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## Measures to decrease Crisis of Governance and Susceptible Constitutionalism in Pakistan

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### Abstract

The judiciary upholds the rule of law in the society being a guardian of the constitution.. The judiciary provides a forum not only to resolve disputes, through their decisions but also enforce laws in a fair manner. The judiciary is free to apply the law without regard to the government's wishes or the public opinion. An independent judicial system helps to maintain the constitutional balance by providing a check on the powers of the legislative and the executive branches. The higher courts have power under the constitution to review the unconstitutional decisions or act of the government which is violating the fundamental rights of the citizen, the same was granted by the constitution. the courts possess the power to direct government officials or other organ of state to proceed with in the limits of the constitution.

**Keywords:** Constitutionalism, Executive, Judiciary, Legislature.

### 1- Introduction:

In the nation building process, the driving force for the sustainable growth and development is based on social activism, efficient public administration, effective governance and tangible legalism, therefore constitutionalism is a device for social control. Constitutionalism was considered one of the important phenomena of the previous century. Judicial review is a constitutional device or means to limit the Government from over reaching the individual. Therefore the term government embraces legislative, executive and judicial. The judiciary has the power to set aside the unconstitutional legislation, unconstitutional decisions of the executive and also take action on the violation of fundamental rights of the citizen, which is granted by the constitution through Judicial review, this power granted by the constitution to the judiciary.

Judicial review is a type of proceeding where the court looks at the lawfulness of the decision-making process. If the court finds that a decision is unlawful, that decision will be quashed and the decision-maker can be forced to re-make the decision according to the law. Under the constitution of Pakistan High Courts have this kind of jurisdiction under article 199 of the constitution and the Supreme Court has jurisdiction under article 184(3) to adjudicate the matters through direct jurisdiction.

The judiciary has viewed, as a most powerful organ of the state because through judicial review, the judiciary has the power to set aside the unconstitutional actions or decisions of the Executive and Legislature. It is natural for tension and frictions arise from the decisions of the courts, a non-political branch of the government, on the one hand, and the political branches of the government

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i-e the legislature and the executive. What controls the relationship of these branches is “Rule of law, which is the natural and fundamental essence of a written constitution”.

A.K. brohi, “fundamental law of Pakistan”, “the rule of law demands that before, by means of an administrative decree, people’s rights could be interfere with, the authority to issue the decree must be shown as following from the will of the legislature as manifested in its enactments.” So the authority of the courts to deal with complaints brought before it by means of appropriate by proceeding regards to either an abuse or excessive exercise of administrative actions flows from its obligations to enforce the constitution and law, this concept is known as legalism which further provides away, out for the rationality of judicial power known as judicial activism. The practical application of this constitutional philosophy is called as judicial review.

In the nation building process, the driving force for the growth and development is based on social activism, efficient public administration, effective governance and tangible legalism. "Governance" is what a "government" does.

Now the tangible form of the governance is form formulation, formation and implementation of public policy, nevertheless the definition of public policy is, “what a government does and doesn’t do”, and tentacles of the government are public administrators and their actions.

However the genesis of the public policy is the “primary legislation” of the national and provincial assemblies and their legislators, but the rationale of optimal political practicality of public policies on the ground is the “secondary legislation” of public administrators and their actions. The accountability and checks and balances of this secondary legislation and discretion can be practically attained only through the tool of Judicial review mentioned in our constitution of 1973 under the Article 199. This Judicial power has the following kind of practical applications.

The Higher Courts (High Courts & The Supreme Court) passed an order (Mandamus, Writ and Quo-warranto) and gives the direction to the Government office or other organ of the state etc. through direct jurisdiction to act upon in accordance with law.

It means, “by what warrant or authority” it is a a proceeding to inquire whether authority existed to justify or authorised certain acts of a public character or interest)

Prohibition: (an order that forbids a certain action, an extraordinary writ issue by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a known judicial officer or entity from exercising a power, it is an injunction against governmental usurpation).

