

# POSTCOLONIALITY AND MYTHOLOGIES OF CIVIL(IZED) SOCIETY

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We make up a story to cover the facts we don't know or can't accept . . . .<sup>1</sup>

The repetitions and prevarications of mythology so fog the issue that irresolvable logical inconsistencies are lost sight of even when they are openly expressed.<sup>2</sup>

All societies are constructions in the face of chaos. The constant possibility of anomic terror is actualized whenever the legitimations that obscure the precariousness are threatened or collapse.<sup>3</sup>

## I. INTRODUCTION

All societies being constructions in the face of chaos, all social theory issues from fear of the mob. Nothing brings this into sharper relief than the concept of civil society, increasingly at large across political spectrums and disciplinary divides. Deployed by some as a heuristic category and by others as an object of analysis, its dynamic coexistence as a political slogan and social prescription, analytical concept and normative category make it ripe as a site of contestation. The protean nature of the term "civil society" may account for its current ubiquity. This ubiquity elides distinctions between description, prescription, and aspiration. It is often not clear whether the proponents of the concept are empirically describing the balance of forces and distribution of power in a particular setting or are putting forward normative claims about the desirability of a particular model of social development. The problem is compounded by the fact that one finds an unlikely constellation among the advocates of civil society. They include managers of global capitalism bent upon

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1. JULIAN BARNES, *A HISTORY OF THE WORLD IN 10½ CHAPTERS* 242 (1989).

2. EDMUND LEACH, *CLAUDE LÉVI-STRAUSS* 62-63 (1974).

3. P.L. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 121 (1971), *quoted in* GIORGIO AGAMBEN, *STATE OF EXCEPTION* 66 (Kevin Attell trans., 2005).

the neo-liberal agenda of rolling back the state and paving the way for unbridled circulation and accumulation of capital, socialists in search of a viable political program in the post-1989 world, and third-world intellectuals trying to move beyond the failed postcolonial nationalist projects.

Interrogating the concept of civil society is in tune with the theme, "Critical Approaches to Economic In/Justice," of the Lat-Crit X Conference because cultivation and strengthening of civil society in developing countries is often prescribed as a necessary means of achieving economic development and political stability. This study is informed by three of the foundational points of departure of LatCrit theory. One, almost from its inception LatCrit theory has been mindful of the intersections between the local, national and international.<sup>4</sup> Two, it is a cardinal posture of Lat-Crit that social theorizing is political in nature, as it posits models of distribution of identities and rights.<sup>5</sup> Three, LatCrit has endorsed and cultivated a mode of theorizing that privileges the posture and voices of the subordinated.<sup>6</sup>

My position is that the discourse of viability of civil society in postcolonial polities is theoretically ungrounded and helps to further marginalize subordinated sections of the population. These failings result from the imprisonment of dominant social theories in Eurocentric unilinear evolutionism, an imprisonment that blinds one from the particulars of supposedly universal categories that issue from Europe's experience of modernity. Furthermore, enthusiasm for civil society ignores the truncated colonial career of modernity and the nature of the postcolonial

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4. See generally, Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349, 372 n.65 (1998); Elizabeth M. Iglesias & Francisco Váldes, *LatCrit at Five: Institutionalizing a Post-Subordination Future*, 78 DENV. U. L. REV. 1249, 1279-88 (2001); Pedro A. Malavet, *LatCritical Encounters with Culture, in North-South Frameworks*, 55 FLA. L. REV. 1 (2003); Ediberto Román, *LatCrit VI, Outsider Jurisprudence and Looking Beyond Imagined Borders*, 55 FLA. L. REV. 583 (2003). Two Colloquia organized by LatCrit specifically focused on the international setting. See Colloquium, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996-97); *The First Annual LatCrit Summer Colloquium: Spain, the Americas and Latino/as: International and Comparative Law in Triangular Perspective*, 9 U. MIAMI INT'L & COMP. L. REV. 1 (2000-01).

5. See Gil Gott, *Identity and Crisis: The Critical Race Project and Postmodern Political Theory*, 78 DENV. U. L. REV. 817 (2001); Tayyab Mahmud, *Limit Horizons & Critique: Seductions and Perils of the Nation*, 50 VILL. L. REV. 939 (2005); Francisco Váldes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1, 53 (1997).

6. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Francisco Váldes, *Outsider Scholars, Critical Race Theory, and "OutCrit" Perspectivity: Postsubordination Vision as Jurisprudential Method*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 399 (Francisco Váldes et al. eds., 2002).

state. In order to substantiate these propositions, I will briefly trace the genealogy of the concept of civil society, examine the colonial career of modernity, and analyze the nature of the state in postcolonial settings using Pakistan as an example.

## II. CIVIL SOCIETY: EVOLUTION OF THE CONCEPT

Civil society is not a neologism of the social scientific imagination but a term carrying its own intellectual history, a history that casts an inescapable shadow on contemporary usages. Until the end of the eighteenth century, the term civil society was synonymous with the state or political society, thus, reflecting its classic origins.<sup>7</sup> Civil society was a more or less direct translation of Aristotle's *koinōnia politiké* and Cicero's *societas civilis*.<sup>8</sup> Kant saw *bürgerliche Gesellschaft* as that constitutional state towards which political evolution tends.<sup>9</sup> For Rousseau the *etat civil* was the state.<sup>10</sup> In all of these uses, society is contrasted with the "uncivilized" condition of humanity—whether in a hypothesized state of nature or, more particularly, under an "un-natural" system of government that rules by despotic decree rather than by laws.

By the late eighteenth century, liberal philosophers began to distinguish a discrete form of civil society with quite a different rationale. Far from defining the nature of the state, civil society came to be seen as a means of defense against potential abuse of political power, especially given the unprecedented concentration of power at the apex of the modern polity. For Locke,

"Wherever, therefore, any number of men so unite into one society as to quit every one his executive power of the law of Nature, and to resign it to the public, there and there only is a political or civil society. And this is done wherever any number of men, in the state of Nature, enter into society to make one people one body politic under one supreme government . . . ."<sup>11</sup>

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7. In order to summarize the evolution of the concept of civil society, I draw on NEERA CHANDHOKE, *STATE AND CIVIL SOCIETY: EXPLORATIONS IN POLITICAL THEORY* (1995); *CIVIL SOCIETY AND THE STATE: NEW EUROPEAN PERSPECTIVES* (John Keane ed., 1988); JOHN KEANE, *DEMOCRACY AND CIVIL SOCIETY: ON THE PREDICAMENTS OF EUROPEAN SOCIALISM, THE PROSPECTS FOR DEMOCRACY, AND THE PROBLEM OF CONTROLLING SOCIAL AND POLITICAL POWER* (1988); JOHN KEANE, *CIVIL SOCIETY: OLD IMAGES, NEW VISIONS* (1998).

8. See John Keane, *Despotism and Democracy: The Origins and Development of the Distinction Between Civil Society and the State 1750-1850*, in *CIVIL SOCIETY AND THE STATE*, *supra* note 7, at 35; CHANDHOKE, *supra* note 7, at 78-79.

9. See CHANDHOKE, *supra* note 7, at 82; Keane, *supra* note 8, at 35-36.

10. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT passim* (Maurice Cranston trans., 1968) (1762).

11. JOHN LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* 160 (J.M. Dent & Sons 1955) (1690).

Here a sharp distinction between the state and society is posited as the analytical touchstone of the social contract theory of which Locke was an early exponent.<sup>12</sup>

The Lockean social contract theories build upon an intellectual foundation posited by Hobbes, although the two use the contractarian idea in very different ways. In contrast to the implicitly benign civil society whose consent legitimates the Lockean contract, the Hobbesian vision involves more of a Faustian pact—unlimited power to the sovereign to protect civil society from its demonic impulses.<sup>13</sup> The civil and political society set up by the contract ensured civility because, unlike the uncontrolled state of nature, this society made orderly freedom, security of person and property, and a rational life possible. The act of consent, the contract, also created a juridical society where an individual's life and property could be protected. Locke's architecture of modern political order, inclusive of the state and civil society, rests on three foundations: autonomous rights-bearing individuals, private property, and government by contract limited to protecting pre-contractual rights.

