a starting point on the long path of improvement, leading to contribution to the rule of law.

Second, the expectation of the Chief Justice that judicial education can ensure a solution of 'societal problems'. A critical look at this statement may show that the services of the judiciary are and should not be a panacea for all social problems in Pakistan. Arguably, the positive element embedded in this statement is that judicial competency may serve the purpose of justice as a public good. In other words, the statement appears to use judicial education as an instrument to 'thicken' the conception of the rule of law.

The international judicial conferences (particularly those held in 2012 and 2013) appear to have failed. First, some recommendations, such as conducting of training needs assessment and research, though are concrete, were modestly pursued by the LJCP.[136] Second, the recommendation of the 2011 research studies – on constituting a Committee for devising a national judicial educational policy – was not put on the agenda of the conferences. Third, the recommendation of the 2012 conference that judicial education should seek to sensitize judges to the pain of common litigant is general and vague. This recommendation requires formulation of some common measurable indicators. Either the judicial academies should have worked on it or the 2013 conference should have had a follow-up effort.

As far the AJP, it is evident from the relevant statement of Pakistan's 2001 PRSP, reproduced in B.2 that the AJP was apparently a rule of law support programme. It, however, linked the rule of law with development. The implications of the AJP for the rule of law and judicial education appear to be two-pronged. First, the AJP stresses on the need for judicial training. However, its approach remained thin as it sought to engage with the FJA only and that too in areas of curriculum development and gender sensitization. An AJP commentator has

135 S.B. Mirza *et al.*, 'Research Project – II', *Some Observations on the Problems Facing Judicial Education in Pakistan*, Federal Judicial Academy, Islamabad 2010, pp. 4-9.

136 In early 2014, the LJCP has sent a letter to judicial academies for conducting a training needs assessment exercise.

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noted that substantive training needs both pre-service and on job are yet to be addressed.[137] In its completion report, the ADB itself has admitted:

> [T]he the FJA continues to lack a systematic training program and sufficient capacity to undertake comprehensive judicial training...the judiciary needs to formally recognize the training requirements.[138]

This contribution confined to capacity building may be termed as thin in the context of the rule of law.

Second, AJP focused on economic growth, seeking to address poverty alleviation, through, inter alia, access to justice. Some commentators argue that the AJP has positive impact on entrepreneurship.[139] However, the AJP's contribution to human rights is not explicit. There is a growing debate about mainstreaming human right into the PRSPs.[140] The UN's OHCHR published certain principles and guidelines for a human rights-based approach to poverty reduction strategies in the year 2001. Among them guideline # 8 relates to the poor's right to equal access to justice through a PRSP. As observed above, the AJP was principally aimed at promoting economic growth in Pakistan. Thus it has no visible link to human rights. However, despite this some similarities have been found.[141] For example, the importance of the right of equal access to justice explained in the guideline is compatible with the rationale of the AJP. According to the former, income and capability poverty creates impediments in gaining access to courts. The latter sees vulnerability as lack of access to social, political and economic assets. Similarly, the scope of the former includes a range of procedural rights (for example, equal protection of law and fair trial); that of the latter includes govern-

137 L. Armytage, 'Pakistan's Law & Justice Sector Reform Experience-Some Lessons', *Law, Social Justice & Global Development*, Vol. 2, 2003, pp. 1-10. For further critical analysis of the AJP, *see* F.S. Khan, 'The Way Forward: Access and Dispensation of Justice', *SDPI (Sustainable Development Policy Institute) Research and News Bulletin*, Vol. 11, No. 2, March-October 2004, pp. 17-21, at 18, available at <www.sdpi.org/help/research_and_news_bulletin/march_Oct_2004/bulletin_pdf> (accessed July 16, 2007).

138 ADB, 'Pakistan: Access to Justice Program', Completion Report, December 2009, p. 9.

139 M. Chemin, 'The Impact of Judiciary on Entrepreneurship: Evaluation of Pakistan's "Access to Justice Programme"', *Journal of Public Economics*, Vol. 93, No. 1, 2009, pp. 114-125, examined cases decided by 875 judges between 2001-2003, in light of the AJP's case management techniques, which showed 25 percent increase in disposal rate.

140 *See*, for example, G. Nankani *et al.*, *Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?*, pp. 475-497and F. Stewart & M. Wang, 'Poverty Reduction Strategy Papers within the Human Rights Perspective', *in* P. Alston & M. Robinson (Eds.), *Human Rights and Development: Towards Mutual Reinforcement*, Oxford, Oxford University Press 2005, pp. 447-474; OHCHR, 'Human Rights and Poverty Reduction: A Conceptual Framework', New York/Geneva, United Nations 2004; F. Stewart & M. Wang, *Do PRSPs Empower Poor Countries and Disempower the World Bank or Is It the Other Way Round?*, Queen Elizabeth House Working Paper No. 108, p. 2, available at <www3.qeh.ox.ac.uk/RePEc/qeh/qehwps/qehwps108.pdf> (last accessed 24 March 2007).

141 K. Iqbal, *The Right to Development in International Law: the Case of Pakistan*, London/New York, Routledge 2009. *See* chapter 8, which examines the AJP in the context of the right to development, p. 231.

ment's obligation to provide security and ensure equal protection to all, particularly, the poor.

The thick rule of law contribution of AJP is driven by economic development. However, it also contributes to human rights despite lack of a visible connection. For the sake of convenience, the table below sums up the contributions of the rule of law reform initiatives to judicial education. As the AJP moved towards its conclusion, it faced two great challenges.