In principal Article 8, 142, 143, 174, 184 (3) and 199, all provides a possibility of the locus standi against the politics and the iron triangle of public administration, but in practice the social politics of Pakistan is not compatible with a true spirit of legalism.

My intentions to study the politics of judicial review in Pakistan are to determine this possible antagonism or coexistence. In this proposed study in my view the political parties, pressure groups and regimes are independent variables, whereas judicial review (the practical rationality of judicial power) is an independent variable. I would like to search out the impact level of these two variables on each other.

My directional hypothesis is “the vested interests of political ruling elites have increased the vulnerabilities of judicial review on the Public Actions in Pakistan”.

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**2 -Justification and likely benefits**

The dominant characteristics of modern society are a high degree of the administrative process. A study of administrative law and actions, governance and legalism, therefore, involves an inquiry into certain “basic issues” raised as the result of the interdependence of these three variables, in my point of view legalism is an independent variable and administrative action are dependent variable, whereas governance is the intermediately variable and has a directional impact on administrative actions. The issues of importance are:

- What is the appropriate machinery for the exercise of administrative process?
- What powers are given to the adjudicatory bodies by the status creating them and the regulations made thereunder?
- What should be the process through which administrative decisions are reached?
- What procedure been laid down for the exercise of powers?
- What safeguards are available to those whose interests are affected by administrative actions?
- What further safeguards are necessary – safeguards that are consistent with the administrative exigencies, fairness of administrative proceedings, then righted of individuals, and the democratic values?
- With these issues is linked the central issues: what ought to be the scope of judicial review?
- Is there any directional and logical link between judicial review and public policy?
- How much the degree of the sensitivity is present between public policy process and judicial review?
- Is our political and administrative system close to pluralism or traditional authoritative totalitarianism?
- How much causal relationship is present between pluralism and judicial review?
- The impact of doctrine of political question on judicial activism.
- The significance of the intermediary variable of doctrine of reasonable doubt between public policy process and judicial review.
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This study can provide a plausible pragmatic input of the cognitive model of legalism for the National Judicial Policy making committee.

The philosophy of constitutionalism is based on the believe in transcendent Justice, which is a confluence of,

- Community mind
- Mass Mind

Community mind creates myths which have a transcendent reference and which express the interests of the group as a cooperative organism, the mass mind creates ideologies expressing the “interests of each member of the group reflected and repeated in each other member. A mass can’t create myths, for it has no real history. Myths are the expression of a community mind

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which has enjoyed a long natural growth, so that the sense of togetherness becomes patterned and semantically significant.

This moral foundation of constitutionalism provides, establish and maintain effective restraints on political and government actions. Constitutional government is a kind of self restraint which the people in a democracy impose upon themselves; and whether we have institutions of judicial review or not, its continued existence depends less upon the institutional checks provided than upon the commonly shared knowledge that there are restraint and upon the willingness of individuals voluntarily to submit to those restraints.

So in the course of natural justice the idea and the ideal of judicial process is to give effect to the will of the law, whereas the natural course of legislatures and legislative assemblies is to give effect to the will of the masses. So there can be two possibilities, the possible antagonism between the will of the masses based upon charismatic authority and the will of law/statutes based upon rational legal authority or there can be a possible coexistence between these two parallel forces.

Judicial Review, a plausible rationality of Judicial Activism is a Power of judiciary to maintain the rule of Law, this Doctrine has the pragmatic approach of constitutionalism, which provides a tangible plan of action of separation of power, the core element between the three branches of the state, “legislator, executives and judiciary”.

A.K.Brohi,<sup>3</sup> states in “fundamental law of Pakistan” The coercive power of states reflects itself in the sanctions it provides for the recognition and enforcement of certain class of claims and interests; and such of the claims and interest recognizes and enforce become, by reason of such recognition and enforcement alone, “rights”. It is another way of describing the same legal phenomenon when we, following Dr. Holland,<sup>4</sup> regard a right is a power of a person to control the country with the action of another. Where these rights are enforceable by one citizen against another, the network of legal relations with reference to which this becomes possible could compendiously be characterized as the domain of private law, which consists of the rules with reference to which the State asserts certain rights against the citizens and permits them in turn to exercise certain rights against itself.