The Scottish Enlightenment injected new meanings into the concept of civil society. Here one should bear in mind that the project under girding the Scottish Enlightenment was that of civilizing a supposedly rude and uncivil populace with England serving as the model.<sup>14</sup> For Adam Smith, civil society was the realm not only of the system of satisfaction of material needs but also where men had gained control over human passions through reason.<sup>15</sup> While the individual is seen as egotistical, his self-interest is seen as mediated by the realization that the satisfaction of his interests depends upon the satisfaction of interests of other individuals. Behind the metaphor of "the invisible hand" lay the reasoned and controlled behavior of individuals. Once reason has conquered the inner world of man, and applied reason to the world of nature, the path to material and moral progress is open. An important caveat remained: the egotistical individual could realize his capacities only in a commercial society which offered

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12. For critical studies of the social contract theory and liberalism that focus on exclusions and subordinations engendered by these social theories, see C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962); CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988); CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997); UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999).

13. See THOMAS HOBBS, *LEVIATHAN* (J.M. Dent & Sons 1914) (1651).

14. See, e.g., ARTHUR HERMAN, *HOW THE SCOTS INVENTED THE MODERN WORLD* (2001); *WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* (Istvan Hont & Michael Ignatieff eds., 1983).

15. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Encyclopaedia Britannica, 1990) (1776).

him the freedom to nurture his personality. Commercial society is marked not only by progress in the forces of production, but also by manners and morals, laws and reason. In this sense civil society is a property of commercial societies and an attribute of “advanced nations”—nations that allow the flowering of individual subjectivity because they are supremely confident that egoism and self-interest, passions and love are regulated by reason and the recognition of interdependence.

For Adam Ferguson, there could be no market without the rule of law, the enforcement of contracts and private property guaranteed by the public authority.<sup>16</sup> In turn, the government could not be expected to be limited unless free markets and private property as well as free associations were able to circumscribe the government’s capacity to intervene in the reserved domain of its citizens. The best way to counter the corrupting influences of power and wealth and to revive the sense of public spirit was, therefore, to encourage the creation and strengthening of citizens’ associations.

Thomas Paine’s radical polemic went a step further, asserting the sovereignty of the individual and regarding government as merely a “national association” of citizens.<sup>17</sup> Only individuals had political rights, including the right to withdraw consent from the social contract; governments, for their part, had the duty to serve citizens in the “common interest.” For Paine, common interest based on a natural human proclivity for social reciprocity was a far more effective means of consolidating collective power than a system of positive laws enacted and administered from above.<sup>18</sup>

Perhaps the most articulate liberal exponent of civil society was Alexis de Tocqueville, who drew attention to new types of state despotism implicit in democratic rule.<sup>19</sup> He was concerned not only with the potential tyranny of the majority but also with the inherent contradictions among democratic principles of freedom and equality. In pursuit of equality, for example, citizens empowered the state to undertake the widespread provision of public goods. But in so doing they inadvertently surrendered a measure of liberty, which could result in the administrative suffocation of the society. As the state expanded, so civil life became ever more thoroughly penetrated and controlled. According to

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16. See ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* (Fania Oz-Salzberger ed., 1995) (1767).

17. See THOMAS PAINE, *BASIC WRITINGS OF THOMAS PAINE: COMMON SENSE, RIGHTS OF MAN, AGE OF REASON* (1942).

18. *Id.*

19. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., 1988) (1848).

de Tocqueville, the state should be overseen and checked by the "independent eye of society," made up of "a plurality of interacting, self-organized and constantly vigilant civil associations [sic]" whose functions were to nurture basic rights, to advocate popular claims, and to educate citizens in the democratic arts of tolerance and accommodation.<sup>20</sup> For de Tocqueville, these associations included local self-government, juries, parties and public opinion; other civil associations might include churches, moral crusades, schools, literary and scientific societies, newspapers and publishers, professional and commercial organizations, and organizations for leisure and recreation.

Liberal thinkers, however, did not enjoy an undisputed claim to the concept of civil society. Soon theorists using historicist approaches contested their ideas. For Hegel, civil society was not a natural condition of freedom but a historically produced sphere of life.<sup>21</sup> Sandwiched between the patriarchal family and the universal state, civil society was the historical product of a multi-dimensional process. One of its dimensions was the spread of commodity relations and the emergence of a market that freed the sphere of economic relations from the weight of extra-economic relations, and, thus, the economy from the sphere of politics. Another dimension involved the formulation of civil law which regulated contractual relations among free and autonomous individuals. Yet another dimension was reflected in the de-personalization of violence and the centralization of the absolutist state. Because civil society was inherently conflicted and unstable due to the competitive interplay of private interests, especially the acquisitive urges of the bourgeoisie, Hegel argued that civil society cannot remain civil unless it is ordered politically and subjected to surveillance by the state. Thus, only the state could represent the unity of society and further the freedom of its citizens and because the state sought to modify private behavior with the aim of enhancing the public good, its interventions were by definition legitimate. The term *bürgerliche Gesellschaft* makes no distinction between the sphere of the bourgeois and the sphere of the citizen. While civil society is understood as the arena of the self-seeking economic actor, Hegel also includes within it the impulse to citizenship, the passage from the outlook of civil society to that of the state. That is why the sphere of civil society contains not just economic but social and civic institutions. It includes not just the market, the system of production and exchange for the satisfaction of needs, but also

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20. See CHANDHOKE, *supra* note 7, at 108-10; Keane, *supra* note 8, at 61.

21. See GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., 1942) (1821).

classes and corporations concerned with social, religious, professional and recreational life.<sup>22</sup>

For Marx, civil society emerged “when property relationships had already extricated themselves from the ancient and medieval communal society. Civil society as such only develops with the bourgeoisie . . . .”<sup>23</sup> The discovery of this sphere, and the recognition of its central importance in history, could only come about at a particular stage in the development of the productive forces: the stage at which the bourgeoisie could establish an economy that was in principle and to a good extent in practice distinct from the state and all other regulatory bodies. Consequently, Marx insisted that “the anatomy of . . . civil society is to be sought in political economy.”<sup>24</sup> Civil society and state remain dialectically joined as “structure” and “superstructure.” As the realm of economic relations, civil society was coterminous with the socioeconomic base, as opposed to the state, which was the political and juridical superstructure. Thus, Marx reversed Hegel’s depiction of state-society relations, seeing the state as subordinate in its relations with civil society and its performance conditioned by the interests of the dominant class. The leading twentieth-century theorist of civil society, Antonio Gramsci, used Marxist categories but arrived at quite original conclusions.<sup>25</sup> The formula most commonly found in Gramsci is that the state equals political society plus civil society. Political society is the arena of coercion and domination; civil society, that of consent and direction. The hegemony of a ruling class is expressed through the “organic relations” between the two realms.<sup>26</sup> Gramsci emphasizes the central role of civil society in the manufacture and maintenance of hegemony. He thus sometimes narrowly equates the state with political society, the system of direct coercive rule, leaving to civil society the main work of organizing hegemony.

