COURTING CONSTITUTIONALISM

THE POLITICS OF JUDICIAL REVIEW IN PAKISTAN

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- Moeen Cheema, 'The 'Chaudhry Court': Deconstructing the 'Judicialization of Politics' in Pakistan' (2016) 25 *Washington International Law Journal* 44
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ABSTRACT

This thesis presents a deeply contextualized account of law in postcolonial Pakistan and situates the judicial review jurisprudence of the superior courts, in particular their recent activism and populism, in the contexts of historical developments in constitutional politics, evolution of state structures and broader social transformations. It shows how in each epoch of the postcolonial state's history the superior courts positioned themselves within the state and *vis a vis* the demands that different segments of the society placed upon the state and its institutions. It brings forth evidence that the courts did not define their role in accordance with certain abstract theories of constitutionalism, rule of law and separation of powers that had been deeply imbricated in the postcolonial state's self-justifications. Rather, these courts re-fashioned their role in accordance with fundamental shifts in constitutional politics, state structure and state-society dialectics. In the process, these courts re-cast the theoretical conceptualizations of constitutionalism, rule of law, and separation of powers to better reflect their evolving role and jurisprudence.

A deeper understanding of these phenomena – the evolution of judicial role in response to shifts in socio-political context, and the re-crafting of theoretical frameworks to justify it – will enable us to meaningfully scrutinize the courts' recent jurisprudence and evaluate the judiciary's future role in Pakistan's governance scheme. As such, it will be argued that the courts' role is deeply political in terms of defining the nature and relevant powers of state institutions and the imperatives for their actions. Perhaps the Pakistani situation is unique in this respect, but it might be worthwhile speculating if theory is often an articulation of such deeply contextualized public law jurisprudence elsewhere as well.

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INTRODUCTION

In early 2009, Pakistan was in the international spotlight, and for the right reasons for once. A 'Long March' towards the capital Islamabad, called for by the country's lawyers demanding the reinstatement of the deposed Chief Justice of the Supreme Court, appeared to have morphed into a broader social mobilization for constitutionalism, rule of law, the independence of judiciary and greater democratization.[1] As the Long March steadily progressed towards the capital, the incumbent Prime Minister, Yousaf Raza Gilani, grudgingly announced the restoration of Justice Chaudhry as the Chief Justice of Pakistan in the early hours of March 16. Pakistan's so-called 'Lawyers' Movement' had triumphed dramatically. This was Pakistan's version of the Arab Spring, Tahrir Square and the Orange Revolution rolled into one euphoric and historic moment. The nation-state of 180 million people – plagued by militancy, military rule, endemic political instability and chronic under-development – appeared to have re-joined the global march of liberal political and economic progress.

However, by mid-2012 much of the optimism had evaporated. The elected federal government had demonstrated an utter inability to govern and had been under relentless pressure from the Chaudhry-led Supreme Court, which aggressively pursued a range of corruption charges against key members of the ruling party.[2] Prime Minister Gilani was in the dock, charged with and convicted of contempt of court, and ultimately dismissed as prime minister for refusing to re-initiate long-standing corruption and money-laundering cases against the president. Anxieties had emerged that the courts' aggressive judicial review actions were undermining a weak elected government to the benefit of the military-bureaucratic establishment enabling the latter to reassert, albeit covertly, its role in the state structure. One by one even the prominent leaders of the Lawyers' Movement had begun to voice concerns that the courts were acting as political

[1] Toby Berkman, 'The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power' (2010) 123 *Harvard Law Review* 1705.
[2] See generally, Moeen Cheema, 'The Chaudhry Court: 'Rule of Law' or 'Judicialization of Politics'?' in Moeen Cheema and Ijaz Gilani (eds), *Politics & Jurisprudence of the 'Chaudhry Court' (2005-2013)* (Oxford University Press, 2015).

players, and were threatening to unhinge the transitional-democratic system that had been put in place. The superior judiciary, especially the Supreme Court, faced a chorus of charges of judicial over-reach. The term judicial activism had come to acquire a distinctly negative connotation.

In less than a half-decade since the restoration of the Chaudhry Court through the Lawyers' Movement, the superior courts of Pakistan stood amidst a political maelstrom in a deeply divided polity as the self-proclaimed regulator of the state and the arbiter of state-society relations. The courts' actions had not only brought the proper place of the judiciary in Pakistan's constitutional politics sharply into the spotlight, but had also brought to the surface deeper contestations over the very structures of the governance system, the state and the society. While terms such as judicial activism, separation of powers, political questions doctrine and rule of law were frequently used in argumentation over the courts' role, such invocations of abstract discourses originating in distant political climes did not appear to shed much light on the concrete controversies at hand. Meaningful instruction on how to establish an institutional balance of powers and neat distinctions between law, politics and policy were impossible to find.

While many observers reacted to the Chaudhry Court as if the judiciary had broken a long tradition of apolitical adjudication to suddenly enter the realm of politics, the fact remains that Pakistan's courts have always been a political institution. Pakistan has a fascinating, rich, complex and in several respects unique legal history in which superior courts have progressively carved for themselves a prominent role in constitutional politics. In the seven decades since the country's independent existence, the judiciary has evolved from a subsidiary state institution with limited functions to a central player in the state structure. The courts have incrementally accumulated unprecedented judicial review powers and now claim to be the ultimate judge of the constitutional ambits of other state institutions. How have Pakistan's superior courts moved from the periphery to the core and fashioned such an expansive role for themselves? Why have other state institutions ceded such space to the judiciary? How have the courts shaped public law doctrines and constitutional jurisprudence to bolster and legitimize their place in the state structure? Answers to these and related questions are likely to provide

insight not only into the development of judicial review in Pakistan but also the nature and evolution of its constitutional design and the legal system generally.

This thesis aims to answer these questions by situating the development of public law and judicial review in the context of constitutional politics, evolution of state structure, developments in political economy and the changing social dynamics in and around the state. The Lawyers' Movement, the restoration of an independent judiciary and the emergence of its particular brand of activism were indeed seminal moments in Pakistan's political history. However, these moments were long in the making and their significance cannot be fully understood without an appreciation of the multiplicity of perspectives which perceived constitutionalism, rule of law and the independence of the judiciary as valuable political and legal goals. These perspectives were informed by diverse historical, political, social, geographic and economic contexts within which these demands had been forged. It is only when we situate the Lawyers' Movement, its antecedents and consequences, within these contexts that we can develop more nuanced, descriptively accurate and analytically coherent account of the nature of the constitutional system and the role of the judiciary therein. When analysed in this mode, public law also becomes a useful lens to understand the political system it seeks to codify, the state structure whose operational rationalities it seeks to mould, the political economy that dictates which interests have voice, and the social dynamics which reinforce and challenge its legitimacy.

A FRAMEWORK FOR ANALYZING JUDICIAL POLITICS IN PAKISTAN

As noted, Pakistan's superior courts have a long history of involvement in the country's constitutional politics. In the decade of 1990s, for example, Pakistan's superior courts embarked on a sustained enterprise of developing Public Interest Litigation modelled on the precedents of the Indian courts. In the process, the courts were repeatedly embroiled in challenges to elections and governmental change, which to many epitomize the 'judicialization of politics'.[3] Earlier, in the late 1980s to early 1990s the Shariat courts, especially the Shariat Appellate Bench of the Supreme Court, had

[3] See, eg, R Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93; R Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721.

engaged in unprecedented judicial review of legislation on the touchstone of Islamic law principles, and had even threatened to review constitutional provisions for conformity to injunctions of Islam.[4] The politicization of Pakistan's courts in effect began right from the outset and can be attributed not just to the courts' attempts to expand their powers but even more so to their pronouncements accepting the curtailment of their jurisdictions. Pakistan's superior courts directly or indirectly validated military *coups d'état*, refrained from entertaining challenges to martial law regulations, and accepted subsequent constitutional machinations of military regimes from 1958-1971, 1977-1988 and 1999-2007. It is this history of judicial passivity as much as their recent activism which has long defined the politics of Pakistan's courts.

Despite this history of judicial politics and the prominent role the courts have played in constitutional crises, there is surprisingly little structural analysis of the politics of Pakistan's courts.[5] The limited body of work on Pakistan's judiciary that does exist is largely descriptive, focuses on a handful of notable constitutional cases, and seeks to explain the cases and controversies in terms of subservience to regime dictates, political affiliations of judges or vagaries of individual personalities. Often this is over-laid with an implicit or explicit prescription rooted in liberal constitutionalism which seeks to draw a sharp distinction between law and politics. This creates a mutually-reinforcing dialectic. The reliance on liberal ideas and languages of separation of powers, democracy and rule of law heighten the perception of the politicization of courts when they are thrust in the midst of constitutional crises. This in turn justifies the demands of liberal constitutionalism – electoral democracy, rule of law, separation of powers and judicial restraint – as abstract ends in themselves, rather than as means to concrete governance, socio-political and economic goals.

In notable contrast with the extant literature on Pakistan's courts, this thesis seeks to understand and explain the institutional role of the courts, the development of public law doctrines and judicial review practices in the context of historical movements in constitutional politics, the evolution of state and broader social transformations. This

[4] See Moeen Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law' (2012) 60 *American Journal of Constitutional Law* 875.
[5] For a notable exception, see Paula R Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge University Press, 1995).

thesis argues that a deeply contextualised analysis of public law and the role of courts provides us with a better understanding of how and why Pakistan's courts have developed certain doctrinal positions, and have defined a particular role for themselves in Pakistan's constitutional scheme. Such a structural and institutional analysis enables us to chart the trajectory of public law in ways that not only account for notable constitutional moments, cases and crises, but also the relatively subtle and long-term evolution of judicial review of executive action, which has progressively emerged as the most significant domain of action in Pakistan's public law. Further, such an analysis renders many aspects of public law and constitutional decisions of courts, which superficially appear to be contradictory or whimsical manifestations of personal politics and interests, explicable in terms of historical and structural evolution of the courts' role in constitutional politics.

Principally this thesis argues that Pakistan's courts have evolved for themselves a mediatory role within the post-colonial state's structure. From the beginning, the superior courts have been called upon to adjudicate deep-seated tensions within the state: between the political executive, the military, and apex civil bureaucracy; between the lower rungs of the bureaucracy and ascendant civil or military elites; and as its own power increased, between the judiciary and other centres of state power. As the relative balance of power between the various institutional players and their affiliated classes has changed, so has the courts' position within the state. Equally significantly, the courts have been thrust in a mediatory role by those classes or groups at the margins of the state who have found the courts useful in terms of pressing certain demands on the state and its affiliated classes and groups. Such is the nature of mediation that the courts have had to align themselves largely with the state and dominant classes, but have enabled excluded groups to win occasional concessions and exert some pressures on the state that they would not have achieved otherwise. As the class and group dynamics within and at the margins of the state have evolved, so has the courts' role, the nature of questions they have been asked to resolve, and the doctrinal positions they have articulated to rationalise such resolutions.

This thesis further argues that in developing and executing their role in mediating intra-state tensions and broader state-society dialectics, the judiciary has also acted as a strategic institutional player seeking to expand its own powers and relevance. As such,

the courts have progressively expanded their judicial review jurisdictions first at the expense of the civil bureaucracy, then elected executives, and ultimately even laying the groundwork for limited judicial scrutiny of the military's role in politics, governance and the economy. While this development of judicial review has not been linear, it has nonetheless been seemingly inexorable. In each period of military rule the courts stepped back or were forced to accept the curtailment of their jurisdiction, but vigorously re-asserted themselves and pushed the boundaries in subsequent periods of civilian rule. In the process the courts laid stronger foundations for their judicial review powers which were harder both for military regimes and elected governments to clip in the later cycles of martial and civilian rule. Progressively, the judiciary has acted to cultivate specific constituencies within and outside the state including the bar, the lower bureaucracy, opposition political parties, and segments of Pakistan's urban and peri-urban middle classes. The courts acted with the design to bolster support for judicial review and/or resist pressures from ascendant military or political elites, and achieved this through privileging the demands and interests of the institutions and classes that formed its expanding support base.

In addition to the structural and strategic imperatives informing a certain conception of judicial role, an array of discrete institutional factors have also played significant if not determinative parts in the development of public law and judicial review in Pakistan. The text of the constitutions which empowered the courts in specific ways; the intellectual tradition of English Common Law bequeathed by colonial rule; the accumulated body of doctrines, precedents and institutional memory of cases and their consequences; the processes of judicial appointment, advancement and dismissal; the ideologies, training and networks of the judges and lawyers; the existence, strength and politics of bar associations; all have at times and to varying degrees had an impact. Beyond the personal and overtly political dynamics that often get undue attention, it is a combination of these structural, strategic and institutional factors which collectively explain the historical trajectory of public law and judicial power in Pakistan. As this thesis will elaborate, a detailed analysis of this structural and institutional politics of the courts provides a sounder basis for understanding and ultimately evaluating the role that courts and judicial review have played in Pakistan's constitutional politics and governance arrangements.

A CONTEXTUALISED HISTORY OF PUBLIC LAW AND JUDICIAL REVIEW

As noted in the previous section, this thesis aims to develop a historical and deeply descriptive account of the development of public law, especially the judicial review doctrines and practices of the superior courts in Pakistan. This narrative will proceed chronologically identifying key changes in state structure, electoral politics, class dynamics in and around the state, and over-arching ideas and idioms in which discrete interests were articulated and legitimated. Having laid out these contexts in some detail each chapter will map the major developments in public law, especially the judicial review doctrines and practices of the superior courts, in each era of Pakistan's history. It must be stated at the outset that any historical narrative is ultimately a matter of interpretation and analysis of complex social facts, and is only as strong and persuasive as the evidence relied upon. It must also be acknowledged that the periodization of such developments in public law, state structure, political economy and societal arrangements will invariably be somewhat problematic and artificial. While transformations in state, society, economy and law are invariably subtle and progressive, rather than distinct and abrupt, and are often not susceptible to neat divisions in historical eras, the cycles of military rule followed by transitions to civil-democratic governance provides a relatively easy way to contextualize developments of judicial review against changing forms of governance.

Chapter 1 of this thesis provides an account of the emergence of **colonial rule** in British India, the formation of the colonial state and the role of law in the consolidation of colonial governance and policies from late 1700s until 1947. The current governance system in postcolonial Pakistan has directly descended from the British *Raj* and continues to bear the legacies of colonial rule in significant ways. As the evolution of the colonial state in British India is charted, particularly in the parts that later became Pakistan, it will be shown that the governance structure remained deeply coercive and law was used primarily as a means of projecting power in aid of colonial policies. While the rule of law emerged as the primary legitimating idiom of colonial rule, the courts remained subservient to the demands of a particularly efficient form of bureaucratic authoritarianism. In the last few decades of the Raj the promise of democratic governance tentatively emerged as the overarching strategy for transition from colonial rule to dominion status. This promise never fully materialized during the Raj, but it

nonetheless bequeathed a language of constitutionalism and rule of law to the postcolonial state. In particular, the role that the courts played in moderating the abuse of sedition and public order laws gave some concrete shape to these ethereal promises.

In the first decade of postcolonial existence Pakistan experienced rapid and dramatic changes in the forms of government and state structure. The Constituent Assembly of Pakistan failed to draft a constitution until 1956, which was abrogated in 1958 in circumstances that paved the way for direct military rule. The causes of this failure of constitutional politics during this period of **postcolonial transition** will be investigated in **Chapter 2**. The role of the newly empowered superior courts will be particularly scrutinized with regard to their alleged complicity in the uprooting of constitutionalism and democracy in the first decade of the republic's existence. However, despite their seeming subservience to the executive the courts continued to push the political elites that came to dominate the new state towards framing a republican constitution. Furthermore, the courts continued to temper the use of state security laws to suppress political dissent just as in the late colonial period. Most notably, the dislocations in the state structure caused by the partition of British India also gave the courts the space to extend their administrative law jurisdiction over a bureaucracy that was in the process of reconstruction. A combination of these strands of formal constitutionalism and procedural rule of law imbued the 'Writ jurisdiction' of the superior courts with a capacity to exert limited restraint on the authoritarianism of the postcolonial state and impose some semblance of administrative propriety on a powerful bureaucracy-dominated executive.

Chapter 3 will chart the consolidation of judicial review during the first period of direct and indirect **martial rule** under the Ayub regime (1958-1968). Despite the military-bureaucratic authoritarianism of the Ayub era and the judicial validation of Martial Law, the courts managed to preserve the judicial review of bureaucratic action. The exercise of the Writ jurisdiction aligned with the priorities of a Martial Law regime that was attempting to subdue and co-opt a hitherto powerful bureaucracy. In the post-Martial Law phase, the promulgation of the 1962 Constitution provided the courts with the basis to deepen the foundations of the Writ jurisdiction along three axes – formal constitutionalism, administrative law, and procedural safeguards against the abuse of public order and state security laws – which have remained at the core of the superior

courts' definition of rule of law in the decades since. In the aftermath of the 1965 war between India and Pakistan, as the Ayub presidency suffered the progressive erosion of its powers and the opposition gained strength, the regime again became overtly authoritarian. In such circumstances the superior courts insisted on minimal procedural safeguards against the enforcement of state security and public order laws and pushed the envelope of the judicial review of executive action. The consolidation of the judicial review jurisdiction of the courts is a significant legacy of the Ayub era.

As Pakistan emerged from the shadows of military rule, dismembered and disenchanted in 1971, democratic governance and progressive politics promised a better future for the masses. The adoption of Pakistan's first constitution by an elected assembly in 1973 added to the optimism for constitutionalism and rule of law. This optimism was quickly dispelled as the elected government of Zulfiqar Ali Bhutto (1970-1976) proved itself to be as authoritarian as its predecessors and very much within the mould of postcolonial governance. The courts, which attempted to rely on the new constitution to protect fundamental liberties and provide a voice to the opposition, were soon undermined by constitutional amendments designed to curtail judicial review. The exercise of judicial review to preserve the civil rights of the opposition was met with accusations that the judiciary was overstepping its bounds and was anti-democratic. Judicial resistance gradually faded under the continuance of the state of emergency and the abuse of state security laws. **Chapter 4** will describe this failure of formal democratic constitutionalism in the face of an **elective dictatorship**. Such was the proof of formal constitutionalism and a procedural rule of law that the courts had constructed in the first three decades of postcolonial nationhood – the law itself was used to rule arbitrarily and ruthlessly.

Chapter 5 will highlight the emergence of a distinctly **praetorian governmentality** in the next cycle of military rule in the 1980s. Having displaced an elected government in the aftermath of rigged elections and a sustained agitation movement by the opposition political parties, the military regime of General Zia ul Haq (1977-1988) set about the task of refining the blueprint for military rule. What was distinctive, however, about this form of praetorian governmentality as compared to the earlier period of military rule was the hegemonic ideation of an alternate basis of political legitimacy predicated on religion. The military regime visibly embarked on the agenda of 'Islamizing' the

constitution and the laws. New Shariat courts were given unprecedented powers of judicial review of legislation for conformity with Islamic law at the same time that the fundamental rights provisions of the Constitution remained under suspension and the superior courts' Writ jurisdiction was incapacitated. Islamization ravaged Pakistan's criminal justice system and created new avenues for the abuse of laws to suppress dissent. Nonetheless, Islamization also enabled the superior courts to re-orient their public law jurisprudence and to bolster their legitimacy. Pakistan's appellate courts learnt to capitalize on this new rhetoric and restructured a more assertive form of judicial review grounded in the normative bedrock of Islamic legality.

As Pakistan emerged from military rule once again upon the death of General Zia in a plane crash in 1988, it underwent a new governmental experience marked by tussles between unsettled elected governments, a constitutionally empowered civilian presidency and a military establishment that covertly exercised considerable power often in collusion with the presidency. **Chapter 6** will highlight how the superior courts utilized the political space available to them in this period of political fragmentation to engineer a dramatic expansion of public law and carved a role for themselves as an important institution of the state in this era of **indirect praetorianism**. As the civil state's machinery became the turf of power struggles, safeguarding its independence and ensuring its rule-boundedness emerged as a key pillar of the superior courts' Writ jurisdiction. The superior courts also began to develop a more robust jurisprudence of rule of law and fundamental rights, while the Supreme Court utilized its Original jurisdiction for the first time to institute Public Interest Litigation. In the years leading up to another extended period of military rule the superior courts asserted their independence, held military courts and specialist tribunals to be unconstitutional, circumscribed emergency powers, and whittled away considerable areas of executive prerogative. Nonetheless, recurrent involvement in matters of pure politics and governmental change resulted in direct confrontations between the judiciary and elected governments, and ultimately the politicization of judicial review in this first significant wave of judicialization of politics and governance.

Chapter 7 will dissect the subtle shifts in state structure and power relations during the third cycle of military rule in Pakistan which for the first time was characterized by a successful hybridity of a **military-civil composite**. When General Pervez Musharraf

overthrew another elected government in October 1999 the familiar architecture of military rule was resurrected. However, heightened levels of elite consolidation and the prominent role of the courts in the state structure constrained the space for overt authoritarianism. Unlike previous military regimes General Musharraf was successful in holding elections and managing a symbiotic relationship with a civilian government whereby real power remained with the military but a semblance of transitional democratic governance could be upheld. The Supreme Court once again validated the military takeover and the continuity of judicial review of executive action initially aligned with the regime's proclaimed agenda of the structural reform of the state and anti-corruption drive. However, when Chief Justice Iftikhar Chaudhry assumed office in 2005 this accommodation between the military-dominated regime and the courts fractured. Given the Musharraf regime's close relationship with the civilian government operating under it, a more robust form of judicial review of executive action initiated by the new Chief Justice increasingly threatened to undermine the regime's core interests. With impending elections in 2007, the regime dismissed the Chief Justice sparking the protest movement by the lawyers that would ultimately pave the way for another transition to civil democratic rule as well as for the restoration of an assertive Chaudhry Court.

Chapter 8 will define the key features of the 'proactivism' of the Chaudhry Court in the most recent period of **corporatist governance**. A fluid and somewhat awkward balance of power appeared to have been reached wherein the military was dominant in some spheres but lacked the capacity to dictate its will wholesale to the other institutional complexes. It also appeared that the political elites and the judiciary had learned from the military's historical success in safeguarding its institutional interests and were similarly acting fairly coherently and strategically in the furtherance of their respective corporate concerns. The resulting form of corporatist governance gave the political system the kind of dynamic equilibrium that it had historically lacked. Given this fragmentation and awkward balancing of institutional power, a resurrected Chaudhry Court found the space to engineer the second significant wave of the judicialization of politics and governance in Pakistan. The judicial review practices entrenched by the court were largely predicated on the three historical strands of legality: namely, formal constitutionalism, administrative law and the review of police powers. However, the court used its judicial review powers proactively and at an unprecedented level. The

lasting legacy of the Chaudhry Court is a superior judiciary with a seemingly permanent place as a coequal player in the state structure along with the political executive and the military.

KEY THEMES OF CONSTITUTIONALISM IN PAKISTAN

The narrative of subtle long-term shifts in constitutional politics, state structure and state-society dialectics along the lines articulated above will enable us to evaluate how and why the courts have fashioned their judicial review practices during Pakistan's history. Before embarking on such a granular analysis, it may be helpful to identify certain overarching developments that are often occluded by the focus on more immediate controversies. Firstly, Pakistan's legal and judicial histories are often written through the lens of 'constitutional law' and read like speculative lines connecting the dots of notable cases and major crises. While these constitutional cases and crises are important, an exclusive focus on this domain of judicial action hides the more significant and consistent developments that have taken place in the sphere of 'administrative law'. It is through the consistent development of the judicial review of administrative action, even under military rule, that Pakistan's superior courts progressively carved an expansive institutional role for themselves. It is principally through the judicial review of executive action – or the Writ jurisdiction – that the courts acquired the power to mediate intra-state tensions and ultimately aggrandized themselves to the status of the regulator of the state.

Secondly, the courts' increasing capacity to mediate state-society dialectics – arising out of the demands of various groups and classes on the periphery of the state – also had much of its basis in the judicial review of executive action. The first significant movement in the Writ jurisdiction's development in the 1950s and 1960s resulted from the efforts of the lower cadres of the bureaucracy to safeguard their interests by challenging discretionary appointments, transfers, dismissals and disciplinary practices. In this process, the courts not only developed the doctrinal foundations of the Writ jurisdiction but also cultivated important constituencies in the educated urban middle classes from which the bureaucracy and much of the bar arose. The second significant movement in the development of judicial review, the explosion of Public Interest Litigation in the 1990s, was mostly pushed by the urban upper-middle and

professional classes, often valorised as the civil society, seeking to protect their economic interests from state action. The third significant movement, that of the Chaudhry Court, was predicated on the support of the urban and peri-urban middle and lower-middle classes that were marginal to the electoral calculus of the political elites while also being deprived of a due share in economic opportunities by the urban upper and professional classes. In between these movements the courts strove hard to consolidate and safeguard their terrain from intrusion by military regimes and elected governments alike, and occasionally provided a platform to political oppositions and other marginal interests to air their demands and grievances without effectively pressuring the state to accommodate them.

Thirdly, while the courts' pronouncements were articulated in the language of liberal constitutionalism, the construction of public law doctrines and rule of law theory can also be explained in the context of altering intra-state dynamics and state-society dialectics. The courts did not define their role in accordance with certain abstract theories of constitutionalism, rule of law and separation of powers that had been deeply imbricated in the post-colonial state's judicial structures. Rather, these courts re-situated themselves from time to time and re-fashioned their role in accordance with the fundamental shifts in constitutional politics, state structure and state-society dialectics charted in this thesis. In the process, these courts re-cast the theoretical conceptualizations of constitutionalism, rule of law, and separation of powers and the doctrinal pillars of their jurisprudence to legitimise and better reflect their evolving role. This is only to argue that theory and doctrine are not determinative of outcomes, but not that they are irrelevant. Doctrines and theoretical conceptions serve very important functions in transmitting the policies of superior courts through the judicial hierarchy and across the legal complex; codifying these policies to build institutional memory across relatively short judicial tenures; and articulating avowedly apolitical self-justifications to mask the strategic and interest-driven aspects of judicial action to the broader publics.

Fourthly, before proceeding with a historical and contextualized account of public law and judicial review, it may be worthwhile to highlight once again how this project departs from and challenges the more traditional liberal histories of public law and constitutional politics in Pakistan. A history of public law which grounds the

explanation of judicial action and articulations in changing forms of governance, state-structures and class dynamic challenges the teleology of liberal historiography and its underlying assumptions of inevitable and inherently valuable progression towards constitutionalism, democracy and rule of law. Such a deeply contextualised analysis of public law reveals the contingency of such progression, to the extent one exists, and reveals that in any given period the state and it superior courts are responsive largely to shifting configurations of dominant classes and elite interests. Further, any advances towards democratization or mass empowerment are at best contingent and reversible.

While the ambitions of this thesis are by and large descriptive and localized – to explain the historical evolution of public law and judicial review in Pakistan – it is hoped that such a grounded description will also provide an insight into the emergent theorization of the judicialization of politics worldwide. The increasing judicialization of politics is a global phenomenon.[6] Over the last few decades even courts in Asia have joined the trend.[7] The literature describing and analysing the judicialization of politics generally attributes three categories of explanations that are be relied upon to analyse the expansion of judicial power in a given polity.[8] The first, a liberal framework, traces the judicialization of politics as a consequence of the global rise in the significance of human rights and rule of law in the later decades of the last century.[9] While the prominence of rights discourse and the constitutionalizing of rights may explain the empowering of courts elsewhere, it seems to shed little light on the expansion of judicial power in Pakistan. As noted in this thesis, Pakistan's courts have failed to develop a coherent rights jurisprudence and have essentially used their fundamental rights jurisdiction to vindicate their administrative and governance directives.

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[6] See generally N C Tate et al (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995); Martin Shapiro et al (eds), *On Law, Politics and Judicialization* (Oxford University Press, 2002); Tom Ginsburg et al (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

[7] See generally Björn Dressel (ed), *The Judicialization of Politics in Asia* (Routledge, 2012); Andrew Harding et al (eds), *New Courts in Asia* (Routledge, 2010); Tom Ginsburg et al (eds), *Administrative Law and Governance in Asia* (Routledge, 2009).

[8] Björn Dressel, 'The Judicialization of Politics in Asia: Towards a Framework of Analysis' in Björn Dressel (ed), *The Judicialization of Politics in Asia* (Routledge, 2012) 4-5.

[9] C R Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); Anne Mary Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103.

Unlike liberal proponents, Ran Hirschl's influential account questions the celebration of rights-based constitutionalism and offers a critical class-based analysis of judicialization that may have greater explanatory power in the Pakistan context.[10] According to Hirschl, the judicialization of politics results from the strategic alignment of various elites who are on the verge of losing power – 'departing hegemons' – who seek to shield their interests and policies from the vagaries of electoral politics. Such elites find it useful to empower not only courts but also other semi-autonomous and professional institutions with which they share ideological commitments. As a result, judicialization and bureaucratization of policymaking is often conservative and tends to undermine the attempts of elected governments to redistribute resources and power. Hirschl's framework resonates with recent criticisms of the judicialization of politics in Pakistan and helps explain the assertiveness of courts especially in times of transition from military regimes to civilian governments when the judiciary imposed serious constraints on social and economic policymaking by elected governments. Judicial review in the immediate aftermath of the exit of the Zia regime in the early 1990s, for example, enabled the military and the presidency to retain a foothold in the political system and shielded the Islamization policies of the Zia era from being rapidly overturned. However, whilst Hirschl's analytical framework enables us to unpack aspects of judicialization in Pakistan at moments of transition from military to civil rule, it does not account for the progressive expansion of the Writ jurisdiction, especially the development of administrative law, even during military rule.

A 'functionalist' explanatory framework which focuses on the strategic motivations and institutional incentives of judiciaries may provide the missing pieces that help us better understand the judicialization of politics in Pakistan.[11] In particular, Ginsburg and Moustafa's analysis of courts under authoritarian regimes may help explain the judicialization of administrative governance which has arguably been the most consistent if not the most visible domain of judicial action in Pakistan.[12] According to

[10] See R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004) 218.
[11] See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behaviour* (Princeton University Press, 2006); Robert H Bork, *Coercing Virtue: The Worldwide Rule of judges* (American Enterprise Institute, 2003); John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 *Law and Contemporary Problems* 41; Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, 1999); Shapiro and Sweet, *On Law, politics and Judicialization*, above n 6.
[12] See Ginsburg and Moustafa, above n 6.

this framework of analysis, judicialization is strategically driven first and foremost by the courts themselves who align with and hence enlist the support of various elite groups and institutional complexes at different times and over different sets of issues. This form of judicialization happens most noticeably in fragmented and highly contentious polities where no one institution or class is able to dominate the state and the political system. As a result, a range of highly political and deeply contested issues end up before the courts, giving the judiciary the space to strategically expand the role of the courts in mediating issues of high politics as well as socio-economic policy. Furthermore, given the unstable and fragmented distribution of powers no adversely affected party is able to effectively push back at the expanding judicial domain while there are always important constituencies that support the courts' decisions.

Ultimately, however, this thesis argues that a deeply descriptive account of the non-linear expansion of judicial power in Pakistan may help highlight how fluid and dynamic the process of judicialization can be. Furthermore, at any given time a range of factors and players may contribute to the expansion of and/or resistance to a more assertive judicial role. Therefore, this thesis represents a call to eschew over-reliance on global frameworks to explain and evaluate the increasing significance of courts anywhere and everywhere, but instead to situate the politics of particular courts in specific historical and political contexts.

COLONIAL STATE-FORMATION

FIGMENTS AND FRAGMENTS OF THE RULE OF LAW

> *[E]qual and impartial justice is one of the main foundations on which British rule in India rests; it brought new ideas and prospects of peace, contentment and good government in a country where the administration of Justice had hitherto been impeded by tyranny and gross corruption; and it affects the life and well-being of every villager and townsman in India. It can be said that, whatever constitutional changes may ensue in the Government of India, the aims and methods of British courts of justice will survive, at any rate in their main features.*
>
> Sir Charles Fawcett, THE FIRST CENTURY OF BRITISH JUSTICE IN INDIA 2 (Clarendon Press, Oxford: 1934)

Any historical account of law in Pakistan must begin with the colonial era. Seven decades after independence from British rule Pakistan retains a *postcolonial* legal system – most of the codes and the structural features of the colonial legal system remain intact. While it is customary to describe the legal systems of former colonies as postcolonial, often the usage of this descriptor lacks critical value. For the assertion of postcoloniality to be analytically meaningful, one must go beyond a mere declaration of the fact of an operative colonial legacy and provide a deeper description of how and why colonial laws and legal structures persist despite the passage of time, intervening political and social disruptions. Equally significantly, one must describe the extent to which that legacy has been jettisoned and explain how and why such change occurred. It is the dialectic of continuity (*-colonial*) and change (*post-*) which makes the lens of postcolonial legality a useful framework for a historical account of a legal system such as Pakistan's.