IV Challenges to the AJP

While the AJP had just concluded in 2008, two unexpected events turned the tide set by the AJP. First, on 3 November, 2007, the Chief Justice of Pakistan (Justice Iftikhar Choudhry) and some 60 other judges of the superior judiciary were dismissed.[142] Second, in 2007 certain non-state actors, notably, the Taliban, launched an insurgency in the KP's northern district of Malakand division. While the dismissal of the judges triggered unprecedented protests by the lawyers and civil society, the protests mainly remained peaceful. The Taliban insurgency, however, brought unprecedented death and destruction in Malakand.A detailed analysis of the reasons for the insurgency is out of the scope of this article. However, one key reason, not only advanced by the militants, but also admitted by all, rather publicly, was the failure of the state's local institutions to efficiently deliver basic services to the people. Arguably, it would be wrong to attribute inefficiency to the local judiciary alone. The insurgents put in place a parallel administration, particularly, police stations and courts. They prevented women from attending schools and doing jobs in public and private organizations.

Both these events have profound impact on the AJP reform as well as on the rule of law. Firstly, the public confidence in the judiciary, the AJP intended to restore, was seriously undermined. Secondly, a bleak response of the law and justice institutions to the crisis and the setting up of a parallel legal and judicial system by the insurgents had a rather retarding impact on the AJP reform. The insurgents' strict prohibition of women's appearance in the public, notably, for the purpose of education and employment characterized a serious impact on women's rights, in particular, the rights of life, employment, education, and

142 On 09 March 2007, President Musharraf sent a reference to the Supreme Judicial Council, against Iftikhar Muhammad Choudhry, the Chief Justice of Pakistan. In the reference, numerous allegations of abuse and misuse of power and corruption were raised. The reference was challenged in a writ petition before the Supreme Court, which was heard and decided in favour of Justice Choudhry by a larger bench of the Court. The decision of the Supreme Court was reported in All Pakistan Legal Decisions (PLD) 2007 Supreme Court (SC) 578. The reference triggered unprecedented protest from lawyers and civil society, which soon culminated in a national (also called the black coat) movement against Musharraf. There is a growing body of scholarly literature on the lawyers' movement. *See*, for example, S. Aziz, 'Liberal Protagonists? The Lawyers' Movement in Pakistan', *in* T.C.Halliday, L. Karpik & M.M. Feeley (Eds.), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, 2012, p. 305. S.A. Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf', *Law & Social Inquiry*, Vol. 35, 2010, p. 985; Note, 'The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power', *Harvard Law Review*, Vol. 123, 2010, p. 1705.

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Initiative	Thin conception of ROL	Thick conception of ROL	Critical remarks
NJP	Upgrade and improve judicial academies to arrange pre-and post-training of judicial officers and court staff	X	General and vague statement; no regular follow-up
Research studies	Devise a national judicial educational policy to do away with overlapping mandate	X	No effort made so far to follow the recommendation
SJA summit	Address basic challenges to judicial education (see the list in B.1)	X	No regular follow-up
International conference 2012-2013	Increase training duration, develop national standard (2012), conduct TNA, continue professional development of judges, and improve faculty (2013)	Focus on sensitization to the pain of litigants/ concern for community expectations (2012)	LJCP has advised judicial academies to conduct TNA. The recommendations of the 2011 research study were not put on agenda of the 2012 conference; nor were those of the 2012 conference followed up in the 2013 conference
AJP	Teach judges case management techniques, delay reduction method, conduct training of trainers, and sensitize judges to gender issues	Link judicial competency to poverty by reducing vulnerability (capability poverty)	ADB's assessment, including final report. Limited independent scholarly research on successes and failures of reform

access to public places. Both events had also far-reaching impact on a wide spectrum of the rule of law. They had negative impact on the independence of the judiciary, protection of the basic human rights, access to justice, fair adjudicative process, and equal protection of law for all. As the Chief Justice Choudhry was restored, the National Judicial Policy Making Committee (NJPMC) formulated a National Judicial Policy (NJP).[143] In the aftermath of the defeat of insurgents, the *Nizam-e-Adl Regulation, 2009* (Regulation 2009), was introduced.

V Prospects of Current Reform

The post-insurgency period attracted donor agencies to diagnose the causes of the insurgency. The United States carried out two studies in 2008: one was the rule of law assessment report and the other was the Pakistan Policy Working Group report. The former observes that the two-month pre-service training of judges is

143 The Policy is available at <www.ljcp.gov.pk> (accessed 15 March 2012). It was revised in 2011.

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not sufficient, nor is the training incentivebased.[144] The latter recommends US assistance to professionalize the judicial system, focusing on human capacity building.[145] This potentially indicates that judicial training and education is of vital importance in correcting the judicial system.

In 2010, the government of the KP carried out a Post-Crisis Conflict Needs Assessment (PCNA) study.[146] The study underscored that the internal causes of the insurgency included marginalization and inequality in both the tribal areas and the settled districts of the KP. It proposed immediate intervention in certain areas, which included capacity building for the personnel of the justice institutions. The study proposed:

> Rights-based (gender/ [Human Right]) justice sector competency-based training system [...including] case management, Investigation and Prosecutorial services" and improvement in ADR methods.[147]

The proposed capacity building seeks to contribute directly to the rule of law (one of nine priority areas) visualized in two of four key PCNA strategic objectives:

- Building responsiveness and effectiveness of the state to restore citizen trust
- Ensuring delivery of basic services[148]

In 2011, the UNDP launched Strengthening the Rule of Law in Malakand (SRLM) project.[149] The SRLM is in line with the government policy enunciated in the PCNA. Its intended outcomes are capacity building of district courts, access to justice, ADR, and improvement in criminal investigation and prosecution.

As will be discussed in the next part, both PCNA and SRLM have been currently providing support to KPJA in the areas of infrastructure, training, research, and ADR.

VI An Overview of Challenges

In B.1, the challenges discovered at the Sind Judicial Academy's summit were listed. To that list, some more may be added here in order to portray a broader land-

144 USAID, *Pakistan Rule of Law Assessment – Final Report*, November 2008, p 12; available at <http://pdf.usaid.gov/pdf_docs/PNADO130.pdf> (last accessed 15 March 2012).

145 US Pakistan Working Group Report, *The Next Chapter: United States and Pakistan*, September 2008, p 19; available at <www.nesa.center.org/uploads/PPWG_Report_2008_11.pdf> (last accessed 15 March 2102).