Civil society is the sphere of culture in a broad sense. It is concerned with the manner and mores of society, with the way people live. It is where values and meaning are established; where they are debated, contested and changed. It is the necessary complement to the rule of class through its ownership of the means of production and its capture of the apparatus of the state. Given the tendency of postcolonial enthusiasts of civil society to

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22. *Id.*

23. KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* 26-27 (R. Pascal ed., International Publishers 1947).

24. KARL MARX & FRIEDRICH ENGELS, *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 43 (Lewis S. Feuer ed., 1959).

25. See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1971).

26. *See id.*

appropriate Gramsci, it is important to note that he recognized that an entrenched civil society is limited to contexts where capitalism and a liberal political order have taken root. For example, he notes that in Czarist Russia, "the State was everything, civil society was primordial and gelatinous; in the West, there was a proper relation between State and civil society, and when the State trembled a sturdy structure of civil society was at once revealed."<sup>27</sup> Furthermore, in his analysis of the relative underdevelopment of southern Italy, Gramsci concludes that even within a single state, unequal development of productive forces and attendant social relations may affect the viability of civil society.<sup>28</sup>

For Jurgen Habermas, civil society is "composed of those associations which, within the framework of the arrangements of public spheres, institutionalize problem-solving discourses for questions of general interest."<sup>29</sup> The preconditions for the emergence of civil society are a plurality of life forms, public communications, and the legality of rights and regulations. According to Habermas, the idea of a public sphere is that of a body of private persons assembled to discuss matters of public concern or common interest.<sup>30</sup> This idea acquired force and reality in early modern Europe in the constitution of "bourgeois public spheres" as counter-weights to absolutist states. These public spheres aimed to mediate between society and state by holding the state accountable via "publicity." At first this meant requiring that information about state functioning be made accessible so that state activities would be subject to critical scrutiny and the force of public opinion. Later, it meant transmitting the considered general interest of "bourgeois society" to the state via forms of legally guaranteed free speech, free press, and free assembly, and eventually through the parliamentary institutions of representative government. Thus, the public sphere was designated as an institutional mechanism for "rationalizing" political domination by rendering states accountable to the citizenry.

Habermas' relatively recent work revolves around a basic tension between an economic and political system and the "lifeworld," of which civil society, in a narrow sense, would be a

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27. *Id.* at 238.

28. See ANTONIO GRAMSCI, *THE SOUTHERN QUESTION* (Pasquale Verdicchio trans., 1995).

29. Jürgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 421, 455 (Craig Calhoun ed., Thomas Berger trans., MIT Press 1992).

30. See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., 1989).

part.<sup>31</sup> He posits “the system” in terms of the state apparatus and the economy as systemically integrated action fields, having a bureaucratic and capitalist life of their own, and he further assumes that they can no longer be democratically transformed from within. Civil society in the Habermasian sense corresponds to the institutions of sociability and discourse of the “lifeworld,” as a sort of new impersonation of the public sphere. This version of civil society refers to voluntary associations outside the realm of the state and the economy. Habermas even places unions, parties, and above all, social movements in the “lifeworld,” hoping that they will be the bulwarks against its colonization by the system “to erect a democratic dam against the colonializing *encroachment* of system imperatives on areas of the lifeworld.”<sup>32</sup>

At this point it is important to take note of an alternative stream of Occidental social theory, exemplified by Carl Schmitt, Giorgio Agamben, and Michel Foucault, that calls into question the very validity of the construct of civil society even in Occidental social formations. This alternative stream posits a view of law and sovereignty that precludes the much heralded public/private distinction and rules out any social sphere distinct and autonomous from the governmental regimes of modernity.

Carl Schmitt saw politics as a conflict between friend and enemy and questioned the liberal-constitutional theory of the state wherein the state is subordinate to law. For Schmitt, “[t]he concept of the state presupposes the concept of the political.”<sup>33</sup> The Hobbesian war of all against all remains an ever-present possibility even after the establishment of the state, so that once the “state and society penetrate each other . . . [there] appears the total state, which potentially embraces every domain. This results in the identity of state and society.”<sup>34</sup> This schema leaves no room for autonomy between the state and society, hence precluding the possibility of civil society. As for the much-heralded liberal rule of law, Schmitt posits that “[t]he exception is more interesting than the rule . . . In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.”<sup>35</sup> The exception and not the rule is foundational because the “[s]overeign is he who decides on the exception.”<sup>36</sup> Sovereignty is seen as the supreme un-derived power of

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31. See JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (Christian Lenhardt & Shierry Weber Nichol森 trans., MIT Press 1990).

32. Habermas, *supra* note 29, at 444 (emphasis in original).

33. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 19 (George Schwab trans., 1976).

34. *Id.* at 22.

35. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 15 (George Schwab trans., 1985).

36. *Id.* at 5.

domination, residing outside the law. The state of exception reveals the factual primacy of the “rule of man” over the “rule of law,” as it signifies a sovereign decision uninhibited by any normative principles or constraints. This is in tune with Hans Kelsen’s conception of the state as a legal order resting upon a *grundnorm* or basic norm that cannot be derived from the system itself.<sup>37</sup> A legally demarcated “principle of legitimacy . . . fails to hold in the case of a revolution . . . [where t]he principle of legitimacy is restricted by the principle of effectiveness.”<sup>38</sup>

Giorgio Agamben takes a leaf from Schmitt to develop the argument that the state of exception, not the rule of law, is the paradigm of modern government.<sup>39</sup> The state of exception constitutes a “point of imbalance between public law and political fact”<sup>40</sup> in an “ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political.”<sup>41</sup> For Agamben, the state of exception, viewed as a “no-man’s-land between public law and political fact,”<sup>42</sup> is “not a special kind of law . . . rather, insofar as it is a suspension of the juridical order itself, it defines law’s threshold or limit concept.”<sup>43</sup> The argument is that the European inter-state wars of the 20th century and the state of exception that accompanied and followed them, transformed liberal democratic regimes through gradual, but sustained, expansion of executive powers. As a result, the state of exception has become “a technique of government rather than an exceptional measure . . . [and] the constitutive paradigm of the juridical order . . . .”<sup>44</sup>

Michel Foucault refuses to recognize any analytical distinction between civil society and the state. For him, “[r]elations of power are not in a position of exteriority with respect to other types of relations (economic processes, knowledge relationships, sexual relations), but are immanent in the latter . . . [and] they

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37. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., 1961); Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d’Etat & Common Law*, 27 *CORNELL INT’L L.J.* 49, 106-16 (1994).

38. KELSEN, *supra* note 37, at 117-19.

39. See AGAMBEN, *supra* note 3; GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., 1998).

40. FRANÇOIS SAINT-BONNET, *L’ÉTAT D’EXCEPTION* 28 (2001), *quoted in* AGAMBEN, *supra* note 3, at 1.

41. Alessandro Fontana, *Du droit de résistance au devoir d’insurrection*, in *LE DROIT DE RÉSTANCE* 16 (Jean- Claude Zancarini ed., 1999), *quoted in* AGAMBEN *supra* note 3, at 1.

42. AGAMBEN, *supra* note 3, at 1.

43. *Id.* at 4.

44. *Id.* at 6-7. Agamben also traces the brief history of the state of exception as a foundational construct in modern constitutions since the French Revolution. See *id.* at 11-22.

have a directly productive role, wherever they come into play.”<sup>45</sup> In the modern disciplinary and governmental society, the lines of power extend throughout social space in the channels created by institutions traditionally located in the civil society. The exertion of power is organized through deployments that are at once ideological, institutional, and corporeal. In this framework, the state is not properly understood as the transcendent source of power relations in society. Rather, it is the dispersed, localized and disjointed nature of power that is important in the study of the practices of everyday life.

Rejecting a top-down analysis of power that starts with the state, sovereignty, and the law, Foucault adopts an ascending analysis of power. Directing attention away from the visible and formalized codes of power, he concentrates on the manner in which individuals experience power at all sites of human relations, the manner in which the individual is constituted by these relations, the specific forms of power acquired in specific contexts and its articulation through discourses, and the fact that power is ubiquitous and immanent. Foucault asserts that “[w]hat we need, however, is a political philosophy that isn’t erected around the problem of sovereignty, nor therefore around the problems of law and prohibition. We need to cut off the king’s head, in political theory that has still to be done.”<sup>46</sup> Foucault’s work makes it clear that the institutions and enclosures of the space beyond the juridical state constitute the paradigmatic terrain for the disciplinary deployments of power in modern society, producing normalized subjects and thus exerting hegemony through consent in a way that is more subtle, but no less authoritarian, than the exertion of authority through coercion. Containment of the mob through surveillance and discipline become the foundational organizing principles of a modern polity, precluding any distinction between the state and civil society.