The longevity of colonial laws and legal structures in Pakistan can be explained by the interplay of several important political and social dynamics in the colonial and postcolonial eras. First, colonial law was embedded in a coherent ensemble of state *institutions* – the bureaucracy, the police, the courts, the military and the political

service – which evolved to define and enforce the political rationalities of colonial rule. Any change in the basic structures of the colonial legal system even after the end of colonial rule could not be made in isolation and required foundational changes in a powerful and integrated state structure. Second, this state structure was built with the assistance of and relied on significant cooperation from existing and emergent native *elites*. If colonial rule remained explicitly coercive, it would not have lasted as long as it did. The establishment and entrenchment of colonial rule thus necessitated the cooptation of diverse elites, often with conflicting interests and demands, through the creation of intricate webs of patronage and inter-dependencies. While this was principally achieved through recruitment into the military, police and lower rungs of the civil bureaucracy, it also involved the use of legitimating ideas and idioms to create conditions in which important segments of the native elites identified their interests with the colonial state.[13] These native elites formed the ruling classes of postcolonial South Asian states including Pakistan whose interests and ideologies were thus invested in the extension of the colonial state structure.

The cooptation of the native elites, however, carried the risk that these classes would progressively demand a greater share of power and resources from the colonial state by employing the same idioms of equality, democracy and rule of law. The colonial state thus evolved a complex and sophisticated technique of *dispersal and rule* whereby the various elites, networks, and localized centres of authority and influence were kept fragmented and in competition with each other. Several distinctions and stratifications of the native elites – along class, religious, regional and ethno-linguistic lines – were employed to pre-empt the emergence of cross-cutting coalitions of groups and classes and that may challenge colonial rule. This also enabled the colonial state to project itself as being above petty local squabbles – with its foreignness and an aura of racial superiority being useful in this respect – and assume the role of an independent and impartial arbiter of native social struggles. While the colonial state successfully managed such competition amongst various groups and classes until its bitter end, it did leave a legacy of centrifugal struggles along class, ethno-linguistic nationalism and

[13] As Nicholas Dirks noted: 'Colonialism was made possible, and then sustained and strengthened, as much by cultural technologies of rule as it was by the more obvious and brutal modes of conquest.' Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton University Press, 2001) 9.

religious fault lines that postcolonial nation states in South Asia found difficult to contain. It is the challenge from ethno-linguistic, religious and regional dissidents which created pressures for change as well as new forms of resistance to such demands for structural transformation in the postcolonial state.

Law occupied a central place in colonial rule in British India along the three axis of state-formation, elite cooptation and ideological hegemony. Law was used to effectively institutionalise the administrative state. Legal accountability and rule-boundedness were used as means to maintain the efficiency and command structure of the bureaucracy and police, especially at the lower rungs which were staffed largely by the natives. Law was also used as an important technology for the maintenance of social control. The criminal justice system was used in ways that enhanced and magnified the state's police powers and minimized the resort to military force. Law was also an important tool to dispense patronage and co-opt Indian elites in multiple ways. *De jure* and *de facto* preferences in access to courts and legal processes remained a structural feature of the colonial legal system until the very end. A plurality of norm systems – religious and customary – was initially tolerated and then regulated to create native investment in and allegiance to the colonial legal order. Law also had a prominent role in regulating the political economy. Property relations and entitlements were reconfigured from time to time to promote social and economic arrangements that best suited the priorities of the colonial state and co-opted elites.[14]

Most notably, while colonial rule was structured on a bureaucratic authoritarianism permeated with the need to maintain racial difference and superiority of the colonialists, the rule of law, laden with abstract promises of equality, was employed as the primary legitimating idiom.[15] The rule of law was not pure rhetoric, however. Such heavy reliance on legal processes for structuring colonial rule resulted in fragments of the rule of law being imbricated in state-formation in ways that not only served the political rationalities of colonialism but also offered opportunities for some interstitial resistance to it. It is the limited availability and partial success of the rule of law in moderating

[14] See D A Washbrook, 'Law, State and Agrarian Society in Colonial India' (1981) 15:3 *Modern Asian Studies* 649.
[15] See Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003).

the authoritarianism of the colonial state, despite its larger failures, that account both for its lasting resonance amongst segments of the colonized elites as well as its utility in legitimizing colonial rule. It is also this dialectic of fragmentary presence but ultimate frustration that underpinned the protracted nationalist struggle for independence from colonial rule – a struggle waged mostly in the form and language of constitutionalism and rule of law. As a result, there was considerable faith in the inchoate ideas of rule of law and democracy on the part of postcolonial elites which continued the struggle for and with these grand ideals long after the end of colonial rule.

A Brief History of Colonial Rule

From the East India Company to the British Raj

The colonial state evolved from the Presidency towns of Calcutta, Bombay and Madras – enclaves of trading privileges extended to the East India Company in the 17th century – to the establishment of Crown rule or the British Raj over the entire Indian Subcontinent by mid-19th century. The British East India Company, established in 1600 by royal charter as a private trading corporation, was granted a monopoly on the trade with India and the East Indies by the Crown. It was not until 1618 when it received permission for the Mughal Empire to lease its first trading facilities that the Company's aspirations of Indian trade became a viable prospect. The Company gradually secured trading posts on both the eastern and western coasts of India, established a fortified factory (warehouse) at Fort St. George in 1640 around which the town of Madras later grew, and acquired Bombay in 1668. With the completion of Fort William at Calcutta in 1715, the Company secured trading bases, essentially city states, across India.[16]

As the Mughal Empire weakened in the 18th century, resulting in the incremental 'relocation' of power from the 'supra-local state' to local powers centres,[17] the Company's opportunities to expand commerce and territory in the hinterland of its

[16] See generally, Bhawani Sankar Chowdhury, *Studies in Judicial History of British India, Books I and II* (Eastern Law House Pvt. Ltd., Calcutta, 1972).
[17] See Jon E Wilson, 'Early Colonial India Beyond Empire' (2007) 50 *The Historical Journal* 951, 955-6.

Presidency towns grew dramatically.[18] The acquisition of the *Diwani* (revenue administration) of Bengal, the richest province of the Mughal Empire and subsequently of British India, laid the foundations of the political economy of colonialism in India. The Company's ascendancy in Bengal also provided the blueprint for its territorial expansion. The Company had secured valid trading privileges for itself and private persons trading under its banner from the Mughal emperor but its operations were under constant pressures from successive *nawabs*, nominally vice regents but *de facto* rulers of Bengal. In 1756, the young nawab attempted to evict the Company from Bengal. This precipitated a military campaign that would firmly establish the Company's dominance over Bengal and north-eastern India within a decade. In 1765 the Company formally acquired the Diwani (revenue administration) as well as informally the *Nizamat* (law, order and policing) of Bengal, Bihar and Orissa in return for maintaining hand-picked nawabs on the symbolic throne.

In the aftermath of its ascendancy in Bengal the Company progressively transformed itself from a trading corporation to a colonial instrument of the British Empire through a steady campaign of territorial expansion. Prior to the acquisition of Diwani the Company had constantly laboured under an imbalance of trade and payments. The Indian trade largely comprised the importation of goods into Britain in return for transfer of payments in bullion to India. This rendered the maintenance of troops and prosecution of wars justifiable only as a commercial necessity. With the acquisition of revenue administration the Company gained access to vital resources and an economic rationale to expand its territory in India.[19] From 1765 onwards the Company embarked on a sustained program of territorial aggrandizement. In 1803, when the Company successfully concluded a protracted campaign against the confederacy of Maratha states, the last bastion of native power in north-central India, it finally had the Mughal

[18] See P J Marshall, 'The British in Asia: Trade to Dominion, 1700-1765' in P J Marshall (ed), *The Oxford History of the British Empire, Volume II: The Eighteenth Century* (Oxford University Press, 1998); R K Ray, 'Indian Society and the Establishment of British Supremacy, 1765-1818' in P J Marshall (ed), *The Oxford History of the British Empire, Volume II: The Eighteenth Century* (Oxford University Press, 1998).

[19] In 1801 the annual exports from Bengal approximated £2.5 million. In comparison, the revenue collected from the territory under the Company's control amounted to £6.9 million. By 1807 the revenue collection rose to £14.5 million. See Kaushik Roy, 'The Armed Expansion of the English East India Company' in Daniel Marston and Chandar Sundram (eds), *A Military History of India and South Asia* (Pentagon Press, 2007) 3.

throne at Delhi in its grasp. The nominal Mughal emperor, then a blind old man, came under the Company's protection and north India was securely within British control.

Towards the end of the first century of the Company's rule in India its dominion was finally extended to Sindh, Punjab and the north-west frontier regions. As such, colonial state and legal institutions were introduced to the territories of present-day Pakistan much later than in Bengal and north-central India. The rulers of Sind were forced into a subsidiary alliance in 1839.[20] An inevitable rebellion and justification for annexation were 'deliberately manufactured' with the imposition of a more demanding subsidiary treaty in 1843.[21] In Punjab, a war broke out with the Sikh rulers in 1845 which, while ending in British victory, revealed the mettle of the Sikh forces.[22] By a treaty in 1846 the Sikhs were compelled to cede Kashmir to the local regent as a reward for his neutrality and restrict the size of the Sikh army. The foreseeable Sikh rebellion materialized and was suppressed in 1848-49. The Company's last Governor-General in India, Lord Dalhousie assumed office in 1848 and embarked on an aggressive campaign of formal annexation of territory, often in clear violation of the earlier subsidiary treaties. Through the annexation of Punjab and Hyderabad amongst other states, the Company consolidated British dominion all the way from Burma in the east to the base of Afghan ranges in the west, from the Himalayas in the north to the tip of the Indian peninsula in the south.

After a century of territorial expansion under the East India Company, however, the colonial state suffered a major disruption. A 'Mutiny' in 1857 by the *sepoys* of the Company's Bengal army shook British rule in India to its very foundations and for a short while even threatened to uproot it permanently. The Mutiny, which quickly transformed into a broader conflagration in north-central India,[23] resolved longstanding debates about the future of the Company and its governance structures in India. The Company shouldered much of the blame for precipitating and mishandling the Mutiny.

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[20] See P E Roberts, *A Historical Geography of the British Dominions, Vol. VII Part I* (Oxford Clarendon Press, 1924) 326-27. Also, see G Anderson and M Subedar, *The Expansion of British India (1818-1858)* (G. Bell & Sons Ltd., London, 1918) 26.
[21] See Roberts, above n 20, 329.
[22] See Roy, above n 19, 14-5.
[23] See D A Low, 'Pakistan and India: Political Legacies from the Colonial Past' (2002) 25:2 *South Asia* 257, 262; Raymond Callahan, 'The Great Sepoy Mutiny' in Daniel Marston and Chandar Sundram (eds), *A Military History of India and South Asia* (Pentagon Press, 2007) 18; Sugata Bose and Ayesha Jalal, *Modern South Asia* (Routledge, 3rd ed, 2011) 77-8.

The Government of India Act passed in 1858 ended Company rule and substituted it by direct Crown rule or the British Raj. The office of the Secretary of State for India, an important cabinet position, replaced the Company's Board of Control. The Governor-General of India also became the Viceroy of the Queen and was directly responsible to the Secretary of State for India.[24]

With direct Crown rule thus established in India, the Raj immediately began the task of restructuring the colonial state on firmer footings than had been the case before the Mutiny. The army, which had continued to play a significant role in governance under the Company's aegis, was relegated to the task of fighting regional campaigns and managing the tribal borderlands on the north-western frontiers. Civil ascendancy was firmly established except in the Punjab and other parts that form present-day Pakistan. Here the demands of governance were entrusted to military men who better understood the 'martial races' which would henceforth provide the Raj with a bulk of its recruits.[25] Elsewhere the Raj was built on the 'steel frame' of the civil bureaucracy whose top rungs staffed almost exclusively by British officials enjoyed vast discretionary powers, while the lower cadres of Indian officials were controlled by elaborate laws, regulations and bureaucratic procedures. The bureaucratization of the state, a grand project of the codification of Indian laws and the cooptation of various elites into the government arrangement gave rise to a form of colonial governance that enabled the Raj to magnify and project its regulatory powers much deeper into Indian society.

The Raj initially focussed disproportionately on the traditional elites, and foremost amongst them were the rulers of the princely states under its dominion, large landholders and tribal chiefs. Its' preoccupation with these classes was rooted in a particular understanding of the basis of disaffection with Company rule leading up to the Mutiny. Various causes were attributed to the Mutiny,[26] but the explanation that resonated with the Raj was that the rebellion was propelled by the displacement of native elites and the undermining of native social structures by a Company

[24] The Charter Act of 1833 had already established a unified Government of India and a Legislative Council. See Eric Stokes, *The English Utilitarians and India* (Oxford University Press, 1959) 169.
[25] On the 'martial races' of India, see Douglas M Peers, 'The Martial Races and the Indian Army in the Victorian Era' in Daniel Marston and Chandar Sundram (eds), *A Military History of India and South Asia* (Pentagon Press, 2007) 34-52.
[26] See Callahan, above n 23, 24-6; Bose and Jalal, above n 23, 72-3.

administration supposedly gripped by the zeal of reform.[27] This was considered unmistakable evidence of the need to maintain and co-opt the native elites into the governance scheme more deeply than the Company had done. Amongst other things, the Raj promised the creation of nominally representative institutions at the municipal and provincial levels, staffed through nomination or elections based on limited franchise, to secure the cooperation of those the British thought were 'natural leaders' of their groups and communities and who invariably had old wealth and traditional status.[28] The expansion in the colonial bureaucracy, police and judicial services also provided an opportunity to 'enlist on our side, and to employ in our service, those natives who have, from their birth or position, a natural influence in the country' including new classes of prosperous, English-educated, urban professionals and businessmen that grew in the post-Mutiny era.[29]

Indian Nationalism, Civil Disobedience and Communal Politics

At the dawn of the 20th century, the Raj appeared to be secure in the support of a huge army of 'collaborators' it had built through its post-Mutiny policies.[30] The princes, large landlords, soldiers of the Indian Army, settlers of new canal irrigated lands, native policemen, and the rank and file of the bureaucracy stood firmly behind the imperial ruler when the first Great War erupted in Europe. The Raj also had the support of the Indian nationalist parties which had recently emerged as vehicles of petitioning for a greater role in statecraft. As their demands for political inclusion gained momentum, the Raj progressively moved from balancing various class or group interests to playing them off against each other in order to delay the emergence of a coherent and concerted political campaign for dominion status. One dimension of Indian politics which increasingly enabled the Raj to position itself as a supposedly impartial arbiter, but which soon acquired a life of its own, was the communal division between the Hindu

[27] See Thomas R Metcalf, *Forging the Raj* (Oxford University Press, 2005) 26-7.
[28] See Thomas R Metcalf, *Ideologies of the Raj* (Cambridge University Press, 1994) 186.
[29] See Thomas R Metcalf, *Forging the Raj*, above n 27, 36.
[30] One must be careful in avoiding the use of term 'collaborator' in perjorative terms. As Partha Chatterjee notes, citing Asok Sen, 'the dialectics of loyalty and opposition did not permit a clear division among the native bourgeoisie or the entire middle class into two exclusive categories of collaborators and opponents of imperialism.' See Partha Chatterjee, 'Nationalist Thought and the Colonial World: A Derivative Discourse?' in *The Partha Chatterjee Omnibus* (Oxford University Press, 8th ed, 2009) 25.

majority and religious minorities. Such was the configuration of constitutional politics in India as the nationalist struggle unfolded.

The two most significant political players to emerge at the national level at the turn of the century were the Indian National Congress and the All-India Muslim League. The Congress, formed in 1885, was an avowedly non-communal organization. It reflected the perceived need of Indian intelligentsia and new urban, educated, nationalist classes to mobilise in order to press their demands on the Raj. The Congress was, at least in its first generation, essentially loyal and elitist. The Muslim League founded in 1906 to purportedly give a voice to more than 60 million Muslims, who were under-represented in the civil service and over-represented in police and army, was also fundamentally loyal to the Raj. The Muslim League was even more elitist as it was essentially a party of the old Muslim aristocracy, the princes and emerging urban upper classes of Bengal and north-central India.[31] The leadership cadres of both the Congress and the Muslim League initially subscribed to the Raj's mythology of rule of law, democracy and development.[32] As such, the nationalist movement and its associated classes adopted constitutionalist methods to press their call of inclusion within the colonial state and consideration within its political, economic and social rationalities.

The Raj reciprocated these demands at the end of the First World War in the form of the Montagu-Chelmsford reform proposals of 1918, which culminated in the Government of India Act, 1919.[33] These constitutional changes created two levels of elected government: a provincial tier with Indian ministers responsible for education, agriculture, health and finance in the provinces of British India; and a Viceregal legislative assembly with a largely advisory role. This system of limited representation was not a step towards a 'progressive realization of responsible government,'[34] but a mere compromise to delay it.[35] It was also contrived to fragment and provincialize Indian politics. The opposition of the government of India to oversight by elected

[31] See Lawrence Ziring, *Pakistan in the Twentieth Century* (Oxford University Press, 1997) 9.
[32] See Bose and Jalal, above n 23, 97.
[33] Government of India Act 1919, 9 & 10 Geo. 5 c. 101.
[34] Preamble to the Government of India Act 1919.
[35] See Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (Sang-e-Meel, Lahore, 2010) 9.

representatives ensured the continued ascendancy of the executive.[36] As a result, colonial bureaucracy remained largely insulated from Indian public opinion and political oversight until the end of imperial rule, except to the extent to which actions could be pressured by civil disobedience or violent resistance.[37]

The First World War precipitated other changes in Indian society that imposed challenging demands on the Raj. By 1918 the Indian Army had expanded to half a million and gave Indian Muslims (who formed a third of soldiers) and Punjab (which provided almost half of the recruits) enhanced significance in the Raj's priorities.[38] As de-commissioned soldiers returned from African and Middle-eastern campaigns, there was a sense of discontent and restlessness all over India, especially in the Punjab. War-time taxes and high inflation had alienated the urban and mercantile classes.[39] Increased debt burden had also crippled the peasantry when Mohandas Gandhi emerged as the leader of a mass movement under the banner of the Congress in 1919. Gandhi's *Satyagraha* (non-violent civil disobedience) movement was launched in protest over the Rowlatt Acts of 1919 which had extended the life of war-time measures for quelling dissent and prosecuting political offences. The Satyagraha coincided with the *Khilafat* movement of conservative Indian Muslims protesting the dismemberment of the Ottoman Empire and the imminent end of the Caliphate.[40] Indian public opinion thus unified against the Raj.

Fortunately for the Raj, some of its strategies of co-opting various segments of Indian elite and middle classes enabled it to survive the immediate post-war turmoil. The non-cooperation movement was noticeably weak in the princely states. The limited democracy introduced by the Montagu-Chelmsford reforms and the support of rural landed classes that it solidified also helped the Raj weather the storm of protest. Support for the civil disobedience movement fragmented when in 1922 Gandhi suddenly and unilaterally called off the non-violent movement after a mob set fire to a police station.[41]

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[36] See David Arnold, 'The Armed Police and Colonial Rule in South India, 1914-1947' (1977) 11:1 *Modern Asian Studies* 101, 103.
[37] See generally Judith M Brown, 'Imperial Façade: Some Constraints Upon and Contradictions in the British Position in India, 1919-35' (1976) 26 *Transactions of the Royal Historical Society* 35.
[38] See Lawrence James, *Raj: The Making and Unmaking of British India* (Little, Brown & Co., 1997) 457; Bose and Jalal, above n 23, 104-5.
[39] See Low, above n 23, 269.
[40] *See* Bose and Jalal, above n 23, 112-3.
[41] Ibid, 118-9.

The leaders of the Khilafat movement considered this a betrayal of their cause. Jinnah, a brilliant Muslim barrister who 'was uniquely admired, respected and coveted by the leadership of both political parties'[42] and had been dubbed the 'Ambassador of Hindu-Muslim Unity'[43] was alienated by Gandhi's 'capture' of Congress and parted ways with the party in 1920.[44] With Jinnah at the helm, the constitutional position of the Muslim League crystallized around constitutional safeguards for the Muslims in the future dispensation of India – separate electorates, guaranteed one-third representation in the central legislature and in the central and provincial governments.

Congress stated its firm opposition to these demands through the Nehru Report of 1928. With discussions on the future constitutional scheme for India thus deadlocked, Congress began its second civil disobedience campaign in 1930-31.[45] Indian Muslims by and large stayed away from the Congress campaign. From 1930-32 the Raj organized a series of Round Table Conferences in London to discuss a negotiated settlement on the future constitution of India as a step towards dominion status. Congress was persuaded to join the second session in 1931 after its anti-colonial campaign ran out of steam. Parties at the conference included, in addition to the Congress and the Muslim League, the representatives of other religious communities and of the 560 or so princely states. The Raj sat at the head of the table comfortable in the assurance that communal divides and the loyalty of the princes would prevent consensus, and any constitutional scheme that might be devised would leave it as the ultimate arbiter of communal, class and provincial divisions.

The Government of India Act, 1935 which reflected the agreement reached at the Round Table Conference fulfilled these expectations.[46] Under the new constitutional arrangement a weak federation between the provinces of British India and the princely states was proposed at the center, but only if a certain number of states agreed to join it on their own terms.[47] It was hoped by the Crown that such a federation would

[42] See Stanley Wolpert, *Shameful Flight: the Last Years of the British Empire in India* (Oxford University Press, 2006) 3.
[43] *See* Akbar S. Ahmed, Jinnah, Pakistan and Islamic Identity 7 (Routledge, London: 2002).
[44] See Jalal, *The Sole Spokesman*, above n 35, 8.
[45] At its peak 29,000 Congress workers were put behind bars. James, above n 38, 529.
[46] The Government of India Act 1935, 26 Geo. 5 & 1 Edw. 8 c. 2. For an overview of the Act, see Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press, 2nd ed, 2009), 21-32.
[47] §§5 and 6.

materialize and would be a weak one as the princes were given significant representation in the federal legislature as well as the option of imposing limitations on federal legislative and executive powers in their states.[48] The grant of greater self-government at the provincial level was also expected to placate the Indian nationalists, at least for a while. At the same time it was hoped that a greater provincialization of politics fostered by the Act would also undermine the prospects of a strong political center. It was envisioned that such a feeble federation would subsequently agree to a nominal dominion status with considerable British influence and oversight. As such, the Act was designed to perpetuate the Raj rather than terminate British rule.

Unfortunately for the Raj the princes did not display sufficient solidarity, and the federation never materialized. The Act also failed to satisfy Indian nationalists. While considerable powers were transferred to elected provincial governments, the spirit of executive domination visibly permeated the new governance arrangement at the central level. The Act gave the Governor-General and the provincial Governors a wide array of discretionary and special powers,[49] including complete control over the military,[50] foreign affairs,[51] maintenance of order,[52] taxation,[53] and spending.[54] The Governor-General and the Governors had the capacity to limit or prohibit discussions on a range of matters before the legislatures,[55] and were also granted the power to dissolve legislatures and assume all power in cases of declared emergencies.[56] The exercise of the discretionary powers and special responsibilities were not justiciable before the courts, including the newly-created Federal Court. Nonetheless, the 1935 Act calmed the political atmosphere in India somewhat, and appeared to provide a pathway to a peaceful even if tortuous transition to dominion status.

[48] §§6(2) and 18(2).
[49] §§12 and 52.
[50] §§8 and 11.
[51] §11.
[52] §§56, 57 and 58.
[53] §37.
[54] §§33, 34 and 35.
[55] §§38, 40 and 86.
[56] §§19, 32, 45, 62 and 93.

The Twilight of the Raj: Constitutional Deadlock and Partition

In the elections for the provincial legislatures held in 1937 roughly half of the electorate, then expanded to 35 million, voted Congress ministries into power in most provinces.[57] The Congress' overwhelming electoral success appeared to be disastrous for the Muslim League. The League failed miserably even in the Muslim-majority provinces of Punjab, Sind and N.W.F.P., and only managed to form an unstable coalition ministry in Bengal. It was shown to be a party of Muslim aristocracy and urban professionals with limited public support. This electoral loss, however, also founded the Muslim League's renaissance. The actions of Congress ministries in several Hindu-majority provinces dramatically aggravated Muslim grievances and convinced many that uncontrolled majoritarian democracy, without the kinds of constitutional safeguards that Jinnah had been advocating, would prove ruinous for the Muslim middle classes in an independent India.

The short-lived political equilibrium suddenly shattered when in 1939 the Viceroy declared India's participation in the Second World War without any consultation and the Congress ministries in the provinces resigned in protest. The Muslim League celebrated a 'Day of Deliverance' which marked the beginning of its notable rise in popularity amongst Indian Muslims and the transformation of its leader from Mr. Jinnah to '*Quaid-e-Azam*' (the Great Leader). Historically, the League had a presence in the provinces of north-central India, where Muslims were a numerical minority, and to a lesser extent in Bengal. The League now also found traction in the Muslim-majority provinces in the west. At its annual session in Lahore in March 1940 the Muslim League adopted a resolution calling for the establishment of Pakistan – independent 'states' for the Muslims of India. There is considerable evidence that the Pakistan that Jinnah demanded at this stage was a constitutional space rather than a nation-state with delineated geographical boundaries.[58] It was essentially a bargaining chip that Jinnah could use to negotiate a confederal arrangement whereby Muslim-majority provinces would achieve the greatest possible autonomy within a future Indian union to be created

[57] See Jalal, *The Sole Spokesman*, above n 35, 15.
[58] Ibid, 57-8.

at the end of the Raj, as well as to win constitutional safeguards for Muslims as minorities in the other provinces.

In order to pursue this strategy Jinnah was required to leave the Pakistan demand as vague as possible while attempting to enlist sufficient support in the Muslim-majority provinces to claim for himself the status of being the 'sole spokesman' of the Muslims of India. The difficulty for Jinnah in the Punjab was that the large landholders and chiefs, whose Unionist party remained loyal to the Raj, resented the Muslim League's intrusion into their support base. The Muslim League's organizational structure and support amongst the landed elites in the other western provinces also remained weak. Jinnah was left with the difficult choice whether to undertake a genuine mass mobilization and party organization in the Muslim-majority provinces or to build a party structure by orchestrating defections to the Muslim League from the Unionists and other local power-brokers. The latter strategy carried the risk of destabilizing factionalism in the party's burgeoning provincial cadres. The choice was made for Jinnah by the rapid decline in the Raj's fortune.

By May 1942 Britain had lost Singapore, and with the Japanese invasion of Burma also its remaining prestige and nerve. At a time when it desperately needed domestic support in India the Congress launched the 'Quit India' campaign, another wave of civil disobedience demanding complete independence from Britain. The Raj's overture to Indian nationalists in the form of the Cripps Mission (1942) failed and although it managed to suppress the movement through the arrests of Congress leadership and thousands of its activists, its hold over India had become precarious. Fortunately for the Raj, Muslims and Sikhs remained detached from the Congress' campaign, which was a major relief given the composition of the Indian Army and police, but this saving grace could not be counted on indefinitely. Furthermore, it was evident that Britain did not have the financial or human resources to hold on to the jewel of the Empire for long after the War. The civil services, by then considerably Indianized, were undermanned and overstretched. British soldiers would resent continued deployment in India after the War while decommissioned Indian soldiers would quite likely become a ferment of discontent. Most alarmingly, the historic balance of payments with India had been

reversed and Britain owed a soaring debt for wartime supplies and services. The prestige of holding on to its colony would come at a huge financial cost.[59]

The Raj thus made the decision to exit India as soon as possible after the end of the War. Whereas hitherto a deadlock in constitutional negotiations between the Congress and the Muslim League suited the Raj, which had played its part in encouraging such an impasse, it now desperately needed a settlement which seemed exceedingly difficult and distant. While Congress demanded an immediate transfer of power, the Muslim League insisted on a negotiated resolution of the minority problem under British arbitration as a precondition. The 1945-46 elections, designed to create a constituent assembly as well as test the relative support for the major parties came at a time of post-War economic hardship and discontent, especially in the Punjab. The Muslim League was poorly organized and funded, and heavily reliant on candidates with local networks and power bases, many of whom had recently deserted the Unionists.[60] The Muslim League performed much better in the Punjab and the other western provinces compared to the 1937 elections, but its victory was far from overwhelming.[61] In Bengal, where the Muslim League was much better organized, it won by a landslide.[62] In the elections for the central legislature the Muslim League won all of the Muslim seats. Jinnah thus emerged as the legitimate spokesman of the Muslims of India, even though his party's electoral success in the western Muslim-majority provinces was due largely to defections of the landed elites.

The party-political situation having thus been clarified, the Cabinet Mission to India (1946) pursued a constitutional compromise that would enable the Raj to make its exit. The Mission proposed two possible schemes: a unitary India with a weak center and greater provincial autonomy, or alternatively a partition of India and Pakistan – as well

[59] See Wolpert, above n 42, 47-8.
[60] The belated conversion of Punjab's landed elites that were hitherto represented in the Unionist party came partly on account of mounting pressure from below. Furthermore, as partition became imminent a conversion to the Pakistan cause appeared the most likely means of continuing access to governmental power and privilege. There was also a distinct economic incentive: agrarian indebtedness had increased dramatically during the depression and the Second World War, mostly along religious-communal lines, and partition promised an instant debt write-off. See Imran Ali, 'The Punjab and the Retardation of Nationalism' in D A Low (ed), *The Political Inheritance of Pakistan* (MacMillan, 1991) 47-8.
[61] See Jalal, *The Sole Spokesman*, above n 35, 150-70.
[62] Ibid, 151-2. The Bengal Muslim League polled 95 per cent of the urban Muslim vote and nearly 85 per cent of the rural Muslim vote. Ibid, 160-1.

as Punjab and Bengal – along communal lines. It expected the Congress to resist the partition of India and the Muslim League to oppose the dismemberment of the Muslim-majority provinces, thereby rendering both amenable to accepting a weak federation with constitutional protections for the minority communities. As anticipated, the Congress initially opposed the first option and Muslim League the second. Jinnah, despite his reputation for inflexibility and hard negotiations was very much open to a compromise. In contrast, the Congress leadership remained insistent on a strong center and even indicated its willingness to accept a partition of the Subcontinent. Jinnah, with his carefully structured gambit having failed, was pushed into a corner from which only the British could extricate him. However, by now the Raj had lost its capacity to resist or pressurize Congress any longer. In essence, the partition of India was thus thrust upon Jinnah.[63]

By December 1946 the Raj had set the date for its exit when Lord Mountbatten was appointed as the last Viceroy of India with the mandate to accomplish a transfer of power by mid-1948. However, Lord Mountbatten was determined to complete the hazardous task of demarcating the borders of the new nation states and of achieving a difficult division of assets in the least possible time. In pursuit of this goal, the Raj disregarded predictions of disastrous consequences in case of the partition of Punjab.[64] Independence was brought forward by nearly a year and on the midnight of 14 and 15 August when the nation states of India and Pakistan were created none of the challenges of border demarcation, division of assets, allocation of administrative personnel, *etc*. had been satisfactorily resolved. Punjab had already begun its descent into communal violence which would ultimately claim hundreds of thousands of lives.[65] Mass migrations between east and west Bengal and east and west Punjab had begun with millions of people displaced on both sides of the new borders.[66] While the seeds of long-standing hatred, future wars and chronic under-development were thus planted in the Indian Subcontinent, the Raj had already made its 'shameful flight.'

[63] See Wolpert, above n 42, 77.
[64] See Jalal, *The Sole Spokesman*, above n 35, 256.
[65] See Wolpert, above n 42, 173-7.
[66] Ibid, 173-82.

THE COLONIAL STATE AND LEGAL SYSTEM

The Indian Civil Service and Bureaucratic Authoritarianism

The foundations of the colonial state and legal system were laid in the land revenue settlements of Bengal and north-central India by the East India Company. Upon the acquisition of the Diwani of Bengal, the Company largely saw and portrayed its administrative arrangement as an extension of the authoritarian tradition of Mughal government. It initially retained the Mughal revenue structure, except to the extent of appointing its own Collectors to oversee revenue administration. The Company also continued to use the titles, styles, processes and personnel of Mughal administration in the transitional period before it began to gradually mould its own administrative structure. The perpetuation of the Mughal tax farming structure in the interregnum enabled the Company to collect revenue without interfering with the native social structures and thus furthered the goals of maintaining order and the agrarian base for revenue harvesting.[67] However, increasing revenue often required the administration to loosen the hold of the *jagirdars* (holders of Mughal-era revenue estates) and local elites over land. This had to be counter-balanced by concerns that a rapid displacement of the jagirdars and other groups with local authority and influence could destabilise Company rule.

The bureaucratic structure that evolved during the next decades of Company rule was designed principally to serve the interests of revenue extraction. The Company developed a state structure in which the bureaucracy had unassailable ascendancy and combined executive, judicial, and revenue-collecting powers in the same officials.[68] Such concentration of discretionary power in a handful of superior officers remained the core administrative principle in British India. A major transformation in the civil administrative structure of the Company began at the turn of the 19th century. Under the reforms undertaken pursuant to the Charter Act of 1793 the Company's commercial bureaucracy evolved into a professional civil service. All important positions in the

[67] See, eg, Eugene F Irschick, 'Order and Disorder in Colonial South Asia' (1989) 23:3 *Modern Asian Studies* 459.
[68] See Chittaranjan Sinha, 'Doctrinal Influences on the Judicial Policy of the East India Company's Administration in Bengal, 1772-1833' (1969) 12:2 *The Historical Journal* 240, 240.