146 *See* PCNA Report.

147 *Ibid.*, p. 48.

148 Two other strategic objectives are 'stimulate employment and livelihood opportunities' and 'counter radicalization and foster reconciliation'. In addition to the rule of law, other priority sectors are governance, agriculture and natural resources, nonfarm economic development, education, infrastructure, health, social protection, and strategic communication. *See* World Bank, Governance Support Project Paper, available at <www.pakistanmdtf.org/governance-support-project.html> (last accessed 6 July 2014).

149 *See* project details at <www.pk.undp.org/content/pakistan/en/home/operations/projects/democratic_governance/strengthening-rule-of-law-in-malakand-/> (last accessed 03 July 2014).

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scape.[150] Challenges having impact on both conceptions of the rule of law may include:

- Training needs assessment may have sufficient contribution to judiciary's role in social context.
- Curriculum development; it may also contain courses on understanding of wider issues reflective of popular wisdom.
- Faculty development; it may include speakers from diverse academic disciplines to help broaden vision of judges and contribute innovation.
- Training evaluation is a key element in feedback and future improvement.
- Internal resistance is still seen among judges, who put greater premium on experience.
- Sparing of judges from this busy court schedule is a great challenge, particularly when the NJP-based case disposal timetable is rigorously pursued.
- Distance learning facility is lacking; it creates difficulty for centralized training at just one institute.
- Funding has two problematic dimensions: first, lack of budget allocation by government and, second, lack of judicial academies' own capacity to generate revenue despite being autonomous bodies.
- Lack of follow-up on decisions taken at various forums for improvement.

E The KP Judicial Academy: A Judicial Education Model

The challenges mentioned in the previous part are faced by the Pakistani judicial educational system as a whole. In this part, the article focuses on the role of the KPJA in addressing those challenges. One important reason for selection of the KPJA, which has already been explained in the introduction (part A), is that the KP is the hard hit by the war against terrorism. The KP justice system shall be competent enough to help in promoting peace in the region, even in the FATA, which is adjacent to the KP. The KPJA is newly established. In order to promote peace, the government appears to have a commitment. The donor community too seems to provide help. This has created a great opportunity for the KPJA to play its due role in enhancing capacity of the justice sector institutions. Second, as will be shown in this part, the KPJA has achieved some relative success as an emerging institution. Thus, it may be trendsetter for other judicial academies across the nation. Following some necessary introductory remarks, this part discusses partial successes of the KPJA in meeting some of the challenges noted above and surveys some emerging challenges. It then contextualizes KPJA's role in relation to key rule of law elements discussed in earlier parts, particularly Section C, in which a theoretical understanding was discussed.

150 Most of these are borrowed from Thomas 2006, pp. 13-14.

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I Establishment

The KPJA was established by a law passed by the provincial legislature of the KP in 2012.[151] Per the law, the aims and objectives of the academy are to provide training to the personnel of all those institutions which are directly or indirectly associated with the administration of justice; to hold conferences, seminars, workshops, and research on important topics; to establish liaison with other research institutes, universities, and bodies; and to inculcate and promote ethical values and standards in judicial officers and personnel of associated institutions.[152] The coincidence of the establishment of the KPJA with the initiation of peace process in Malakand is of great significance. The peace process, launched by the provincial government, is supported by the SRLM and the PCNA, which have considerably helped the KPJA to become functional and to address some of the basic challenges at this nascent stage.

II Partial Successes in Meeting Key Challenges

Capitalizing on the supportive environment, the KPJA was able to kick off its activities in light of a well-thought-out strategy. It has been able to address certain key challenges mentioned in Section B. Those are discussed below.

1 Training Needs, Curriculum, and Faculty

The KPJA is the only judicial training institution in Pakistan, which has conducted a TNA, designed curriculum, and created a pool of master trainers. Under the SRLM project, the KPJA conducted a training needs assessment (TNA) as the first step towards capacity building of key justice sector personnel – judges (including court staff), police investigators, prosecutors, lawyers and paralegals, and ADR/NGO professionals. The TNA aimed at developing a scientific foundation for development of needs-based training curriculum through needs assessment of key justice sector institutions and producing masters for rolling out training for each of the target justice sector institutions. It facilitated a profound analysis of the existing skills of the institutions that helped explore the gaps. However, the TNA field survey was conducted in twelve districts of the KP.[153] It applied quantitative research techniques, such as questionnaire survey, focus group discussion, and key information interviews.[154] It took 691 sample sizes of 12905 populations (5%) of the survey districts. The findings of the study revealed that 55% of the personnel have requested gaps in their knowledge and skills, reflecting the following area-wise picture:

151 The Khyber Pakhtunkhwa Judicial Academy Act, 2012.

152 *Ibid.*, section 4. The KPJA works under the direction of a Board of Governors. The Chief Justice of the KP High Court is the Chairman of the Board.

153 The districts were: Bannu, Buner, Chitral, Dir Lower, Dir Upper, Karak, Malakand Agency, Mansehra, Peshawar, Shangla, Swabi, and Swat.

154 Five thematic focus group discussions (attended by 81 participants) and 81 key informant interviews were held. For this and other details, *see* UNDP and the Institute of Management Science's Training Needs Assessment Report, June 2012 (not yet published; on file with author, hereafter as TNA Report).