This alternative theoretical posture towards the concept of sovereignty and power in modernity helps us to interrogate the conventional constructions of civil society. Civil society, then, is an idea that arose in Occidental social theory out of the same rethinking, reframing, and reconfiguration of allegiances that accompanied the rise of capitalism, the secular territorial state, and modern forms of disciplinary power. It refers to an attempt to theorize a specific historical experience: an ongoing, uninterrupted tradition of a core of socioeconomic and political institu-

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45. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME 1: AN INTRODUCTION* 94 (Robert Hurley trans., 1978).

46. MICHEL FOUCAULT, *Truth and Power*, in *THE FOUCAULT READER* 51, 63 (Paul Rabinow ed., 1984).

tions in northern Europe dating back three centuries. The institutional core consists of the following combination of political and socioeconomic arrangements: a government which is limited and accountable and operates under the rule of law; a market economy based on a regime of private property and private accumulation; an array of free, voluntary associations; and a sphere of free public debate. The concept rests on a premise that assumes precise outlines within modern European history—that social relations are both sustained and energized by autonomous, secular collectives with legal personality operating within a frame of rationalized self-referential law. Consequently, claims of the existence of civil society in postcolonial settings must be reconciled with the inescapable conclusion that the construct of civil society is embedded in Europe's particular experience of modernity, that it rests upon a classic liberal stabilization of social relations on the basis of rights, and that a capitalist economy is its indispensable precondition. Implicit in claims of civil society in postcolonial formations are erroneous assumptions regarding the universality of Eurocentric evolutionist history, the validity of civilizing claims of colonialism, and the benign nature of the postcolonial state.

### III. EUROCENTRICISM AND THE COLONIAL CAREER OF MODERNITY

Claims that civil society is viable in postcolonial formations constitute part of an imagined re-creation of one of the stages of history that Europe has already passed through—the historical processes of development and consolidation of capitalism. This posture is marked by a unilinear evolutionist perspective whereby a historical process unfolding under concrete conditions—seventeenth to twentieth century Europe—is presented as a universal path upon which all subsequent social developments are fated to tread. The outcome is history by analogy rather than history as process. This imperialism of categories born of terminal vocabularies<sup>47</sup> and grand narratives of modernity ensures that a particular reality has meaning only in so far as it can be seen to reflect a particular stage in the development of European history. Here, the European experience of modernity is taken as a universal history, and it is assumed that “it is only the concepts of European social philosophy that contain within them the possibility of universalization.”<sup>48</sup> Ignoring differences within Europe, Eurocentricism presents European historical experience in an

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47. HOMI BHABHA, *THE LOCATION OF CULTURE* 125 (1994).

48. Partha Chatterjee, *A Response to Taylor's "Modes of Civil Society,"* 3 *PUB. CULTURE* 119, 119 (Fall 1990).

idealized, mythologized, and non-contradictory form. European political theory is taken too literally, as if it were a *description* of European history rather than a *prescription* for its development. Just as it holds up modern European history as a mirror in which to gauge the significance of all other human development, Eurocentricism also has a tendency to view its objects as lacking the capacity to comprehend their own past as a step in developing their own history.

Containing and disciplining the masses under the guise of making them civil(ized), then, appears to be foundational to modernity. Modernity unfolded in concert with the emergence of capitalism and rendered the world disenchanting and imprisoned in what Weber termed the “iron cage” of the modern economic order.<sup>49</sup> In his search for an antidote to this lack of stable meaning and grounded legitimacy, Weber finds legalist liberalism wanting and pines for a charismatic leader to lend the system coherence.<sup>50</sup> In this scheme, the political role of the masses is limited to acclaiming the leader who has captured power, rendering them passive objects rather than political actors.<sup>51</sup> This dismissive attitude towards the masses was contagious and infected the elite amongst the colonized quickly.<sup>52</sup> To appreciate the inherent relationship between civilizing and civil society, one has to be mindful that “at the origin of the creature stands not purity . . . but purification . . .”<sup>53</sup> The Hobbesian Leviathan has to continually ensure that terms of the social contract are adhered to, lest pre-contractual brutish tendencies burst into the open; peasants have to be hammered into Frenchmen.<sup>54</sup> The parallel here is with racism, to be seen as resting not upon race but racing. The parallels between civilizing, purification, and racing are foundational to the concept of civil society—forged against the

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49. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181-83 (Talcott Parsons trans., 1958).

50. MAX WEBER, *ECONOMY AND SOCIETY* 241-45, 266-71 (Guenther Roth & Claus Wittich eds., 1968).

51. For a detailed discussion, see DAVID BEETHAM, *MAX WEBER AND THE THEORY OF MODERN POLITICS* (1974).

52. Even Mahatma Gandhi, the veritable champion of the marginalized, on more than one occasion expressed his frustration with (fear of?) the mob. For example, following an India-wide tour during the anti-colonial non-cooperation movement of 1920, he wrote: “[w]ith a little forethought this mobocracy, for such it was, could have been changed into a splendidly organized and educative demonstration.” MAHATMA GANDHI, *18 COLLECTED WORKS* 274, quoted in RANAJIT GUHA, *DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA* 225 n.66 (1997). Another of Gandhi’s articles was entitled *Democracy “Versus” Mobocracy*, GANDHI, *supra*, at 240.

53. WALTER BENJAMIN, *THE CORRESPONDENCE OF WALTER BENJAMIN* 138 (Gershom Scholem & Theodor W. Adorno eds., Manfred R. Jacobson & Evelyn M. Jacobson trans., 1994), quoted in AGAMBEN, *supra* note 3, at 61.

54. See EUGEN WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE 1870-1914* (1976).

backdrop of the colonial career of modernity, establishment of civil society always entails civilizing the “Other.”

Given the colonial career of modernity, it is more productive to read colonialism and postcoloniality from the perspective of the subordinated and the marginalized—the subaltern. The colonial and postcolonial subaltern subject was brought into sharp relief by the South Asian Subaltern Studies Group.<sup>55</sup> Their project aims at interrogating the hegemonic stream of historiography that sees social change as evolutionary and posits dominant elites as the only agents of change. Subaltern Studies posits that moments of social change are pluralized and located in confrontation and resistance rather than evolutionary transition, and that subalterns are the primary agents of change. This point of departure enables an “against-the-grain” reading of the official archive and demands that one listen to “the small voice of history.”<sup>56</sup> There is an obvious concert between Subaltern Studies and Lat-Crit theory, in particular in their shared commitment to anti-subordination. This makes analytical approaches of Subaltern Studies particularly productive in a critique of the concept of civil society.

Like so many other Enlightenment concepts, the meanings of civil society were forged on colonial terrain.<sup>57</sup> The term “civil society” partakes of a Eurocentric provincialism, and its construction was integrally related to the construction of an uncivil “Other.” Indeed, for philosophers like Kant and Hegel the term was not unrelated to, and in many ways legitimated, the processes of colonial subjugation.<sup>58</sup> For Ferguson, the celebrated advocate of civil(ized) society, innate deficiencies of the colonized precluded their inclusion in the sphere of freedom and civility.<sup>59</sup> The time period marked by the colonial expansion of Europe saw the consolidation of History—a unilinear, progressive, Eurocentric, teleological history—as the dominant mode of

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55. See SELECTED SUBALTERN STUDIES (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988); MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL (Vinayak Chaturvedi ed., 2000); THE LATIN AMERICAN SUBALTERN STUDIES READER (Ileana Rodríguez ed., 2001).

56. Ranjit Guha, *The Small Voice of History*, 9 SUBALTERN STUDIES: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY 1 (Shahid Amin & Dipesh Chakrabarty eds., 1997).