Company's service became the preserve of British Covenanted Civil Servants who had long-term contracts with the Company. Only inferior positions were open to native Uncovenanted Civil Servants who were employed on short-term contracts or specific commissions. A culture of rule-boundedness was aggressively introduced within the Covenanted cadre starting with the Charter Act of 1793 which incorporated a manual of civil service rules and regulations. Induction and training processes for Covenanted servants improved considerably with the establishment of the Fort William College in Calcutta in 1800 and the East India College at Haileybury in England in 1806, where candidates for Covenanted positions were required to undertake professional study for three years. The salary structures were also improved and private trading was strictly prohibited.

Further restructuring of the civil service began in the last days of the Company. Competitive examinations for the Covenanted positions were held in England in 1853. With the displacement of the Company in the aftermath of the Mutiny, the Raj replaced the Covenanted officials with exclusive corps of the Indian Civil Service (ICS) and the Indian Political Service (IPS) below which there were hierarchical layers of generalist and specialist bureaucracy. The IPS officers were the 'super-elite' who served in the frontier regions and princely states, and effectively ruled these regions and managed their political affairs. Roughly two-third of its members came from the army and one-third from the ICS.[69] ICS officers were generalists who not only commanded the administrative structure, police and the judiciary in the districts but all superior positions in the provincial and central administration were reserved for them. The ICS officers were by and large the product of English public schools and belonged to British upper-middle class. From 1878 onwards successful candidates underwent a two-year course at Balliol College in Oxford and were imbued with the traditions of Oxbridge as much as with knowledge of Indian languages and culture. The remuneration of the ICS was high, even by comparison with the bureaucracy in England.[70]

[69] Ralph Braibanti, 'Public Bureaucracy and Judiciary in Pakistan' in La Palombara (ed), *Bureaucracy and Political Development* (Princeton University Press, 1963) 375.
[70] See James, above n 38, 308-9.

The ICS was bolstered 'with the prestige of race' and despite the frequent promises of Indian access to ICS recruitment it remained overwhelmingly white.[71] While the ICS was reserved for British officers, the opportunities for native employment in the junior rungs of the bureaucracy and police were dramatically expanded. An elaborate civil service structure not only magnified the Raj's presence in Indian society but native employment in its lower cadres also served to align the interests of old and new elites with colonial imperatives. As noted in the Parliament, the employment of Indians 'would afford the best security for the permanence of our rule, for it would make the highest class of natives, as well as those of low degree, feel that their own good was bound up in the continuance of our sway.'[72] The composition and ethos of the ICS, and the nativization of an enlarged bureaucratic apparatus under it, was bound to enhance the sense of racial superiority in the ICS and a distrust of the native servants working under it. Narratives of the venality, incompetence and cowardice of native officials became an essential part of the official folklore. Native officials were the *other* of the ICS and gave context to the courage, competence and uprightness of the British officials at the helm of Indian destiny.

The burgeoning ranks of educated, professional, English-speaking, English-mannered urban elites placed challenging demands on the Raj to harness their intellectual resources through employment in the upper cadres of bureaucracy, police, judiciary and military as well.[73] The pressure to extend the 'Indianization' of the state to the top, and with it the diffusion of the Raj's coloniality, thus grew with the expansion of these new urban classes.[74] The question of the Indianization of the bureaucracy explicitly remained on the Raj's agenda throughout its existence. The Aitchison Commission Report (1886-87), the Islingtom Commission Report (1915), the Lee Commission Report (1924) and the Simon Commission Report (1930) present a record of the colonial state's continuing difficulties and anxieties with Indianization. The Raj was amenable to the large scale employment of Indians in the lower cadres of the civil service and police which were mostly Indianized by the beginning of the 20th century.[75]

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[71] Ibid, 307, 347.
[72] See S V Desika Char, *Centralized Legislation: A History of the Legislative System of British India from 1834 to 1861* (Asia Publishing House, Delhi, 1963) 325-6.
[73] See Eric Stokes, 'The First Century of British Colonial Rule in India: Social Revolution or Social Stagnation?' (1973) 58 *Past and Present* 136, 154-9.
[74] See Ralph Braibanti, *Research on the Bureaucracy of Pakistan* (Duke University Press, 1966) 102-6.
[75] See Brown, above n 37, 40.

The ICS, however, was jealously guarded as the bastion of white privilege with a majority of posts remaining in the hands of English Oxbridge-trained bureaucrats. As late as 1909 only 65 out of 1,244 ICS officers were natives. It is partly the failure to meet the demands for the Indianization of the apex state structure that provided the impetus for the self-government movement in India.[76]

Foundations of the Anglo-Indian Legal System

The primary purpose of the creation of a legal system by the East India Company was to bolster revenue administration.[77] Initially the Company retained much of the idiom and many of the structures of the pre-colonial legal system.[78] In 1772 it created appellate courts to deal with matters arising in the *mofussil* (hinterland of the Bengal Presidency).[79] Despite the nomenclature which signified a continuation of indigenous legal forms, these courts were new institutions. Nonetheless, by entrusting the Governor-General, his Council and Collectors with the most significant judicial offices, the 'Mughal tradition' of intertwining judicial authority with executive offices had been continued.[80] A non-colonial rule of law demanded, amongst other things, a judiciary independent of the executive and somewhat capable of shielding its Indian subjects from arbitrary action. These were not features of the Company's legal system. Furthermore, in recognition of the primacy of the revenue demands, jagirdars and intermediate level landlords and tax farmers were generally exempted from the jurisdiction of the courts, except with the prior permission of the Governor-General and Council.

In the Presidencies where British citizens resided, however, core principles of the rule of law were put to the test. The Regulating Act of 1773 created a Supreme Court of Judicature at Calcutta, a Crown court vested with civil and criminal jurisdiction in the Presidencies and essentially over all matters relating to the Company's British and

[76] Ibid, 41-3.
[77] See Bernard S Cohn, 'Some Notes on Law and Change in North India' (1959) 8:1 *Economic Development and Cultural Change* 79, 89.
[78] See generally Kartik Kalyan Raman, 'Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence' (1994) 28:4 *Modern Asian Studies* 739. For a brief overview of the Mughal legal system, see ibid, 743-5; Sinha, above n 68, 244-6.
[79] See B B Misra, *The Central Administration of the East India Company* (Manchester University Press, 1959), 231-47, 310-11, 322-4.
[80] See Bijay Kisor Acharyya, *Codification in British India* (S K Banerji & Sons, Calcutta, 1914) 12-3.

native servants. Unlike the courts in the hinterland, the Supreme Court was separate from the executive and was responsible for protecting the rights of all residents of the Presidencies from the excesses of Company officials. It was even granted the power to issue prerogative writs. This proved to be a disastrous experiment. The Supreme Court ran into controversy and a visible struggle with the executive ensued over a case involving corruption charges against the Governor-General.[81] There was considerable evidence suggesting that the Chief Justice was partly driven by self-interest and this tussle was a means to seek greater office and privileges. Whatever the causes of the executive-judiciary clash might have been, robust protection of the natives from oppression was not one of them.[82] The Settlement Act of 1781 resolved the underlying constitutional tension by exempting the actions of the Governor-General and Council from the court's jurisdiction and barred it from issuing prerogative writs in revenue and related matters.[83]

The Cornwallis Code of 1793, of which the Permanent Settlement of Bengal was a part, brought about the first significant reform in the laws and legal system of India outside the narrow confines of the Presidency towns. The stated aim of the Code was to achieve political stability, security of property and revenue. Limited separation of judiciary from the executive was declared as vital to this project. A hierarchy of civil courts was set up in the mofussil under the *Sadr* (provincial) appellate courts. The district courts were staffed by British judges deciding cases with the aid of native 'law officers' who were Hindu or Muslim scholars tasked with guiding the courts on Islamic or Hindu law in personal matters.[84] A parallel system of criminal circuit courts was also set up with in effect the same British judges and Indian law officers. District and circuit judges were granted a status and pay higher than the Collectors. Appeals against the decisions of district and circuit judges' decisions lay to the Sadr courts. Sadr courts could also deal with charges of corruption against the judges. The Company and its British

[81] See Roberts, above n 20, 183-190.
[82] A Select Committee report observed that 'the Court has been generally terrible to the natives, and has disgraced the Government of the Company without substantially reforming any of its abuses.' Chowdhury, above n 16, 214.
[83] See Char, above n 72, 7, 9.
[84] Native law officers remained a feature of the court system from 1772 until 1864, although their role progressively diminished in significance. See D H A Kolff, 'The Indian and the British Law Machines: Some Remarks on Law and Society in British India' in W J Mommsen and J A De Moor (eds), *European Expansion and Law: The Encounter of European and Indigenous law in 19th- and 20th-Century Africa and Asia* (Berg Publishers, 1992) 213.

employees, who could previously be tried only before the Supreme Court, were made subject to the jurisdiction of the District and Sadr courts when performing their duties in the hinterland.[85]

The basic structures of the legal system created by the Cornwallis Code were extended to Madras and Bombay Presidencies and remained intact until the end of Company rule in India.[86] The separation between the judiciary and the revenue administration was, however, constantly subject to revision. By 1807 the Governor-General and Council gave up *ex officio* judicial functions but the puisne judges appointed to the Provincial appellate courts were Covenanted servants of the Company. In 1811 a non-member of the Council was appointed as the Chief Judge of the Provincial Court in Bengal, thereby achieving a complete separation between the judiciary and the executive for the first time, an arrangement which the Court of Directors only grudgingly accepted.[87] In additional changes to the judicial system, separate provincial courts were established for the Western Provinces and Bengal and the District judges were made Session judges in 1831. These judicial reforms also opened the judicial service to Indians. The lower tiers of courts were considerably expanded and staffed by native subordinate judiciary which henceforth did the overwhelming bulk of judicial work at the trial level.[88]

However, the Company's administration never reconciled itself to the Cornwallis doctrine of separation of judiciary and executive at least as far as revenue affairs were concerned. In 1831, certain judicial functions related to revenue matters were reverted to Collectors who were given the additional charges of the District Magistrate.[89] The merger of administrative, judicial and police powers in the Collector was firmly re-established and became the permanent exception to the separation of judiciary from the executive in British India.[90] Most significantly, this model was retained in its purer form in Punjab and the north-western frontier region until the end of the British Raj.[91] From

[85] REG. 28, Code of Cornwallis, 1793. For details, see Chowdhury, above n 16, 28-29.
[86] See Chowdhury, above n 16, 27. On the variations in Madras and Delhi, see Eric Stokes, *English Utilitarians*, above n 24, 142-3.
[87] See Misra, above n 79, 264-5.
[88] See generally Colonel Sykes, 'Administration of Civil justice in British India, for a period of Four Years, Chiefly from 1845 to 1848, both inclusive' (1853) 16:2 *Journal of the Statistical Society of London* 103.
[89] See Eric Stokes, *English Utilitarians*, above n 24, 284-9.
[90] Ibid, 155, 163-4, 167.
[91] Ibid, 243, 277.

an administrative standpoint, the merger of the Collector and district magistracy was ultimately deemed necessary to facilitate the supervision of the police and maintenance of law and order. The vesting of revenue and judicial powers in the same official also ensured that there would be no clash between the Company's revenue demands and the demands of justice.[92] In addition to the separation of judicial and executive functions, several other aspects of the rule of law also remained aspirational or mere statements of intent. Except for the suppression first of *thugs* and later of designated criminal tribes, essentially mobile and marginalized groups with limited attachment to land, policing remained a low priority.[93] Brutality, torture, extra-judicial action, indiscipline and low conviction rates remained characteristic features of policing throughout Company rule.[94]

Apart from their utility in subjecting small occupier-cultivators to the revenue administration's demands for payment of arrears, to the moneylenders' debt collection claims, and to suppression by European indigo plantation owners, the courts remained highly inefficient. While colonial administrators frequently referred to the notorious litigiousness of the natives, there is considerable evidence of a lack of intent to establish an effective legal system that would cater to the legal disputes that even a mildly litigious society may be expected to generate.[95] Furthermore, a bulk of litigation was the product exclusively of the Company's policies. The Company's legal system remained deeply embroiled in revenue administration with a great deal of litigation representing challenges to rent demands, moves for ejectment of tenants, claims of occupancy tenancy status, and other revenue related issues.[96] The overwhelming majority of civil and even criminal cases were also related to the ownership, control and revenue assessments of agricultural land.[97] Many cases arose out of the land sales and transfers compelled by failure to meet revenue assessments. Many landholders who

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[92] Ibid, 155.
[93]See Sandra B Freitag, 'Crime in the Social Order of Colonial North India' (1991) 25:2 *Modern Asian Studies* 227, 231.
[94] See Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press, 2000), 69-70.
[95] See Lloyd and Susanne Rudolph, 'Barristers and Brahmans in India: Legal Cultures and Social Change' (1965) 8 *Comparative Studies in Society and History* 24, 29-30.
[96] See Oliver Mendelsohn, 'The Pathology of the Indian Legal System' (1981) 15:4 *Modern Asian Studies* 823, 846.
[97] Ibid, 837. Also, see Bernard S Cohn, 'From British Status to Indian Contract' (1961) 21:4 *Journal of Economic History* 613, 618; Sykes, above n 88, 107, 114, 121.

were meant to be dispossessed retained possession of the land and the failure of formal title to transform into effective control emerged as the source of prolonged civil suits.[98]

Court fees remained prohibitive. No mechanism for the enforcement of court judgments was available to the courts and hence to those who could not rely upon their relations with state officials or their own private power. Evidentiary rules were unnecessarily complicated and court processes were dilatory with the result that it took up to fifty years to decide some cases.[99] There were numerous possibilities for appeal. Corruption was rampant, as was forgery and perjury.[100] The judiciary was composed largely of those civil servants who were retired or incompetent and courts became the 'resting places of those members of the service who were deemed unfit for higher responsibilities.'[101] The colonial legal system failed in the aim of providing even limited dispute resolution as cases were litigated endlessly in overburdened courts.[102] Instead it provided opportunities for the strategic use of litigation for 'intimidation and harassment and new means for carrying on old disputes;'[103] 'to "bury" bad cases for years at a time, which might be lost if heard before unofficial panchayati tribunals;'[104] or as 'fabrications to cover real disputes by those who had the requisite resources.[105]

The Company administration was fully aware of the various issues with its legal system right from the outset.[106] Given that over a period of more than half a century these issues remained unresolved, it could be argued that the legal system was designed to be misused precisely 'as its institutional structure suggested it should be.'[107] Nonetheless, by providing a mechanism whereby the institutions of the state may be moved by individuals, the colonial courts reinforced the impression upon the native population of

[98] See Oliver Mendelsohn, above n 96, 844.
[99] See Washbrook, above n 14, 658.
[100] See Cohn, 'Some Notes on Law and Change', above n 77, 90.
[101] See Roberts, above n 20, 302; Washbrook, above n 14, 658.
[102] See David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32:3 *Modern Asian Studies* 513, 518-24; W H Rattigan, 'The Influence of English Law and Legislation Upon the Native Laws of India' (1901) 3:1 *Journal of the Society of Comparative Legislation* 46, 46-8.
[103] See Marc Galanter, 'The Displacement of Traditional Law in Modern India' (1968) 24 *Journal of Social Issues* 65, 70.
[104] See Washbrook, above n 14, 659.
[105] See Cohn, 'Some Notes on Law and Change', above n 77, 90.
[106] Ibid, 90. Also, see Cohn, 'From British Status to Indian Contract', above n 106, 622; Misra, above n 79, 251-2.
[107] See Washbrook, above n 14, 660.

the colonial administration's power and authority. They also provided Company rule with some degree of legitimacy in the eyes of those marginal to rural social hierarchies and 'gave rise to a sense of individual right not dependent on opinion or usage and capable of being actively enforced by government, even in opposition to community opinion'.[108] Occasionally, the law ended up on the side of the poor and powerless, providing a means to challenge the abuse of authority by a local despot (English or Indian) through a recourse to another institution of the colonial state, a superior bureaucrat or a semi-independent court, but ultimately reinforcing the power and authority of that very state. Even the excesses of colonial rule could seemingly be cured only by the colonial state.

Codification of the 'Rule of Difference'

The establishment of Raj and the restructuring of the bureaucratic steel frame were also concomitant with the large scale codification of laws and significant changes in the Indian legal system. In the immediate aftermath of the rebellion major statutory measures were passed within the span of a few years, including the Indian Penal Code, 1860; the Police Act, 1861 (which introduced a uniform police system in most of India); the first Code of Criminal Procedure in 1861; the Code of Civil Procedure, 1859; Evidence Act, 1872; Customs Act, 1863; and the Contract Act, 1872; amongst others.[109] Collectively these laws were meant to be 'one great and entire work symmetrical in all its parts and pervaded by one spirit.'[110] While these extensive codes had been in the pipeline for several years, or decades in case of the Penal Code for example,[111] the Mutiny provided the final impetus for this grand lawmaking project.[112]

[108] Marc Galanter, above n 103, at 70-1. Also, see Lloyd and Susanne Rudolph, above n 95, 31; Durba Ghosh, 'Household Crimes and Domestic Order: Keeping the Peace in Colonial Calcutta, c. 1770 - c. 1840' (2004) 38:3 *Modern Asian Studies* 599, 622-3.
[109] For a list of Acts passed between 1857 and 1872, see Acharyya, above n 80, 69.
[110] See Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (2005) 23 *Law & History Review* 631, 631.
[111] The Indian Law Commission established in 1836 had done a lot of the groundwork but achieved little success in the face of determined opposition in the Company administration. See Char, above n 72, 208. On the history of the Indian Penal Code, see Stokes, *English Utilitarians*, above n 24, 219-33.
[112] See Partha Chatterjee, *The Nation and its Fragments* (Princeton University Press, 1993) 18. *Contra* Skuy, above n 102, 553. Skuy asserts that other than the direct displacement of the Company by the Crown there is no direct linkage between codification and the Rebellion of 1857.

The Raj also merged Company and Crown courts in one judicial hierarchy and created new and powerful High Courts across India.[113] Only the three High Courts established in the Presidency towns of Calcutta, Madras and Bombay inherited the Crown courts' power to issue prerogative writs. However, limited notions of some prerogative writs were incorporated in the Civil Procedure Code thereby enabling the other High Courts to exercise quasi-writ powers. Civil courts were also granted the power to issue ordinary injunctions, mandatory or prohibitory, and declarations under the Specific Relief Act, 1877.[114] The Criminal Procedure Code, 1898 granted the High Courts of Calcutta, Madras and Bombay the power to issue 'directions in the nature of *habeas corpus*' but this power was again confined to their provincial jurisdictions.[115] In 1923, the other High Courts established at Allahabad (1886), Patna (1916) and Lahore (1919) were also granted the power to issue writs in the nature of *habeas corpus* but this excluded detentions under political and state security laws.[116]

The codification of laws and restructuring of the court hierarchy opened up enormous opportunities for Indian lawyers. In the Company's legal system native lawyers had been largely confined to business before the lower courts staffed by Indian judges, and enjoyed a terrible reputation as being 'ravenous pettifoggers who fattened on the misery and terror of the litigants.[117] A newfound opportunity to appear before the High Courts, often in successful competition with English barristers, enabled several Indian lawyers to make names and fortunes by the end of the 19th century. One-third of the appointments to the High Courts including that of the chief justices were initially reserved for British barristers. The other positions on High Court benches were divided equally amongst the judicial services of the ICS, and lower court judges or Indian lawyers practising in the High Courts.[118] The appointment of native judges to the highest courts in the land and opening prestigious practice avenues to them allowed Indian lawyers to develop professional equivalence with English barristers. This helped to enhance the public perception and reputations of both the bench and the native bar.

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[113] The High Courts Act, 1861.
[114] §54 and 55 of Specific Relief Act 1877, and §9 of Civil Procedure Code, 1908 read with §42 of the Specific Relief Act, 1877.
[115] §491, Code of Criminal Procedure, 1898.
[116] See Rohit De, 'Emasculating the Executive' in Halliday, Karpik and Feeley (eds), *The Fates of Political Liberalism in the British Post-Colony* (Cambridge University Press, 2014) 66.
[117] Samuel Schmitthener, 'A Sketch of the Development of the Legal Profession in India' (1968-69) 3 *Law & Society Review* 337, 350.
[118] Ibid, 355.

The codification of laws and restructuring of court system was accompanied by a heightened rhetorical usage of the rule of law, legitimizing colonial rule as benevolent, constrained and committed to fostering equality between the colonialists and the natives. However, colonial law was permeated through and through by the 'Rule of Colonial Difference'.[119] Driven by the need to maintain some separation between the rulers and the ruled and an aura of the superiority of the colonialists, various statutes made exemptions and distinctions favourable to the English. The Rule of Colonial Difference was evident most notably in the very structure and service regulations of the bureaucracy which represented a systematic attempt to keep Indians out of the more significant positions of power.[120] An equally glaring manifestation of the Rule of Colonial Difference was in the codification of the criminal procedure laws which required that white defendants could only be tried before English judges.[121] Courteney Ilbert's Bill of 1883 for amendment to the Criminal Procedure Code would have finally ended the preferential treatment of Europeans by providing for trial before native Magistrates and judges. However, the bill was vehemently opposed not only by non-official Europeans but was also resisted by British officials and judges. The continuation of special exemptions for Europeans in criminal procedure presented a sharp and disillusioning contrast to the rhetoric of rule of law and equality that accompanied the codification of laws in India.

In addition to such *de jure* exemptions, the colonialists enjoyed *de facto* preference in all facets of the legal system, including in the prosecution and sentencing for violent crimes committed against Indians.[122] 'Despite contemporary claims that colonial justice grew more effective over time, sentences for British attacks on Indians were harsher at the beginning of the nineteenth century than at the end... Unequal sentencing for Indians and Europeans was always the norm.'[123] Furthermore, distinctions had to be instituted even amongst the colonialists in the form of preferences in favour of the official

[119] See Chatterjee, above n 112, 16-34.
[120] Ibid, 20.
[121] See generally Kolsky, 'Codification and the Rule of Colonial Difference', above n 110, 635.
[122] See Elizabeth Kolsky, *Colonial Justice in British India* (Cambridge University Press, 2010) 185-228.
[123] See Jordanna Bailkin, 'The Boot and the Spleen: When was Murder Possible in British India?' (2006) 48:2 *Comparative Studies in Society and History* 462, 463-4. For an account of such discrimination in the early periods of colonial rule, see generally Ghosh, above n 108.

Englishmen, especially bureaucrats, when compared to the non-official expatriates, the planters and the tradesmen.[124] Crimes by non-official expatriates were seen as a threat to the Raj since it tended to undermine the authority of the bureaucracy and made colonial difference explicit.[125] Official attempts to curb violence by Britons against Indians could be described as a way of 'preserving the doctrine of racial superiority through humanism… Thus, the notion that the civil service enjoyed a more humanitarian relationship with indigenes was preserved in the public record.'[126] Violence by military personnel, however, was treated even more strictly since it was often seen as breakdown of discipline.[127]

The stratification of access to the law based on social status – which might be termed as the 'Rule of Social Difference' – was extended even more comprehensively to the natives. The Raj's political rationalities mandated that the Indian elites co-opted into the colonial governance scheme may also be allowed differential treatment. The Rule of Social Difference necessitated the maintenance of the plurality and privatization of law that had become deeply embedded during the Company's reign. Thus formal accommodations for customary and religious practices continued despite the mass codification of India's law. Another level at which privatization was furthered was through the devolution of some administration of law to local arbitration mechanisms such as the *panchayats* and the *jirgas*. While 'unofficial and informal arbitrational procedures had always existed in rural society' the key difference in this movement of extending the Rule of Social Difference was that these mechanisms were now being 'drawn up into the structure of the state and given a full legitimation.'[128]

The Rule of Social Difference was not only confined to those areas of law that were privatized but was also extended to the formal court system. Avenues were created even within criminal procedure for the exercise of differential power such that criminal law became an instrument of social hierarchy. A prime example of this phenomenon was the statutory framework for the 'compoundability' of cases in the Criminal Procedure

[124] See Kolsky, 'Codification and the Rule of Colonial Difference', above n 110, 635.
[125] See Bailkin, above n 123, 468-9; Singha, above n 94, 287.
[126] See Ranajit Guha, 'Neel Darpan: The Image of the Peasant Revolt in a Liberal Mirror' (1974) 2:1 *Journal of Peasant Studies* 1.
[127] See Bailkin, above n 123, 464.
[128] See Washbrook, above n 14, 694, 698. On the role of *panchayats* during Company's rule, see Raman, above n 78. *Contra* Kolff, above note 84, 209.

Code.[129] This granted judges the discretion to accept a compromise between the complainant and the accused – even if the compromise had effectively been achieved through coercion – in a range of serious criminal cases. This shielded native elites from criminal prosecution except for the most significant criminal offences such as homicide. On the converse, the threat of formal legal process became an instrument of harassment available almost exclusively to those with disproportionate social, economic and political power. Formal criminal process and legal institutions were used for intimidation and as a pressurizing tactic to compel abandonment or settlement of civil disputes. The codes of Indian law thus not only codified procedural laws and substantive rights but also social relations and power hierarchies, thereby imparting them a longevity they may not have otherwise had.

FIGMENTS AND FRAGMENTS OF THE RULE OF LAW

Systemic Corruption and Rule of Administrative Law

As noted earlier, despite its core authoritarianism colonial rule was steeped in claims of the implantation of a rule of law such as the East had never experienced.[130] Rights and rule of law talk served important ideological ends at various stages of colonial rule. For instance, the belief in a universal and natural right to free trade coupled with the notion that the rights of Englishmen travel with them legitimized the Company's initial confrontations with native powers in India, especially in Bengal. The inviolability of private property rights also formed the lynchpin of the Company's resistance against expanding parliamentary and cabinet regulation at home. Even more significantly, the Company administration's rule of law claims served to legitimate the 'paternal despotism' of the early colonial state by distinguishing it from real and imagined 'Oriental despotism' that India had previously labored under.[131]

[129] Under §345 of the Criminal Procedure Code, 1898 (Act V of 1898) a range of offences specified in Schedule II could be compounded by the permission of the court. The listed compoundable offences included a number of serious offences. The composition of an offence had the effect of an acquittal as per subsection 6 of §345.
[130] See, eg, Sinha, above n 68, 241-2. The claim to having established an unprecedented 'Rule of Law' can be attributed, amongst others, to Secretary of State Sir Samuel Hoare. See Lloyd and Susanne Rudolph, above n 95, 24.
[131] See Singha, above n 94, vii-xvii; Nasser Hussain, above n 15, 47-55.

The implantation of rule of law was also increasingly seen as serving, even if incidentally, the Company's governance needs.[132] Lord Cornwallis, arguably the chief architect of the colonial legal system, thus dilated upon the benefits to the Company of codifying laws and implanting a culture of legality in India:

> The proposed arrangements only aim at insuring a general obedience to the regulations, which we may institute; and at the same time impose some check upon ourselves against passing such as may ultimately prove detrimental to our own interests, as well as the prosperity of the country. The natives have been accustomed to despotic rule from time immemorial, and are well-acquainted with the miseries of their own tyrannic administrations. When they have experienced the blessings of good government there can be no doubt to which of the two they will give the preference. We may therefore be assured that the happiness of the people, and the prosperity of the country, is the firmest basis on which we can build our political security.[133]

On the flip side, as the Company's administration noted, 'whenever the English in India descend to the ordinary level of political morality among Asian potentates they lose all the advantages of the contrast.'[134]

There was an undeniable contradiction between the very nature of colonialism and the ideological and rhetorical usage of rule of law, Common Law rights and liberties that saturated discourses on the legitimacy of Company rule in India. Nonetheless, not all talk of the rule of law was completely instrumental or merely transparent rhetoric. Strands of rule of law discourse reflected genuine aspirations on the part of the colonizers, and fragments of the rule of law materialized in ways which cultivated loyal and long-lasting allegiance to it amongst important segments of the native elites. One strand of rule of law discourse can be traced most directly to the desire of the Company's administration to curb corruption amongst the English and native officials in India. Such was the genesis of much of the rule of law talk that permeated the internal discourses of the Company throughout the century of its rule in India.

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[132] For an early example, in a 1714 dispatch to Bengal the Court of Directors advised its officials to 'see justice administered impartially to all and speedily, to govern mildly' for 'this is the best method to enlarge our town and increase our revenues.' Dispatch to Bengal, Jan. 13, 1714, India Office Records, Letter Book No. 15, cited in Roberts, above n 20, 87.

[133] See Acharyya, above n 80, 109-10.

[134] See Roberts, above n 20, 207.

From the outset, the Company faced considerable challenges in maintaining order and discipline amongst its ranks in the Presidency towns and forts. Delinquency was rife amongst the Company's employees, especially the younger British staff. An even bigger concern was the extent of private trading, pilfering, and misuse of Company resources by the senior officials in the Presidencies and the hinterland. Corruption invariably led to a weakening in the Company's administrative cohesion. 'There was a general contempt of superiors' and 'a total contempt of public orders whenever obedience was found incompatible with private interests.'[135] Corruption was also the primary cause of the Company's troubles with native rulers during its early expansion was the extent of private trading being undertaken by the Company's officials who behaved as predator entrepreneurs and claimed tariff exemptions for their commercial activities in addition to the Company's goods.[136] The abuse of trading privileges secured by the Company were compounded by a host of native intermediaries and agents who not only acted on behalf of the Company and its officials but sought tariff exemptions for their private trade with the approval and connivance of Company officials. A 'spirit of plunder' and a 'passion for the rapid accumulation of wealth' thus pervaded the rank and file of the Company during the first years of its rule in Bengal.[137] The situation was equally 'pestilential' in the other Presidencies.[138]

The Court of Directors in London was dismayed by 'the most fatal examples of corruption, licentiousness and total want of public spirit.'[139] While Company officials prospered, the Company did not. It labored under a serious threat of insolvency and the stockholders clamored for a share of the profit to come to them rather than Company officials. Meanwhile, Company officials who returned to England with new money, derisively referred to as the 'nabobs', sought matching social status to the chagrin of established aristocracy. The cherished route to such status was through the acquisition of a seat in Parliament.[140] The dialectics of corruption and rule of law played themselves

[135] Ibid, 154.
[136] See Karl de Schweinitz Jr., *The Rise and Fall of British India: Imperialism as Inequality* (Metheun, 1983), 112, 153.
[137] Roberts, above n 20, 148.
[138] Ibid, 195.
[139] Despatches to Bengal, March 4, 1767, quoted in Misra, above n 79, 382.
[140] By 1790 former Company officials held 45 seats in a House of Commons of 558. James, above n 38, 48.

out in a protracted tussle between the British Parliament and the Company over the regulation of Indian affairs. The Company pleaded inherent rights to property, free trade and reform of the civil service in defence against increasing Crown regulation. Understandably, the Company administration's attempts at rule of law indoctrination became correspondingly prominent.

The roots of British India's first significant attempt at constitutionalizing colonialism also lay in this anti-corruption strand of the rule of law. The Company's weak financial position and a parliamentary inquiry into its operations in Bengal paved the way for the Regulating Act of 1773. The Act, dubbed as India's first constitution, brought the Company's affairs under Cabinet oversight.[141] It also brought the three Presidencies of Bengal, Madras and Bombay under a centralized administration based in Calcutta. The Regulating Act of 1773 also provided for the creation of the Supreme Court of Judicature at Calcutta, whose initial purpose was to control Company officials. The India Act of 1784 further strengthened governmental oversight through the creation of a Board of Control, through which the Chancellor of Exchequer began to exercise executive control over the Company's operations in India. The acceptance of governmental oversight and the legal reforms undertaken by the Company were part of the consideration in return for extensions in the Company's charter and trade privileges in 1781 and 1793.

With the restructuring of the bureaucracy into Covenanted and Uncovenanted cadres, the rhetoric of rule of law acquired an increasingly racial dimension. As Company service became the vocation of a British elite, an overwhelming sense of superiority came to be deeply embedded within the Company Covenanted officials' cultural and ideological milieu.[142] '[T]he psychological need of a conquering minority to preserve social distance; and that potent mixture of suppressed fear and open arrogance, which makes up racialism, gained firm ascendancy.'[143] Uncovenanted native officials were increasingly seen as incorrigibly corrupt and untrustworthy. Rule of law talk became progressively racialized during the Company's rule in the first half of the 19th century: a constant reminder to superior British officials to maintain their discipline, dignity and

[141] See Chowdhury, above n 16, 197.
[142] See Bose and Jalal, above n 23, 55.
[143] Eric Stokes, 'First Century', above n 73, 145.

racial superiority; and of the need to enforce discipline and hold to account the burgeoning hosts of native servants, inferior in rank and character. Rule of law discourses thus evolved in the first century of colonial rule primarily in the context of the Company's internal corruption.