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001004

> NGOs (63%)...court staff (62%) followed by Special Public Prosecutor (59%), ADR and Senior Police Officers (58% each) and District Public Prosecutor (52%)...Judiciary (48%), District/High Court Bar and Upper/Junior Police [officials] (47% each).[155]

Thematic gaps generally identified were communication (except judges), computer skills, and gender sensitization. Key recommendations for judges and court staff are as under:

- Gaps may be filled in areas such as communication, leadership management, case and court management, strategic planning, HRM, crisis management, human rights, gender sensitization, procedural and substantive laws, commercial laws, laws of key justice sector institutions, team building, and computer skills.
- Training, conferences, seminars, lectures, workshops, dialogues, and exposure visits are recommended to bridge the above gaps.
- The management should spare judges and court staff for capacity building and reasonably provide all necessary institutional support, enabling environment to apply the skills to be learnt at training.
- Capacity building initiatives should be based on participative, cultural, gender, and rights-based approaches.
- The training material should in the form of predesigned tailored modules address the identified gaps.
- Adult learning techniques should be adopted during capacity building programmes, such as group work, case studies, structural learning exercises, role play, simulation exercises, and lectures.
- The duration of capacity building programmes should be conducive and convenient for all stakeholders.
- To evaluate the learning curve of the participants, there should be well-designed pre- and post -test and end of workshop evaluation. The results of evaluation shall be addressed in the coming training programmes.
- The management should develop a training calendar for a specific period in advance so that the District and Sessions Judges may be able to adjust their routine workload accordingly.
- Modules for master trainers should be designed and developed by relevant experts for delivery at Judicial Academy.
- The composition of potential master trainers shall be based on expertise from relevant fields and profession according to the following break-up: judiciary 40%, lawyers 20%, professionals 20%, and academia 20%.
- There should be a learning resource centre to facilitate knowledge management and research.
- New developments in laws/precedents should be made part of capacity building programmes through the proposed learning resource centre on regular basis.

155 *Ibid.*, p. xiii.

- During the TNA exercise the participants opined different durations for pre-service training. Based on the above opinion, the expert forum recommended that the pre-service training should be of nine months, including six-month classroom input and three-month attachment.

Following the identification of gaps, separate training manuals were designed for each category of justice personnel. The KPJA developed the following three manuals:

1 Case and court management
2 Procedural and substantive laws (both for judges)
3 Case and court management (for court staff)[156]

Next, towards faculty development, forty-five master trainers, mostly among judges, were trained. Finally, trainings were rolled out.[157] Additionally, the KPJA conducted a small-scale TNA on judicial opinion writing. In light of that TNA, a course was designed and some 275 junior rank judges were trained. During the training, a pre-and post-training evaluation mechanism was devised. For further evaluation of the judicial opinion writing training, on-job application of skills survey was also launched.

The TNA being the first of its kind will go a long way as a foundational study to pursue judicial training on more scientific basis. It may prove a best practice for other judicial academies of the country. While the TNA has immediate impact on capacity building of the justice sector personnel, it may have wider implications for the overall quality of justice as a public good.

2 *Research*

All the national initiatives, discussed above, have shown great concern for research. The KPJA established a research wing within the first year of its birth. The research at KPJA will be historical, on the region in the context of the rule of law; academic, in the form of research articles, books, and dissertations; and action, on contemporary legal and judicial issues in relation to local social and economic conditions. With the support of two donors – the UNDP and the World Bank – the research wing of the KPJA has recently completed three action research studies on Malakand.[158] Given the serious dearth of research in judicial studies, the studies will be pioneering and trendsetting, likely to prompt more research on Malakand and elsewhere in the KP.The research is likely to contribute to efficiency and effectiveness of the justice system as well as wider issues of public concern.

156 The KPJA has also designed other manuals. They are for mediators, FATA judicial officials, probationer civil judges.

157 After inauguration of the KPJA in July 2012, training courses commenced in August 2012. From August 2012 till August 2014, the total number of personnel trained was 1999, which include 792 judges, 200 court staff, 91 prosecutors, 724 lawyers, 25 journalists (court reporters), and 167 others (such as probation and prison officials and public information officers).

158 They are civil cases culminating in criminal cases – a baseline study in trends in crime at Swat and Dir Upper districts; Gaps between formal and informal justice systems (UNDP-sponsored) and Efficacy of Judicial System in Malakand (World Bank sponsored).

doi: 10.5553/EJLR/138723702015017001004

3 *Awareness and Distance Learning*

Lord Bingham argues that the public must be entitled to benefit of law. This necessitates public awareness on laws of the country. The KPJA has added public awareness and distant learning to its capacity building portfolio. For this purpose it has set up an FM radio. The radio is run on non-profit aimed at learning and awareness. In some programmes, the radio receives grievances from listeners. The grievances are then transmitted to a human rights cell in the Peshawar High Court for judicial action. Arguably, a rare achievement, there is no such distance learning and public awareness institution, at least in South Asia.

4 *Mediation Centre*

As noted above, donors, such as the ADB, UNDP, and the World Bank, have incorporated ADR in their reform programme. It was also argued in Section C that local dispute resolution mechanism contributes to the rule of law. In order to contribute to ADR, the KPJA has established a mediation centre. The centre has trained fifteen master trainers and fifty-five judges and lawyers as mediators. It provides mediation services. It contributes to mainstreaming ADR in formal justice system.

5 *Training of the FATA Officials*

The FATA has proved to be most troubled part of Pakistan during this war against terrorism. Its justice system is run under the Frontier Crimes Regulation (FCR), 1901, a colonial law. The FCR restricts the jurisdiction of ordinary civil courts, including that of the High Court of the KP, and denies fundamental rights to the people of the FATA. There is a growing call for repeal of the FCR. The KPJA has been able to arrange judicial capacity building programmes for judicial officials of FATA. The programme will help improve judicial capacity of those running the justice system there. Such trainings are likely to lessen the agonies of the people of FATA, with implications for reducing radicalism and militancy. Arguably, judicial reform in FATA will make significant contribution to the rule of law in Pakistan.

6 *Higher Educational Plan*

Pakistan Higher Education Commission has conferred a degree award status on the KPJA (for master's degree and diploma). The KPJA's higher educational plan aims at contributing to quality of legal education and introducing judicial studies as a distinct sub-branch within the current higher legal educational opportunities in Pakistan. It will also contribute to degree-level academic research.