Justice (r) Fazal Karim<sup>5</sup> states in “Judicial Review of Public Actions”, if the constitution is in written form, then it determines the powers of the organs of the state. In case *Marbury v. Madison*<sup>6</sup> (This was the first elaboration of the august court of U.S. (Supreme Court) on the principle of Judicial Review. In this issue, William Marbury directly approaches to the U.S Supreme Court, as provided by the Judiciary Act of 1789, through a writ of Mandamus [on this type of petition Higher Courts give the direction to lower courts or a public servant to proceed their duties in accordance with law].

In the United States, the Judicial review system was adopted from the U.K judicial system.<sup>7</sup> According to James Bryce<sup>8</sup> in his “American Common Wealth” stated that this U.K

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<sup>3</sup> A.K.brohi, fundamental law of Pakistan, 1958, p.3

<sup>4</sup> Holland professor, jurisprudence, 12<sup>th</sup> edition.8,9,301, article entitled “the high Court Control of inferior tribunals’ in Current Legal Problems”

<sup>5</sup> Justice (r) fazal karim, Judicial review of Public Actions, Pakistan law house,

<sup>6</sup> 1 cranch 137, 2L Ed. 60 (1803)

<sup>7</sup> Legal control of government by Bernard Schwartz and H.W.R. Wade, p.206

<sup>8</sup> James Bryce in “The American Commonwealth” 3<sup>rd</sup> ed .V.I. p.267

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doctrine impress the US judicial review system and legislature. In reported case<sup>7</sup>, it was held that same is true for the doctrine of Judicial Review in many countries such as Pakistan, India, Australia, New Zealand etc.

It was held in the reported case in India “Chandra Kumar case- AIR 1997 SC1125” The Supreme Court and High Court derived their power of Judicial Review from the constitution, it cannot be taken away or abridged except in accordance with the constitution, the constitution of India granted power to the higher Judiciary regarding judicial review. So the even a constitutional amendment can’t divest this power of the higher courts. In a reported Law case (Zafar Ali Shah Case- PLD2000 SC 869) one can observe that it is the same position of Pakistan.

So for compatible pluralism in Pakistan we need the confluence of social activism and judicial activism by socio-economic grass root development and democratic maturity. Therefore Judicial Activism at grass root level as well as on provincial and federal level is a Judicial Power in actions but as it is clear by the review of National Judicial Policy that this judicial Power is the victim of different social, political dyslexia and itself a weak entity so for the strength of Judicial Power, we need a mature egalitarian, social political and cultural environment.

The National Judicial Policy is mainly focusing on the elimination of corruption, incidents of inefficiency and delays injustice. Which is a direct outcome of an outdated conservative Judicial system victimized by the monopoly and corrosion of other main system and subsystem of the Pakistani society.

Nevertheless the procedure for Judicial Review is present in our Judicial system, but practically due to the doctrine of political question and doctrine of reasonable doubt as well as the inefficiency and corruption of the Bench. This dynamic (Judicial activism) concept has no utility in our political system.

The National Judicial Policy is neglecting the role of subdivision / district / provincial Bar associations. The Judicial of any country can’t be entirely based upon Courts and Benches. One has to look upon the role and maturity of Bars. There is no doubt that we in Pakistan have a working functional system for the training, management and administration of Judges. But the Bar councils have no plausible system of training. Management and Administration of lawyer’s especially young lawyers, other than the Monopoly, abetment, corrosion and nepotism of non legal entities of society. So no matter how good and transparent system we have in our judicial system. We can’t achieve Cognizance model of legalism in Pakistan without due and proper training of young lawyers and eliminating the monopoly / corruption of District Bar Councils, influenced by the vested interest of non legal entities of our elite system of politics and administration.