As the Raj displaced the Company, it substituted the Covenanted cadre with the ICS and greatly expanded its administrative structure, especially through the mass recruitment of Indians at the lower rungs of the technical services. Just as under the Company, the roots of rule of law talk lay first and foremost in the need to control the subordinate bureaucracy. The perceived defects of native officials demanded the elaboration of rules, regulations and procedures that would minimize the scope for their corruption and ineptitude. The control of the bureaucracy through elaborate service regulations became an integral priority. Furthermore, the codification of laws enabled not only a more streamlined administration but the elaboration of legal processes and rights provided opportunities for some classes of colonial subjects to move the courts against improper administrative action at the lower levels. Punjab, for example, experienced not only a relatively more authoritarian form of paternalistic despotism but also one of the most elaborate exercises in land revenue surveys and the 'recording of rights.'[144] The roots of the rule of law in Punjab and elsewhere thus lay in courts having the capacity to rule against administrative action on the basis of these recorded rights. This explains the faith in the rule of law amongst important segments of the native elites, especially those classes that were beneficiaries of employment in the colonial bureaucracy and who were subject to the rule of administrative law.

Colonial Courts, Rule of Law and Indian Nationalism

Another noticeable factor propelling a faith in the rule of law and resultantly a largely constitutionalist mode of the nationalist struggle against colonial rule was the prominent role that lawyers had come to acquire in Indian politics. Native lawyers had been the most vocal and influential group amongst the urban educated classes from the late 19th century onwards. Law had been the chosen profession for educated Indians,

[144] See David Gilmartin, 'The Strange Career of the Rule of Law in Colonial Punjab' in Mussarat Abid and Qalb-i-Abid (eds), *History, Politics and Society: The Punjab* (University of Punjab, 1994) 6-7.

second only to the civil service.[145] Unlike the native civil servants whose role was vital in the furtherance of the colonial enterprise, Indian lawyers were often seen as a hindrance to administrative expediency. The apex bureaucracy were not enamoured of native lawyers who wielded colonial law and used the courts to challenge the actions of the administration. The influence of the native bar was frequently denounced as '*vakil*-raj' in the Anglo-Indian circles which regarded it as 'power which undermines the prestige and diminishes the beneficience of British rule.'[146] By early 20th century the more successful amongst the native lawyers had achieved parity in professional standing and reputation with the best of the English barristers in India.[147] As lawyers began to play a prominent role in Indian nationalist movement, and in the leaderships of both the Congress and the Muslim League,[148] a constitutionalist framing of the nationalist struggle as well as communal politics was bound to emerge.

A certain degree of alignment in ideology between the leaderships of the nationalist parties and the bench also began to materialise as the nationalist struggle gained momentum and several prominent Indian lawyers were appointed to the highest judicial offices. The Raj had been amenable to much greater Indianization of the judiciary, even at the highest rungs, when compared to the ICS. The High Courts established in Calcutta, Madras and Bombay were from an early stage opened to Indian lawyers for practice as well as appointment to the bench. By 1929, when Congress' second civil disobedience movement was in full swing, roughly half of the High Courts' and a majority of District and Sessions judges were Indian.[149] The emerging nexus between an Indianized judiciary and activist lawyers can be partially credited with a rise in the prestige of both the bench and bar in the eyes of the native population. Punjab provides the quintessential case-study of the role played by the Indianized courts in mediating between the nationalist opposition and the Raj. As inter-War unrest and the civil disobedience movement in the Punjab led to large scale arrests of political activists and prosecutions for sedition, the High Courts emerged as a significant site of resistance to

[145] See Schmitthener, above n 117, 368, 372.
[146] Ibid, 376-7, citing A H L Fraser, *Among Indian Rajahs and Ryots* (1912) 65.
[147] Ibid, 378.
[148] On the role of the lawyers in the Congress, see ibid, 378-81.
[149] By 1932, of the 183 judges assigned to courts below the High Courts, two-third were Indian. In comparison, in 1932 only 28 per cent of the elite ICS officers were Indian. As late as 1940, 90 per cent of some 2500 judges were Indian while more than half of ICS were still British. James, above n 38, 541.

the Raj's authoritarianism. In return the courts defined the limits of legally permissible opposition to the Raj.

The Raj's anxieties were particularly acute in the Punjab and its reaction to unrest especially harsh. Whereas the Raj could negotiate the constitutional demands of the nationalist parties and even weather Gandhi's non-violent civil disobedience movement with a degree of equanimity, violent protests in the Punjab, hitherto the strongest bastion of colonial rule, evoked the specter of another Mutiny. The Raj also realized the weaknesses in its coercive powers, especially the police, with the result that in cases of widespread protests or other domestic emergency it had to rely on the Indian army.[150] The prospect of using the army in the Punjab, where roughly half of its soldiers had roots, was thus the ultimate nightmare and elicited panicked overreactions. An exemplary instance was that of the Jallianwala Bagh 'massacre' in 1919 where facing an unauthorized protest gathering in an enclosed ground in Amritsar Brigadier-General Dyer commanded his troops to open indiscriminate fire without warning.[151] To many, the incident marked the beginning of the end for the Raj.[152] Humiliating punishments meant to reinforce the racial superiority of the British, widespread publication of the details of the incident, repression during the martial law elsewhere in the Punjab, and Dyer's unrepentant testimony at a subsequent judicial inquiry collectively dealt a significant blow to faith in British law and justice.

In the following decade the Raj anxiously kept an eye on dissidence in the Punjab, attempting to clamp down on any hint of dangerous disaffection.[153] As the Congress threatened another Satyagraha or non-violent civil disobedience movement in 1928, the Raj tried to prevent the spread of discontent through a heavy-handed use of the sedition provision in the Indian Penal Code.[154] A study of the sedition cases decided by the Lahore High Court in this period presents a fascinating account of the role of colonial courts in negotiating the boundaries between legitimate political opposition to the Raj and seditious threats to bring down a 'Government established by law.' While the High

[150] Ibid, 526.
[151] See K L Tuteja, 'Jallianwala Bagh: A Critical Juncture in the Indian National Movement' (1997) 25 *Social Scientist* 25.
[152] See Nasser Hussain, above n 15, 99-100.
[153] See, eg, *Jiwan Singh v. King Emperor*, AIR 1925 Lahore 16; *Ram Saran Dat v. Emperor*, AIR 1925 Lahore 298.
[154] §124-A of the Indian Penal Code, 1860 (Act XLV of 1860).

Court was tolerant of political criticism even if made in angry or intemperate language, and did not deem it seditious so long as the ultimate goal was to petition the government for redress,[155] it writhed at calls for *Swaraj* (self-rule) or overthrow of the British Raj.[156] The court struggled hard to contain dissent from overflowing the embankments of constitutional negotiations being channeled by the Simon Commission (1928) to the Round Table Conference in London (1930-32). The court also exhorted Congress workers to abide by their non-violence creed and was apprehensive of the slightest hint of violent resistance.[157] Denigrations of the impartiality and efficacy of British law and justice were taken as a direct affront.[158] Revolutionary and leftist calls for the overthrow of the system were seen as particularly threatening.

While the Lahore High Court occasionally overturned convictions for sedition on technical grounds,[159] in the overwhelming majority of cases it found the impugned speech and conduct seditious. And yet, in case after case native High Court judges reduced the sentence, most often to time already served, thereby effectively providing relief to the appellants.[160] The court found grounds for mitigation in the personal circumstances of the accused, the misreading of evidence by the trial judge or Magistrate, or their failure to abide by procedural requirements. There was always an undercurrent of lack of complete faith in native policemen and other petty officials who prepared the notes of seditious speeches and appeared as witnesses.[161] The native High Court judges had a soft spot for dissident lawyers whether appearing as appellants or

[155] For example, in *Professor Indira v. Emperor*, AIR 1930 Lahore 870, the court noted that ;the underlying idea of this speech was to induce the people to represent their grievance to the Government' and reduced the sentence to imprisonment already undergone (two and half months).
[156] See, eg, *Sant Ram v. Emperor*, AIR 1930 Lahore 86; *Satya Pal v. Emperor*, AIR 1930 Lahore 309.
[157] See, eg, *Anand Kishore v. Emperor*, AIR 1930 Lahore 306. In several cases the court noted the appellants' plea that their creed was essentially one of non-violence and found considered it implicitly a ground for mitigation in sentence. See *Satya Pal v. Emperor*, AIR 1930 Lahore 309; *Khushal Chand v. Emperor*, AIR 1930 Lahore 875.
[158] See, eg, *Kidar Nath Sahgal v. Emperor*, AIR 1929 Lahore 817 (while the sentence was reduced to one year's imprisonment, it was relatively high compared to other cases in that period); *Malik Amir Alam v. Emperor*, AIR 1930 Lahore 885; *Narinjan Das v. Emperor*, AIR 1931 Lahore 31(2).
[159] See, eg, *Chuni Lal v. Emperor*, AIR 1931 Lahore 182; *Chint Ram v. Emperor*, AIR 1931 Lahore 185; *Secretary, High Court Bar Association, Lahore v. Emperor*, AIR 1932 Lahore 559.
[160] See, eg, *Kidar Nath Sahgal v. Emperor*, AIR 1929 Lahore 817; *Sant Ram v. Emperor*, AIR 1930 Lahore 86; *Arjan Singh v. Emperor*, AIR 1930 Lahore 153(2); *Anand Kishore v. Emperor*, AIR 1930 Lahore 306; *Satya Pal v. Emperor*, AIR 1930 Lahore 309; *Sham Das v. Emperor*, AIR 1930 Lahore 874; *Ram Saran Das v. Emperor* AIR 1930 Lahore 892; *Narinjan Das v. Emperor*, AIR 1931 Lahore 31(2); *Sham Lal v. Emperor*, AIR 1931 Lahore 97; and *Kirpal Singh v. Emperor*, AIR 1931 Lahore 106.
[161] See, eg, *Chint Ram v. Emperor*, AIR 1931 Lahore 185; and *Ram Saran Das v. Emperor Emperor* AIR 1930 Lahore 892.

on behalf of them.[162] They allowed revision petitions filed by activist lawyers to be heard and disposed of when the defendants themselves were unable to appeal or refused to submit to the jurisdiction of the courts.[163] In notable contrast, in the odd case in which the appeal lay before an English judge of the Lahore High Court, the tendency towards leniency was likely to be jettisoned in favor of the demands for strict deterrence.[164]

These cases of sedition arising in the Punjab and Delhi also present a revealing picture of the threat perception of the Raj as well as a catalogue of grievances it was struggling to contain through a negotiated constitutional dispensation for India in the form of a new Government of India Act. These ranged from injury to communal sentiment – police attacks on Sikh temples in Punjab, or religious violence against Muslims in Kashmir – to secular concerns with the fomenting of communal violence blamed squarely on the Raj's policy of 'divide and rule.'[165] There were pamphlets, poems, books and magazine articles referring to the 'War of Independence' of 1857 and the Jallianwala Bagh, sketches of the lives and struggles of martyrs who had engaged in armed resistance, and glorification of the killing of English officials and resistance of arrest.[166] There were exhortations to merchants and consumers to boycott English goods.[167] There were celebrations of revolutionary figures such as Lenin, Bose and Bhagat Singh, tirades against the inherent racism and inequity of colonial rule, and calls for the overthrow of the political and economic system of exploitation in its entirety.[168] However, most noticeable for their absence were activists and lawyer members of the Muslim League. The Muslim League had clearly decided to play by the rules of constitutional negotiation to further its demands of nascent Muslim nationhood.

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[162] See *Sham Lal v. Emperor*, AIR 1931 Lahore 97. In *Ram Chand v. Emperor*, AIR 1929 Lahore 284, while the court refused bail to two of the defendants, it noted that the brothers of the third defendant were 'respectable advocates' and granted him bail.
[163] See, eg, *Sham Lal v. Emperor*, AIR 1931 Lahore 97; and *Secretary, High Court Bar Association, Lahore v. Emperor*, AIR 1932 Lahore 559.
[164] *See*, for example, *Om Parkash v. Emperor*, AIR 1930 Lahore 867; and *Malik Amir Alam v. Emperor*, AIR 1930 Lahore 885. Also, see *Ram Saran Dat v. Emperor*, AIR 1925 Lahore 298. *Contra Anand Kishore v. Emperor*, AIR 1930 Lahore 306; *Sham Lal v. Emperor*, AIR 1931 Lahore 97.
[165] See, eg, *Chint Ram v. Emperor*, AIR 1931 Lahore 185; and *Secretary, High Court Bar Association, Lahore v. Emperor*, AIR 1932 Lahore 559.
[166] See, eg, *Arjan Singh v. Emperor*, AIR 1930 Lahore 186; *Khushal Chand v. Emperor*, AIR 1930 Lahore 875; and *Ram Saran Das v. Emperor*, *Emperor* AIR 1930 Lahore 892.
[167] See, eg, *High Court Bar Association, In re. Vidya Wati v. Emperor*, AIR 1932 Lahore 613.
[168] See, eg, *Om Parkash v. Emperor*, AIR 1930 Lahore 867; *Professor Indira v. Emperor*, AIR 1930 Lahore 870 *Malik Amir Alam v. Emperor*, AIR 1930 Lahore 885; and *Ram Saran Das v. Emperor*, *Emperor* AIR 1930 Lahore 892.

As the Second World War began, an overstretched Raj, lacking the patience and wherewithal to manage prosecutions for sedition, relied on preventive detentions of Congress workers under the Defence of India Act, 1939 and the Defence of India Rules framed thereunder. Throughout the War the Lahore and other High Courts continued to perform a role similar to the one they had performed a decade earlier – recognizing the executive's power but insisting on strict interpretations of the laws authorizing preventive detention.[169] However, the newly-created Federal Court, the first all-India level court established under colonial rule, pushed the envelope through an unexpectedly robust exercise of the writ of *habeas corpus*.[170] The Federal Court equated the definition of a prejudicial act under the Defence of India Rules with sedition, and defined it narrowly to exclude criticism of the government even if made in abusive language. In a subsequent case the court went one step further and declared Rule 26, under which preventive detentions were affected, to be *ultra vires* the Defence of India Act, 1939 as it did not require reasonable suspicion.[171] Concerned by the Federal Court's action and fearing a flood of *habeas corpus* petitions across India, the Governor-General promulgated an Ordinance retroactively amending the Defence of India Act and shielding detentions under Rule 26 from challenge.[172] While the court validated the amendment, it demanded that the provincial Governors should personally exercise the judgment that the detentions were necessary and could not delegate this function to subordinate officials.[173]

The Federal Court, and before it the High Courts, thus demonstrated a commitment to procedural legality and compelled both the nationalist leadership and the Raj to choose a constitutional method to resolve their political impasse. The courts' role in mediating

[169] *See*, for example, *High Court Bar Association v. Emperor*, AIR (28) 1941 Lahore 301, where the Lahore High Court held that writing a letter to the District Magistrate informing him of a plan to shout anti-war slogans was not an act 'preparatory' to prejudicial conduct. In *Mrs. Bharucha v. Emperor*, AIR (29) 1942 Lahore 203, the court held that distributing a pamphlet with the words "Nearly 1000 Political Prisoners Detained in India without Trial" cannot be classified as 'news' since this information was widely known, and the poster was not a news-sheet or newspaper in terms of the Press (Emergency Powers) Act, 1931. In *Dilbagh Singh v. Emperor*, AIR (31) 1944 Lahore 373, the court categorically stated that Rules 26 and 129 of the Defence of India Rules were for preventive detention and could not be used to punish past conduct. . In *Teja Singh v. Emperor*, AIR (32) 1945 Lahore 293, the court found the detention to be mala fide as the concerned police officer had a history of enmity with the detainee and failed to produce a record of grounds on which a reasonable suspicion may be based.

[170] *Niharendu Dutt Majumdar v. Emperor*, AIR (29) 1942 Federal Court 22.

[171] *Keshav Talpade v. Emperor*, AIR (30) 1943 Federal Court 1. Also, see De, above n 116, 63-4.

[172] Defence of India (Amendment) Ordinance, 1943 [Ordinance 14 of 1943].

[173] *Emperor v. Sibnath Banerjee*, AIR (30) 1943 Federal Court 75. Also, De, above n 116, 65.

the political struggle for self-rule and their limited success in tempering the Raj's authoritarianism in its challenging final years provided grounds for continuing faith in the rule of law especially on the part of the nationalist elites that would soon displace the Raj. In turn, the native judges who would staff the highest courts of new nation states of South Asia learnt not only the techniques of mediating political conflicts but also developed lasting relationships and commonalities in outlook with the nationalist elites that took over the responsibilities of postcolonial governance from the Raj.

THE COLONIAL INHERITANCE OF PAKISTAN

The purpose of this brief historiography was to unveil the nature and the structural foundations of the colonial state and legal system that Pakistan inherited upon its independence. The legacy of colonial state-formation processes was of a deeply authoritarian civil state structure with uncontrolled discretionary power vested in a narrow elite cadre of the bureaucracy. Pakistan also inherited the legal system of the British Empire in India which, contrary to frequent use of rule of law rhetoric, was not the Law's Empire.[174] This was a coercive legal system, designed to maintain order through the command of habitual obedience to this political dispensation. It was riven with the rule of difference – *de jure* and *de facto* distinctions, exemptions and preferences were made in favour of the colonialists and those co-opted into the colonial administration's disciplinary project. The courts had a subsidiary role confined to policing the legality of executive action at the lower levels of the bureaucracy but were disabled from checking the uses and abuses of power at the higher levels of the executive. In the territories that became West Pakistan, the most blatant kind of exceptionalism to the rule of law in the forms of martial law and tribal regulations were prevalent throughout. Pakistan thus inherited conditions suitable for the emergence of a lasting military-bureaucratic authoritarianism unless this tendency was thwarted through the emergence of a stable constitutional arrangement and the institution of legitimate electoral governance.

The promise for democratic constitutionalism had, nonetheless, been created by the manner in which the Muslim League had waged its struggle for nationhood, its

[174] Reference here is to Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

longstanding demands for devolution of power from the centre and constitutional safeguards for minorities. The Muslim League leadership's avowed commitment to the ideals of British rule of law – strengthened by its experience to a successful constitutional struggle for nationhood and having witnessed the tentative advances made by the courts in the late colonial period from the sidelines – also foreshadowed an ideological alignment between the political executive and the judiciary. However, apart from the apex leadership of the League, the new nation-state's political classes generally lacked democratic credentials and the experience to manage the delicate balancing that postcolonial governance required. The central leadership of the Muslim League that took over the reins of Pakistan on independence arose mostly from the Muslim-minority provinces of north-central India who, as migrants to the Muslim-majority parts that formed Pakistan, lacked a strong political constituency in the new nation. The party's provincial leadership cadres, especially in the West Pakistan provinces, were recent converts to its causes, belonged mostly to the landed elites and would invariably pose a challenge to the central leadership. In turn, this created the conditions for potentially destabilizing competition over and around the governance arrangement between the dominant political classes.

Another significant challenge for the emergence of constitutionalism and stable electoral democracy in the post-colonial state arose out of provincial and ethno-linguistic divisions. While colonial rule generally left behind circumstances of socio-political and economic underdevelopment, there were vital differences between the parts of Bengal that became East Pakistan and the provinces that emerged as West Pakistan on independence. The western wing of Pakistan, which had been belatedly subdued by the East India Company and which had largely been ruled by the Raj along the governance prerogatives of an earlier era, had a relatively more militaristic and hierarchical socio-political culture. The eastern wing, which had remained the agrarian backwaters of Calcutta throughout colonial rule, nonetheless had relatively more egalitarian social structure produced through the breakup of landholdings in the aftermath of the Bengal Settlement and a stronger civil-political culture developed through two centuries of colonial governance. This East-West faultline when super-imposed on the tendency towards military-bureaucratic authoritarianism and fractious political competition for control over the state made post-colonial nation-building a difficult enterprise.

POSTCOLONIAL LEGALITY

TRANSITIONAL STATE-BUILDING *SANS* CONSTITUTIONALISM

Despite the glorious language of independence and the pageantry of the transfer of power, 14th August, 1947 only marked the beginning rather than the achievement of decolonization. As Dipesh Chakraborty notes, decolonization is a:

> historical process that looks necessarily clumsy, complicated, and inherently incomplete (that is, fragmentary)… Becoming postcolonial is a process, and not a state of being ever achieved with any degree of finality. To be sure, societies and polities in India and Pakistan today are very significantly different from what they were like under British rule. But the changes have come slowly and never through a wholesale rejection of what political and social thought in the subcontinent owed to the Raj.[175]

As such, the new nation-state of Pakistan embarked on a process of transitional state-building that was necessarily tentative and, for the most part, the nature and forms of postcolonial governance could barely be distinguished from colonial rule except only in the racial identity of the new rulers.

An important factor, that reflected as well as contributed to a tortuous transition were the juridical mechanics of independence. While the legal instrument which formalized the end of the Raj and the transfer of powers was titled the India Independence Act, both the successor states of India and Pakistan became self-governing Dominions in the British Commonwealth rather than free republics.[176] With the grant of Dominion status, the Government of India Act became the transitional constitution of Pakistan. The 1935

[175] See Dipesh Chakraborty, 'Introduction' in Dipesh Chakraborty, Rochana Majumdar and Andrew Sartor (eds), *From the Colonial to the Postcolonial: India and Pakistan in Transition* (Oxford University Press, 2007) 3-4.

[176] If the Congress grudgingly agreed to Dominion status, the Muslim League did so willingly. For the Muslim League leadership Dominion status was necessary in order to retain British personnel, who occupied most of the top civil and military positions upon partition; ensure that Pakistan may get its fair share in the division of assets and resources; and continuing British role in mediating potential conflict between the two new nation states. See Harshan Kumarasingham, 'The 'Tropical Dominions': The Appeal of Dominion Status in the Decolonisation of India, Pakistan and Ceylon' (2013) 23 *Transactions of the Royal Historical Society* 223, 232-40.

Act, with 321 sections and 10 Schedules, was the longest statute passed by the British Parliament. It only formalized the reality of executive domination but, nonetheless, created the possibility that those rules may be enforced through the courts to exercise some constraints on the executive. The members of the Constituent Assembly indirectly elected through the 1946 elections who wanted to join Pakistan formed the first Constituent Assembly. Jinnah became the country's first Governor-General and presided over the new state 'unquestionably as the supreme political authority … and not as a ceremonial figurehead.'[177] A Federal Court of Pakistan was established, staffed mostly by the Muslim judges of the colonial High Courts.[178]

While India managed to frame a new constitution in 1952, Pakistan struggled with constitution-formation for a painfully protracted period. With Jinnah's death in September 1948, barely a year after partition, the prospects of constitution-making became progressively bleak. With delayed constitution-making, the contradictions bequeathed by colonial rule – the dialectics of authoritarianism and rule of law; of elite cooptation by and ethno-linguistic competition for control over the state – became glaring. New challenges of state-building after a violent partition and in the absence of adequate resources imposed impossible demands on the state. Divisions quickly emerged between the Bengali-majority East Pakistan and the Punjabi-dominated West Pakistan as to the nature of federalism and division of powers between the centre and the federating units. The usage of Muslim-nationalism to structure the demand for Pakistan during the late colonial period had unleashed difficult questions about the Islamic nature of the state and society, which needed to be resolved through a delicate constitutional balancing. A central bureaucratic structure had to be resurrected out of the ashes of partition with a limited human resource base comprising a few remaining British officials and a handful of Muslim superior services staff. These contradictions and challenges could only be contained through inclusive constitution-making, but these were also the biggest impediment to the framing of a republican constitution.

With the continuation of a colonial form of governance, Pakistan's superior courts were cast in the roles of safeguarding the democratic-constitutional aspirations in the new

[177] Ibid, 241.
[178] Hamid Khan, *A History of the Judiciary in Pakistan* (Oxford University Press, 2016) 17.

nation while being fully implicated in the construction of the postcolonial state. On the one hand, partly as a consequence of the continued reliance on legal instruments to effectuate the state's authoritarianism, the courts were called upon to resolve the tensions between rule *by* law and the rule *of* law, a role they had embraced in the late colonial period. At the same time the courts found the space and the impetus to extend their administrative law jurisdiction over the bureaucracy that was in the process of reconstruction and were increasingly involved in state-building in this function. Most notably, the courts were thrust into the role of mediating the processes of constitution-formation between the political elites that came to dominate the new state and the ethno-linguistic and provincial elites that found themselves at the margins. With increasing political instability the framing of a republican constitution, that guaranteed an inclusive federalism and enshrined fundamental rights, became the ultimate goal of the new nation's political imagination. The 'Writ jurisdiction' of the superior courts emerged as the primary site for militating for that goal and challenging the executive that resisted such demands.

THE RESURRECTION OF BUREAUCRATIC AUTHORITARIANISM

Fragmentation of the Muslim League and Centralization of Power

Pakistan was born in a state of crisis – a failed state, to use more contemporary parlance. As millions of refugees migrated across the newly demarcated borders in Punjab and Bengal amidst spiraling violence, the need to care for the victims of this partition 'fractured Pakistan's already feeble economy, strained its meagre resources, and imposed an impossible burden upon its administrative structure.'[179] The limited financial resources allocated to Pakistan under the partition plan were initially withheld by the government of India.[180] The economic burden of disproportionately large armed forces was exacerbated when the Indian government also reneged on its commitment to transfer Pakistan's share of military assets. Pakistan's first few budgets were thus 'defence budgets.'[181] The central government was forced to appropriate a greater

[179] Ziring, above n 31, 69.
[180] Wolpert, above n 42, 191.
[181] See Stanley A Kochanek, *Interest Groups and Development: Business and Politics in Pakistan* (Oxford University Press, 1983) 46.

portion of provincial taxes and it was not until 1950 that even a pittance was allocated for development.[182]

The first significant challenge for the new nation was to create a central government and its administrative structure.[183] The state structure suffered from multiple crises at inception including loss of records, lack of equipment and infrastructure. The biggest challenge, however, was an acute shortage of personnel, especially at the top of the bureaucratic hierarchy.[184] As the seceding state from the Indian union Pakistan had to create a central state apparatus from scratch, to be cobbled together from remnants of the Indian Civil Service. The provincial bureaucracy, technical services and the police had also been badly disrupted by the partition. While the civil administration and military were far from 'overdeveloped' pillars of the state at independence,[185] colonialism had bequeathed a structural design and the ideological foundations for state aggrandizement. In the following decade as Pakistan resurrected a central state structure dominated by the new Civil Service of Pakistan (CSP) – an elite cadre of generalist bureaucracy that traced its lineage and ethos directly to the ICS-IPS – the bureaucracy became the most significant locus of state power just as during the Raj.

The CSP was able to progressively play a prominent role in formulating policy and effectively implement it largely independent of political constraints or direction. A prime example of this was the creation of the post of the Secretary-General of the Government of Pakistan, an apex bureaucratic office whose holder could co-ordinate the actions of all the departments of the bureaucracy cutting across lines of responsibility and accountability to individual ministers.[186] The elite bureaucracy gained an expertise in national governance which empowered it to wrest the initiative from the Muslim League leadership and relegate the political classes to a subsidiary

[182] Ayesha Jalal, *Democracy and Authoritarianism in South Asia* (Cambridge University Press, 1995) 22.
[183] This was not the overdeveloped state characterized by the 'excessive enlargement of powers of control and regulation' that Hamza Alavi traced the roots of dictatorship in Pakistan to. Hamza Alavi, 'State and Class in Pakistan' in Hassan Gardezi and Jamil Rashid (eds), *Pakistan: The Roots of Dictatorship, The Political Economy of a Praetorian State* (Zed Press, 1983) 42.
[184] See Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 112-3; Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 365-8.
[185] Jalal, *Democracy and Authoritarianism*, above n 182, 54. Also, see Omar Noman, *The Political Economy of Pakistan 1947-85* (KPI Ltd., 1988) 200.
[186] Alavi, above n 183, 75.

role in statecraft within a few years of independence. Arguably, the foundations for the resurrection of bureaucratic authoritarianism in the new state were laid by Jinnah himself. When the Quaid-e-Azam decided to assume the office of the first Governor-General of Pakistan in preference to that of the Prime Minister, he appeared to validate and legitimize the tradition of executive domination deeply embedded in the Government of India Act 1935, Pakistan's interim constitution.[187]

Under Jinnah virtually all prominent bureaucratic positions were the preserve of British officers who remained answerable solely to the Governor-General. Of particular significance was his decision to use the constitution-making powers of the Governor-General to insert §92-A in the 1935 Act which empowered his office to declare a state of emergency, dismiss a provincial government and transfer its powers to the Governor.[188] Jinnah used this power twice in his brief tenure as Governor-General. The first precedent was set when he authorized the Governor of Sindh to dismiss the Chief Minister for insubordination and impose Governor's rule.[189] Again in 1948, in the face of an inability to constrain the infighting amongst the Unionist-turned-Leaguers in the Punjab, Jinnah authorized the Governor to take charge. The Governor utilized §92-A powers to impose a state of emergency and not only dismissed the government but also dissolved the provincial assembly.[190]

Jinnah, mindful of his impending death, saw himself as fulfilling a transitional role in guiding the new state through its formative crises. He was also compelled to rely on the apex bureaucracy who resultantly had near-complete control of day to day governance. Thus, 'a demotion of the political leadership in favour of the bureaucracy' was 'Jinnah's unintended contribution to the future of Pakistan.'[191] Nonetheless, attributing the

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[187] See, eg, Khalid bin Sayeed, *Pakistan: The Formative Phase, 1857-1948* (Oxford University Press, 2nd ed, 1968) 251; Salim Qureshi, 'Restoration of Democracy in Pakistan: A Critical Analysis of Political Culture and Historical Legacy' in Veena Kukreja and Mahendra Prasad Singh (eds), *Democracy, Development, and Discontent in South Asia* (Sage, 2008) 83; Philip Oldenburg, *India, Pakistan, and Democracy* (Routledge, 2010) 54-7.

[188] This constitution-amending power under §8 of Indian Independence Act, 1947 was granted initially for a term of seven and a half months but was extended by a year until March 1949. In July 1948 this power was used to insert §92-A. See Alavi, above n 183, 79.

[189] This was done under §51(5) of the 1935 Act, as amended by Pakistan (Provisional Constitution) Order 1947. See Ziring, above n 31, 82-3.

[190] Ibid, 84. Also, see *Ghulam Muhammad Khan Wasan v. Ghulam Qadir*, PLD 1954 Sind 294, where the Sind Chief Court held the dissolution to be legal amongst other things.

[191] Alavi, above n 183, 78.

genesis of civil authoritarianism to the founder of the nation may be unduly uncharitable. In appointing his foremost political successor Liaquat Ali Khan as the Prime Minister Jinnah had created viable prospects for transition to more democratic forms of governance. Upon Jinnah's death in September 1948 power naturally shifted towards the office of the Prime Minister and the new Governor-General maintained a weak and largely ceremonial position. Liaquat Ali Khan's dictatorial style of governance, however, provides vital clues to the structural as opposed to the personal foundations of civil authoritarianism in postcolonial Pakistan.