7 *Coordination*

The SJA summit underscored the importance of coordination among judicial academies and other academic institutions. Seeking to address this challenge, the KPJA has signed memorandum of understanding with three local universities and has also designed a coordination plan with judicial academies.

III Emerging Challenges

Despite some successes, the KPJA faces a host of challenges to become an institution that is well established to contribute to the establishment of the rule of law. First, the KPJA will prove a real test of judicial leadership of the KP province. It is the will and capability of the judiciary itself to provide leadership to the KPJA. The leadership shall have to own it. The ownership, however, does not mean a mere and strict administrative control of the institution. The leadership needs to appreciate that first the KPJA is an autonomous body, having an executive body in the form of its Board of Governors. While powers may be delegated to the Chairman of the Board (the Chief Justice of the KP province), such delegation of power may not lead to bypassing the Board. Second, the leadership need to maintain consistency in its policy about the KPJA. This will require institutional policy making and implementation, not by one or a few top senior officials.

Second, the government of the KP has to commit funds. While as an autonomous body, the KPJA has to generate its own fund, the government needs to appreciate that at this nascent stage gradual support will be necessary. Commentators argue that in the United States, judicial education faces budgetary cuts. Some states have explored alternative ways of funding their judicial education. For example, in New Mexico, judicial training fund is linked to fee and fine paid in courts.[159] This may prove an example of best practice for the KP.

Third, sparing of judges for training is very difficult. Courts have usually very busy schedule. Taking away judges for training is likely to negatively impact on disposal of cases. It, in no way, means that there shall be no training at all. The 2012 international judicial conference and the TNA Report have suggested that judges may be given opportunity to attend trainings. The High Court of the KP province may adopt standard operating procedures for nominating judges and court staff for trainings. One possible way is the concept of mobile (on-job) training, on which some work is being done at the policy level.[160] Nonetheless, resources and leadership will still be required to implement this idea.

Fourth, coordination with other academies within the country is something that is relatively easier to be embraced. The recommendations of the judicial conferences too require that coordination is essential. Indeed, coordination will enable judicial training schools to exchange their views and work more closely to develop national standards of judicial education.

Fifth, training needs should be regularly explored and scientifically used for developing new courses. A regular training impact assessment mechanism should be put in place to ascertain the actual outcomes of training. Lack of opportunities for further education is an area about which most judges have many complaints. In recent years, there have been growing numbers of educational opportunities abroad, which are more liberally provided to civil servants. But judges are lagging far behind. Judges complain that judicial leadership is not following an even-handed and transparent policy.

159 Thomas 2006, p. 10.

160 The FJA issued an official letter dated 15 April 2013 to all judicial academies, suggesting mobile training; available in the official record of the KPJA.

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Sixth, while there is much talk about training of judges of the District Judiciary, there is almost no indication that the judges of the higher judiciary, too, require training. It may be recalled that in the debate for the need for judicial education in Australia, the proponents of judicial education argued that after elevation to the bench, good lawyers need training because their role changes from persuasion to evaluation. Even otherwise, as argued in PartII, accusing fingers are raised at recent appointments in higher judiciary. While training cannot validate an appointment made in violation of merit, it assumes greater importance where incompetency is alleged. A long term challenge faced by the KPJA is its contribution to the rule of law.

IV The Rule of Law: A Long-Term Challenge

The KPJA has shown its commitment to contribute to the rule of law. As its mission statement reflects:

> We will transform young law graduates into...Judges...professionally sound... sensitized...rights of the vulnerable poor...prepared to contribute to the rule of law.[161]

Drawing on the philosophical rule of law literature examined in Section B, some relevant elements of the rule of law will be explored and the role of judicial education contextualized therein. The purpose is to propose a rule of law-led agenda for judicial education of the KP's justice sector officials, particularly, judges. Such an agenda may aim at, first, enhancing their professional standards and, second, enabling them to restore the confidence of people who greatly suffered an orgy of death and destruction in a spiral of organized violence and terrorism. Such an education programme will help create a spirit of understanding the pain of those seeking justice from courts (a recommendation made by the 20102 International Judicial Conference, Islamabad).

The first and foremost element of the rule of law is: "the law must be accessible and so far as possible intelligible, clear and predictable".[162] It appears that law must be open, easy to understand, transparent, and predictable. In a specific British context, Lord Bingham pinpoints three factors which affect accessibility of laws.[163] First, laws are expressed in complex language. Second, the quantity of legislation is enormous, which alone makes accessibility difficult, despite the Internet facility. Third, courts' judgments are very lengthy.

161 The full mission statement reads: "We will transform young law graduates into honest, patient, sober, confident, disciplined, analytical and law knowing judges, whose attitude will be changed and made professionally sound through basic knowledge and necessary skills; sensitized in particular, to develop harmony amongst all justice sector institutions and to the protection and promotion of the rights of the vulnerable poor; and prepared to contribute to the establishment of the rule of law". *See* the KPJA Brochure.

162 Bingham 2008, p. 124.

163 *Ibid.*, p. 125.

Pakistan has still retained major substantive and procedural laws introduced by the British colonial rulers.[164] Since the independence in 1947, legislation is drafted in English language with the same level of legalese as reflected in the colonial statutes. Pakistan's national language is Urdu. Each of the four provinces has major regional languages: Punjabi in Punjab, Sindhi in Sind, Baluchi in Baluchistan (Pashto in some parts), and Pashto in the KP.[165]