57. Jonathan S. Hearn, *Scottish Nationalism and the Civil Society Concept: Should Auld Acquaintance be Forgot?*, 20 POL. & LEGAL ANTHROPOLOGY REV. 32 (1997).

58. Tsenay Serequeberhan, *The Idea of Colonialism in Hegel's Philosophy of Right*, 29 INT'L PHIL. Q. 301 (1989).

59. Ferguson wrote in 1767 that Africa had a “weakness in the genius of its people” and did not inspire “virtues which are connected with freedom, and required in the conduct of civil affairs,” quoted in JOHN L. COMAROFF & JEAN COMAROFF, *Introduction to CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA: CRITICAL PERSPECTIVES 1* (John L. Comaroff & Jean Comaroff eds., 1999).

experiencing time and of being.<sup>60</sup> In History, time overcomes space—a process whereby the geographically distant Other is supposed to, in time, become like oneself; Europe's present becomes all Others' future.<sup>61</sup>

Embodying the agenda of modernity, History constitutes a closure that destroys or domesticates the alterity of the Other. History as a mode of being becomes the condition that makes modernity possible, with the nation-state posited as the agency, the subject of History, which will realize modernity. History becomes a master code, something imaginary that informs the "civilizing mission" of colonialism, posited as a world-historical task. Today the fundamental postcolonial challenge is to redress Europe's "homogenizing and incorporating world historical scheme that assimilate[s] non-synchronous developments, histories, cultures, and peoples to it."<sup>62</sup> One step towards meeting this challenge is to recognize that "repression and violence . . . are as instrumental in the victory of the modern as is the persuasive power of its rhetorical strategies."<sup>63</sup> Nothing better illustrates this fact than the colonial career of modernity, where one can also locate the roots of today's postcolonial maladies.

One must take issue with the Eurocentric evolutionist claim that modern power in its colonial career simply replicates its evolution in Europe.<sup>64</sup> Colonialism is absolute government, founded not on consent but on conquest. Consequently, the modern regime of power in its colonial career was "destined never to fulfill its normalizing mission, because the premise of its power was the preservation of the alienness of the ruling group."<sup>65</sup> The universalist claims of modernity floundered in the colony, and the promise of the rule of law yielded to "the rule of colonial difference,"<sup>66</sup> a rule whereby, within colonial discursive and institutional practices, the colonized are represented as inferior and radically Other. The constructions of an immutable difference between the colonizer and the native, reconciled

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60. See DEREK ATTRIDGE ET AL., *POST-STRUCTURALISM AND THE QUESTION OF HISTORY* (1987); Ashis Nandy, *History's Forgotten Doubles*, 34 *HIST. & THEORY* 44 (1995); ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* (2d ed. 2004).

61. JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* (2d ed. 2002).

62. Edward W. Said, *Orientalism Reconsidered*, in *LITERATURE, POLITICS AND THEORY: PAPERS FROM THE ESSEX CONFERENCE, 1976-1984* 210, 224 (Francis Barker et al. eds., 1986).

63. Dipesh Chakrabarty, *Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?*, 37 *REPRESENTATIONS* 1, 21 (1992).

64. David Scott, *Colonial Governmentality*, 43 *SOC. TEXT* 191 (1995).

65. PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* 18 (1993).

66. *Id.* at 16.

colonialism's professed civilizing mission with its violence. Modernity's promise of rationality and rule of law collapsed in the colonies, and the professed universality of European constructs betrayed their particularity. Contradictions and ironies abounded, as did the defenses of the gulf between rhetoric and reality on the grounds of practicality and the exceptional circumstances of the colonies.

This rule of difference rendered the colonial state fundamentally different from the parent metropolitan state. While "the metropolitan state was hegemonic in character with its claim to dominance based on a power relation in which the moment of persuasion outweighed that of coercion, . . . the colonial state was non-hegemonic with persuasion outweighed by coercion in its structure of dominance."<sup>67</sup> This directly affected the relationship of law with both the state and the social formation at large. In the colony "law was a department of the executive,"<sup>68</sup> never achieving the autonomy envisaged by liberal designs of governance even when formally incorporated in projects of macro social engineering.<sup>69</sup> For the colonizer, while "[o]ur law is in fact the sum and substance of what we have to teach them . . . it is a compulsory gospel which admits of no dissent and no disobedience."<sup>70</sup> This ensured that, in the colony, the promise of a modernizing transition from the "rule of force" to the "rule of law" was most pronounced in its breach, and Enlightenment's developmental march to reason and freedom never materialized.

The colonial state was marked by an aspiration for a comprehensive hegemony and the ambition to remake, in its own vision, a society deemed irremediably flawed. Colonialism confined development of capitalism to selected sections of the economy. Non-capitalist modes were preserved, even reinforced, and articulated with the global economy.<sup>71</sup> Colonialism, then, constitutes a truncated project of modernity, a rule of essentialized difference between colonizer and the native, with coercion outweighing consent as the mode of governance and law serving as an instrument of executive power. The non-recognition of the

67. Guha, *supra* note 56, at xii.

68. David Washbrook, *Law, State and Agrarian Society in Colonial India*, 15 MOD. ASIAN STUD. 649, 714 (1981).

69. See generally IMRAN ALI, *THE PUNJAB UNDER IMPERIALISM, 1885-1947* (1988); RANAJIT GUHA, *A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT* (1963).

70. James Fitzjames Stephen, *Legislation Under Lord Mayo*, in W. W. HUNTER, *LIFE OF THE EARL OF MAYO: FOURTH VICEROY OF INDIA 169* (2d ed. 1876), quoted in ERIC STOKES, *THE ENGLISH UTILITARIANS AND INDIA* 302 (1959).

71. See SAMIR AMIN, *ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT* (Brian Pearce trans., 1974); SAMIR AMIN, *UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM* (Brian Pearce trans., 1976).

colonial fracture as foundational to modernity lends itself to the chronic propensity to project the particular as universal, to forward prescription packaged as description, and to deny the agency of the colonized. The key lies in discerning how power is organized in colonial formations, how its vital organizing principle is the coexistence of the language of rights with that of culture and custom, and how this is in tandem with the co-existence of multiple modes of production such that circuits of capital accumulation are developed while retaining spheres of non-capitalist modes of production. This institutional legacy of how power is organized remained largely intact through the phases of formal decolonization and nationalist rule.

The key design of colonial organizations of power was the system of so-called "indirect rule" or "the regime of differentiation,"<sup>72</sup> which forged specifically "native" institutions rooted in "culture" and governed by "custom" through which the colonial regime would rule native subjects. Mahmood Mamdani terms this institutional segregation "decentralized despotism."<sup>73</sup> Unilateral claims were a defining characteristic of the colonial state; natives were made subjects but never citizens. This left only a furtive, marginal space for an embryonic "civil" society. Participation in this society was limited to the urban, educated natives like Macaulay's "interpreters between us and the millions whom we govern."<sup>74</sup> The terminal stage of colonialism appeared to herald activation of these pockets of civil society as part of nationalist self-assertion. However, in retrospect, it appears that the civil societies of the terminal colonial era were stillborn, aborted by the combined effect of the dominant societal projects of nationalist leadership, the exigencies of management and reproduction of postcolonial power, and the potent legacy and logic of the colonial state, which remained embedded within its successor apparatuses. I now turn to the configuration of postcolonial formations to evaluate the viability of civil society there.

#### IV. THE STATE AND THE ELUSIVE CIVIL SOCIETY IN POSTCOLONIAL FORMATION

A glaring omission in the discourse of civil society in postcolonial formations is that the discourse gives little attention to civil society's relation to the state—beyond stressing its autonomy and even independence from the state. This is hardly adequate unless we assume that the state and civil society occupy

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72. MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 7 (1996).

73. *Id.* at 8.