Liaquat presided over a party that had been in disarray virtually from the outset. Its long-standing and leading members at the centre were migrants to the new nation-state and lacked a constituency in the parts that formed Pakistan, especially in the western wing. Refugee settlers in the urban areas of West Pakistan became the central Muslim League's prime constituencies. This was bound to be a weak political base. The central bureaucracy was also dominated by migrant officials from north-central India, and with preferential recruitment in the highest cadres of the bureaucracy from amongst the relatively better-educated migrants, the central political leadership of the Muslim League and the apex bureaucracy developed mutual dependencies. An increasing disconnect from the provincial cadres and democratic politics, which would have weakened both the central political leadership and the bureaucracy's ascendant position, was thus inevitable.[192] As the migrants settled mostly in the new capital at Karachi and in the urban areas of Punjab,[193] politics and state structure began to develop an ethnic-regional configuration. Thus, a vital factor propelling Pakistan on the trajectory of state aggrandizement and autonomy from public opinion, the 'tragedy' of its politics, was that its new rulers were almost as much a minority in postcolonial Pakistan as the British were in colonial India.[194]

As power began to consolidate in a central leadership and bureaucracy based in West Pakistan, a corresponding sense of discrimination and disempowerment began to brew in East Bengal (which later became East Pakistan). The two wings of the new nation-

[192] See Mohammad Waseem, *Politics and the State in Pakistan* (Progressive Publishers, 1989) 112-3.
[193] See Shahid Javed Burki, *Pakistan Under Bhutto, 1971-1977* (New York: St. Martin's Press, 1980) 11-2.
[194] See Sher Baz Khan Mazari, *A Journey to Disillusionment* (Oxford University Press, 1999) 53; Oldenburg, above n 187, 74.

state were not only separated by thousands of miles of distance across the Indian landmass, but also by significant cultural difference. East Bengal was more populous, more densely populated, less urban, but more literate.[195] East Bengal was also more religiously diverse but ethnically and linguistically homogenous. Most significantly, East Bengal was relatively poorer and its economic situation continued to decline throughout the 1950s.[196] There were also vital differences in political culture and social structures, a direct legacy of the differential impact of colonial rule. East Bengal had relatively more egalitarian social structures; progressive politics and democratic impulses had deeper foundations. Bureaucratic authoritarianism had weakened over two centuries of stable colonial rule and religious tolerance was deeply embedded.[197] West Pakistan areas, on the other hand, had a closer experience of more militarized forms of authoritarianism that were reminiscent of the zenith of the Raj in the 19th century.[198]

These differences of physical and cultural space were compounded by Bengali under-representation in the central government, apex bureaucracy and military.[199] With the perceived and actual absence of any direct or indirect say in the policymaking of the rapidly centralizing and aggrandizing state, the severance of central Muslim League leadership from the politics of East Bengal accelerated. Large swathes of West Pakistan were similarly beyond the horizons of the central political leadership. In the NWFP the Muslim League had lost out to the Congress in the 1946 elections and its position was thus interminably weak. The tribal areas adjoining NWFP and Balochistan were the most under-developed parts of Pakistan.[200] Low population density, harsh landscape, and backward economy all militated for continuing political neglect. The postcolonial state made little effort to assimilate them into the nation-building project.[201] The central

[195] See Kochanek, above n 181, 4-5.
[196] Ibid.
[197] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 46-8.
[198] On the differential colonial inheritance of West Pakistan, especially the Punjab, see Christophe Jaffrelot, 'India and Pakistan: Interpreting the Divergence of Two Political Trajectories' (2002) 15:2 *Cambridge Review of International Affairs* 251, 253-5; Sayeed, above n 187, 281; Oldenburg, above n 187, 18-9.
[199] See Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 48-9; Kochanek, above n 181, 52.
[200] At partition Balochistan was divided into British Balochistan, the state of Kalat and the tribal areas. Mazari, above n 194, 49.
[201] Quaid-e-Azam Mohammad Ali Jinnah personally assured a Grand Tribal *Jirga* in April 1948 that the autonomy of the tribal areas from the state structure and payment of grants and allowances would be maintained in the new nation. 'Jinnah's Address to the Tribal Jirga at Government House, Peshawar,

Muslim League leadership had no political links in these parts of West Pakistan and abandoned their governance to the co-operative enterprise of bureaucracy and the local tribal chiefs or *sardars* just as under the Raj. East Bengal and large parts of West Pakistan thus emerged as the periphery of the rapidly consolidating postcolonial state.

The Muslim League's position in the core of the new state – the politically and economically relevant provinces of Punjab and Sindh – also lay on major fault-lines. The provincial Muslim League leaderships constituted mostly of large landowners and old Unionist party stalwarts who had belatedly converted to its cause on the eve of the partition.[202] Recalcitrant provincial leadership cadres of the party emerged as the most significant political opposition to the central government. The failure of the central leadership to curtail such provincialization of politics had initially compelled Jinnah to resort to the inherently and overtly viceregal constitutional device of §92-A. Prime Minister Liaquat, however, sought seemingly democratic but covertly authoritarian means to reel in recalcitrant provincial leaders.[203] The Public and Representative Offices (Disqualification) Act passed by the Constituent Assembly in 1949, known popularly as PRODA, set an institutional pattern for successive anti-corruption statutes in Pakistan's history whose acronyms were short-hands for political machinations by the state. It provided for the disqualification of any politician found guilty of misconduct, which was vaguely defined, and was manifestly used as a tool to discipline politicians until its repeal in 1954.[204] The threat of chastisement was matched by patronage through grant of portfolios, business licenses, permits, and other institutionalized forms of corruption.[205]

April 17, 1948' in *Quaid-i-Azam Mohammad Ali Jinnah Speeches and Statements as Governor General of Pakistan 1947-48* (Ministry of Information & Broadcasting Directorate of Films & Publications, 1989) 238.

[202] In Punjab politics reverted to landlord dominance in the Unionist mould soon after partition. See Ian Talbot, *Pakistan: A Modern History* (St. Martin's Press, 1998) 133. On the predominance of feudal landlords and business groups in the politics of Pakistan during its first decade (1947-58) see generally Talukder Maniruzzaman, 'Group Interests in Pakistan Politics, 1947-1958' (1966) 39:1/2 *Pacific Affairs* 83. The central Muslim League was not initially dominated by landlords. Arguably, it was from 1953 onwards, with Ghulam Mohamad becoming Governor-General, that landlord influence became predominant in the central Muslim League leadership as well. See Burki, *Pakistan Under Bhutto,* above n 193, 17-8, 30-31.

[203] See Ziring, above n 31, 104.

[204] Herbert Feldman, *Revolution in Pakistan* in *The Herbert Feldman Omnibus* (Oxford University Press, 2001) 76-7.

[205] See Kochanek, above n 181, 63-4.

With Prime Minister Liaquat's assassination in 1951 the brief ascendancy of parliamentary politics, even if in form rather than substance, came to an end. Khawaja Nazimuddin, a Bengali politician of softer political and personal disposition, succeeded Liaquat Ali Khan as Prime Minister while Ghulam Mohammad, one of Pakistan's most experienced bureaucrats, became the Governor-General. This set the stage for bureaucratic domination of politics.[206] Violent anti-Ahmadi protests in 1953 resulted not only in the resignation of the Chief Minister of Punjab, but also the dismissal of Prime Minister Nazimuddin and his Cabinet by the Governor-General. The legal and political legitimacy of this dismissal of government was reinforced when the Constituent Assembly quiescently elected a successor Prime Minister.[207] Broader support of the Governor-General's decision was seen in the absence of protest, which became the measure of proto-democratic legitimacy.[208] In a short span of six years the Muslim League, the founding party of Pakistan, had all but crumbled. Bureaucratic authoritarianism and centralization of policymaking had been entrenched in the design of the postcolonial state. The failure of democratic politics enabled the bureaucracy to transform postcolonial Pakistan into a 'virtual administrative state, less a representative expression and more the recrudescence of a familiar but palatable, if not benign, authoritarianism' – all within a few years of independence.[209]

The Struggles over Constitution-making

A key contributor to the Muslim League's fragmentation and displacement to the margins of power politics was its inability to negotiate a stable constitutional arrangement that would devolve some power to the provinces, provide mechanisms for holding elections, and ensure smooth transitions of government at both central and provincial levels. While the colonial legacy was one of authoritarianism, independence had created a short window of opportunity for democratic politics and generated the optimism that the metropolitan's tradition of parliamentary supremacy and rule of law would become the dominant constitutional doctrines of the new republic. The prospects

[206] Alavi, above n 183, 80.
[207] Ibid, 81.
[208] Ziring, above n 31, 145.
[209] Ibid, 99. For a detailed account of the political turmoil of the 1950s and the rise to power of the bureaucracy, see Khalid bin Sayeed, 'The Political Role of Pakistan's Civil Service' (1958) 31:2 *Pacific Affairs* 131, 131-9.

of democratic constitution-making were, however, precarious from the very beginning and became inevitably doomed with the political ascendancy of the bureaucratic oligarchy.

The first Constituent Assembly tasked with the formation of the permanent constitution of the new republic represented narrow political elites.[210] The Constituent Assembly was composed of members indirectly elected by provincial assemblies, which had themselves been elected under limited franchise with approximately fifteen per cent of the population as the electorate. During its' seven years of existence from 1947 to 1954, the Constituent Assembly convened on only 116 days for constitution-making and failed spectacularly in that task. Its efforts at achieving a consensus constitution of Pakistan quickly got bogged down in two major controversies – the place of Islam in the political system and the representation of East Bengal, whose population outnumbered the combined populations of all of the West Pakistan provinces. The Objectives Resolution of 1949, passed after considerable discussion and not without controversy, laid down the basic principles of the future constitutional scheme and was destined to become the preamble to Pakistan's several constitutions. While it categorically identified democracy, freedom, equality, tolerance and social justice as the fundamental principles of state, several ambiguous references to Islam left open the possibility of these principles being subjected to certain orthodox interpretations of Islamic doctrines.[211]

A Basic Principles Committee of the Constituent Assembly was established to delineate the key features of the constitution in accordance with the Objectives Resolution. Its Interim Report of 1950, however, provoked criticism for not giving Islam a central place in the constitutional scheme. More significantly, it was also controversial as it was perceived to be undermining East Bengal's electoral representation. The Committee had recommended the creation of a bi-cameral legislature with equal powers in both houses and in which the upper house would have equal representation from all the constituent units, giving the four provinces of West Pakistan an overwhelming

[210] Alavi, above n 183, 65.
[211] *See* Fazlur Rahman, 'Islam and the Constitutional Problem of Pakistan' (1970) 32 *Studia Islamica* 275, 277.

majority.[212] In response, a constitutional convention of prominent politicians, lawyers and journalists was assembled in East Bengal which proposed a confederal arrangement in which East Bengal and the West Pakistan provinces would have autonomous governments with a weak centre only responsible for currency, foreign affairs and defence. The Second Draft Report of the Basic Principles Committee in 1952 again proposed a bi-cameral legislature but with greater powers vested in the House of the People and 'parity' or equal representation for both East Bengal and the West Pakistan provinces in both houses.[213] This time greater opposition emerged in the Punjab along with demands for the vesting of equal powers in both houses of the legislature.[214]

By the end of 1953 the Constituent Assembly had failed to develop agreement on Pakistan's first constitution and had thus failed in its primary task. Its performance as the interim legislature also left much to be desired, as it had effectively abdicated that domain to the executive which legislated through Ordinances.[215] Provincial elections of East Bengal, belatedly held in March 1954, resulted in a humiliating defeat for the Muslim League at the hands of left-leaning opposition parties.[216] The election result effectively delegitimized Muslim League members of the Constituent Assembly from East Bengal and highlighted how unrepresentative that body had become over the course of its existence. Reacting to labour unrest, the rising opposition in East Bengal toward a budding alliance with the United States and growing secessionist sentiment, Governor Iskander Mirza imposed Governor's Rule, suspended the government and effectively annulled the elections. With the subsequent dismissal of Nazimuddin as Prime Minister by the Governor-General in 1954 and the Constituent Assembly's decision to stamp its approval on this action, all power effectively shifted to the bureaucracy-dominated executive. The Constituent Assembly had thus become rather irrelevant to Pakistan's governance; bureaucratic authoritarianism had become Pakistan's *de facto* constitution.

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[212] Hamid Khan, *Constitutional and Political History of Pakistan*, above n 46, 64-6. In addition, the Report stirred the hornets' nest of national language by proposing to make Urdu the national language thereby further alienating the aspirations of the Bengali-speaking majority that lived in the eastern wing. Ziring, above n 31, 109.
[213] Hamid Khan, *Constitutional and Political History of Pakistan*, above n 46, 68-71.
[214] Ziring, above n 31, 133.
[215] From 1947-1958 the Assembly met for an average of 30 days per year and passed 160 laws. In comparison the executive issued 376 ordinances. Kochanek, above n 181, 59.
[216] Ziring, above n 31, 155; Alavi, above n 183, 81.

Arguably, the realization of its predicament motivated the Constituent Assembly's unexpected agreement on a constitutional arrangement. A new proposal on the distribution of seats in a federal bi-cameral legislature received widespread support within and outside the Constituent Assembly. According to this arrangement, seats in the lower house were to be distributed amongst the provinces on the basis of population with East Bengal getting 165 out of the total of 300 seats. Seats in an upper house with a total strength of 50 would be distributed equally amongst all the provinces such that the four West Pakistan provinces would get an overwhelming majority. However, as both houses of the legislature were to have equal powers with any disagreements to be settled in a joint sitting, both the wings of the country would effectively have parity.[217] With the resolution of these major stumbling blocks the Constituent Assembly adjourned in September 1954 for the Constitution Bill to be drafted by a committee of draftsmen. The Constituent Assembly anticipated and attempted to pre-empt any interference from the Governor-General by amending several provisions of the 1935 Act, thereby reducing the Governor-General's powers.[218] It also inserted §223-A in the 1935 Act giving the superior courts the powers to issue prerogative writs against executive action for the first time in the country's history, and repealed the notorious PRODA.[219]

Pakistan was thus on the verge of constitutionalizing, *al beit* belatedly, the aspirations of independence and jettisoning the legacy of bureaucratic authoritarianism when in October 1954 Governor-General Ghulam Muhammad imposed a state of emergency, dismissed the Prime Minister and dissolved the Constituent Assembly a mere three days before it were to reconvene. In issuing the Proclamation of Emergency the Governor-General claimed that the Constituent Assembly had failed in its primary task of constitution-making and had begun to act as a permanent legislature. It had thus become an unrepresentative and undemocratic institution. The Governor-General further claimed an inherent prerogative power, as the juridical successor of the King in Parliament, to dissolve the Assembly. This was in effect a West Pakistani 'bureaucratic-military coup.'[220] A 'Cabinet of Talents' was appointed which included General Ayub

[217] Hamid Khan, *Constitutional and Political History of Pakistan*, above n 46, 73-4
[218] The Assembly amended §§9, 10, 10B and 17. See Ahmed Shuja Pasha, *Pakistan: A Political Study Political Study* (Sang-e-Meel Publications, 1995) 99.
[219] Ziring, above n 31, 162.
[220] See Oldenburg, above n 187, 67-8.

Khan, the serving Army Chief, as the Defence Minister and Iskander Mirza amongst others.[221] There was no Bengali representation in the new cabinet.

Maulvi Tamizuddin Khan, the President of the Constituent Assembly and the successor to Jinnah in that office, challenged the proclamation of emergency and the dissolution of the Constituent Assembly before the Sind Chief Court.[222] As Pakistan stumbled precipitously into bureaucratic authoritarianism, the burden of staying the democratic-constitutionalist course thus fell on the superior courts. The ensuing legal battle turned on the juridical significance of independence from colonial rule as manifested in the Indian Independence Act, 1947. The Independence Act had not imposed any time limit on the existence of the Constituent Assembly presumably because it was anticipated that it would frame a constitution within a few years and reach its natural end in the process. The Act also appeared to envisage two distinct roles for the Constituent Assembly – as the constitution-making body and as the interim legislature. In the seven years of its existence it had come to be recognized that while framing laws of a constitutional import the Constituent Assembly was a sovereign body and its Acts did not need the assent of the Governor-General.[223] In contrast, while passing ordinary legislation the Constituent Assembly was deemed to be acting as a legislature under the Government of India Act, 1935 and the validity of such Acts required the assent of the Governor-General. The Independence Act had also specifically repealed the provision of the 1935 Act which had hitherto empowered the Governor-General to dissolve the Constituent Assembly.

The Sind Chief Court rejected the Governor-General's assertion of prerogative power and unanimously found that the Constituent Assembly was a sovereign body with no legal limits on either its life or constitution-making powers.[224] The court's decision thus appeared to signify that, as flawed as the Constituent Assembly's democratic

[221] Ziring, above n 31, 169; Alavi, above n 183, 38.
[222] *Maulvi Tamizuddin Khan v. The Federation of Pakistan*, PLD 1955 Sind 96.
[223] See *Khan Iftekhar Hussain Khan of Mamdot v. The Province of the Punjab (Through the Governor)*, PLD 1950 Federal Court 15. The Federal Court dismissed a challenge to the validity of the PRODA on the grounds that the Constituent Assembly did not have the power to pass legislation, and because PRODA had not received the Governor-General's assent. The court held that §8(1) of the India Independence Act, 1947 empowered the Constituent assembly to enact legislation 'for the purpose of making provisions as to the constitution of the Dominion.' Since PRODA was a law of a constitutional nature it was within the legislative competence of the Constituent Assembly and did not require assent.
[224] *Maulvi Tamizuddin Khan v. The Federation of Pakistan*, PLD 1955 Sind 96.

credentials might have been, the moment of independence marked the substitution of the colonial tradition of executive prerogative with the metropolitan tradition of parliamentary supremacy and rule of law. The Governor-General appealed to the Federal Court in *Maulvi Tamizuddin Khan* focusing on a technical challenge to the jurisdiction of the High Court to issue prerogative writs on the basis that §223-A, passed by the Constituent Assembly on the eve of its dissolution, was itself not valid legislation as it had not received the Governor-General's assent.[225] Justice Cornelius was the lone dissenter in the Federal Court and supported the Sind Chief Court's position. In his view, the Indian Independence Act, 1947 marked a break with royal prerogative and parliamentary supremacy was thus Pakistan's over-arching constitutional doctrine.[226] Chief Justice Munir and the majority on the bench, however, upheld the challenge as they saw Pakistan's interim constitutional scheme to be an extension of the colonial tradition. The majority envisaged the Governor-General's role as similar to that in other Dominion constitutions and found not only that he had the prerogative power to dissolve the Constituent Assembly but also that all Acts of the Constituent Assembly, whether of a constitutional nature or in furtherance of ordinary legislation, required assent.

THE FOUNDATIONS OF THE WRIT JURISDICTION IN POSTCOLONIAL LEGALITY

Continuation of Colonial Legality under the Government of India Act

The Federal Court's decision in *Maulvi Tamizuddin Khan* has often been seen as the genesis of Pakistan's constitutional courts' subservience to authoritarian regimes and complicity in the perpetual undermining of democratic aspirations. However, it is unhelpful to see these significant constitutional moments as exclusively political decisions out of their jurisprudential context. Pakistan's courts had continued to display a deep entrenchment in the tradition of colonial legality since independence. After all, most of the judges serving on the superior courts had been recruited during the colonial

[225] *The Federation of Pakistan v. Maulvi Tamizuddin Khan*, PLD 1955 Federal Court 240.
[226] This was a view that he had espoused in earlier decisions of the Lahore High Court and the Federal Court as well. See *Abdus Sattar Khan Niazi v. Crown*, PLD 1954 Federal Court 187; *In the matter of Khan Iftekhar Hussain Khan of Mamdot*, PLD 1950 Lahore 12.

era through the judicial branch of the ICS and had served as judges in the High Courts. The Government of India Act had remained, with little modification, the constitutional framework of the dominion of Pakistan, and the precedents of the colonial courts were thus fully applicable. Constitutionalism *sans* a constitution required a break with their intellectual and juridical tradition of restraint, positivism and a procedural rule of law that the courts were not yet equipped to make.

The few constitutional decisions of the superior courts prior to the *Maulvi Tamizuddin Khan* reveal how the judiciary disavowed any power to extend the scope of judicial review beyond the scrutiny of the *vires* of legislative and executive action. For example, in an early case involving the detention of a student leader the Dacca High Court held that the life of the East Bengal Preventive Detention Ordinance could not be extended through another Ordinance as §88(2) of the Government of India Act, which served as Pakistan's interim constitutional framework, did not explicitly grant the Governor such a power.[227] Nonetheless, the court upheld the detention as a subsequent order issued under the Criminal Procedure Code, while the proceedings were pending, was valid on its face. Likewise, in a case challenging the disqualification of the former Chief Minister of Sind by a tribunal established under PRODA, the Federal Court refused to recognize a general principle creating a right to appeal.[228] The court held that such tribunals were the creation of special laws and if the legislature did not expressly provide for an appeal then no such right could be inferred. In a challenge to the legality of §92-A, the Lahore High Court denied the contention that the enactment was against the democratic spirit of independence as the petitioner could not point to any 'specific words to that effect in the Indian Independence Act.'[229]

As Pakistan became an insecure state in its early years – fearful of external aggression from India and internal implosion from ethno-linguistic division – the use of emergency and state security legislation dating back to the late colonial period persisted. Early decisions under the Press (Emergency Powers) Act, 1931 heralded the continuation of judicial mediation of security laws similar to the Lahore High Court's decisions in sedition cases during the Raj. Cornelius J equated the language in the Press (Emergency

[227] See *Maulvi Tamiz-ud-din Ahmad v. Province of East Bengal*, PLD 1949 Dacca 1.
[228] See *Hamidul Huq Chowdhury v. His Excellency, the Governor-General of Pakistan*, PLD 1953 Federal Court 279.
[229] *Ghulam Nabi Bhullar v Crown*, PLD 1955 Lahore 61.

Powers) Act with the definition of sedition under the penal code and held that describing the Punjab Safety Act as a 'lawless law' did not amount to bringing the government into contempt.[230] In another case Cornelius J found references to oppressive actions of Pakistan Army against citizens in the frontier lands as genuine criticism of military personnel's actions and thus not tantamount to bringing the institution of the Army into hatred or contempt.[231] The Lahore High Court noted in another instance that the definition of sedition had changed over time and that the press deserved greater latitude in criticism of government policies and actions.[232] At the same time, reminiscent of the colonial era, the courts also drew the limits of permissible criticism and dissent. Critique of the rationale of partition and the raison d'être of the Pakistani state were not acceptable forms of expressing dissent.[233] This was particularly the case when the criticism was made by the religious right, describing the state as an 'enemy of Islam' and labelling it as 'irreligious.'[234]

Where the language of new security and detention laws was modeled on colonial era legislation, the courts read the text literally and demanded strict compliance with the formalities laid down in the statute. For example, the Sind Chief Court declared that mere membership of a political party (in this case the Communist party) did not provide sufficient grounds for preventive detention under the Security of Pakistan Act, 1952.[235] Further, the court held that the grounds of detention must be disclosed with requisite specificity to enable the *detenu* to make representations to the government that the detention was not merited as required by the Act.[236] The Sind Maintenance of Public Safety Act, 1948 and the Sind Public Order Act, 1952 also provided similar procedural protections which the court assiduously policed. While the Sind Chief Court recognized the legislative competence of the provincial legislature to promulgate security and public order laws under the Government of India Act,[237] in appropriate cases the court held detentions to be illegal when the grounds for the detention were not communicated

[230] *In the matter of the "Naya Zamana" a newspaper v. Crown*, PLD 1949 Lahore 212. Also, see *In the matter of Hamidia Electric Press, Peshawar*, PLD 1951 Peshawar 31; and *Mazhar Ali Khan v. The Governor of the Punjab*, PLD 1954 Lahore 14.
[231] *Sher Muhammad v. Crown*, PLD 1949 Lahore 511.
[232] *Malik Nasarullah Khan Aziz v. Crown*, PLD 1950 Lahore 420.
[233] *Abdur Rahman Malik v. Crown*, PLD 1949 Lahore 510.
[234] *Ali Mohammad Khadim v. Crown*, PLD 1952 Lahore 573.
[235] *Hasan Nasir v. Crown*, PLD 1953 Sind 37.
[236] *Muhammad Ahmad v. Crown*, PLD 1955 Sind 73.
[237] *Muzaffar Mahmood v. Crown*, PLD 1951 Sind 64.

or were too general and vague for the detenu to challenge them.[238] Similarly, the court held that the requirement of a review after six months as provided in the statute was mandatory and any detention which was not reviewed would become illegal at the expiry of that period.[239]

The Frontier Crimes Legislation, 1901 (FCR) operative in the Tribal Areas adjoining NWFP and Balochistan, however, provided an altogether different model for state security legislation. It enabled the executive to commit anyone to trial before a *jirga* without the possibility of judicial review through a *habeas corpus* petition under §491 of the Criminal Procedure Code.[240] It was the FCR model of legal impunity which was followed in the state security legislation in Balochistan and the settled areas of NWFP provinces. The absence of any procedural protections here gave the courts very little room to scrutinize detention orders. For instance, when scrutinizing the preventive detention on the suspicion of anti-state activities of Khan Abdul Wali Khan, which had lasted almost five years, the Peshawar Judicial Commissioner's Court found that the NWFP Public Safety Act, 1948 imposed no limit on the duration of the detention.[241] While the courts ruefully noted the expanded use of security legislation in the western provinces, even when compared to the Raj's reliance on the Defence of India Act and Rules during the Second World War, and chafed at the use of secret evidence in justifying detentions of political dissidents, they could provide little relief except when even the most basic formalities had not been adhered to.[242]

This design of the frontier legislation was enlarged to the Punjab through the public safety acts promulgated in 1947 and 1951 in that province. Here, the tussle between impunity and legality played out in the Lahore High Court, which had greater standing and a longer history of exercising limited review powers through the *habeas corpus* jurisdiction under the Criminal Procedure Code. In a couple of early cases the High Court assumed the power to scrutinize the basis of detentions relying upon the

[238] See *Muzafardin alias Muhammad Shafi v. Crown*, PLD 1950 Sind 68; and *Sardaru v. Crown*, PLD 1953 Sind 4.
[239] *Mirpaldas Khushaldas v. Crown*, PLD 1954 Sind 25.
[240] See *S. Bismilla Shah v. N.W.F.P. Government*, PLD 1950 Peshawar 52; and *Langar Khan v. Crown*, PLD 1950 Lahore 126.
[241] See *Arbab Muhammad Hasham Khan v. Crown*, PLD 1953 Peshawar 72. Also, see *Abdul Wali Khan v. Crown*, PLD 1951 Baluchistan 65.
[242] See *Ajab Gul v. Crown*, PLD 1954 Peshawar 20; and *Arbab Muhammad Hasham Khan v. Crown*, PLD 1954 Federal Court 1.

information provided by government and police officials.[243] However, in a case challenging the detention of Maulana Maudoodi, the head of the *Jamaat-i-Islami* which had emerged as the preeminent Islamist opposition to the governmment, the Federal Court held that so long as a detention order complied with the requisite formalities the court could not investigate the basis of the detention.[244] The onus was on the *detenu* to bring evidence to show that no legitimate grounds for the detention existed. Learning from this litigation, the executive quickly adopted the practice of refusing to volunteer any evidence of the grounds of detention and claiming a public interest privilege when faced with an inquiry by the courts. The High Court lamented this practice, and noticing with some dismay that unlike the Sind legislation the Punjab public safety law had done away with all procedural protections, found no scope to exercise meaningful judicial review in such cases.[245] While the Federal Court attempted to whittle down the public interest privilege against disclosing the grounds of detention – leaving it to the High Court to decide such claims in individual cases – it also noted that the term 'reasonably' had specifically been omitted from the Punjab legislation leaving the courts with no objective basis to test the 'satisfaction' of the detaining authority that the *detenu* was likely to engage in prejudicial conduct.[246]

Doctrine of State Necessity: Learning to Mediate Constitutional Crises

The *Maulvi Tamizuddin Khan* decision must thus be seen in the light of a continuing colonial legacy of formal legality despite the courts' new Writ jurisdiction created through the insertion of §223-A. At the same time, the case must also be judged in the light of the subsequent decisions of the Federal Court which dealt with a continuing constitutional crisis, and through which the courts attempted to define the scope of their expanding role in statecraft. While there is considerable basis for the accusation that

[243] In *Maulvi Muhammad Ali v. Crown*, PLD 1949 Lahore 376, the court held the Punjab Public Safety Act, 1947 to be valid legislation and found the detention of Maulana Maudoodi to be justified. His call upon citizens not to join the armed forces and public servants not to take an oath of loyalty to the government until an Islamic constitution was agreed upon was found to be prejudicial to public order. In contrast, in *Abdul Ghafoor v. Crown*, PLD 1949 Lahore 55, the court found the detention of a trade union leader with suspected Communist leanings to be invalid on the basis that the purpose of the detention was clearly interrogation rather than the prevention of a prejudicial act.
[244] See *Maulvi Muhammad Ali v. Crown*, PLD 1950 Federal Court 1.
[245] See, eg, *Chiragh Din v. Crown*, PLD 1950 Lahore 451.
[246] *Muhammad Hayat v. Crown*, PLD 1951 Federal Court 15.

the Federal Court facilitated the descent into authoritarianism, given particularly the subsequent iterations of the doctrine of state necessity, such an analysis fails to appreciate the complex nature and forms of postcolonial governance and the courts' nuanced role in mediating its inherent contradictions. The superior courts saw themselves, perhaps justifiably, as fully implicated in the task of nation-building in the new republic.[247] However, instead of articulating and insisting upon broad structural principles on which the republic and its constitutional politics ought to be framed, an approach manifested by the Sind Chief Court and Justice Cornelius in the apex court, the majority of the Federal Court chose to mediate between the various political actors with the aim of steering them towards specific political outcomes.[248]

Pakistan's superior courts would manifest this approach time and again through subsequent constitutional crises achieving limited short-term gains in terms of avoiding greater crises, but invariably giving much space and a veneer of legitimacy to the authoritarian structures of Pakistan's emergent postcolonial governance. This pattern fully characterized the subsequent decisions of the Federal Court in the dissolution of the Constituent Assembly saga. While the majority's decision in *Maulvi Tamizuddin Khan* validated the dissolution of the Constituent Assembly, it did not give the Governor-General a free reign. The very argument on the basis of which the Governor-General's appeal succeeded also created the imperative of constituting a new Constituent Assembly and furthering the constitution-formation process. As per the Federal Court's decision not only was the insertion of §223-A , which granted the High Courts the power to issue prerogative writs, into the Government of India Act 1935 invalid but the legality of all legislation passed by the Constituent Assembly which had not received the Governor-General's assent was also suspect.[249] Such legislation

[247] Munir, CJ believed in a strong central government and held a deep distrust of the Constituent Assembly. He had already displayed a pro-bureaucracy and anti-politics bent in a report on the anti-Ahmadiyya riots in Punjab in 1953. See Allen McGrath, *The Destruction of Pakistan's Democracy* (Oxford University Press, 1996) 190, 200-1.

[248] Munir, CJ later argued that the decisions in the *Maulvi Tamizuddin* line of cases were pragmatic. Ibid, 215-7. There appears to have been a concern that Martial law would have been imposed in 1955 if the court had not defused the situation through the *Maulvi Tamizuddin* decision. See Justice (Retd.) Fazal Karim, *Judicial Review of Public Actions* (Pakistan Law House, 2006) 1474.

[249] In fact, as the court noted in *Reference by H. E. the Governor-General* (Special Reference 1 of 1955), PLD 1955 Federal Court 435, 476, the validity of all laws passed by the Constituent Assembly after 1950 and all laws passed by Provincial Assemblies since the last elections were indirectly in question.

included forty-four statutes, several of them of a constitutional nature, thereby threatening an extensive legal crisis.

The Governor-General initially refused to acknowledge the double-edged nature of the outcome in *Maulvi Tamizuddin Khan* and attempted to overcome the legal difficulties by promulgating an Ordinance which purported to give retroactive assent to a majority of those statutes that would have been invalidated in accordance with the Federal Court's decision.[250] The Ordinance also amalgamated the West Pakistan provinces into a single administrative scheme or 'One Unit' so as to effectively achieve parity between Punjab, which would dominate West Pakistan, and East Bengal which was renamed as East Pakistan. This neat stratagem did not resolve the underlying legal crisis, however. In *Usif Patel v. Crown* the Federal Court took up the broader implications of the *Maulvi Tamizuddin Khan* decision.[251] This time around, the court pressed the strict consequences of the Governor-General's logic in dissolving the Constituent Assembly and forced him to face the constitutional crisis of his own making. The court held that while the Governor-General may have had the prerogative to dissolve the Constituent Assembly he did not have any power to assume its functions and legislate upon constitutional matters through Ordinances. The court also reminded the Governor-General of his counsel's representation during the hearings in *Maulvi Tamizuddin Khan* that a new Constituent Assembly would be constituted as soon as possible and indicated that only such a representative body could retroactively validate laws of a constitutional nature.[252]

The Governor-General again resisted by summoning a Constituent Convention, a portion of whose members would be nominated by him, and issued a Proclamation claiming emergency powers to retroactively validate constitutional laws in order to prevent a breakdown.[253] The Governor-General also filed a reference before the Federal Court seeking its advisory opinion on the constitutionality of these measures.[254] The Federal Court declared that the Governor-General had no mandate to convene a

[250] Emergency Powers Ordinance, 1955 [Ordinance IX of 1955].
[251] *Usif Patel v. Crown*, PLD 1955 Federal Court 387.
[252] Ibid, 399, 401.
[253] There is evidence that the Governor-General planned to impose a new constitution by ordinance after the Convention had rubber-stamped its approval. See Newberg, *Judging the State*, above n 5, 52.
[254] *Reference by H. E. the Governor-General* (Special Reference 1 of 1955), PLD 1955 Federal Court 435, pursuant to §213 of the Government of India Act, 1935.