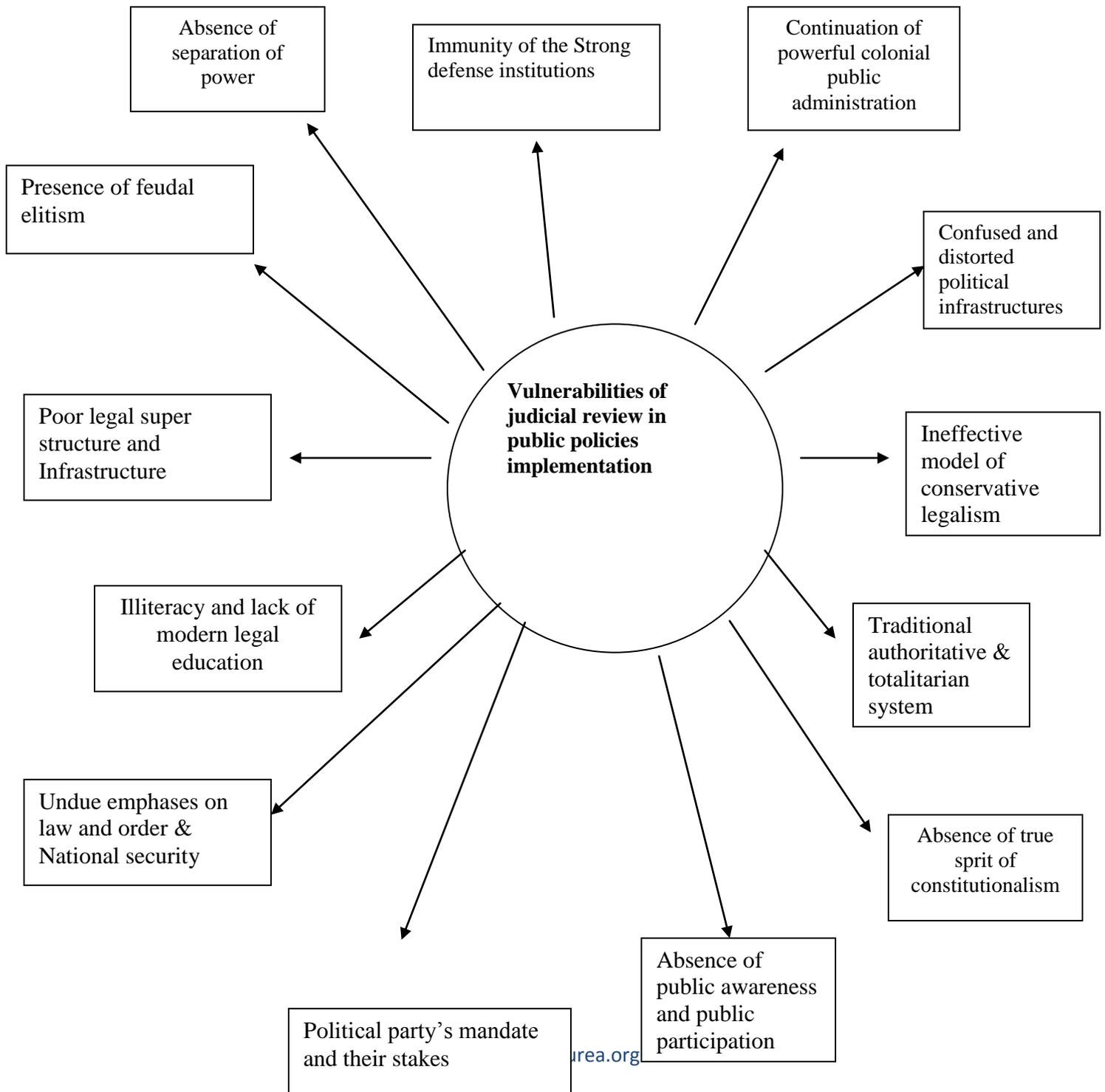
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7 Sabir Shah v. Shad Muhammad PLD 1995 SC 66,250)