Overall literacy rate for 2012-2013, as recorded in the Economic Survey of Pakistan, is 57%.[166] KP's literacy rate is 37%.[167] In legal practice, English is generally considered as the language of the court, though this is neither a statutory requirement nor an official compulsion. In the District Judiciary, Urdu and even regional languages are also used during judicial proceedings. However, the dominant trend is in favour of the use of English, irrespective of the fact that proficiency in English language has considerably deteriorated. Low literacy rate and linguistic heterogeneity pose serious challenge to the state to ensure that law is meaningfully accessible, clear, and intelligible to the public. The language of the law has deeper implications for the rule of law. As Tamanaha argues that where "the language of the law is different from the common vernacular of groups within society", it leads to a clash between legal rules and social norms.[168] In such a situation, which is typical of Pakistan, Tamanaha maintains, "the law has a weak role in preserving social order".[169] The main question is: Should the language of the text of the law be changed from English to, at least, Urdu, the national language? The answer is a simple yes. But the real difficulty starts with *how* to go about using Urdu language. The enterprise requires a strong will and huge resources. A still greater difficulty is whether Pakistan's ruling elite –mostly Western educated – would allow what may be called a cultural change. Perhaps there is no simple answer to this question. Pragmatism, however, requires that the language issue may be addressed by introducing a culture of gradually writing the text of the law in national language. As far as that cultural change is awaited, the existing culture of English language may be attuned to the so-called plain English move-

164 The Pakistan Penal Code was introduced in 1860, the Code of Criminal Procedure Code in 1898, and the Civil Procedure Code in 1908.

165 There are other smaller regional languages: Brahui and Makrani spoken in parts of Baluchistan, Seraiki and Hindko spoken in parts of the Punjab and the KP and Khowar and Kohistani spoken in parts of KP.

166 Highlights of Economic Survey of Pakistan, 2012-2013, available at <www.finance.gov.pk/survey/chapters_13/HGHLIGHTS%202013.pdf> (last accessed 8 August 2013).

167 *See* Government of KP Bureau of Statistics, KP highlights in figures, 2011, at <www.khyberpakhtunkhwa.gov.pk/Departments/BOS/nwfp-ind-education-tab-23.php> (last accessed 8 August 2013).

168 Tamanaha 2007, p. 11; Brooks 2003, p. 2322.

169 *Ibid.*

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ment in legal writing. The movement calls for resorting to the use of simple text in laws so as to ensure greater accessibility of common people to the laws.[170]

The KPJA may play a positive role in improving the linguistic quality of legislation. To this end, it can design and run courses in legal and legislative drafting.[171] It can play a more active role in improving the quality of judicial opinion writing. Currently, the KPJA is running a series of short course on judgment writing in which two days are devoted to enhancement of English language proficiency. Hence, it is mainstreaming the plain legal English movement in its syllabus. Alongside this, arguably, there appears to be a strong temptation to the Judges of the District Judiciary to write its judgments in Urdu or even regional languages, for example, Pashto. The KPJA may help fulfil such a temptation. It can establish a robust language clinic to help promote the cultural change of moving towards the use of national language in legal writing. With the help of the KPJA's research wing, the centre can enter into research activities, helping both the national language and the legal and judicial system. The law-language combination can further help create what may be called a cultural ownership of law.

The second element of the rule of law, as Tamanaha argues, is the development of 'a cultural view about law through socialization'.[172] The state officials and the citizens should have a widely and equally shared orientation 'that the *Law Does Rule and Should Rule*'.[173] Tamanaha argues that the inculcation of a cultural belief in the rule of law is the 'hardest to achieve', particularly in a society where people lack trust in the government, fear and/or avoid the law, perceive that the justice sector personnel are corrupt and incompetent and see that the law is not fairly applied to all.[174] A judicial training school like the KPJA can firstly, play a limited role of public awareness campaign about the importance of the rule of

170 *See*, for example, H.Y. Yew, 'Plain Legal English for Lawyers', *Singapore Academy of Law Journal*, Vol. 8, 1996, p. 303. The movement is receiving an encouraging response from many governments. For example, the United States introduced a Plain Writing Act, 2010, that requires that federal agencies use "clear Government communication that the public can understand and use". For a critical view, *see* R. Assy, 'Can the Law Speak Directly to Its Subject? The Limitation of Plain English Language', *Journal of Law and Society*, Vol. 38, 2011, pp. 373-404.

171 M. Ilahi, 'Linguistic Disharmony, National Language Authority and Legislative Drafting in Islamic Republic of Pakistan', *European Journal of Law Reform*, Vol. 15, No. 4, 2013, pp. 400-414, argues that in Pakistani laws are drafted in English, which is the language of a small fraction of Pakistani society. Though Urdu is a constitutionally declared national language, with the exception of a minority of people, it is not the first language of majority of people. Language is also a political issue related to identity. From the standpoint of the rule of law, this situation militates against the plain language movement for writing laws, which aim at making law understandable for the people. In Art. 251, the 1973 Constitution of Pakistan has declared Urdu as national language and has directed that 'arrangements shall be made for its being used for official and other purposes within fifteen years from the commencing day'. The article further provides that 'English language may be used for official purposes until arrangements are made for its replacement by Urdu'. In 1979, a National Language Promotion Department was introduced under the federal Ministry of Information, Broadcasting and National Heritage. The Department has made no contribution to Urdu translation of laws.

172 Tamanaha 2007, p. 14.

173 *Ibid.*, p. 13.

174 *Ibid.*

law. In this regard, it has already started undertaking this responsibility through an FM radio, which creates public awareness. The proposed language clinic can promote such an orientation through public awareness programmes. Secondly, it can bring about meaningful attitudinal change in the justice sector officials through capacity building in the area of judicial ethics. The promotion of ADR may also prove to be a useful tool in the development of the rule of law as a cultural norm. The reasons are obvious: ADR is ingrained in local culture, it retains confidence of the people, and it provides relatively cheap and quick means of dispute resolution. The mediation centre of the KPJA may play a useful role in promoting the rule of law.

The existence of an independent judiciary is the third element of the rule of law. One of the basic principles on the independence of the judiciary, adopted by the UN, is that "consideration be first given to the role of judges in relation to the system of justice and the importance of their selection, training and conduct".[175] Judicial competency significantly contributes to judicial independence. J. Waldron, a well-known rule of law theorist, includes a trained judicial officer in the list of demands for the rule of law.[176] A judicial training programme must be focused on inculcating a spirit in judges to perform fairly and without bias and fear or favour from others. Take, for example, bias. On a judicial training programme, judicial officers could be helped how to avoid explicit and implicit bias. Similarly, judicial opinion writing trainings aimed at improving the judicial reasoning process may lead to improve public confidence. Moreover, regularly updating judges on judicial performance indicators and principles of judicial conduct also help bring about more independence.