74. Thomas B. Macaulay, *Minute on Indian Education*, in *SELECTED WRITINGS* 237, 249 (John Clive & Thomas Pinney eds., 1972).

separate realms. Even Gramsci, a veritable patron saint of civil society enthusiasts, warned against “a neglect of the moment of political society, of force, of domination.”<sup>75</sup> Crucial to understanding the structure and functioning of civil society is the fact that these are inextricably tied to the structure and functioning of the state. Any theory of civil society is by implication also a theory of the state. The failure to recognize this fact accounts for the rational, legal state implicitly posited by postcolonial enthusiasts of civil society. Interrogation of civil society must be carried out with the state as a constant reference point since civil society acquires a system of meanings only in relation to the state.

Even its proponents acknowledge that a civil society free of state regulation is neither possible nor desirable. Shils, for example, notes that the state “lays down laws which set the outermost boundaries of the autonomy of . . . civil society.”<sup>76</sup> He acknowledges that while a free civil society “lays down limits on the actions of the state,” it is “not totally separate from the state” for, if it were, it would not be “part of society.”<sup>77</sup> Similarly, John Keane argues that because the state’s role is not an unfortunate limit on free civil society, but rather a condition for it, “sovereign state power is an indispensable condition for the democratization of civil society.”<sup>78</sup> Recognizing that civil society is a terrain of conflict, Keane argues that

the competing claims and conflicts of interest generated by civil society could be settled peacefully only by means of laws which are applied universally. Since universal laws cannot emerge spontaneously from civil society, their formulation, application and enforcement would require a legislature, a judiciary and a police force, which are vital components of the state apparatus.<sup>79</sup>

Even where it has all but ceased to operate as a sovereign organism or where its empirical existence is analytically challenged as a mere artifact of the international system, enjoying only “negative sovereignty,”<sup>80</sup> the state system continues to define politically demarcated territorial space—and thereby the possibility of civil society. The very notion of civil society loses its meaning if severed from the state.

I now turn to Pakistan as a paradigmatic example of a postcolonial formation to demarcate the contours of the

75. GRAMSCI, *supra* note 25, at 207.

76. Edward Shils, *The Virtue of Civil Society*, 26 GOV'T & OPPOSITION 3, 4 (1991).

77. *Id.*

78. KEANE, DEMOCRACY AND CIVIL SOCIETY, *supra* note 7, at 22.

79. *Id.*

80. See ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD (1990).

postcolonial state. At the end of British colonial rule in 1947, Pakistan inherited the colonial state form without any structural break to such an extent that the state is not so much a postcolonial state as a colonial one. The military “sword arm” and the bureaucratic “steel frame,” both bequeathed by the colonial state, remain the foundations of the Pakistani state, and patterns of governance established to sustain colonial rule have proved enduring.<sup>81</sup> The resulting colonial form of the Pakistani state has precluded consolidation of the essential building blocks of civil society.

The leaders of the “Pakistan Movement” were not only the products of the general milieu of the colonial encounter; they had developed their identities and world views in close proximity to the colonial state apparatuses and as such formed part of the “salarariat.”<sup>82</sup> Having internalized key aspects and assumptions of European public culture that furnished the bases of their elite status, they were well-versed in the modern imperative inseparably interlinking the nation, the state, and political sovereignty, with the nation posited as the master identity that subsumes other identifications. However, the geographical and demographic disjunction between the nation they posited and the state they came to rule ensured that the colonial form would remain intact. August 14, 1947 (day of Pakistan’s formal independence), thus, inaugurated another variant of colonial rule. Termed variously as the “viceregal model,”<sup>83</sup> the “overdeveloped state,”<sup>84</sup> the “hyper-extended state,”<sup>85</sup> and “praetorian state,”<sup>86</sup> Pakistan rested on the rule of difference. Based on an essential-

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81. See AYESHA JALAL, *THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN’S POLITICAL ECONOMY OF DEFENCE* (C.A. Bayly et al. eds., Cambridge Univ. Press 1990); TAN TAI YONG, *GARRISON STATE: THE MILITARY, GOVERNMENT AND SOCIETY IN COLONIAL PUNJAB, 1849-1947* (Bipan Chandra et al. eds., 2005).

82. Hamza Alavi, *Formation of the Social Structure of South Asia Under the Impact of Colonialism*, in *SOUTH ASIA (SOCIOLOGY OF “DEVELOPING SOCIETIES”)* 5 (Hamza Alavi & John Hariss eds., 1989). Gandhi, who was a product of the same milieu and belonged to the same strata, pined to “discipline” the “unmanageable,” “uncontrollable,” “undisciplined,” mob. According to him “[t]he great task before the nation today is to discipline its demonstrations . . .” Again, “[t]he nation must be disciplined to handle mass movements in a sober and methodical manner.” Yet again, “[w]e can do no effective work unless we can pass instructions to the crowd and expect implicit obedience.” M.K. GANDHI, 18 *THE COLLECTED WORKS OF MAHATMA GANDHI* 240-42, 275 (1958), quoted in Guha, *supra* note 56, at 139-40.

83. See KHALID B. SAYEED, *PAKISTAN: THE FORMATIVE PHASE, 1857-1948* (2d ed. 1968).

84. See Hamza Alavi, *The State in Postcolonial Societies: Pakistan and Bangladesh*, in *IMPERIALISM AND REVOLUTION IN SOUTH ASIA* 145 (Kathleen Gough & Hari P. Sharma eds., 1973).

85. See Mustapha Kamal Pasha, *Security as Hegemony*, 21 *ALTERNATIVES* 283 (1996).

86. See Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 *UTAH L. REV.* 1225 (1993).

ized difference between the ruling elite and the natives, particularly the Bengalis, the state remained non-hegemonic, with coercion always outweighing persuasion in its claim of domination. Attempts to constitute a state-nation and the denial of federalism, suppression of representation, and destruction of alterity, were the hallmarks of the new state from its very inception. The state's primary project of "conjuring Pakistan"<sup>87</sup> is by using "security as hegemony."<sup>88</sup> Denial of citizenship rights to East Bengalis, who constituted a majority of the population, quickly became the defining feature of the new state. This imperative translated into the military-bureaucratic oligarchy's domination of the ruling power bloc, extra-constitutional usurpations of power, and the absence of liberal rights of speech, assembly, and association. Dissent and resistance were countered by unbridled state violence, including military actions—the most infamous being the 1971 genocide in East Bengal.<sup>89</sup> As in classic colonial rule, members of the polity remained subjects, denied the rights and opportunities to become citizens.

The law in Pakistan has functioned as it would in any colonial form: to furnish legitimacy to the rule of difference; to thwart the principle of popular representation; and to facilitate the erasure of identifications other than those sanctioned by the omnipresent state. Deploying doctrines of "civil necessity," "revolutionary legality," "constitutional deviation," and "de facto power," the courts have consistently furnished legitimacy to repressive political orders.<sup>90</sup> The judiciary has remained an influential fragment of the dominant power bloc, and judicial pronouncements are animated by the guiding principle that obedience is owed to de facto power. The judiciary thus plays a vital constitutive role in the formation of an authoritarian state that rules subjugated and silenced subjects.<sup>91</sup>

Through the use of coercive and ideological apparatuses, the Pakistani state has sought to achieve unrestricted domination over society. It aspires to attain not only relative autonomy from society through comprehensive instruments of political control, but also suzerainty, if not monopoly, extending over social and economic vectors of accumulation. The regulatory infrastructure of the colonial state was extended and deepened to include mar-

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87. Ayesha Jalal, *Conjuring Pakistan: History as Official Imagining*, 27 INT'L J. MIDDLE EAST STUD. 73 (1995).

88. Pasha, *supra* note 85, at 283.

89. See MOHAMMAD WASEEM, POLITICS AND THE STATE IN PAKISTAN 266-96 (1989); HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 406-30 (2001).