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**3- PROBLEM CAUSE DIAGRAM:**



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### 4- PROBLEM AREAS:

- Absence of separation of power and strict Legalism..
- Immunity of the Strong defence institutions.
- Continuation of powerful colonial public administration.
- Confused and distorted political infrastructure.
- Continuation of powerful colonial public administration.
- Traditional authoritative & totalitarian system.
- Absence of true spirit of constitutionalism.
- Absence of public awareness and public participation.
- Political parties mandate invested interests.
- Undue emphases of law and order & National security.
- Illiteracy and lack of modern legal education.
- Poor legal superstructure and Infrastructure.
- Presence of feudal elitism.

### 5- RANKING OF THE PROBLEM AREAS AND ITS CAUSES:



(Absence of socio economic and political liberalization)

1. Continuation of powerful colonial public administration.



(Distorted vision of transparency and self governess)

2. Confused and distorted political infrastructure.



(Improper political training and weak political institution)

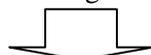
3. Absence of true spirit of constitutionalism.



4. Traditional authoritative & totalitarian system.

(Presence of irrational, subjective, tangible legal system)

5. Immunity of the Strong defence institutions



(Legacy of long periods of Martial law regimes)

### 6- PROBLEM STATEMENTS:

- Vulnerabilities of Judicial Review in the incidents of bad Governance and poor Administration.

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- Incompatibility between the value / ethics of legalism which is (**sum ranking**) and the value / ethics of Public Administration (welfarism)
- The policy design of social activism is capacity building / incentives based (bottom up) whereas the policy design of judicial activism is a Wilsonian / authority model (top down). So the social, political environment of Pakistan is not mature enough to deal with this heterogeneity and pluralism.

**7- LOGICAL FRAME WORK:**

| Directive Hierarchy | Statement   | Indicators  | Measurement of Verification (MOV)  | Risks and assumptions   |
|---------------------|---|---|--|---|
| Aims                | Transparent dispensation of de-jure Public Policy Process and implementation.   | Relatively less influence of Iron Triangle of Civil and Military Beurocracy, Feudal landlords and opportunist Politicians in the Policy making process. | # Reports and data of Public accounts committee.<br># Reported Law cases of Judicial review from Law Journals.         | # Unstable Socio Political and Economic System.<br># Incidences of Military intervention.<br># Vested interest of Global actors and powers. |
| Objectives          | Strict Separation of Powers and effective Judicial Review in the Public Policy Process.   | Increase in transparency and comprehensive checks and balances in the overall Socio Economic Development of National as well as Local level.            | Reports and data available from NAB and FIA.   | # Monopoly of any specific branch of Government.<br># Incidences of corrosion and abetment.<br># Collusion between institutions.            |
| Outputs             | # Sustainable compatibility of Constitutionalism and Legalism with good Governance.<br># Smooth and stable Socio Economic and political environment | # The essence of equity, efficiency and Utilitarianism is dominating in the Pro-Bono Publico activities of Public                                       | # Reports from concerned authorities.<br># Data from specific NGO's<br># Survey Reports on print and electronic media. | # Geographical and Economic vulnerability<br># Provincial and Local prejudices.<br># Dyslexia about the Islamic Theocracy and               |