The fourth key element of the rule of law is restricted discretion of courts (as well as executive officials). Discretion leads to inconsistency in decisions and may badly impact on the right to fair trial. The rule of law scholars, however, acknowledge that absolute prohibition of discretion is not necessary because it is by the exercise of discretion that a court or a government official applies a legal rule to an unforeseen situation. In order to prevent arbitrary exercise of discretion, it is argued that discretion may be narrowly defined and reasonably justified.[177] Pakistani courts enjoy wide discretion in criminal law (except in some offences under Islamic law) and, to some extent, in civil law. Arguably, the wide discretion creates a scope for abuse and thereby bears negative implications on public confidence. In a country where public dissatisfaction with the delivery of judicial service is widespread, proper training on judicious use of discretion is imperative. There is either no or very little training specifically on the significance and implications of discretion. Interestingly, the situation elsewhere is not different. In Ireland, for example, newly appointed judges receive no worthwhile training. This, it is argued, leads judges to develop their own approach to sentencing, which is

175 *See* Basic Principles on the Independence of the Judiciary, adopted by the seventh UN Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolution 40/32 of 29 November 1985 and 40/32 of 13 December 1985.

176 Waldron 2010, p. 3.

177 Bingham 2008, p. 128; Tamanaha 2007, p. 9.

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unlikely to ensure consistency.[178] In the United States, the American Bar Association has recommended that training in the appropriate exercise of discretion should be an important part of judicial training.[179] It is also important to keep judges aware of sentencing options, including rehabilitative programmes that may be available within their jurisdiction. Accurate and complete information will help ensure that a judge is able to develop the most appropriate sentence in each case. Appropriate courses on discretion with examples from Pakistan's and other countries' case law and research on sentencing would enable the KPJA build capacity for the proper use of judicial discretion.

The protection of human rights is the fifth element of the rule of law. Lord Bingham argues that the law shall adequately protect fundamental rights of the citizens.[180] He, however, admits that this may not be universally recognized as an element of the rule of law. It was discussed in Section B that human rights is a part of the 'thick' conception of the rule of law. However, even on the 'thin' side of the rule of law, protection of human rights is a basic duty of the judiciary. Professor Raz argues that while the legal system of a nondemocratic society based on denial of human right may conform to the rule of law, "it will be an immeasurably worse legal system".[181] Bingham argues that "a state which savagely repressed or persecuted sections of its people could not...be regarded as observing the rule of law...".[182] Thus, in any country, especially in Pakistan, human rights must figure visibly in a judicial training programme. In a report on the independence of judges and lawyers, a UN Special Rapporteur, who visited Pakistan in May 2012, recommended that capacity building should compulsorily include specialized training on gender equality and women's rights and international human rights law.[183] The KPJA gives due consideration to human rights in its training courses. Recently, it has prepared a pool of fifteen master trainers for a human rights training.[184] Part of its educational plan, the KPJA, has designed a three-month human rights certificate course, which will be soon converted into a six-month diploma course. Whatever little judicial training is imparted to both probationer and serving judges, international law is not included in it at all. Both the training

178 N. Maguire, 'Consistency in Sentencing', *Judicial Studies Institute*, Vol. 2, 2010, pp. 14-54, at 23-24.

179 American Bar Association, Commission on Effective Criminal Sanctions, Report to the House of Delegate on training in the exercise of discretion, at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report.VI.PDF.121306.pdf> (accessed 10 August 2013).

180 Bingham 2008, p. 131.

181 Raz 1979, p. 221.

182 Bingham 2008, p. 133.

183 Human Right Council, A/HRC/23/43/Add.2, Report of the Special Rapporteur (G. Knaul) on independence of judges and lawyers, p. 22.

184 In March 2014, the KPJA conducted three-day training of trainers' course on human rights for judges. The course was designed and led by Dr. N.A. Shah, a Senior Lecturer, the University of Hull, United Kingdom. With the support of the KPJA, Dr. Shah also prepared a training manual for the trainers. Many internationally reputed human rights scholars contributed to the training via a video link.

and education in international human rights will also help the Stat fulfil its international obligations.[185]

The sixth element is "the right of unimpeded access to a court as a basic right protected by...domestic law".[186] This requires in Bingham's words, 'a free and independent' and in Tamanaha's words 'a robust' legal profession.[187] While in Pakistan, the legal aid system is still to develop full scale, nevertheless, of late, there have been some efforts by both the judiciary and the legal profession to address this as a key theme of the rule of law.[188] They include the introduction of the District Legal Empowerment Committees (Constitution & Functions) Rules, 2011, and the Public Defenders and the Legal Aid Office Ordinance, 2009. The KPJA can help the legal aid efforts through training of lawyers and research. While the provision of legal aid is the obligation of the state and the legal profession, the creation of a public defenders' centre at the KPJA will train the lawyers in the area of legal aid. A robust legal profession also requires a robust training. In Pakistan including the KP, there is no vocational institutional training for lawyers. All that is prevalent is attachment with a senior lawyer for a maximum period of one year. In practice such a chamber-based learning is neither formal nor institutional. If the federal and provincial bar councils come forward, a judicial training school may address this issue of formal institution-based training. In recent years, there has been growing trend among lawyers to resort to violence against journalists, government officials, particularly police officials, and even judges inside the courts. A journalistic analysis has sarcastically noted that "[l]ike all 'revolutionary' movements, the lawyers' movement too used threats, and actual violence, in some cases, to deter fellow-lawyers from 'disagreeing'".[189] Its research wing can also carry out research studies to help establish a workable system. This situation necessitates a formal institutional training of lawyers to help develop a robust legal profession for the larger interest of the rule of law in Pakistan. Part of this, the KPJA has commenced a series of training for lawyers.