90. Mahmud, *supra* note 37, at 49.

91. See *id.*; PAULA R. NEWBERG, JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN (1995).

ket monopolies, state cooperatives, administered prices in key sectors, direct control of vital industries, licensing of many economic activities, and close monitoring of external trade. Wedded to development models prescribed by modernization theory<sup>92</sup> and peddled by international development agencies,<sup>93</sup> the state in Pakistan quickly became an instrument of class production. Through a regime of permits, licenses, bonus vouchers, tax holidays and protectionist barriers, a crony capitalist class was created. Relatively weak and beholden to the state that created and sustained it, this class has remained incapable and unwilling to play the classic role of the bourgeoisie in creating public spheres and other foundations of civil society. The uneven development of different sectors that was initiated under colonial rule remains the dominant feature of the economy. Important segments of the economy retain non-capitalist modes of production, which keep a majority of the population outside the purview of a system of needs based on autonomy, self-determination, contract, and freedom of entry and exit. Consequently, extra-economic factors remain integral to relations of production, and mediation between non-urban social groups and the state is conducted primarily by feudal landowners, tribal chiefs, and spiritual leaders.

In Pakistan, the formal Weberian traits presumed in the image of the modern state—impersonality of office, uniform application of rules, predictability of behavior, rationality of organization—are interpreted by a radically different set of patrimonial practices. The result is a state in the colonial form supplemented by varying degrees of patrimonialism. Following the partition of India and the resulting mass migrations, the disposal of evacuee property in Pakistan furnished an opportunity to abuse state power for personal gain—a trait that quickly became entrenched. The endemic corruption of political elites and the military-bureaucratic oligarchy can be seen as the price that the state's struggle against society extracts from all: ineffective government and the institutionalization of mechanisms for extracting resources for personal gain. The offices of the state are treated as if they were grants by decentralized patrimonial states that could be appropriated and exploited by their occupants to benefit themselves and their constituents. The rule of law, a canonical

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92. See Tariq Banuri, *Modernization and its Discontents: A Cultural Perspective on Theories of Development*, in *DOMINATING KNOWLEDGE: DEVELOPMENT, CULTURE AND RESISTANCE* 73 (Frédérique Apffel Marglin & Stephen A. Marglin eds., 1990); ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995).

93. *THE POST-DEVELOPMENT READER* (Majid Rahnema & Victoria Bawtree eds., 1997).

enabling condition of civil society, is an early casualty of these practices.

The implications for the state-civil society ensemble are enormous, particularly as it relates to the mode of articulation between the two. Whereas in modern Europe the political inclusion of the lower classes took an integrative mode marked by a relatively horizontal inclusion of the people in the national political arena, in Pakistan, as in many postcolonial societies, the integration mode is that of patron/client relationships or charismatic populism.<sup>94</sup> This mode of integration brings people into the political process via their insertion into personalized and highly particularistic patron-client networks. Such networks cut across and undermine more horizontal forms of political organization like trade unions or parties that are primarily based on universalistic criteria of recruitment. The populist mode mobilizes and introduces people into the political process via the masses' attachment to a leader whose charisma becomes the major source of legitimation and whose organization becomes the main link between private interests and the public sphere.<sup>95</sup> These modes of political integration preclude the growth of autonomous associational life composed of free and unattached individuals who may articulate private interests. In the absence of such autonomous associations, a viable civil society cannot exist.

The pervasiveness of the ideological apparatuses of the Pakistani state also precludes development of a robust civil society. The state is the dominant force in the cultural sphere. All levels of education and mediums of mass communication are controlled or closely regulated by the state. Of particular importance here is the interpenetration of religion and the state. To ground its myths of origin, facilitate formation of a state-nation, and thwart dissent, the Pakistani state from its very inception deployed religion as an instrument of public policy. The state became a veritable theologian that sought explicitly to define for social actors the fashion in which they must see and interpret themselves and the world. In so doing, the theologian-state erected itself as the constitutive principal creating the language and

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94. See SHAHID JAVED BURKI, *PAKISTAN UNDER THE MILITARY: ELEVEN YEARS OF ZIA UL-HAQ* (Westview Press 1991); SHAHID JAVED BURKI, *PAKISTAN UNDER BHUTTO, 1971-1977* (1980); MOHAMMAD WASEEM, *POLITICS AND THE STATE IN PAKISTAN* (Progressive Publishers 1989).

95. See ALTAF GAUHAR, *AYUB KHAN: PAKISTAN'S FIRST MILITARY RULER* (2d ed. 1993); HASSAN GARDEZI AND JAMIL RASHID, *PAKISTAN, THE ROOTS OF DICTATORSHIP: THE POLITICAL ECONOMY OF A PRAETORIAN STATE* (Hassan Gardezi & Jamil Rashid eds., 1983); PHILIP E. JONES, *THE PAKISTAN PEOPLES PARTY: RISE TO POWER* (Oxford Univ. Press 2003); STANLEY WOLPERT, *ZULFI BHUTTO: HIS LIFE AND TIMES* (Oxford Univ. Press 1993); LAWRENCE ZIRING, *PAKISTAN: AT THE CROSSCURRENT OF HISTORY* (2003).

myths of social formation. The result has been an erasure of any public/private distinction, a preclusion of secularism, the prevention of individual freedom and autonomy, and the absence of a legal order founded upon an entrenched regime of rights—all essential building blocks of civil society.

Enthusiasts of civil society must also square the pervasive political deployment of religion by the Pakistani state with the proposition that “[c]ivil society . . . does not translate into Islamic terms.”<sup>96</sup> In Europe the emergence of civil society was enabled by historical moves towards secularism, individualism, and pluralism. The project of Islamic revivalism, however, remains “[u]nsoiled by history, not subject to any substantive effect of temporality[;] this quest for purity presents itself as a fastidious and rigorous adherence to a body of textual material which excludes reference, or at least normative reference, to anything else.”<sup>97</sup> The prime category in the Islamic notion of society is that of unity. An organicist and vitalist model of the body politic is proffered: a healthy society is one in which its various components, both individual and corporate, are functionally interdependent and in accord with the purpose, or the teleological terminus, of being a polity envisioned by the invariant textual referents. The vital principle of unity and presumed cohesion of the body politic envisages “solidaristic corporatism.”<sup>98</sup> Islam is posited as “self-enclosed, impenetrable in its essence, and [as] a substance presupposed by history rather than being its product.”<sup>99</sup> The notion of a body social or civil society remains “absent from Islamic political thought except as an abstract locus of order and disorder which receives the action of *dawla* [the state], and is only implicitly conceived in Islamic law.”<sup>100</sup>

The Pakistani state’s incremental but unmistakable moves to render rules of public and private conduct subservient to orthodox readings of foundational Islamic texts have serious implications for the emergence of civil society. The “Islamization” agenda of the state precludes subjectification of individuals as free and autonomous and renders liberal civil rights illusory even when formally enumerated in the constitution.<sup>101</sup> Furthermore, over the last decade, the state-orchestrated rhetoric of “Islamization” has facilitated the proliferation of armed and organized pri-

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96. Serif Mardin, *Civil Society and Islam*, in *CIVIL SOCIETY: THEORY, HISTORY, COMPARISON* 278, 279 (John A. Hall ed., 1995).

97. AZIZ AL-AZMEH, *ISLAM AND MODERNITIES* 77 (1993).

98. TAHA PARLA, *THE SOCIAL AND POLITICAL THOUGHT OF ZIYA GÖKALP, 1876-1924* (1985).

99. AL-AZMEH, *supra* note 97, at 84.

100. *Id.* at 90.

101. See Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 *FORDHAM INT’L L.J.* 40 (1995).

vate militias committed to establishing a theocracy. The escalating inter-sectarian violence that these militias have fostered has spawned a political culture of fear and silence. Appropriating the state-sponsored rhetoric of “Islamization” and threatening the use of force, these fundamentalist militias have often blackmailed the state into extra-constitutional declarations acknowledging the *Sharia* [Islamic Law] as the only law in areas controlled by them.<sup>102</sup> Besides raising critical questions about state sovereignty and constitutional order, these ominous developments negate the depersonalization of violence in favor of the territorial juridical state—a fundamental prerequisite of civil society.