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|-----------------------|--|--|--|--|
|                       | # Rule of law and Pluralism prevails instead of Traditional Totalitarianism and Elitism.   | Administration.<br># Sustainable Democratic and Egalitarian Political System.<br># Tangible growth and empowerment of Civil Society.   | # Turnout reports in the electoral process.<br># Percentage of civil society participation.<br># Banks reports on saving and investment.   | Liberal Democracy.<br># Opportunist can prevail.<br># Monopoly a coercion of Technocracy.  |
| Inputs and Activities | # Legislative, Executive and Administrative branches of Government are strictly working in their specific Spheres.<br># Continuation of Democracy.<br># Cognoscenti model of Legalism.<br># Client friendly Public administration. | # Rational, indigenous and cognitive Law making process in National and Provisional assemblies without coercion.<br># Free and fair election.<br># Independence and accountable of Judiciary, with tangible, effective speedy Justice.<br># Effective governance and administration based on equity and meritocracy. | # Bills passed in National and Provincial assemblies, and level of reaction against or for them from stakeholders.<br># Election commission reports.<br># Number of Lawsuits.<br># Number of workshops for the training Local and National level Politicians.<br># NIPA reports. | # situational charisma can over rule the rational needs<br># Transitional leaders may emerge and can lead to a social, political matrix of mix ideologies. |

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**8- SWOT analysis of the cognitive model of legalism in Pakistan**

**9- Conclusion**

|   |   |
|---|---|
| <p style="text-align: center;"><b>STRENGTH:</b></p> <ul style="list-style-type: none"> <li>➤ Transparency in governance</li> <li>➤ Equity based Dispensation</li> <li>➤ Increased efficiency in public administration</li> <li>➤ Equilibrium of checks and balances</li> <li>➤ Utilitarian welfare based political system</li> <li>➤ Increased economic benefits</li> <li>➤ Respect for law and order</li> <li>➤ Frictionless political environment</li> <li>➤ Maturity in Governance and administration.</li> </ul>  | <p style="text-align: center;"><b>OPPORTUNITIES:</b></p> <ul style="list-style-type: none"> <li>➤ Internal socio political stability would attract foreign investor.</li> <li>➤ Global recognition</li> <li>➤ Our infrastructure by donors agencies</li> <li>➤ Universal belief on our legal system</li> <li>➤ Brain Draining would Stop</li> <li>➤ Socio political development</li> <li>➤ Political mature culture.</li> <li>➤ Vacuum and need for the Indigenous compatible laws and regulations.</li> </ul>  |
| <p style="text-align: center;"><b>WEAKNESS:</b></p> <ul style="list-style-type: none"> <li>➤ Too many laws and regulations would confuse action plans</li> <li>➤ Monopoly of technocrats</li> <li>➤ Our traditional political system will not tolerate such sudden changes like as Devolution plan</li> <li>➤ Our legislators are not properly trained</li> <li>➤ Top down approach and bottom up approach would confuse each other and delaying tact would prevail</li> <li>➤ Our educational System is not compatible for this change.</li> <li>➤ Intellectual deficit society</li> <li>➤ Our political culture used to status Quo.</li> <li>➤ Immature and underdeveloped administrative and political culture.</li> <li>➤ Legislators have no social, political and administrative skills and intellects</li> </ul> | <p style="text-align: center;"><b>THREATS</b></p> <ul style="list-style-type: none"> <li>➤ Abetment of Technocrats can be monopolized by donor agencies</li> <li>➤ The vested interest of liberal European democracies can prevail</li> <li>➤ Monopoly of fundamental Islamic thoughts of Middle East Monarchy can Prevail</li> <li>➤ New kinds of elites can emerge which would be incompatible with our Developing Society</li> <li>➤ Any developed global power can dominate our social political system due to vacuum in Governance</li> <li>➤ Confused practicality of Islamic thoughts and Philosophy</li> <li>➤ Legacy of colonial laws and regulations</li> <li>➤ Extreme heterogeneity and deficit of confidence among different stakeholders and clients</li> </ul> |

It is clear that the role of the judiciary is much important to maintain the rule of law in the society. The higher courts are contributing in the development and continuation of the democracy in Pakistan and also deciding constitutional and political matters amicably.

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The various issues concerning many social actors being to formulate their demands in legal and judicial terms are decided by the judiciary according to the norms of the constitution of Pakistan. Unconstitutional decisions of the legislative and executive reviewed by the judiciary through judicial review. In this way, the judiciary maintains checks and balance over the legislative and government.

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