Constituent Convention. He was obligated to create a representative Constituent Assembly on the same principles as the original one had been constituted and hence could not nominate any members either. However, whereas Justices Cornelius and Sharif adhered to the stance adopted in *Usif Patel* by holding that only the new Constituent Assembly could retroactively validate constitutional laws, the majority led by Chief Justice Munir allowed the Governor-General to temporarily extend the life of the impugned statutes until the new Constituent Assembly had an opportunity to deal with that issue.[255] The legal doctrine relied upon to reach this result was that of 'civil or State necessity' which granted a head of state emergency powers analogous to those of a military commander during martial law.[256] Notably, even according to the majority's view the doctrine of state necessity did not enable the Governor-General to affect any changes in the constitutional scheme.[257]

Through its decisions in the *Maulvi Tamizuddin Khan* line of cases the Federal Court mediated the Governor-General's grand claims of inherent prerogative, almost sovereign powers, and paved the way for the renewal of democratic constitution-making processes through the creation of a new Constituent Assembly. Even the invocation of the doctrine of state necessity in the *Special Reference* came at considerable cost to the Governor-General's authority by compelling him to proceed with the constitution-making process that would invariably undermine his powers. A new Constituent Assembly was thus assembled in 1955 which managed to agree on the country's first constitution. While the 1956 Constitution bore the legacy of executive dominance and vested powers which had previously been enjoyed by the Governor-General in an unaccountable President, it had nonetheless adopted a parliamentary form of government. It envisaged a uni-cameral legislature with parity between East Pakistan and West Pakistan, thus accepting the One Unit scheme. The courts were granted a constitutional Writ jurisdiction and fundamental rights were enshrined.[258] When the

[255] Ibid, 478.
[256] Ibid, 478-86. For Justice Cornelius in contrast, the operation of the doctrine of civil or state necessity was confined to emergency during war or large-scale disturbance of public order. Ibid, 511.
[257] Ibid, 486.
[258] In colonial India only the three High Courts of the Presidency towns (Calcutta, Madras and Bombay) had power to issue prerogative writs. By the Charter Act of 1861 these three High Courts inherited the power to issue writs while the other High Courts including the Punjab High Court initially had no such power. Civil courts had the power to issue ordinary injunctions, mandatory or prohibitory, under §54 and 55 of Specific Relief Act 1877, and declarations under §9 of Civil Procedure Code, 1908 read with §42 of the Specific Relief Act, 1877.

Governor-General stepped down and Iskander Mirza replaced him as the first President of the country it appeared that the crises-ridden decade of constitution-making was finally nearing an end.

Writ Jurisdiction and the Foundations of Administrative Law

The belated framing of the constitution was an achievement in itself, but several important issues had remained unresolved and the constitution-making process had created further conflicts.[259] The new Constituent Assembly had lacked sufficient democratic legitimacy and had been indirectly elected by the provincial assemblies that were themselves the product of rigged elections.[260] As it began working as the interim legislature political pressures were mounting. Amidst the emergence of new party configurations and shifting loyalties, the central government experienced unprecedented instability – four different Prime Ministers rotated through that office in a span of less than two years.[261] General elections were meant to be held soon after the framing of the 1956 Constitution but were delayed until February 1959.[262] With increasingly impatient demands for elections under the new Constitution, the bureaucratic executive and the entrenched political class faced an existential threat.[263] The dilemma for Pakistan's ruling elites was how 'to hold elections that would legitimate but not change the *status quo*.'[264]

As the pre-constitutional governance arrangement persisted despite the framing of the 1956 Constitution, the apex bureaucracy retained its preeminent position within the postcolonial state. The dominance of the senior CSP was bound to raise tensions not only with the central, provincial or regional politicians, but also with the lower cadres of the bureaucracy. The Provincial Civil Services (PCS) had also suffered from

[259] Feldman, *Revolution in Pakistan*, above n 204, 25-6.
[260] Provincial elections in Punjab and NWFP in 1951 and in Sindh in 1953 were rigged. The 1954 elections in East Bengal were relatively free but their results were overturned. See Oldenburg, above n 187, 78.
[261] See Pasha, above n 218, 121. The provincial governments also suffered from instability. Violent clashes in the East Pakistan assembly contributed to the death of the speaker, while the situation in West Pakistan was not much better either. Feldman, *Revolution in Pakistan*, above n 204, 30-2.
[262] Ibid, 33; Hamid Khan, *Constitutional and Political History of Pakistan*, above n 46, 115.
[263] Alavi, above n 183, 83. The 1954 elections in East Bengal had indicated that anti-statist parties like the National Awami Party (NAP) and the Awami League (AL) would have displaced the incumbent Republican Party and the Muslim League. Oldenburg, above n 187, 78.
[264] Andrew R Wilder, *The Pakistani Voter: Electoral Politics and Voting Behaviour in the Punjab* (Oxford University Press, 1999) 17.

dislocation and disruption during the partition process, and suffered from shortages of qualified personnel at the higher levels.[265] It was initially expected that officers from the higher rungs of provincial services would be recruited to the CSP, and the elite central and provincial cadres might even be merged into a uniform service structure. However, the CSP succeeded in maintaining their corporate identity and monopoly over central policymaking posts, as well as a spatial and social aloofness from the PCS, various technical groups, the lower strata of public services and the general public.[266] Marked differences in pay structure and privileges, delays in payment of salaries to lower cadres, and the exclusion of the technical services and PCS from central policymaking posts bred friction between the CSP and the rest of the public services.

The lowest cadres of the public services became the ferment of discontent. As more poorly educated and poorly paid officials were recruited *en masse* in the lower levels of the public services, turning government employment into a quasi-welfare system, Pakistan's bureaucracy transformed rapidly into a highly inefficient leviathan.[267] A contrast with the dilapidation of the lower strata of the administrative pyramid justified the CSP's insistence on maintaining their elite status, further fuelling a vicious cycle of resentment and demoralization at the lower levels. Even the CSP cadre began to show signs of stress at the junior levels. Concerns over the rapidly deteriorating condition of the higher education system and a lack of extended experience in the districts due to rapid promotions began to cast a shadow on the prestige of the recent inductees in the CSP. The security of tenure, as well as the morale, of the CSP was also under a sustained attack from government politicians seeking to rely on the bureaucracy to achieve local political advantages.[268] Factionalism along ethnic-regional-linguistic, caste-tribe and religious-sectarian lines began to emerge.[269]

Accusations of corruption, nepotism and political leanings began to plague the bureaucracy all the way to the top. The bureaucracy's control over land registration and

[265] Muslims had been historically under-represented in the provincial services as well, even in the Muslim-majority provinces and especially in the higher policymaking positions. Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 378.
[266] The Pakistan Pay Commission established under Justice Munir underlined cultural differences between the CSP and lower cadres of public service. Ibid, 134-5.
[267] Ibid, 384.
[268] Ibid, 385.
[269] Ibid, 388-9.

allocation over refugee property provided an opportunity for corruption that lasted for decades. Hindu and Sikh migrants from West Pakistan areas had left behind highly valuable urban and rural property which was meant to be allocated to refugees from India. Since this was to be done often in the absence of detailed records of property that the refugees had abandoned in India, the bureaucracy had extensive discretion in refugee property settlement and was presented with many avenues for profiteering. In addition to such direct pecuniary corruption the bureaucracy, especially the highest rungs occupied by the CSP, abused public resources in a manner that constituted more subtle and institutionalized forms of corruption.[270] While corruption was widespread, accountability was weak.[271] As a result, the grievances within the public services, especially the middle and lower strata of bureaucracy, ensured that the superior courts were involved as the arbitrators of administrative wrongdoing. In the absence of suitable internal mechanisms, such as effective public service commissions or tribunals, the newly-established Writ jurisdiction of the superior courts was invoked to resolve disputes over appointments, dismissals, transfers, temporary postings, reversions, and seniority issues.

While the governance scheme of the 1956 Constitution remained effectively in ethereal suspension, the superior judiciary was the only beneficiary and the sole operational sphere of the new constitutional scheme in the interim. The 1956 Constitution enshrined an impressive array of fundamental rights and empowered the reconstituted Supreme Court to issue 'directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* … for the enforcement of any of the rights conferred.'[272] Article 170 vested a more extensive Writ jurisdiction in the High Courts of West and East Pakistan – the power to issue writs for the enforcement of fundamental rights as well as 'for any other purpose.'[273] While the Supreme Court remained reluctant to directly exercise its fundamental rights jurisdiction, the High Courts began to lay down solid foundations of administrative law. This was enabled by the design of the 1956 Constitution, Part 10 of which, following the Government of India Act model in this regard, prescribed extensive rules and

[270] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 223-4.
[271] Feldman, *Revolution in Pakistan*, above n 204, 76.
[272] Article 22, *1956 Constitution of Pakistan*.
[273] Article 170, *1956 Constitution of Pakistan*.

safeguards concerning the appointment, transfer, termination and alteration of the terms of employment of civil servants.[274] Resultantly, many of the challenges to the legality of administrative action came from within the bureaucracy itself as much as from the affected public.[275] This deeply involved the High Courts in understanding and determining the rules that governed the administration.

The Lahore High Court, the oldest High Court in West Pakistan, began to push the boundaries of judicial review right from the outset. The first conceptual challenge for the court in the absence of an indigenous jurisprudence was to determine to what extent it was bound by the restrictions on the named writs in English law. For example, the court initially grappled with the principle that the writ of certiorari was traditionally available only against judicial and quasi-judicial decisions,[276] or that the writ of mandamus was strictly controlled and may not be issued for the vindication of personal contractual rights.[277] However, relying on the permissive language in Article 177 – whereby the courts were empowered to issue directions, orders *or* writs, *including writs in the nature of* the named writs –the courts held that they were not bound by the limits on the issuance of writs in English law and extended the purview of judicial review to purely administrative acts.[278] In *Hadi Ali* the court held that the petitioner should have been issued a show cause notice and provided an opportunity for a fair hearing even though the governing statute did not mandate such a requirement.[279] In *Hussain Haji Ahmed* the court held that the Writ jurisdiction was not barred even if an alternate remedy existed if availing such a remedy was too costly, not expeditious or the proceedings were against the principles of natural justice.[280] In *Afzal Baig* the High Court held that a competent authority must apply its' own mind to the decision and cannot merely approve the decision effectively made by a subordinate official.[281]

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[274] Article 179-190, *1956 Constitution of Pakistan*.
[275] Approximately 3,000 (or 20 per cent) of writs from 1955-1962 were service matters internal to the bureaucracy. Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 420-1.
[276] See, eg, *M. Abdul Majid v. West Pakistan Province*, PLD 1956 (WP) Lahore 615.
[277] See, eg, *Ikram-Ul-Haq v. Islamic Republic Of Pakistan*, PLD 1958 (WP) Lahore 365.
[278] See, eg, *Muhammad Ramzan v. Rehabilitation Commissioner General Lahore*, PLD 1956 (WP) Lahore 642.
[279] See, eg, *Hadi Ali v. The Government of West Pakistan*, PLD 1956 (WP) Lahore 824. For other cases establishing the right to a fair hearing see *Raja Muhammad Afzal Khan v. Federation of Pakistan*, PLD 1957 (WP) Lahore 17; *Muhammad Ayyub v. The Government of West Pakistan*, PLD 1957 (WP) Lahore 487; *Federation of Pakistan v. Fayyaz Ahmad*, PLD 1958 (WP) Lahore 500.
[280] *Hussain Haji Ahmed v. S. Ashhad Ali*, PLD 1957 (WP) Karachi 874.
[281] *Afzal Baig v. Government of West Pakistan*, PLD 1957 (WP) Lahore 467.

In a technique of expanding their jurisdiction that Pakistan's superior courts would come to perfect in due course, the High Court adopted a three-step process. First, the court assumed its jurisdiction to review certain administrative actions and expounded the jurisprudential basis, but denied relief in the instant cases.[282] Second, the court expanded its judicial review powers by invalidating administrative action of relatively minor significance and granting relief in cases involving low grade employees of the civil services. For instance, *Muhammad Nawaz Khan*, a case in which the court asserted its authority to quash delegated legislation, involved the reinstatement of a minor employee of the Punjab Transport Board.[283] Likewise, *Salamat Ali Jafri*, wherein the court established its power to determine the seniority of public servants involved a minor official.[284] This ensured that there was less cause and motivation for the executive to push back against judicial review. Having proclaimed its jurisdiction, however, in the third step the court began to extend its reach to the upper cadres of the bureaucracy. Even such tentative early attempts at establishing administrative law and entrenching principles of natural justice attracted resistance from an apex bureaucracy determined to retain its hold on the state apparatus. The elite bureaucracy saw the courts' Writ jurisdiction as undermining the discipline of the lower services and as wastage of vital resources in litigation.[285]

Perceiving the likelihood of an increasing pushback from the bureaucracy, the Supreme Court urged caution in the exercise of the Writ jurisdiction. In *Hikmat Hussain* the Supreme Court reversed the High Court and held that the respondent who had served as the Post Master General in an officiating capacity could be reverted to his original post without being 'given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him' – such a requirement laid down in Article 181 applied to tenured posts only.[286] Likewise, in *Moazzam Hussain Khan* the Supreme Court again overruled the High Court and held that the Director of the Intelligence

[282] *Hadi Ali v. The Government of West Pakistan*, PLD 1956 (WP) Lahore 824, is such an instance.
[283] *Muhammad Nawaz Khan v. Chairman, Punjab Road Transport Board, Lahore*, PLD 1956 (WP) Lahore 1068. For another example, see *Manzoor Hasan Rizvi v. Pakistan*, PLD 1957 (WP) Karachi 804.
[284] *Salamat Ali Jafri v. the Province of West Pakistan*, PLD 1956 (WP) Lahore 548; *Liaqat Ali Khan v. Secretary to the Government of Pakistan, Ministry of Foreign Affairs and Commonwealth Relations*, PLD 1958 (WP) Karachi 117.
[285] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 406-7.
[286] *Pakistan v. Hikmat Hussain*, PLD 1959 Supreme Court (Pak) 107.

Bureau did not enjoy a security of tenure and the government had complete discretion in making high level postings and transfers.[287] It cautioned the High Courts that exercising the Writ jurisdiction in such instances would undermine the separation of powers.

In the seminal case of *Tariq Transport Company* the Supreme Court consolidated the foundations and jurisdictional boundaries of the Writ jurisdiction under the 1956 Constitution.[288] The Supreme Court read a range of requirements, imported from English administrative law, into the general and permissive language of Article 170. Unlike the High Courts, the apex court interpreted the phrase 'writs in the nature of' to mean that the restrictions and requirements traditionally associated with the issuance of the prerogative writs were applicable to the Writ jurisdiction of the High Courts. As such, where a suitable alternate remedy was available to the petitioner the High Courts should resile from exercising the Writ jurisdiction. The court also held that the test of *locus standi*, a direct personal interest in the matter as opposed to a general or public interest, must be satisfied by the petitioner. The court highlighted the extraordinary nature of the Writ jurisdiction and asserted that the High Courts should intervene only when there was an error of law or a clear beach of procedural requirements laid down in legislation. A focus on legality as opposed to administrative propriety meant that the High Courts should avoid getting involved in factual inquiries. These limits on the Writ jurisdiction would hereafter remain the key principles defining the exercise of the High Courts' powers and would find explicit mention in the subsequent constitutions of Pakistan. The Supreme Court's assertion that 'any encroachment by the High Court in a field reserved for the executive would amount to judicial invasion' and violation of the separation of powers would become a recurring theme defining the battle lines around judicial review.

THE END OF THE CONSTITUTIONAL INTERLUDE

Despite the political instability since the promulgation of the 1956 Constitution, Pakistan appeared to be slowly progressing towards a stable constitutionalism.

[287] *Pakistan v. Moazzam Hussain Khan*, PLD 1959 Supreme Court (Pak) 13.
[288] *Tariq Transport Company v. Sargodha-Bhera Bus Service*, PLD 1958 Supreme Court (Pak) 437.

Preparations were underway for the first general elections held on the basis of universal franchise when President Iskander Mirza imposed Martial Law and abrogated the Constitution in October 1958.[289] The primary justification for the Martial Law advanced by President Mirza was the unworkability of the 1956 Constitution and the political instability it had engendered. This assertion occluded the fact that the political problems he cited were a product of the old arrangement and the soundness or otherwise of the constitutional scheme adopted in 1956 could only be gauged after elections had been held. President Mirza assumed the office of the Chief Martial Law Administrator (CMLA) and appointed a twelve-member cabinet including General Ayub Khan, the long-serving Commander-in-Chief of the military. A mere two days later, the Supreme Court delivered its judgment in *State v. Dosso*, validating the imposition of Martial Law and the abrogation of the constitution.[290] That very night General Ayub Khan pressured President Mirza to resign and emerged as Pakistan's first military ruler.

Barely a decade since its emergence as an independent nation state Pakistan had reverted from a one-party dominated state to bureaucratic authoritarianism reminiscent of colonial rule. For the next decade Pakistan would have its first experience of direct military rule under the Ayub regime. Nonetheless, the demand for a stable and inclusive constitutional scheme had not been fully extinguished, especially in East Pakistan and in the smaller provinces of West Pakistan. In the brief constitutional interlude the courts had justified the promise of constitutionalism through the exercise of the Writ jurisdiction. At his inaugural address as the Chief Justice of the West Pakistan High Court Justice M. R. Kiyani, under whose leadership the High Court laid the foundations of a more robust form of judicial review and whose reputation was 'widespread among the masses,'[291] described the writs as 'flowers of paradise … the modern manifestation of God's pleasure … [which] dwells in the High Court.'[292] While such celebration of judicial review may have been over-effusive, the courts had nonetheless demonstrated a capacity to exert limited restrain on the authoritarianism of a fearful state and impose

[289] 15 February 1959 was the deadline for elections and preparations were underway. Feldman, *Revolution in Pakistan*, above n 204, 33-4.
[290] *State v. Dosso*, PLD 1958 Supreme Court (Pak) 533.
[291] See Ralph Braibanti, 'Cornelius of Pakistan: Catholic Chief Justice of a Muslim State' (1999) 10:2 *Islam and Christian-Muslim Relations* 117, 135.
[292] Ibid, 136.

some semblance of administrative propriety on a powerful executive through their newly-founded Writ jurisdiction.

MARTIAL RULE

MILITARY-BUREAUCRATIC AUTHORITARIANISM AND 'BASIC' CONSTITUTIONALISM

With the abrogation of the 1956 Constitution, Pakistan descended into a prolonged period of military-bureaucratic authoritarianism. During the first nationwide Martial Law, the Ayub regime developed the blueprint for military rule that would be adopted by successor military regimes in Pakistan. This technology of martial rule included a validation of the *coup* by the Supreme Court; a quasi-presidential constitutional scheme; a controlled form of democracy reminiscent of late colonialism; a local government system that would provide minimal democratic cover; an accountability drive essentially designed to discipline political elites and senior bureaucrats; and minor administrative reforms to reign in the civil bureaucracy. Contradictorily, however, with the framing of the 1962 Constitution the country experienced governance under a post-independence constitution, *albeit* short-lived, for the first time. The 1962 Constitution, which paved the way for the end of Martial Law, provided for a most basic form of democracy which, nonetheless, gave some space for political dissent to be expressed through the parliamentary and electoral processes. More significantly, it enshrined fundamental rights and enabled the political opposition to challenge arbitrary government action through the courts.

In addition to the technology of military rule, another lasting legacy of the Ayub regime was the exacerbation of ethno-linguistic and regional fault lines in the postcolonial nation. A strong central government based in West Pakistan which dominated national policymaking heightened the marginalization of East Pakistan. The Ayub era was dubbed the 'Great Decade' of development as a program of state-led industrialization, agrarian reform and large-scale infrastructure development financed through international borrowing led to notable macro-economic growth. However, the benefits of such development were inequitably distributed, with the political and economic elites of West Pakistan prospering to the exclusion of all. As most of the military command

and many of the senior bureaucrats who occupied key positions belonged to north-central Punjab and the settled areas of the NWFP, the sense of exclusion and disadvantage amongst the peripheral regions of West Pakistan also increased. A pervasive sense of socio-political and economic inequality, and the continuing failure to create a democratic and inclusive constitutional system, gave rise to widespread protests that led to the end of the Ayub regime, and created the conditions for secessionism in East Pakistan leading to the bloody dismemberment of the nation-state that followed.

Despite the military-bureaucratic authoritarianism of the Ayub era, the courts were able to consolidate their judicial review powers. During the years of Martial Law, despite the judicial validation of untrammelled powers vested in the military regime, the courts managed to continue a low key form of judicial review of bureaucratic action. The exercise of the Writ jurisdiction aligned with the priorities of a Martial Law regime that was attempting to subdue and co-opt a hitherto powerful bureaucracy. In the second phase, the promulgation of the 1962 Constitution which provided the courts extensive judicial review powers and belatedly enshrined fundamental rights, the courts pushed the envelope further and embraced a robust administrative law jurisprudence along the lines that an eager West Pakistan High Court had done in its short period of activism under the 1956 Constitution.

In the aftermath of the 1965 war between India and Pakistan a beleaguered Ayub presidency, whose economic agenda and international standing had suffered a major setback, also faced a domestic political crisis. The 1965 presidential elections ensured the continuity of the regime but at the cost of a significant loss of legitimacy. As the opposition to the regime gained strength, the restrained constitutionalism of the previous years gave way to a state of emergency and increasing reliance on public order and state security laws to suppress dissent. It is in these circumstances that the superior courts found themselves once again at the centre of a crucial political struggle with opposition politicians and dissidents challenging the repressive use of these laws with some success. The consolidation of the judicial review jurisdiction of the courts along three axes – formal constitutionalism, administrative law, and procedural safeguards against the abuse of public order and state security laws – which have remained at the

core of the superior courts' definition of rule of law in the decades hence, is a significant legacy of the Ayub era.

'REVOLUTIONARY LEGALITY' AND 'REFORM'

The First Martial Law

Pakistan's first nationwide Martial Law preceded its first military regime by twenty-one days. On 6 October 1958, Iskander Mirza, the President and a former Major-General, imposed Martial Law, dismissed the federal and provincial governments and dissolved the legislatures after the successive failures of four Prime Ministers to form stable ministries. On 10 October 1958, the Laws (Continuance in Force) Order, 1958 was passed to fill the legal void created by the abrogation of the 1956 Constitution. There were notable personal-political factors at play in the imposition of the Martial Law. President Mirza was a likely loser in the forthcoming transition if elections had been held in February 1959 as planned. General Ayub Khan was also in the midst of his second five-year term as Commander-in-Chief, which was unlikely to be extended any further. On 27 October 1958, General Ayub Khan, who had been appointed as Prime Minister in the interim, secured President Mirza's resignation and sent him into exile. The ease with which this transition was affected revealed what a lame duck president Mirza had become in the absence of any meaningful public or political support, and that power had already gravitated towards the military.[293]

More significantly, however, there were important institutional factors that heralded the military's rise to preeminence within the state structure long before the advent of the Martial Law regime. Like the bureaucracy, the military was in disarray at the time of partition and was immediately subjected to great stresses.[294] The Army had to undergo a rapid program of restructuring at considerable national expense and as such was part

[293] See Newberg, *Judging the State*, above n 5, 71-72; Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 114-122.

[294] Pakistan inherited a disproportionately large Army, a legacy of the colonial policy of large-scale recruitment from the Punjab, but faced leadership challenges as it inherited only a small number of Muslim officers at independence. Ayub Khan was promoted from Lt. Colonel to General in 4 years and appointed the Army Chief. See Kochanek, above n 181, 46. The military was denied its share of hardware and material resources allocated in the partition, was short of equipment and financial resources, and was embroiled in its first war with India over Kashmir in 1948. See Oldenburg, above n 187, 46-7.

of the early stages of state-building. From the outset the military was involved in law and order functions in support of the civil government and bureaucracy. The Army was called upon to aid in maintaining order during the refugee crisis, garnering widespread public support in the process. As Pakistan underwent multiple crises in subsequent years the military was frequently dragged into maintaining law and order in aid of civil government.[295] In 1954, when the Governor-General dismissed the Constituent Assembly General Ayub Khan, a serving Army Chief, was appointed as the Defence Minister in the so-called 'Cabinet of Talents' providing an indication of the extent to which the military had been imbricated with the executive.[296]

During these various encounters over the first decade the military developed a sense of the workings of politics and bureaucracy, and increasing disdain for both. This sense had come to be widely shared by the general public and the imposition of Martial Law was greeted with acquiescence or quiet approval.[297] The absence of public dissent was part of the Supreme Court's justification for the validation of Martial Law and the abrogation of the 1956 Constitution in *State v. Dosso.*[298] Notably, *State v. Dosso* was decided before General Ayub Khan displaced Iskander Mirza as the Chief martial law Administrator (CMLA) and was neither a direct legal challenge to the imposition of Martial Law or to military rule. In an appeal against decisions of the High Court which had declared the draconian Frontier Crimes Regulations (FCR) to be in violation of the fundamental rights guaranteed under the 1956 Constitution,[299] a majority in the Supreme Court led by Chief Justice Munir held that the case could not be decided without a pronouncement on the legal status of the fundamental rights provisions as well as the 1956 Constitution, and hence of the Martial Law Proclamation that had abrogated it. Justice Cornelius was the lone dissenter to the extent that he refused to engage with that issue. Taking a naturalistic position he opined that fundamental rights did not derive their validity from a formal constitution, which merely provided a restatement of these norms, and hence existed even when such a constitution had been abrogated.

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[295] See Feldman, *Revolution in Pakistan*, above n 204, 38-43; Oldenburg, above n 187, 47.
[296] Ziring, above n 31, 169; Oldenburg, above n 187, 38.
[297] Notably, even Fatima Jinnah, who emerged as the main opposition contender against Ayub Khan in the 1965 presidential elections, also supported the coup. Ziring, above n 31, 225.
[298] *State v Dosso*, PLD 1958 Supreme Court (Pak) 533.
[299] See *Malik Toti Khan v. District Magistrate, Sibi and Ziarat*, PLD 1957 (WP) Quetta 1; *Dosso v. State*, PLD 1957 (WP) Quetta 9.

Chief Justice Munir and the majority of the bench, however, pushed the 'legal positivism' displayed in *Maulvi Tamizuddin Khan* to radical extremes. Relying on its interpretation of Hans Kelsen's theory of the law and state,[300] the court held that the *coup d'état* was in fact a *Grundnorm*-creating revolution and its validity could only be determined as a matter of social fact. The factual evidence relied upon by the court to establish the efficacy of revolutionary change included the acquiescence of the state structure and the silent majority which had refused to protest. The court ignored the likely impact of 29 Martial Law Regulations issued in the very first days after the coup. In a series of populist measures designed to shore up public support the Martial Law authorities had cracked down on smuggling and hoarding of goods, leading to a dramatic reduction in the prices of basic commodities.[301] The regime also imposed a ban on the trading of import licenses, which in the public eye were a key source of political corruption, and compelled the payment of back and under-reported taxes.[302] These measures were, however, accompanied by the threat of serious prosecutions before Martial Law tribunals for dissent or disobedience to the regime, including mandatory capital punishment for assisting the 'recalcitrants' – rebels or rioters – and for protest in the streets.[303] The absence of dissent was as manufactured as it was a manifestation of public support.

By ruling on the validity of the *coup* the court granted the regime a veneer of legal and proto-democratic legitimacy. It rendered the Martial Law Proclamation into the 'shortest Constitution in the world' by granting the regime the power to create any laws and even frame a new constitution.[304] In accordance with its proclaimed judicial and perceived public mandate the Martial Law regime proceeded to cure the ailments of Pakistan's politics and state structure. The reform agenda was designed as much to undermine the power of interest groups which may offer resistance to the regime, such as large landowners and the bureaucracy, and secure their cooptation as it was to garner public support and legitimacy.[305] One such program, larger in rhetoric but less so in

[300] The court cited Hans Kelsen, *General Theory of Law and State* (Anders Wahlberg trans, Cambridge, 1945).
[301] See Feldman, *Revolution in Pakistan*, above n 204, 6-8.
[302] Ibid, 54-7.
[303] Ibid, 5.
[304] Newberg, *Judging the State*, above n 5, 87.
[305] Burki, *Pakistan Under Bhutto*, above n 193, 4.

impact, was the Land Reform in West Pakistan in early 1959 in which the regime imposed ownership ceilings and proceeded to resume excess land.[306] However, even after the reforms the average landholding remained high, much of the land acquired by the government was of poor agricultural quality and the regime issued compensation bonds for its acquisition.[307] While the resumed land was first offered for sale to poor tenant farmers and serfs, most of them could not afford it and more than half of it remained unsold.[308] Most of the resumed land was then re-sold to military officials and bureaucrats at discounted prices in order to redeem the compensation bonds, effectively instituting a subtle form of institutionalized corruption, creating new wealth and bolstering a new institutional middle class.[309]

While the land reforms had very limited redistributive impact they indicated the risks of resistance to large landowners and feudal politicians.[310] Consistent with this agenda, the regime also employed overtly coercive means to reign in opposition politicians. The Public Offices (Disqualification) Order, 1959 and its substitute, the Elective Bodies (Disqualification) Order, 1959 (EBDO), essentially followed the PRODA model.[311] Anybody found guilty under EBDO would automatically stand disqualified from politics until 1966. Given the timings of future elections this would effectively lead to a decade-long disqualification, hence incentivizing the majority of likely defendants to choose voluntary retirements. Nearly 6,000 politicians were 'Ebdoed' – that is retired or were disqualified.[312]

The administrative reforms of the Martial Law regime followed a similar design. The complicity of the apex bureaucracy was vital to the Ayub regime as even at its peak it

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[306] West Pakistan Land Reforms Regulation, 1959 (Martial Law Regulation No. 64). Approximately 2.5 million acres of land were surrendered by 902 landowners, barely a third of the projected estimates. Feldman, *Revolution in Pakistan*, above n 204, 64. That West Pakistan, especially Punjab, badly needed land reforms is reflected in the average size of landholding of each declarant. Jalal, *Democracy and Authoritarianism*, above n 182, 146. The East Bengal provincial government had implemented land reforms as far back as 1950. Feldman, *Revolution in Pakistan*, above n 204, 61.
[307] Jalal, *Democracy and Authoritarianism*, above n 182, 146.
[308] Feldman, *Revolution in Pakistan*, above n 204, 64-5.
[309] Jalal, *Democracy and Authoritarianism*, above n 182, 146; Mazari, above n 194, 98.
[310] Burki, *Pakistan Under Bhutto,* above n 193, 42.
[311] Elective Bodies (Disqualification) Order, 1959 [President's Order No. 13 of 1959].
[312] Feldman, *Revolution in Pakistan*, above n 204, 89. Nearly 40 per cent of those affected were large landowners, most of who were threatened or charged with misappropriating a higher than allocated share of water or causing irrigation schemes to be altered for their benefit. Burki, *Pakistan Under Bhutto,* above n 193, 29.

'was not essentially military in character' and bureaucrats continued to occupy key positions.[313] While the regime did not countenance structural change in the state, it claimed to undertake a comprehensive scrutiny of bureaucrats in order to weed out corrupt or incompetent officials. Historically, apex bureaucracy had enjoyed a security of tenure but these protections were whittled down making it relatively easier to dismiss bureaucrats through the mechanism of Scrutiny Committees.[314] Despite the claims of endemic corruption, only a small number of senior officials were found guilty of serious misconduct or corruption and removed from office.[315] The results of the scrutiny process thus did not match either the public perception or the regime's claims of tackling widespread corruption in the bureaucracy. As with the campaign against corruption, the regime's plans for improvement in the service structure also bore the hallmarks of a design to undermine potential resistance by the apex bureaucracy rather than a serious intent to reform. The regime unleashed a program for the study and analysis of bureaucratic malaise, in partnership with American public and private aid agencies.[316] However, reports which characterized the bureaucracy, especially the CSP, as 'over-centralized, over-coordinated, under-supervised and under-propelled' or were mildly critical of defense-related matters were either delayed on never published.[317] As a result, despite a lot of intellectual activity there was very little structural change in the bureaucracy. The CSP continued to maintain the cohesive, elitist, corporate tradition of the colonial ICS better than the bureaucracy of any other postcolonial state with which it shared that legacy.[318]

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[313] Alavi, above n 183, 83-4. Also see Burki, *Pakistan Under Bhutto,* above n 193, 99; Feldman, *Revolution in Pakistan*, above n 204, 10-11; Kochanek, above n 181, 54.

[314] See Public Scrutiny Ordinance, 1959 and Public Conduct (Scrutiny) Rules, 1959. The Ordinance and the rules also removed the protection of judicial review and the right to examine witnesses, while also adding a new and ambiguous ground of removal for 'reputation for being corrupt.' Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 290-2.

[315] Between January and June 1959, 57 Scrutiny Committees investigated the conduct and reputations of 1,662 central government officials in a process characterized by secrecy. Less than 2.5 per cent of approximately 2800 Class I officials were found guilty of serious misconduct or corruption and removed from office. Feldman, *Revolution in Pakistan*, above n 204, 81-3; Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 292-3.

[316] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 88-91, 213.

[317] Ibid, 218-9, 222, 229.

[318] Ibid, 3, 100. As late as 1964 only 432 generalist CSP officers continued to dominate key policymaking positions in a state bureaucracy nearly a million strong. Ibid, 140. The only notable reform of the public service under Martial Law was that the regime created an 'economic pool' which included some officers from the technical services as well, and limited policymaking positions were opened to these non-CSP officers. Ibid, 225-6. The other significant change in the state structure was the introduction of the corporate form as an instrument of economic development. Ibid, 236-7.