185 Bingham 2008, p. 140.

186 *Ibid.*, p. 134.

187 *Ibid.*, p. 134; Tamanaha 2007, p. 15.

188 *See* report of a one-day UNDP workshop on Legal Aid: Finding Sustainable Solution, held in Islamabad, on 23 June 2012. The report (on file with the author) was prepared by the author as the lead facilitator at the workshop.

189 Pakistani press has reported numerous incidents of lawyers' improper behaviour with many other professionals and in relation to certain key occurrences of national importance. According to news analysis, over a dozen incidents of such behaviour has occurred. *See* K. Ahmad, 'The Middle Class Had Gone Berserk', *Daily the Friday Times* (a weekly newspaper), 23-29 March 2012, Vol. XXIV, No. 6, available at <www.thefridaytimes.com/beta2/tft/article.php?issue=20120323&page=5>. In June 2014, a rape suspect ran away from police custody with the help of his lawyer after bail plea of the suspect was dismissed by the High Court, *see Daily Dawn*, 28 June 2014 at <www.dawn.com/news/1115657> (last accessed 17 July 2014).

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F Conclusion

The three questions posed at the beginning of this article focused on, first, interrelationship between judicial education and the rule of law; second, potentiality of judicial education to promote the rule of law; and, third, challenges to judicial education in contributing to the rule of law. The article has contextualized the case of Pakistan because of the problems Pakistan is facing in improving judicial efficiency itself and its catalytic role in creating an impact on wider issues, such as security, human rights, and governance. It has also examined the prospects of judicial education in the KP province of Pakistan, for peace building through efficient and effective delivery of justice service.

At the outset, the article has defined judicial education as capacity building of all justice sector officials and proved that continuing judicial education is a must for judges irrespective of the fact that before elevation to the bench, a lawyer was well experienced in law. The main reason, as reflected in the earlier literature, was that the role of a lawyer is to persuade and that of a judge is to evaluate. The theoretical framework of the rule of law informs the concept of judicial education. Having intrinsic importance, judicial education through judicial efficiency directly contributes to prospectivity, generality, certainty, and equality of law (thin conception of the rule of law). Judicial education also plays an instrumental role in creating an enabling environment for promotion of human rights, democracy, and good governance (thick conception of the rule of law). Here Justice Martin may be referred to again, who has argued that judicial independence hinges on public confidence, which, in turn, depends on judges performing efficiently and sensitive to the needs of the community and social context in which they serve.

An in-depth analysis has revealed that judicial education is a significant variable of the rule of law theory and practice. Evidence has shown that governance and the rule of law have been serious problems of the political economy of Pakistan since decades. Inefficient delivery of justice service is a key issue. The creation of a well-educated and well-trained judiciary is badly needed. The reform efforts Pakistan made were politically half-hearted and scientifically inadequate, lagging far behind similar efforts elsewhere in the world. As justice remained on the margin of the legal and judicial system in Pakistan, inequality, social exclusion, and vulnerability increased. The events occurred on 9/11 further deepened bewilderment. While the ADB-supported AJP reform committed huge financial and technical support to Pakistan's justice system from 2002 to 2008, excepting some minor successes, Pakistan failed to steer its justice system out of the muddle. Had the AJP delivered significantly, the justice system might have been able to help the state check rising radicalism and militancy. The Malakand insurgency and judicial crisis (2007-2009), right at time when the AJP was being concluded, demonstrates lack of seriousness in the political will of the state, to give the rule of law reform a fair chance.

Although certain recent judiciary-led national efforts for addressing the challenges of judicial education, spearheaded by Pakistan's Law and Justice Commission through international judicial conferences, appear to be commendable, a critical analysis has proved that such efforts lack a clear vision, consistency,

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coherence, and follow-up mechanism. The rule of law hardly appears in those efforts. As key challenges of judicial education are yet to be addressed in a scientific manner, the role of judicial education in realizing the rule of law leaves much to be desired. Is there any way forward?

In a limited way, the judicial academy of the KP province, having scored successes in addressing some basic challenges (for example, TNA, curriculum, faculty, research, and awareness), creates hope for improvement. The KP academy's contribution to peace through justice is of immense importance, as it may add value to improvement in the quality of justice and can also extend its services to the FATA through an educational programme that is clearly articulated and aimed at addressing key elements of the rule of law. In five areas, the KPJA can play an extremely important role in contributing to the rule of law in the KP. They are training, research, awareness, mediation/ADR, and language clinic. Among them, the last mentioned (*i.e.* language clinic) is not existing. The remaining four have already been actively functioning. Language clinic and awareness may contribute to peoples' accessibility to and benefit of law, particularly in human rights. Training and research may prove beneficial for justice sector personnel in improving judicial efficiency. The mediation centre may be helpful in encouraging ADR in itself and also as a support to the formal justice system. An active and assertive role in capacity building of lawyers may help develop a robust legal profession, one that will learn why and how that the rule of law does not mean the rule by lawyers. In these circumstances, the KPJA appears to have the potential to act as a role model. However, the KP academy is still at a fledgling stage. Only coming years will say whether it will be a real success or not. In order to emerge as a strong institution, it has to successfully address, at least, three emerging challenges: government's political will to commit funds, an able judicial leadership and ownership, and training impact assessment. Finally, it has to become part of and a contributing factor to a broader national judicial educational policy and open to and learn from international experiences.

The success of the rule of law reform largely depends on the political will of a state. While development community has been contributing handsomely to the rule of law reform, their biggest challenge is to help developing countries merge social and legal norm. The merger of social and legal norm may promote a rule of law culture in which people will realize that the law grown from their own soil, not from a distant land for some ulterior motive, that the people making laws (ruling elite) and implementing laws (bureaucratic elite) themselves follow the law, that the people see their behaviour is guided by law, and that they have access to the benefits of law.

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