In summary, the nature of the state in Pakistan precludes development of a robust civil society. The colonial state-form, along with the military “sword arm” and the bureaucratic “steal frame” bequeathed by colonial rule, remains intact. Resting its claim of domination on coercion, this state has preserved non-capitalist modes of production, failed to establish the rule of law, denied civil and political rights to the majority of the people, deployed religion as a means of containing dissent, and proved unable or unwilling to control personalized, private violence. The search for civil society (as posited by canonical Western texts), is, in this context, an exercise in futility. Proponents of the existence of civil society in Pakistan typically rest their claim on some particular new social development such as the rise of non-governmental organizations, activist women’s groups, or the growth of print media. While all of these developments have significant political and cultural implications, they remain confined to relatively small sections of the population. More importantly, [as the above analysis demonstrated] the preconditions and features of civil society constitute a comprehensive package that includes overlapping developments in the economic, legal, political, and cultural spheres. Isolated pockets of civil society-like activities can be identified in almost any society in almost any historical period. Claiming the existence of viable civil society whenever one discerns an isolated site of civil-society-like process is akin to the proverbial blindfolded man describing the elephant by touching a single part of its body.

Still, others who acknowledge that civil society in Pakistan at best remains embryonic and fragile nevertheless hope that it will mature and strengthen in time if pockets of non-governmental social action continue to multiply. This raises the question of

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102. See HASSAN ABBAS, *PAKISTAN’S DRIFT INTO EXTREMEISM: ALLAH, THE ARMY AND AMERICA’S WAR ON TERROR* (2004); HUSAIN HAQQANI, *PAKISTAN: BETWEEN MOSQUE AND MILITARY* (The Brookings Inst. Press 2005).

whether civil society can be achieved in the face of a hyper-extended state. Even Keane, a leading advocate of civil society, sees civil society and the state as “the condition of each other’s democratization.”<sup>103</sup> He acknowledges that “[s]ince universal laws cannot emerge spontaneously from civil society, their formulation, application and enforcement would require a legislature, a judiciary and a police force, which are vital components of a state apparatus.”<sup>104</sup> If, however, the autonomy of civil society is, as Keane says, to be “legally guaranteed,” who but the state will be the guarantor?

Pierre Rosanvallon proposes a strategy of “bringing society closer to itself” through “an effort to fill out society, to increase its density by creating more and more intermediate locations fulfilling social functions, and by encouraging individual involvement in networks of direct mutual support.”<sup>105</sup> He admits, however, that “there is no way in which the state itself can be instrumental in bringing about such a reconstitution of society.”<sup>106</sup> That would require the state to voluntarily reduce its scope and power, something that, whatever its rhetoric, the modern state does not do. Rosanvallon is content to urge the state to be more “pluralist” in its conception of law, and to bring in a new category of “social law” that would enable “segments of civil society” to be “recognized as legal subjects and enjoy the right to establish laws independent of state law.”<sup>107</sup> He fails, however, to offer an account of how or why an entrenched state would relinquish its power as sovereign lawmaker. All he can do is paint a grim scenario in which, if the requisite initiatives are not forthcoming, the result would be “a bastard society in which ever stronger market mechanisms will coexist with rigid statist forms and the growth of a selective social corporatism.”<sup>108</sup> This scenario represents Pakistan’s predicament well.

The deeper question remains whether the resurrection of the concept of civil society is necessary or useful. If the objective is to contain unbridled state power, promote pluralism, recognize cultural diversity, and entrench political representation and accountability, we have available in the popular imagination, concepts of justice, accountability of rulers, social harmony, decision-making by collective consensus and reciprocal rights and obligations between the individual and the community. If the

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103. KEANE, DEMOCRACY AND CIVIL SOCIETY, *supra* note 7, at 15.

104. *Id.* at 22.

105. Pierre Rosanvallon, *The Decline of Social Visibility*, in CIVIL SOCIETY AND THE STATE: NEW EUROPEAN PERSPECTIVES, *supra* note 7, at 199, 206.

106. *Id.* at 204.

107. *Id.* at 205.

108. *Id.* at 217.

central political question in Pakistan is the colonial form of the omnipresent state, the primary agenda of progressive forces must be the comprehensive contestation of the state. Locating this contest in the minor pockets of civil society would be self-defeating. We need to conceptualize the terrain of this struggle in line with the history of political struggles in their settings.

In the turbulent political history of Pakistan, resistance to the state has never been spearheaded by the civil society. Bengali intelligentsia, Baluchi tribesmen, Sindhi peasants, Muhajir students and educated women have at various times furnished the grammar of democratic struggle in Pakistan. Landmark political transitions have been driven by the periodic congealing of diverse strata of society in "the popular upsurge,"<sup>109</sup> an ephemeral activist coalition through which various social groups momentarily suspend divergent interests in favor of the common goal of removing an incumbent regime. This experience precludes the proposition that there is, or should be, a unitary entity that stands apart from, and in opposition to, the state—the two being mutually exclusive and jointly exhaustive of the social space. We should focus instead on the modalities that enable the state, and that which is not the state, to be discursively and materially constituted. This process would enable us to identify a myriad of non-state social groupings—citizens, communities, social groups, coalitions, classes, interest groups, ethnicities, nationalities and parties.

## V. CONCLUSION

Civil society is indeed an elusive concept. Forged on the anvil of modern European history and reported in the annals of European social theory, the concept of civil society is anchored in the consolidation of capitalism as the dominant mode of production. Autonomous individuals, a legal order based on liberal rights, secularization of culture, depersonalization of violence, pervasive associational life and forums of free public discourse are its essential building blocks. Civil society, then, is a sphere within modern forms of social life; its comprehensive flowering is limited to social formations where capitalism and a liberal political order become entrenched. An against-the-grain reading of the archive, however, shows that the concept covers up the process of disciplining and subordination of the masses in the name of making them civil(ized).

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109. GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 53-56 (1986).

Even if the conventional understanding of civil society were valid, its viability in postcolonial formations remains elusive. This is because colonialism, the infamous truncated project of modernity, precluded civil society from taking root in the colonies. Founded on conquest rather than consent, the colonial state rested its claims of domination on coercion and institutionally essentialized differences between the ruler and the ruled. The native remained subjected to power, denied representation and citizenship. Growth of capitalism was restricted to selected sectors of the economy; non-capitalist modes of production were preserved, reinforced, and articulated with a regime of global accumulation. This milieu could produce only an anemic civil society limited to some sections of urban modernized elites.

Following the negotiated "transfer of power," Pakistan, like most postcolonial formations, inherited colonial state apparatuses and forms of governance. This lineage combined with geographical and demographic anomalies of the new polity to cause the retention, even consolidation, of the colonial form. Dominated by a military-bureaucratic oligarchy, the coercive and ideological apparatuses sought complete domination of society. The denial of representation, suppression of diversity, formation of a state-nation, and abuse of state power for personal gain quickly became the defining features of the over-extended state. Major sectors of the economy remained non-capitalist, and a class of crony-capitalists was nurtured to preside over the limited capitalist sphere. The judiciary furnished legitimacy, cynical use of religion was orchestrated by the state to silence dissent, and brute force was deployed to contain resistance. This state of affairs leaves little room for the growth and consolidation of civil society.

Edward Said, who alerted us to the constitutive and dominating power of orientalism and colonial rule, also reminds us that "[i]n human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is obviously what makes change possible."<sup>110</sup> In postcolonial formations one does discern pockets of resistance to both the domineering state and the neo-liberal project. These pockets of resistance often spawn robust new social movements that have an agenda of peace, justice, dignity, and community. Whether this agenda is accomplished depends to a great measure upon our willingness and ability to break free from the straight-jacket of Eurocentric unilinear evolutionism. Only such a break will enable us to imagine forms of collective life worthy of being called human and complete the project of de-colonization.

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110. EDWARD W. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* 246-47 (1983).