Writ Jurisdiction: The Bridge Across the Chasm of Martial Law

State v. Dosso has achieved notoriety as the quintessential example of judicial servility and of creative jurisprudence – a form of negative judicial activism – to validate military rule, not without justification. Chief Justice Munir, however, later justified the court's decision in *State v. Dosso* as a pragmatic choice, arguing that challenging the Martial Law would not only have been futile but would also have resulted in the permanent curtailment of the court's jurisdiction.[319] Therefore, he saw the survival and long-term interest of the judiciary in conceding the constitutional sway of the Martial Law regime while preserving a limited administrative and civil law jurisdiction until a new constitution was promulgated. This compromise appeared to be reflected in the Laws (Continuance in Force) Order, 1958 as well which did not suspend the courts' Writ jurisdiction but only barred them from questioning the actions of Martial Law authorities.[320] During the nearly four years of the Martial Law, from October 1958 to July 1962, the court stood by its pronouncements in *State v. Dosso* and continued to vest extra-constitutional powers in the regime. In *Mehdi Ali Khan* the Supreme Court refused to review its decision in *State v. Dosso* and the majority and Justice Cornelius reiterated their positions on fundamental rights.[321] In *Mian Iftikhar-ud-Din*, the court upheld amendments to the Security of Pakistan Act, 1952, pursuant to which the regime confiscated newspapers which had been critical of it, thereby disavowing any legal or supra-constitutional constraint on the regime's capacity to promulgate coercive laws.[322]

The court, however, did attempt some tentative formal restrictions on subordinate Martial Law authorities by relying on narrow interpretation of ouster clauses and self-defined distinctions between the various types of legal instruments used by the regime.[323] In *Muhammad Ayub Khuhro*, for example, the Court refused to accept a blanket ouster of the Writ jurisdiction of the High Courts from reviewing proceedings of summary military tribunals and demanded specific clauses in each applicable regulation.[324] While this enabled the court to grant relief to an opposition politician in

[319] Newberg, *Judging the State*, above n 5, 77-78.
[320] Laws (Continuance in Force) Order [President's Order (Post Proclamation) No. 1 of 1958].
[321] *The Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 Supreme Court (Pak) 387.
[322] *Mian Iftikhar-ud-Din v. Muhammed Sarfraz*, PLD 1961 Supreme Court 585.
[323] See Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 280.
[324] *Muhammad Ayub Khuhro v. Pakistan*, PLD 1960 Supreme Court 237. Several Martial Law instruments expressly forbade judicial review but such ouster clauses were narrowly interpreted. For

this case, it imposed minimal formal constraints on the regime's future actions. It was only after the Martial Law had formally ended that the Supreme Court provided a concrete analysis of its review powers over the actions of Martial Law authorities by citing a distinction between actions and enactments of the CMLA which had supremacy pursuant to *State v. Dosso*, and the actions and orders of subordinate and local Martial Law authorities that were bound to comply with the provisions of the 1956 Constitution and civil laws to the extent those had been left intact.[325] While this was an exercise in *post hoc* rationalization it, nonetheless, set the tone for the courts' engagement with the regime's actions in the subsequent period of constitutional rule. It also set a precedent for later periods of Martial Law.

As noted earlier, while the courts avoided reviewing the legislative, judicial and executive actions of Martial Law authorities they nonetheless utilized the Writ jurisdiction to review the actions of the civil bureaucracy. In the absence of fundamental change in the administrative structure, the courts continued to address both the external grievances against the bureaucracy as well as the internal tensions between the CSP and the lower cadres of the bureaucracy. While the courts' nascent fundamental rights jurisprudence under the 1956 Constitution had been disabled by *State v. Dosso*, their administrative law jurisdiction had remained by and large intact. The Laws (Continuance in Force) Order had denuded the Writ jurisdiction by withdrawing the broader power to issues 'orders and directions … to any government' thereby excluding the actions of the Martial law authorities from review. However, the actions of the civil administration remained subject to challenge through writs, and the West Pakistan High Court in particular continued to adopt a relatively more activist bent even during the Martial Law.[326] The Supreme Court, in contrast, had been generally more conservative and as the more significant of the state's appeals questioning the expansion of the High Courts' review powers began to reach the Supreme Court during the Martial Law period, tensions over the definition of the Writ jurisdiction were inevitable.

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example, in *Gulab Din v. Major A. T. Shaukat*, PLD 1961 (WP) Lahore 952, the High Court ruled that its jurisdiction was ousted only with regard to actions taken by the CMLA himself.

[325] *Muhammad Afzal v. Commissioner, Lahore Division,* PLD 1963 Supreme Court 401.

[326] As Chief Justice Kayani saw it, 'certiorari varie[d] with the imaginative consciousness of the judicial mind' and there was 'plenty of it in the High Court.' The West Pakistan High Court issued nearly 15,000 writs from 1955 to 1962, of which approximately 3,000 dealt with service matters internal to the bureaucracy. Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 421-2.

Consistent with its understanding of a limited judicial role that the Supreme Court had espoused even before the Martial Law, the Court urged restraint in the exercise of the Writ jurisdiction and advised deference to the executive.[327] The Supreme Court confined the Writ jurisdiction to the five named writs,[328] and directed adherence to the parameters of English law 'in all essential respects.'[329] At the same time, however, the court resisted attempts at the ouster of its review powers over the actions of civil administration much more robustly than it did in the case of the military courts and Martial Law authorities. In *Zafar Ahsan*, the Supreme Court accepted that the actions of a Scrutiny Committee may be excluded from review, but imposed five conditions for the ouster to be effective.[330] These conditions closely matched the traditional grounds of judicial review and thus enabled the courts to exercise review powers in appropriate cases in much the same way as if their jurisdiction had not been ousted.[331] Through the continued exercise of the Writ jurisdiction against civil administration the courts thus created a bridge across the discontinuity of the Martial Law. The regime had also come to accept the Writ jurisdiction, within the confines self-defined by the Supreme Court, as it did not undermine its core interests. In fact, the Writ jurisdiction aligned with the regime's aims by keeping the bureaucracy under some checks and improving its procedures without compelling any structural alterations.

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[327] *Province of East Pakistan v. Muhammad Abdu Miah*, PLD 1959 Supreme Court (Pak) 276.
[328] *The State of Pakistan v. Mehrajuddin*, PLD 1959 Supreme Court (Pak) 147. In fact, the court merely reiterated a position it had already adopted in a pre-Martial Law case. See *Tariq Transport Company v. Sargodha-Bhera Bus Service*, PLD 1958 Supreme Court (Pak) 437
[329] *Lahore Central Co-operative Bank, Limited v. Saif Ullah Shah*, PLD 1959 Supreme Court (Pak) 210. Pakistan's courts continued to follow Privy Council decisions even after the Privy Council (Abolition of Jurisdiction) Act, 1950. Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 420.
[330] *Zafar-ul-Ahsan v. Republic of Pakistan*, PLD 1960 Supreme Court (Pak) 113. The conditions stated were: the authority must be properly constituted as per the terms of the governing statute; the affected person must be subject to its jurisdiction; it must act within the statutory grounds of action; the order must be proper under the governing statute; and its action must not be *mala fide*.
[331] For example, the Supreme Court invalidated the actions of a scrutiny committee because it had reached its decision within a day of receiving the replies to its show cause notices. *Muhammad Zaman Khan v. M. B. Nishat*, PLD 1962 Supreme Court 22. Likewise, in *Syed Anwar Ali Shah v. Fiayaz Ali Khan*, PLD 1962 (WP) Lahore 483, the High Court of West Pakistan voided the actions of the respondent authority for both constituting the scrutiny committee and then hearing the appeals against its decision. In response to the courts' decisions the Martial law authorities amended and improved the procedures governing the scrutiny of bureaucrats. For a discussion of this and similar cases, see Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 296-8.

The gradually expanding Writ jurisdiction had subtly begun a fundamental change in the postcolonial state's structure. The once powerful CSP, which had been pushed into submission by the military, was now subjected to ever-increasing scrutiny by the superior courts. It also found itself increasingly discredited and weakened by friction with the provincial services and the lower rungs of the bureaucracy. In comparison, the superior courts had gained notable credibility and prestige through their visible judicial review actions. They were also being seen by the lower bureaucracy as the only avenue for the resolution of their grievances.[332] One case, in particular, marked the different institutional trajectories and symbolized the contrasting public perceptions of an 'arrogant bureaucracy dominated by martial law and a sympathetic judiciary.'[333] Sir Edward Snelson, Secretary of the Law Ministry and one of two remaining British ICS officers, was charged with and convicted of contempt by a unanimous High Court of West Pakistan.[334] The Secretary had commented that the High Court had established a Writ jurisdiction 'without reference to the strictly defined frontiers of the prerogative writs' thereby interfering with and even usurping executive functions.[335] There was some basis for this assertion as the Supreme Court had overruled attempts by the High Court to expand its jurisdiction on at least twelve different occasions, as noted earlier.[336] Nonetheless, the Supreme Court also maintained the conviction thereby marking the contours of the Writ jurisdiction as the sole preserve of the superior judiciary.[337]

Despite the Supreme Court's role in validating the Martial Law, the Writ jurisdiction enabled the courts to forge ideological alignments with two important segments of the society which offered the greatest opposition to the Martial Law regime: lawyers and students. Not only were lawyers a powerful non-state group, law students formed the most significant section of public university students as well as the intake into the

[332] This trend continued through the constitutional period of Ayub Khan's rule. See, eg, *Pakistan v. Azizul Islam*, PLD 1964 Dacca 748; *Muhammad Alam v. Pakistan*, PLD 1965 (WP) Karachi 100; *Abdul Majid Sheikh v. Mushaffe Ahmed, Section Officer, Government of Pakistan, Ministry of Defence, Karachi,* PLD 1965 Supreme Court 208; *Saeeda Tasneem Ara v. Province of West Pakistan*, PLD 1967 Lahore 1112; *Muhammad Seraj v. Pakistan*, PLD 1967 Dacca 820; *Naseem Jahan Naim v. General Manager (now Vice-Chairman) P.W.R., Lahore*, PLD 1968 Supreme Court 112.
[333] Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 425.
[334] *State v. Sir Edward Snelson*, PLD 1961 (WP) Lahore 78.
[335] Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 426; Braibanti Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 263-4.
[336] Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', above n 69, 437; Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 266-7.
[337] *Sir Edward Snelson v. Judges of the High Court of West Pakistan*, PLD 1961 Supreme Court 237.

bureaucracy.[338] The lawyers partly derived their political clout from their sheer numbers and partly from the existence of cohesive bar associations capable of nationwide action.[339] The bar associations consistently urged the courts to constrain the lawlessness of the executive and provided organized backing to this end. What made the lawyers such a powerful opposition group was that their influence was not restricted to the urban areas. Lawyers had always been important mediators between the rural and peri-urban populations and the state, and had a long history of actively engaging in local politics.[340] Like the lawyers, university students were another powerful group that tended to engage in opposition, especially of the violent kind.[341] The Martial Law regime was sufficiently threatened by student politics to bring amendments to the Penal Code making it a crime to incite students to political activity, and issued Ordinances that enhanced the disciplinary powers of university administrations over students and staff.[342] A range of student grievances, including against disciplinary action, came to be raised in Writs before the West Pakistan High Court in particular.[343] Given the courts' involvement in matters of vital interest to lawyers and students through the Writ jurisdiction, it was not surprising that the post-Martial Law opposition politics had a highly legalistic tone. The demands for the rule of law – defined as guarantees for the independence of judiciary, the expansion of the Writ jurisdiction and repeal of authoritarian statutes – thus figured prominently in the opposition to the Ayub regime.

[338] On the political power of the legal community, see Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 256-9. From 1954-64 Pakistan produced 8,820 law graduates, approximately 17 per cent of all degrees. Ibid, 249-55.
[339] Ibid, 252-3.
[340] Sadaf Aziz, 'Liberal Protagonists?: The Lawyers' Movement in Pakistan' in Halliday, Karpik and Feeley (eds), *The Fates of Political Liberalism in the British Post-Colony* (Cambridge University Press, 2014).
[341] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 27-35, 40-4.
[342] See Pakistan Penal Code (Second Amendment) Ordinance, 1962. For a list of the University Ordinances, see Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 4 n 59.
[343] Consistent with the broader trends in the development of the Writ Jurisdiction, the courts exhibited initial restraint and confined themselves to ultra vires review through the Martial Law period but in doing so ensured that their jurisdiction remained unaffected. Ibid, 36-8. In the post-Martial Law period the Supreme Court expanded its review powers. *University of Dacca v. Zakir Ahmad*, PLD 1965 Supreme Court 90.

CONSOLIDATION OF THE WRIT JURISDICTION UNDER THE 1962 CONSTITUTION

'Basic Democracy' and Formal Constitutionalism

Prior to lifting the Martial Law in July 1962 and substituting it with a constitutional framework, General Ayub Khan constructed the political framework necessary to manage a transition to controlled democracy. The Basic Democracies Order, 1959 created a system of local government easily managed by an authoritarian regime.[344] It also enabled the regime to claim that it was introducing grassroots level democracy to Pakistan, which would cure the ills of its parliamentary politics in the long run. In some sense 'all democracies are basic but some are more basic than others.'[345] The Basic Democracy design envisaged four tiers of local government in which only a majority of the representatives at the lowest rung, that of Union Councils, would be directly elected.[346] These local bodies had significant functions but the controlling authority was vested in senior bureaucrats who exercised enormous and unchecked control over the fiscal and administrative powers of the councils, could review and overturn their decisions, remove elected officials, or even supersede entire councils if they deemed fit.[347] More than the regime's stated goals, the effective use of the Basic Democracy system revealed the real intent behind its design. In 1960 General Ayub held a referendum in which an overwhelming majority of the electoral college, comprising 80,000 Basic Democrats or Union Council members, voted him the President for the next five years. The same group then served as the electorate for indirect elections to the National Assembly. The composition of the National Assembly, dominated as it was by large landholders and traditional political classes, revealed the extent to which the regime needed and sought to co-opt these classes despite simultaneously threatening their traditional power bases.[348]

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[344] The Basic Democracies Order, 1959 [President's Order No. 18 of 1959].
[345] Feldman, *Revolution in Pakistan*, above n 204, 115.
[346] Ibid, 116-7.
[347] Kamal Siddiqi (ed), *Local Government in South Asia: A Comparative Study* (University Press Ltd., 1995) 104.
[348] On the composition of legislatures during Ayub's rule, see Kochanek, above n 181, 61.

The 1962 Constitution, which replaced the Martial Law framework, represented the most significant 'achievement' of the regime, reflected the key ideas of the military rulers and their proclaimed solutions to Pakistan's political ailments. The Constitution was dictatorial in form and spirit and sanctioned a 'government of the President, by the President, and for the President' according to its critics.[349] Former Chief Justice Munir, who served briefly as the first Minister for Law and Parliamentary Affairs under the 1962 Constitution, argued that the 'constitution conform[ed] neither to the Parliamentary nor the Presidential pattern' as the President was accountable to neither the legislature nor the people.[350] Even the Chairman of the Constitution Commission set up by the regime disapproved of the document and disavowed any responsibility for its creation.[351] The Commission had recommended a presidential constitution, but its recommendation for direct elections and the inclusion of fundamental rights had been disregarded.[352] The Law Reform Commission's recommendations on the separation of the lower judiciary and the executive in the districts had also been rejected.[353] Its recommendations on the Writ jurisdiction of the High Court were, however, accepted with the inclusion of Article 98.

Nominally, the 1962 Constitution transferred greater subject-powers to the provincial legislatures as the National Assembly only had enumerated powers with the residuary powers vested in the provinces, and had made political and economic parity a stated aim.[354] However, Article 131 reserved special powers to the National Assembly to meet the demands of national interest, security or economic stability. Executive authority in the provinces was vested in the governors, who were appointed by and acted under the President and could be removed at will.[355] The National Assembly had very limited

[349] Mazari, above n 194, 105.
[350] Herbert Feldman, *From Crisis to Crisis: Pakistan 1962-1969* in *The Herbert Feldman Omnibus* (Oxford University Press, 2001) 2; Ralph Braibanti, 'Pakistan: Constitutional Issues in 1964' (1965) 5:2 *Asian Survey* 79, 82.
[351] Feldman, *From Crisis to Crisis*, above n 351, 2.
[352] Braibanti, 'Pakistan: Constitutional Issues in 1964', above n 352, 80.
[353] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 318.
[354] Braibanti, 'Pakistan: Constitutional Issues in 1964', above n 352, 83-44. The aim of achieving parity between the wings was amongst the directive principles of state policy, and allowed for affirmative action in public employment. Dacca was declared the principal seat of the National Assembly and Bengali was included in the list of state languages along with Urdu and English. Even a majority of Cabinet was ethnically Bengali. Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 53-4, 284-5.
[355] Articles 80 and 118, *1962 Constitution of Pakistan*.

financial powers and could only comment on but not refuse the budget.[356] The President could dissolve the National Assembly and could veto its legislation, which could only be over-ridden by a two-third majority in the National Assembly.[357] Even in that case the President could refer the bill to a referendum by Basic Democrats.[358]

Despite the highly authoritarian nature of the 1962 Constitution, its short life provided some cause for belief in the capacity of formal constitutionalism to impose minimal restraints on arbitrary power. Within four days of the Constitution's date of effect President Ayub flouted it. Article 103 required federal and provincial ministers to relinquish membership of the National Assembly. However, President Ayub passed an Order patently made pursuant to Article 224, a transitional provision designed to remove difficulties in bringing the Constitution into effect, exempting ministers from that demand.[359] The Order was challenged before the East Pakistan High Court which declared it to be unconstitutional.[360] In dismissing the appeal against the High Court's decision the Supreme Court asserted the pre-eminence of the Constitution as the 'master-law' and signalled that the President would hereafter have to abide by the terms of his own Constitution.[361] This was arguably a high point in the postcolonial state's turbulent constitutional history, a *Marbury v Madison* moment that established the courts' powers of the constitutional review of legislation.[362] This could result in some effective checks on the President's capacity of action so long as he did not have the requisite majority in the National Assembly to amend the Constitution, which he initially did not.

Within a fortnight of the Constitution coming into effect groupings resembling political parties had formed in the National Assembly.[363] Soon thereafter legislation formally recognized political parties despite the regime's earlier denunciations of party

[356] Feldman, *From Crisis to Crisis*, above n 351, 4.
[357] Article 27, *1962 Constitution of Pakistan*..
[358] Articles 27(5) and 24, *1962 Constitution of Pakistan*..
[359] Removal of Difficulties (Appointment of Ministers) Order, 1962 [President's Order No. 34 of 1962].
[360] *Muhammad Abdul Haque v. Fazlul Quader Chowdhry*, PLD 1963 Dacca 669.
[361] *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, PLD 1963 Supreme Court 486.
[362] The court effectively overrode Article 133, which purported to grant the legislature and President to decide upon their own law-making capacities.
[363] Feldman, *From Crisis to Crisis*, above n 351, 18-9. Two Muslim League factions had emerged, the Council Muslim League mostly comprising old stalwarts and the Convention Muslim League which was in effect the President's party. Ibid, 20-2.

politics.[364] While the President's Convention Muslim League had a simple majority, the opposition commanded the support of approximately 65 members in a house of 156. This had no impact on legislation or government business, the National Assembly was largely irrelevant in these regards anyway. However, making amendments to the Constitution became a challenge for the President as the Convention Muslim League lacked a two-third majority.[365] As the regime resorted to more overtly authoritarian ways to pressurize opposition members into submission, through the detention of opposition politicians under a wide array of security and public order statutes, its efforts were undermined by the courts. Most notably, when the regime banned the *Jamaat-i-Islami* and detained its founder Maudoodi along with a number of party leaders its actions were challenged. While the West Pakistan High Court dismissed the petition, the East Pakistan High Court declared them unconstitutional.[366] In appeals against both decisions, the Supreme Court sided with the East Pakistan High Court and held that the ban violated the freedom of association provision of the bill of rights recently inserted by the First Amendment to the 1962 Constitution.[367]

The First Amendment, moved merely five months after the Constitution came into effect, was passed with the consent of the opposition and elevated non-justiciable 'Principles of Lawmaking' into justiciable Fundamental Rights under an amended Article 98.[368] It also restored the 'Islamic Principles' which had been incorporated in the 1956 Constitution but had initially been omitted from the 1962 text. The amendment had been initiated in response to public opinion and presumably with an eye to the 1965 presidential elections. The Second Amendment to the Constitution was not, however, supported by the opposition as it enabled the President to continue in office after the expiry of his term until a successor had been elected.[369] It could also allow him to reverse the order of the presidential and National Assembly elections through a strategically timed dissolution of the legislature. The debate on the amendment bill was acrimonious and the Second Amendment was only passed after the

[364] Political Parties Act, 1962.
[365] Feldman, *From Crisis to Crisis*, above n 351, 23-4.
[366] *Tamizuddin Ahmed v. The Government of East Pakistan*, PLD 1964 Dacca 795. The Jamaat had also filed a criminal appeal before the West Pakistan High Court which was rejected. See Newberg, *Judging the State*, above n 5, 96.
[367] *Saiyyid Abul A'la Maudoodi v. The Government of West Pakistan and the Government of Pakistan*, PLD 1964 Supreme Court 673.
[368] Constitution (First Amendment) Act, 1963.
[369] Constitution (Second Amendment) Act, 1964.

defection of four opposition members, some under immense pressure and one incentivized through an appointment to the West Pakistan High Court. The defections were exempted from the operation of provisions of the Political Parties Act which barred floor-crossing and required a member changing parties to resign and seek re-election.[370] Even this reduced form of parliamentary politics thus re-affirmed the regime's distaste for parliamentary democracy.

Having carefully managed another round of Basic Democracy elections in end 1964, President Ayub sought re-election for a second five-year term in January 1965. By that stage the combined opposition had managed to rally around a single candidate, Fatima Jinnah, the highly esteemed sister and close companion of the Quaid-e-Azam. With immense powers of patronage wielded as the incumbent, President Ayub managed a slim majority in East Pakistan and a substantial one in West Pakistan.[371] A subsequent constitutional challenge to the Basic Democracy system and the Electoral College Act of 1965 succinctly marked the divergent paths of the two wings of the nation. In response to the Writ petitions, the High Court of East Pakistan declared the Act to be unconstitutional for impermissible delegation of legislative powers, and for violating the separation of executive and legislative powers.[372] More significantly, it found the Basic Democracy system to be in contravention of the provincial autonomy guarantees in the 1962 Constitution. On appeal the Supreme Court reversed the High Court's decision and even chided it for its strongly worded criticism of the state structure.[373] Chief Justice Cornelius and the court declared that the Basic Democracy system was formally legal and it was not the courts' purpose to question its underlying political theory. The Supreme Court, which thus reposed its confidence in formal constitutionalism, was once again on the wrong side of history as political developments would soon render the 1962 Constitution and its governance structure into a nullity.

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[370] §8(2), Political Parties Act, 1962. This was done on the basis that political parties did not legally exist when the National Assembly members were elected. Feldman, *From Crisis to Crisis*, above n 351, 31.
[371] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 54.
[372] *Sherajul Haque Patwari v. Sub-divisional Officer, Chandpur*, PLD 1966 Dacca 331.
[373] *Province of East Pakistan v. Sirajul Huq Patwari*, PLD 1966 Supreme Court 854.

In the elections for the National Assembly held in March 1965 the Basic Democrats secured Ayub's Convention Muslim League 126 out of 156 seats in that house. Having gained the necessary supra-majority in the National Assembly, the regime proceeded to make five additional amendments to the 1962 Constitution designed to strengthen the presidency's hold over the political system even further. The Third Amendment altered the disqualification provisions of Article 103(2) exempting several categories of persons from disability to contest National Assembly elections for holding offices for profit in the service of Pakistan.[374] The exemptions indicated the regime's intent to co-opt rural middle classes and petty landlords, and thereby also threaten the power bases of the large landowners.[375] The Fourth and the Sixth Amendments revealed even more starkly the regime's compulsions of simultaneously co-opting and undermining another powerful segment. At independence the mandatory retirement age of the Civil Service was 55 years of age and remained thus until 1960 when the Martial Law regime raised it to 60 years. The Fourth and Sixth Amendments, passed a few months after the Presidential election of 1965, reduced the retirement age again to 55 years, enabled the President to retire any official with more than 25 years of service, but also granted the President and provincial Governors the discretion to extend service beyond the retirement age.[376] The timings of these changes reveal the regime's heavy reliance on the bureaucracy to systematically rig the sensitive transition from the first to the second presidential term under the 1962 Constitution.[377]

In September 1965 Pakistan and India went to the second war over Kashmir which resulted in a military stalemate, but led to disastrous diplomatic and domestic political consequences for the Ayub regime. The much-vaunted economic development of the previous seven years and the regime's credibility plummeted. President Ayub imposed a state of emergency under Article 30, and the Fifth Amendment passed in the aftermath of the 1965 war suspended Fundamental Rights during the continuance of the emergency.[378] The Seventh Amendment further simplified the procedure whereby national and provincial legislatures could rubberstamp and convert ordinances into Acts

[374] Constitution (Third Amendment) Act, 1965.
[375] Feldman, *From Crisis to Crisis*, above n 351, 32.
[376] Constitution (Fourth Amendment) Act, 1965; Constitution (Sixth Amendment) Act, 1966.
[377] Feldman, *From Crisis to Crisis*, above n 351, 33-4, 231.
[378] Constitution (Fifth Amendment) Act, 1965.

of the legislatures.[379] With these five amendments and the imposition of emergency the Constitution effectively reverted to Martial Law in substance, if not in form. The amendments to the 1962 Constitution 'led to popular belief that the Constitution … was simply a plastic instrument … to be shaped and moulded … as circumstances and convenience might dictate.'[380] The only strand of constitutionalism that survived during the emergency period was the relatively more robust Writ jurisdiction of the superior courts and the brand of procedural legality that they wielded.

The Expansion of Judicial Review under Military Rule

Article 98 of the 1962 Constitution, which provided the High Courts' Writ and fundamental rights jurisdictions, had adopted the Martial Law device of specifying particular writs without any reference to the possibility of other kinds of orders or directions.[381] The new constitution also excluded the military and confined Writs in service matters of the civil bureaucracy within enumerated grounds.[382] Article 98 also specified the various Writs without using the Latin phraseology, subjected the availability of all the writs to the absence of an adequate remedy, and writs in the nature of *certiorari* and *mandamus* (but not *habeas corpus* and *quo warranto*) to the additional requirement of *locus standi*. This initially encouraged the courts to continue showing fidelity to the more restrictive strands of the Supreme Court's jurisprudence. The availability of Writs thus continued to be subjected to the requirement of the absence of a suitable alternate administrative remedy.[383] In case of a procedural failure the substantive decision was to be referred back to the administration, lower court or

[379] Constitution (Seventh Amendment) Act, 1966.
[380] Feldman, *From Crisis to Crisis*, above n 351, 35.
[381] Article 98 described writs without the Latin titles. In addition to Article 98, the courts grounded their Writ Jurisdiction in Article 2 which guaranteed the protection of law before a citizen could be deprived of life, liberty, reputation or property.
[382] Articles 174-190, *1962 Constitution of Pakistan*. Five articles specified the terms and conditions of service and implicitly limited the High Courts' jurisdiction over bureaucratic grievances. For a discussion of this and similar cases, see Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 288-9.
[383] See CJ Manzur Qadir's judgment in *Mehboob Ali Malik v. Province of West Pakistan*, PLD 1963 (WP) Lahore 575. Also, see *Chittagong Engineering and Electric Supply Co. Ltd. v. Income Tax Officer, Companies Circle IV, Chittagong*, PLD 1965 Dacca 11. Earlier, in *Tariq Transport Company v. Sargodha-Bhera Bus Service*, PLD 1958 Supreme Court (Pak) 437, Munir, CJ had similarly stipulated that no writ was to be granted unless all administrative remedies had been exhausted.

tribunal.[384] Courts were not to strike down bureaucratic determinations on the basis of errors of fact.[385]

Nonetheless, the courts gradually built on the foundations of the Writ jurisdiction which had been preserved through the Martial Law and extended their reach over executive action in the post-Martial Law years of the regime. Certiorari was expanded to include purely administrative actions, in addition to judicial and quasi-judicial determinations as the High Court of West Pakistan had done under the 1956 Constitution.[386] The requirements of natural justice were deemed applicable even where a governing statute did not expressly provide for them.[387] The actions of the bureaucracy could be reviewed for reliance on extraneous factors.[388] Legislative powers could not be delegated to executive authorities unless concrete guidance and limits were provided.[389] Likewise, in service matters the requirement of a hearing before termination was made applicable in cases of contractual employees as well.[390] The courts also began to scrutinize promotions, transfers, and service structures of the bureaucracy much more readily than they had historically done.[391] Within a decade of the establishment of the Writ jurisdiction it could be stated that the extent of the courts' involvement in scrutinizing executive action and laying the parameters of executive power were greater in Pakistan than in any other developing country.[392]

In the post-1965 war years of the Ayub regime the superior courts found themselves once again in the midst of political controversy as they were called upon to impede the regime's reliance on coercive laws to undermine and control opposition political parties and recalcitrant groups. The Ayub administration had been an essentially authoritarian regime even prior to the emergency, despite the constitutional veneer and form under which it formally operated in the post-Martial Law years. This is evidenced by the historically unprecedented use of coercive colonial-era statutes even more so than in

[384] *Azmat Ali v. Chief Settlement and Rehabilitation Commissioner, Lahore*, PLD 1964 Supreme Court 260.
[385] *Ata Ullah Malik v. Custodian Evacuee Property, West Pakistan*, PLD 1964 Supreme Court 236.
[386] *Mehboob Ali Malik v. Province of West Pakistan*, PLD 1963 Lahore 575.
[387] *Messrs. Faridsons Ltd. Karachi v. Government of Pakistan*, PLD 1961 Supreme Court 537.
[388] *Ikram Bus Service v. Board of Revenue, West Pakistan*, PLD 1963 Supreme Court 564.
[389] *Ghulam Zamin v. A. B. Khondkar*, PLD 1965 Dacca 156.
[390] *Khwaja Ghulam Sarwar v. Pakistan*, PLD 1962 Supreme Court 142.
[391] See, eg, *Mohammad Ali Akhtar v. Pakistan*, PLD 1963 (WP) Karachi 375.
[392] Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 244-5.

the last decades of the Raj.[393] A range of new legal instruments such as the Maintenance of Public Order Ordinances of 1960 (MPO) were added to the coercive armoury of the postcolonial state. In the aftermath of the war, the regime's authoritarian tendencies were exacerbated by the perceived and real regional, linguistic and sectarian tensions as much as by the rising political opposition to the regime. Given the centralization of power in the Presidency, these two diverse strands of concerns inevitably coalesced and the regime in turn saw and dealt both with political opposition and demands for provincial or regional autonomy as national security threats. The press, as much as opposition politicians most of whom belonged to East Pakistan or the marginalized regions of West Pakistan, were systematically subjected to legalized harassment. In adjudicating challenges to the operation of these laws the courts largely confined themselves to *ultra vires* review and the demands of procedural legality. Nonetheless, the strict observance of principles of legality constrained the executive in some ways. The rules had to be laid down in advance and adhered to. In the least, the manipulations of law had to be blatant rather than secretive or subtle.

The courts' insistence upon legality and the positives of its positivist approach can also be witnessed in a number of cases challenging preventive detention. As the regime became more overtly coercive in its last few years,[394] the standard of review exercised by the courts also became more stringent. In *Maulvi Farid Ahmad*, for example, the West Pakistan High Court held that detention could be challenged through a writ of *habeas corpus* and, while the sufficiency of the grounds of detention was not justiciable, the court could determine whether the power was being exercised in accordance with the terms and purposes of the statute.[395] In *Abuzar*, the detained students had distributed

[393] A prime example of this was the expanded use of FCR. Provincial governors had the authority to extend FCR to areas beyond the tribal areas. In 1960 FCR was extended to parts of Balochistan and Mianwali. Central Government of Frontier Crimes (Amendment) Ordinance, 1962 enabled the Governor to extend it to whole of West Pakistan which power was used to cover entire Peshawar, Kohat, DG Khan and Quetta Divisions, plus districts in Punjab, Sindh and Balochistan. Ayub justified FCR as speedy and simple justice. West Pakistan Criminal Law (Amendment) Act, 1963 confined FCR to the tribal areas but provided a modified and mixed procedure for those parts of West Pakistan where FCR-type regulations might be considered desirable. Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 190-8. Similarly, §144 of CrPC was used at an unprecedented level and for political suppression under Ayub, often with indefinite extensions despite a stated term of 2 months. The use of Defence of Pakistan Rules and other security laws became 'unrestrained'. Feldman, *From Crisis to Crisis*, above n 351, 237-40.

[394] On police brutality, political murders and harassment through legal processes, see Feldman, *From Crisis to Crisis*, above n 351, 61, 205; Kochanek, above n 181, 72.

[395] *Maulvi Farid Ahmad v. Government of West Pakistan*, PLD 1965 (WP) Lahore 135.

posters appealing to Basic Democracy's electoral college members not to vote in favor of a government candidate.[396] The court held that the purpose being electioneering, there was no visible threat to public order and the detention was illegal in such circumstances. By 1968 when the protest movement against Ayub's rule was reaching a crescendo and the tide was visibly turning, the courts pushed the envelope a little further. In *Hakim Muhammad Anwar Babri*, the District Magistrate had issued a preventive detention order on the basis of a speech in which the orator had allegedly 'brought into contempt the lofty personality of the Head of State.' The court invalidated the detention on the basis that preventive detention must relate to future rather than past acts.[397] The Supreme Court finally held, towards the end of the Ayub era, that the grounds for preventive detention relied upon by the executive were not subjective but were rather conditions that had to be objectively verified to the satisfaction not only of the executive official who had been granted the discretion but also that of the court.[398]

Despite the limited success that the courts achieved in curbing the illegality of the executive, the essentially positivistic approach of the courts had its constraints. Whenever the state had the will and the wherewithal to create a repressive law it faced little resistance from the courts that continued to be bounded by the text of the law. A positivist jurisprudence of rights did not provide for much constraint on the executive's actions when untrammeled powers were vested in it and the goal posts may be easily shifted. For example, in *Rowshan Bijaya Shaukat Ali Khan* the Supreme Court faced a challenge to the *vires* of a preventive detention order issued under a provision of the East Pakistan MPO Ordinance which empowered the executive to effect preventive detention if there were reasonable suspicions of the person 'having earlier committed or having been seen to be committing, or to be about to commit' a prejudicial act.[399] The court had little choice but to validate 'preliminary precautionary preventive detention' (*per* Cornelius J). In another notable case, that of *Malik Ghulam Jilani*, a similar decision was reached despite the Supreme Court affirming the need to establish for itself that reasonable grounds existed for ordering preventive detention as per the

[396] *Abuzar v. The Province of West Pakistan*, PLD 1966 (WP) Karachi 260
[397] *Hakim Muhammad Anwar Babri v. District Magistrate, Hazara*, PLD 1969 Peshawar 55. Also see *Qazi Masood Gul v. Government of West Pakistan*, PLD 1969 Peshawar 50.
[398] *Government of West Pakistan v. Haider Bux Jatoi*, PLD 1969 Supreme Court 210.
[399] *Government of East Pakistan v. Rowshan Bijaya Shaukat Ali Khan*, PLD 1966 Supreme Court 286.

terms of the statute.[400] What were the court to do when the terms of the statute, in this case §3 of the Defence of Pakistan Ordinance, were so broad.[401] In the final analysis, the courts' continuing acceptance of the over-arching constitutional framework and their positivism ultimately undermined their capacity to check the arbitrary exercise of powers by the regime through the Writ jurisdiction.[402]

The coerciveness of the Ayub regime, despite the veil of constitutionalism and the efforts of the courts to impose the constraints of formal legality, only exacerbated the regional and ethno-linguistic tensions that its ideation of nationalism and national security were patently meant to address. As East Pakistan's politics became increasingly radicalized and demands for greater autonomy became vociferous, the regime became disproportionately coercive. When Mujibur Rahman, leader of the *Awami* League, championed a six-point formula for the resolution of East Pakistan's grievances – which included the demands for a confederal constitution and fiscal autonomy, including separate currencies, control over taxation and foreign exchange by both wings – this was seen as a step towards secession. Mujibur Rahman was arrested in April 1966. When a court granted him bail, he was re-arrested under the Defence of Pakistan Rules and the East Pakistan Safety Ordinance pursuant to a non-bailable warrant for a total duration of two years. In a quintessential example of the regime's use of coercive laws and legal processes, a Special Tribunal was set up under a new Ordinance to try him for sedition in what gained notoriety as the *Agartala Conspiracy Case*.[403] Just as in East Pakistan, demands for provincial autonomy and the break-up of the One Unit became the rallying point of oppositional politics in the

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[400] *Malik Ghulam Jilani v. Government of West Pakistan*, PLD 1967 Supreme Court 373.

[401] The use of broad language designed to defeat a positivist court's formal notional of legality appears to be common in statutes of the era. One of the most remarkable specimens of statutory drafting of the kind is the Punjab Control of Goondas Ordinance, 1959 which provided for the 'control of disorderly persons commonly known as goondas.' §13 provides 26 (A to Z) definitions of a goonda whose movements may be restricted and controlled.

[402] As Malik Ghulam Jilani noted:

> any law which a citizen can invoke in his defence or for his protection is quickly changed … The so-called constitution finds itself amended and multilated [*sic*] the moment any court of law appears likely to grant relief to a citizen under its provisions, and the courts accept amendments with obvious satisfaction.

See Newberg, *Judging the State*, above n 5, 106, citing Lawrence Ziring, 'Pakistan: The Vision and the Reality' (1977) 4:6 *Asian Affairs* 385.

[403] The tribunal was established under the Criminal Law Amendment (Special Tribunals) Ordinance, 1968 [Ordinance VI of 1968].

marginalized regions of West Pakistan. Again, the regime responded with repression of the opposition through the detention of critics and institution of false cases.

THE UNCONSTITUTIONAL END OF THE 'GREAT DECADE'

There were distinct economic undertones to the demands of provincial autonomy in both East and West Pakistan, as it was fuelled by resentment at the domination of Punjab and the settled parts of the NWFP in recruitment in the military and bureaucratic services, and in the distribution of economic patronage through industrial permits, trade licences and barrage lands, *etc*. The Ayub regime had received much acclaim for its economic development initiatives but these had in fact generated grave distortions in policymaking and multiple dimensions of inequity. Compared to the first decade of Pakistan's independent existence there was indeed considerable growth in some segments of the economy, especially in the large-scale industrial sector.[404] However, much of the Ayub era's celebrated economic reforms focused on West Pakistan.[405] The acute centralization of power in the Presidency and in an apex bureaucracy directly responsible to him meant that Bengali influence in these power centers was minimal.[406] Furthermore, it was mostly the industrialists, large landowners and the upper military-bureaucratic cadres based in West Pakistan that prospered.[407] Masses of peasants, industrial labour and the lower strata of government employees languished just above or below the poverty line.[408]

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[404] See Kochanek, above n 181, 90; Burki, *Pakistan Under Bhutto,* above n 193, 43.
[405] Feldman, *From Crisis to Crisis*, above n 351, 8. A number of important state corporations set up to push the regime's agenda of managing economic growth were all based in West Pakistan. Ibid, 180-1.
[406] Bengalis in particular continued to be grossly under-represented in the bureaucracy, especially in policy-making positions. Even by 1964 only 30 per cent of CSP were Bengali. Braibanti, *Research on the Bureaucracy of Pakistan*, above n 74, 50; Feldman, *From Crisis to Crisis*, above n 351, 181.
[407] Mahbub ul Haq, the Ayub regime's Chief Economist framed the 22-family issue in a speech in April 1968. Burki, *Pakistan Under Bhutto,* above n 193, 64. The regime realized that concentration of wealth a problem and assurances about this were given. As early as 1959 a study had revealed that 24 domestic groups and foreign corporations controlled nearly 50 per cent of the industrial sector. By 1968 it could be alleged that 22 families/groups controlled 66 per cent of industrial, 70 per cent of insurance and 80 per cent of banking sectors. While the exact figures could be disputed, and concentration probably was not as high as alleged, there was no doubt as to the concentration of wealth and resources in a small sector. Kochanek, above n 181, 93-6.
[408] Hamza Alavi, 'Elite Farmer Strategy and Regional Disparities in Agricultural Development' in Hassan Gardezi and Jamil Rashid (eds), *Pakistan: The Roots of Dictatorship, The Political Economy of a Praetorian State* (Zed Press, 1983) 291-310.

Much of the industrial growth had been subsidized through foreign loans, and the growing debt-burden and rising indirect taxation placed undue burdens on the general population.[409] Inflation, rural and urban unemployment, and neglect of basic education and health services, rendered the regime's development achievement 'really quite trifling [and] the spectre of poverty [remained] as haunting and as ominous as ever.'[410] As the 'regime became more oppressive and more corrupt without providing any material benefits to the deprived masses,' discontent seethed.[411] Ironically, within days of the official celebration of the 'Great Decade' of development in October 1968 protests broke out. The movement which began amongst the rural and peri-urban middle classes soon attracted industrial labour, students and opposition political parties.[412] The regime responded with characteristic repression: opposition politicians were detained and protests were brutally suppressed.[413] However, as the protest movement gathered strength cracks began to appear within the bureaucracy. Most importantly, the extent and violence of the protests necessitated the use of military to quell unrest which caused discontent in the ranks.[414] This was a constituency that even the President could not ignore.

As belated attempts to pacify the opposition through promises to lift the emergency and suspension of security laws failed, General-President Ayub Khan relinquished power on 25 March, 1969. Instead of affecting a transition under the 1962 Constitution, Ayub Khan handed over the reins to General Yahya Khan, the chief of the military. Pakistan's brief constitutional interregnum thus ended in yet another Martial Law. Nonetheless, this limited experience of governance under the 1962 Constitution may be seen as having strengthened the aspirations for constitutionalism in postcolonial Pakistan. Despite its noted defects, the capacity for the opposition to rely on the Constitution and the courts to constrain an otherwise all-powerful presidency and the success of the protest movement invigorated the promise of democratic politics and rule of law.

[409] Jalal, *Democracy and Authoritarianism*, above n 182, 151-2; Alavi, above n 183, 86.
[410] Feldman, *From Crisis to Crisis*, above n 351, 51.
[411] Ibid, 189.
[412] Burki, *Pakistan Under Bhutto,* above n 193, 48.
[413] Feldman, *From Crisis to Crisis*, above n 351, 259-60, 266-70.
[414] Ibid, 270-1.

More importantly, structural shifts had begun taking place in the institutional balance of powers within the state. Although the bureaucracy remained a prominent player in the postcolonial state's structure, its powers and insularity had been denuded by the military regime. The sustained erosion in the power and the prestige of bureaucracy was accompanied by a corresponding rise in that of the judiciary. While the superior judiciary appeared to comply with the demands of the executive in constitutional cases, it appeared to subtly undermine the executive's control over the bureaucracy. The grant of powers of the judicial review of executive action through the Writ jurisdiction empowered the superior judiciary to interstitially curb, at least to some extent, the illegality of the executive. A most remarkable aspect of the development of the Writ jurisdiction arose from cases in which bureaucrats were the petitioners: cases where civil servants challenged the terms of their service, promotions, transfers, dismissals, disciplinary proceedings and other service matters. The High Courts' decisions in these cases gave bureaucrats some room to maneuver, delay or out rightly refuse unpalatable directives of the higher executive. Furthermore, the decisions of the superior courts in services cases began to embed notions of the superiority and respect of the judiciary not only in the eyes of the general public but also the bureaucrats who increasingly brought their grievances to these courts. These shifts in the state structure would in time enable the courts to offer greater resistance to authoritarianism, and highlight the demands for democratic constitutionalism at the behest of increasingly politicized and mobilized segments of society.

ELECTIVE DICTATORSHIP

SOCIALIST POPULISM AND THE MYTH OF A CONSENSUS CONSTITUTION

Pakistan's early constitutional woes have been recorded in detail.

> No other new nation attaining post-colonial independence after 1947 suffered the institutional discontinuities or the shredding of the social fabric which Pakistan experienced. It took longer than any other new nation to approve a constitution in 1956 – fully nine years after establishment.[415]

That constitution lasted a mere two years and was abrogated even before the first national elections could be held on the basis of universal franchise. The Ayub regime, and periods of Martial Law that bookended it, entrenched military-bureaucratic authoritarianism.[416] Judicial capitulation in the face of the military takeover and the continued weakness of political parties, especially the founding Muslim League, meant that the aspiration of achieving a democratic constitutional system of government remained a distant mirage even two decades after the end of colonial rule.

Nonetheless, Pakistan's brief experience under the 1962 Constitution had offered a fleeting glimpse of the promise of constitutionalism and rule of law. The populism of the anti-Ayub movement and its eventual success in bringing about the downfall of a powerful military dictator indicated that the country might finally be able to hold nationwide elections and begin a democratic process of constitution-making. The military regime of General Yahya Khan appeared willing to hold relatively free and fair elections and allow a transfer of power to an elected government. An inclusive constitution-making process – which negotiated the demands for confederalism that had gained a foothold in East Pakistan while the West Pakistan political, military and bureaucratic elites insisted on a strong central government based in the new capital of Islamabad – was vital for the survival of the country as a unified entity. The emergence

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[415] *See* Ralph Braibanti, 'Cornelius of Pakistan: Catholic Chief Justice of a Muslim State' (1999) 10:2 *Islam and Christian-Muslim Relations* 117, 142.

[416] See Newberg, *Judging the State*, above n 5, 71-72; Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 114-122.

of two popular political parties with progressive agendas in both East and West Pakistan, but neither of which had much support in the other wing of the country, created both opportunities as well as challenges for the impending constitutional negotiations. Ultimately, it is the failure of the postcolonial elites to reach a constitutional settlement at that crucial historical juncture which led to a bloody civil war in the east and the dismemberment of Pakistan.

A truncated Pakistan – comprising the West Pakistan territories – that emerged out of the ashes of the 1971 civil war finally had a popularly elected government and legislature dominated by Zulfiqar Ali Bhutto. A strong and populist government under Bhutto steered the country through this existential crisis and even succeeded in promulgating the country's first politically negotiated constitution in 1973. Given the previous failures in constitution-making and its tragic consequences, the 1973 Constitution acquired the mythical status of being the manifestation of a historic democratic consensus. This perception has been heightened in the political imagination by the constitutional mayhem perpetrated by the later military regimes of General Zia ul Haq (1977-1988) and General Parvez Musharraf (1999-2008), which while nominally recognizing the continuity of the 1973 Constitution sought to alter its basic framework from a parliamentary to quasi-presidential scheme. A closer scrutiny of the founding of the 1973 Constitution shows, however, that far from being the glorious culmination of a belated national consensus it was a product of messy political bargaining which resulted in a constitutional design and text riven with glaring contradictions. It is the failures of the original 1973 design, as much as the subsequent machinations that contributed to the perpetuation of military and civilian authoritarianism in the subsequent decades.

Having achieved a constitutional cover an insecure Bhutto government continued the state of emergency that had been imposed during the civil war throughout its tenure, with the result that the fundamental rights provisions of the new constitution remained in suspended animation, and continued the abuse of state security and public order laws even more blatantly to suppress the opposition than had been the case in the last years of the Ayub regime. Within the first few years of the 1973 Constitution's promulgation, the Bhutto government brought several amendments designed to curtail the Writ jurisdiction and undermine the independence of the superior judiciary. The Supreme

Court had been instrumental in urging the Bhutto government to move towards, and defining, some of the contours of a democratic constitution in the early years. However, despite the promulgation of a democratic constitution, Pakistan's superior courts found themselves once again in the difficult role of having to mediate the authoritarianism of the postcolonial state with a minimalist constitutional apparatus. Writ jurisdiction was again the only mode available to the opposition, which mostly belonged to the smaller provinces of NWFP and Balochistan, to challenge arbitrary detentions and politically-motivated prosecutions before military courts and tribunals. This was as much a matter of survival for the courts as for the political opposition, who found themselves in a prolonged resistance to preserve the basic structures of judicial review erected during the Ayub years, and which the judiciary had salvaged through yet another Martial Law.

CIVIL WAR AND THE TRANSITION TO 'CIVIL' AUTHORITARIANISM

Failure in Constitution-making and Secession

There were several notable differences between the Yahya and Ayub Martial Law regimes. First, this was a purer form of military rule: all key policymaking positions were held or dominated by military men, and the bureaucracy was relegated to secondary administrative functions.[417] Second, the regime appeared willing to relinquish political power after stabilizing the country as extended military rule had become untenable after a decade of Ayub Khan. It also seemed ready to hold relatively free elections, the first on the basis of universal franchise in the country's history. This was despite the regime's deeply entrenched suspicion of Mujibur Rahman's Awami League which would have sought normalization of ties with India, significant reduction in military spending, greater Bengali representation in the bureaucracy and military, and taxation of agricultural income if it gained power.[418] In contrast, the military *junta* was relatively more comfortable, both politically and personally, with Zulfiqar Bhutto and his new party, the Pakistan People's Party (PPP).[419] Bhutto had been part of Ayub's cabinets from the beginning of the Martial Law regime until 1966 when he resigned as Foreign Minister over a public disagreement on the post-war settlement with India.

[417] Mazari, above n 194, 156.
[418] Alavi, above n 183, 88.
[419] Ziring, above n 31, 329.

Thereafter, he had emerged as the most prominent politician in West Pakistan in the last years of Ayub.

The Yahya regime was prepared to risk relatively free elections because it anticipated a hung parliament and a fragmented political scene, especially in East Pakistan, leaving the military with a significant role as the king-maker and the wielder of real power.[420] Judging by the regime's post-election interventions, it would not have allowed free elections if the results had been accurately predicted.[421] The Legal Framework Order provided for elections which were initially scheduled for October 1970.[422] The elected National Assembly would have 120 days within which to frame a new constitution. The regime disbanded the One Unit scheme restoring the four provinces in the western wing.[423] A series of natural disasters in East Pakistan led to a delay in the elections. The regime's slow relief response to the disaster further fuelled a feeling of neglect and resentment against a West Pakistan dominated state.[424] In elections held in December 1970 the Awami League won a landslide victory.[425] Bhutto's PPP also achieved an overwhelming electoral success in West Pakistan despite polling less than half the votes cast. Nonetheless, its 81 seats in the National Assembly would leave it far behind the Awami League and out of power.

The Awami League could not only form a government without the support of any other party but could also frame a new constitution, which under the terms of the LFO required a simple majority. Further, the Awami League could also count on the support of minor parties from West Pakistan's NWFP and Balochistan provinces where the PPP had gained little or no electoral support, and which parties supported the Awami League's demand of greater devolution of powers to the provinces. Despite the clear electoral success of the Awami League, Bhutto nonetheless demanded an equal role in negotiations over the future constitution as the sole representative of West Pakistan. General Yahya called the National Assembly's inaugural session in March 1971 to be

[420] Burki, *Pakistan Under Bhutto,* above n 193, 55; Alavi, above n 183, 88; Ziring, above n 31, 327, 329.
[421] Burki, *Pakistan Under Bhutto,* above n 193, 58.
[422] Legal Framework Order, 1970 [President's Order No. 2 of 1970].
[423] Province of West Pakistan (Dissolution) Order, 1970 [President's Order No. 1 of 1970].
[424] Ziring, above n 31, 330-1.
[425] Awami League won 160 out of the 162 openly contested seats and polled more than 75 per cent of the votes cast. For the details of the results of the 1970 elections see Burki, *Pakistan Under Bhutto,* above n 193, 56-7; Mazari, above n 194, 173.

held in Dhaka but constitutional negotiations between the PPP and Awami League remained deadlocked. Yahya postponed the National Assembly session indefinitely under pressure from his military *junta* a mere two days before the scheduled date and even as the members had arrived in Dhaka. This was to be the final betrayal of East Pakistani expectations, the moment of irreparable break when demands for provincial autonomy transformed into a call for secession.[426] Widespread protests in East Pakistan paralysed the civil administration and the Awami League effectively took over control of the province.

In response, the Yahya regime launched a pre-planned military operation on 25 March 1971 with an attack on Dhaka University and the massacre of Bengali intellectuals, professors and professionals ensued.[427] This marked the dark beginning of a civil war, with an attritional guerrilla campaign by *Mukti Bahini* (the militia wing of the Awami League) in the hinterland's tough terrain in which the West Pakistan dominated military effectively became an occupying force. As the guerrilla campaign reached a military stalemate in the monsoons and the *junta* refused to seek a political settlement, India militarily intervened citing the refugee influx from East Pakistan as justification. On 5 December Indian troops crossed the border in a concerted campaign in East as well as West Pakistan. On 16 December 1971 the Pakistan Army humiliatingly surrendered 93,000 soldiers and the control of East Pakistan to India. The surrender paved the way for the secession of East Pakistan and the emergence of the independent state of Bangladesh. A near-rebellion in the middle and junior officer ranks of the army in West Pakistan, who held the high command as responsible not only for the military debacle in the 1971 war but also the political situation which led to the dismemberment of Pakistan, compelled General Yahya to step down and hand over power to Bhutto. On 20^{t} December Bhutto was sworn in as President and the first civilian Chief Martial Law Administrator (CMLA) of what was left of Pakistan.

[426] Ziring, above n 31, 346-7.
[427] Ibid, 349-52.

A Civilian Martial Law

Bhutto not only inherited a military, diplomatic and political catastrophe – in some measure of his own making – but also an acute economic crisis.[428] The PPP had been elected on the basis of a pro-poor manifesto and a socialist populism that had spread across Pakistan. As national growth plummeted, the PPP government embarked on a program of structural reforms in accordance with its socialist manifesto. Bhutto unleashed the first of several waves of nationalization of industry in 1972 and abolished the managing agency system that had enabled business families to become large conglomerates. Rather ingeniously, it was management that was taken over rather than assets and no compensation was paid.[429] Foreign investment was, however, exempted from nationalization in this phase in the first of many difficult compromises with global capital. Labour reforms of 1972 also extended rights to workers in small scale industry even if at the cost of hurting an influential constituency in the Punjab.[430] These measures were of immense symbolic significance as they indicated the new government's resolve to act on its socialist program. In the longer term these measures were also necessary for the development of more efficient and egalitarian economic arrangements.

However, the timing and manner of these reforms was problematic. The success of the nationalization program was over-estimated as several of the nationalized units were already suffering from losses and many had been stripped of assets in anticipation.[431] The resulting loss in investor confidence and flight of capital abroad undermined the prospects of economic stabilization.[432] It appeared that the government suffered from some insecurity and was determined to push through as much of its agenda as possible in the Martial Law period when it had untrammelled power. Careful planning was thus foregone in the design and implementation of these challenging reforms.[433] The lasting political legacy of these and further rounds of nationalization during Bhutto's tenure

[428] See Aijaz Ahmad, 'Democracy and Dictatorship' in Hassan Gardezi and Jamil Rashid (eds), *Pakistan: The Roots of Dictatorship, The Political Economy of a Praetorian State* (Zed Press, 1983) 109-15.
[429] Rafi Raza, *Zulfiqar Ali Bhutto and Pakistan, 1967-1977* (Oxford University Press, 1997) 147.
[430] Burki, *Pakistan Under Bhutto,* above n 193, 121.
[431] Raza, above n 429, 147. These measures somewhat reduced the concentration of ownership in the large-scale industrial sector but did not come close to eliminating it. Kochanek, above n 181, 98.
[432] Burki, *Pakistan Under Bhutto,* above n 193, 118.
[433] Raza, above n 429, 148-9; Burki, *Pakistan Under Bhutto,* above n 193, 165.

was that Pakistan's mercantile and industrial classes consolidated in opposition to the PPP government and played an important role both politically and financially in the protest movement that ultimately spelled its doom.[434]

Bhutto's much vaunted land reforms of 1972 followed a very different trajectory from the nationalization program.[435] Despite reaping considerable political benefits for the populist government, they affected only nominal changes in ownership patterns and rural landlord-tenant relations.[436] Extending the pattern of Ayub's land reforms, the PPP government reduced ownership ceilings, provided greater protection to tenants, and transferred the liability for revenue payments and water rates to the landlord.[437] While some land in excess of the ceilings was taken over without compensation and visibly redistributed amongst landless tenants, large landlords mostly evaded land reforms by nominally transferring excess land in the name of multiple family members. Likewise, while the tenants got greater *de jure* rights and security from eviction, the landlords retained their influence over the revenue bureaucracy and police and hence *de facto* control over the land. The inability of land reforms to fundamentally alter agrarian relations is evidenced by and explains why, contrary to popular myths, PPP's power throughout its tenure in the 1970s was rooted in alliances with large landowners.[438] While the regime's policies largely favored landowning classes, the economic condition of the poor also improved under Bhutto, even if not to the extent of the public perception that the government's propaganda successfully cultivated.[439]

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[434] Kochanek, above n 181, 81-2; Burki, *Pakistan Under Bhutto,* above n 193, 160-11. Further waves of nationalization of in 1973 and 1974 irreparably fractured the government's relations with medium and large industry. Kochanek, above n 181, 215; Burki, *Pakistan Under Bhutto,* above n 193, 116-7. In 1974, Bhutto made a break with the founding socialist members of the PPP and leading left-leaning ministers in the cabinet lost their portfolios to centre-right leaning ministers. By 1975-76 the PPP began to reverse its policies perhaps with an eye toward the forthcoming elections. Alavi, above n 183, 51. Nonetheless, despite repeated assurances of no further nationalization and an agreement on a compensation formula the government undertook the nationalization of another 2196 rice, wheat, cotton ginning, sugar, tobacco, cinema, and textiles units in 1976, alienating agricultural business which had hitherto been an important PPP constituency. Kochanek, above n 181, 216.

[435] Martial Law Regulation No. 115, PLD 1972 Central Statutes 388.

[436] Burki, *Pakistan Under Bhutto,* above n 193, 138-41.

[437] Ibid, 139.

[438] Alavi, above n 183, 46. The party's organizational structure at the district level continued to be centered on large landowners *cum* tradition political actors and spiritual authority figures. Burki, *Pakistan Under Bhutto,* above n 193, 160-61. Dependence on landlord interest showed in the selection of candidates for the 1977 elections. Id at 192.

[439] Burki, *Pakistan Under Bhutto,* above n 193, 190.

The middle classes were more often the losers, and this manifested in the middle class resentment against Bhutto and the PPP government.[440]

The predominance of landed classes was not the only respect in which the basic structures of postcolonial politics remained intact despite the populist politics of the 1970s. As Jalal notes, 'the post-1971 Pakistani state structure was only marginally different from the one preceding it. The institutional imbalance within the state remained substantially unchanged despite the assumption of presidential office by an elected leader.'[441] While Bhutto was nervous about the machinations of the military and the bureaucracy, he did not strive for parliamentary and judicial checks but instead sought to strengthen his own power as a civilian dictator.[442] The virtual collapse of the army's structure and morale in the 1971 war gave Bhutto a position of unprecedented power.[443] The military command which still envisioned a political role for itself despite the East Pakistan debacle was quickly subdued through changes in the command structure, dismissal of army and air chiefs and purges of both opponents and former patrons in the military command.[444] Substantial military expenditure, the recognition of Bangladesh, and the successful negotiation of the Simla Agreement with India, resulting amongst other things in the return of the prisoners of war, yielded Bhutto considerable leverage with and support within the military.[445]

The other potential source of resistance to the government's agenda, the bureaucracy, had its powers whittled down permanently in the Bhutto years. The bureaucracy also underwent purges designed to inculcate loyalty. In March 1972, soon after taking over as CMLA, Bhutto compulsorily retired 1,303 bureaucrats including a number of senior officials.[446] Bhutto also appointed several retired bureaucrats and police officials of the Ayub-era, with whom he had developed personal ties, to key positions.[447]

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[440] Ibid, 184-9.
[441] Jalal, *Democracy and Authoritarianism*, above n 182, 77.
[442] Ibid, 80.
[443] Ahmad, above n 428, 100-1.
[444] Bhutto abolished the positions of commanders-in-chief of the services and- restyled them Chiefs of Staff answering to the President. He also conducted two purges of military leadership, dismissing the army and air chiefs, both his former supporters. Nonetheless, Bhutto continued to distrust the army and was perpetually fearful of a military coup. Raza, above n 429, 159-61; Burki, *Pakistan Under Bhutto,* above n 193, 70; Ahmad, above n 428, 101.
[445] On military expenditure, see Burki, *Pakistan Under Bhutto,* above n 193, 105.
[446] Mazari, above n 194, 232.
[447] Raza, above n 429, 145.

Administrative reforms in 1973 made several far-reaching changes in the service structure of the bureaucracy that were long overdue.[448] The CSP was finally abolished and all cadres of the public services were merged into the All Pak Unified Grades, allowing for movement of personnel between the different service groups.[449] In another significant measure, lateral entry into the services was opened up for the first time. The 1973 Constitution withdrew protections and security of tenure that had historically been granted the civil service. Officers of any rank could be retired at the government's discretion after 25 years of service. The increase in recruitment to the public services, lateral entry, and the ease of dismissal or transfers to undesired postings made the bureaucracy susceptible to political influence at all levels.[450] However, Bhutto's administrative reforms were also contradictory in that while they undermined the power of specific bureaucratic offices they increased the corporate and collective power of bureaucracy as the public economic sector expanded dramatically.[451] Nationalization and the resulting bureaucratic management of state run corporations increased the space for political patronage of the bureaucracy.[452]

Having undercut potential threats from the military and the bureaucracy, Bhutto focused on the political opposition and dissension within his own party. The political opposition was fragmented and had limited presence within the legislature. However, there were a number of ideological and regional factions in the PPP which could possibly lead to a break-up of the party and the loss of Bhutto's control over the National Assembly.[453] Bhutto created a new paramilitary organization, the Federal Security Force (FSF), which was designed to curb unrest and minimize the need to call in the army in aid of civil powers.[454] The FSF was used to not only harass the opposition but also to quell dissent within Bhutto's own party. Political violence, murders, and

[448] The reforms were affected through the Civil Servants Ordinance, 1973 [Ordinance XIV of 1973], Service Tribunals Ordinance, 1973 [Ordinance XV of 1973], Federal Public Service Commission Act, 1973, and Cabinet Secretariat Memoranda of 14 September and 20 November, 1973.
[449] Alavi, above n 183, 75-6. When Bhutto came to power 225 out of 300 top posts were occupied by CSP. Burki, *Pakistan Under Bhutto,* above n 193, 99.
[450] While presenting a complex analysis of the historical context of the changes in administrative structure brought about by the Bhutto government, Kennedy identifies one particular motivation: namely, 'the desire to gain some measure of political control over the members of the bureaucracy.' See Charles H Kennedy, *Bureaucracy in Pakistan* (Oxford University Press, 1987) 81. Also, see S M A Ashraf, *Bureaucracy and Corruption* (Hamdard Foundation Pakistan, 1998) 28-34.
[451] Jalal, *Democracy and Authoritarianism*, above n 182, 82.
[452] Alavi, above n 183, 53-4; Ahmad, above n 428, 102.
[453] Burki, *Pakistan Under Bhutto,* above n 193, 79.
[454] Jalal, *Democracy and Authoritarianism*, above n 182, 82.

detentions became a regular feature of the PPP's tenure from its very inception.[455] By 1972, when the Martial Law period of Bhutto's rule neared an end and the promise of a political constitution finally dawned in a re-configured and dismembered Pakistan, Bhutto had reinforced the structures of postcolonial authoritarianism in a manner that would endure, despite the parliamentary and democratic form of the future constitution.

THE FRAMING OF THE 1973 CONSTITUTION AND THE MYTHOLOGY OF CONSENSUS

Constitutionalizing Elective Dictatorship

Bhutto preferred a presidential constitution and could have framed one.[456] The PPP had a substantial majority in the National Assembly, the powers of a Martial Law, and a democratic mandate to promulgate a constitution on its own. The left wing of the PPP that held greater influence in the Martial Law years also pushed for a centralization of powers that was needed to effectively implement its progressive socio-economic agenda. Such a presidential constitution would have better reflected the realities of political power in the postcolonial state and, like Ayub's 1962 Constitution, would have at least had the virtue of transparency. However, Bhutto desired the legitimacy of a consensus constitution and correctly anticipated that the opposition would insist on a parliamentary framework. Initial negotiations with the opposition were promising as a compromise on an interim constitution was reached in March 1972. In a display of accommodation, the PPP acknowledged the right of opposition parties, the National Awami Party (NAP) and the *Jamiat Ulema-i-Islam* (JUI), to form provincial governments in Balochistan and the NWFP. The PPP also agreed to consult with the provincial governments on the appointment of governors in these provinces and promised to hold local government elections to replace the disbanded Basic Democracy scheme.

[455] Ziring, above n 31, 381, 398.
[456] Mazari, above n 194, 280. Bhutto's personal vision had arguably been expressed in a memorandum in 1962 where he had proposed a one-party system with a subservient legislature and judiciary. Burki, *Pakistan Under Bhutto,* above n 193, 80.

The Interim Constitution was passed by the National Assembly in April 1972 and paved the way for the lifting of the Martial Law. In a surreal acknowledgement of the continuing structures of authoritarianism, the Interim Constitution was based on the Government of India Act, 1935 model with presidential form in the centre and a parliamentary form in the provinces. Bhutto had successfully used the threat of the indefinite continuation of Martial Law to cajole the opposition into accepting an authoritarian Interim Constitution. The National Assembly would act as the constituent assembly and set up a committee to draft the permanent constitution. Despite the relatively smooth beginnings of constitutional negotiations, disagreement and distrust began to appear. Negotiations over the permanent constitution broke down as Bhutto insisted on a more authoritarian framework that would ensure the continued centralization of power. Not only did the opposition insist on parliamentary form and provincial autonomy, even Bhutto's own law minister broke ranks and resigned. Bhutto had genuine if not necessarily legitimate concerns with regard to provincial autonomy and the weakening of the central government. Firstly, there was a concern that Punjab would undermine central authority given the relative size of its population and economy.[457] Secondly, Bhutto feared that in the absence of a strong central government the military would reassert its political power.

An accord on the future constitution was reached between the PPP and the opposition parties in October 1972 when Bhutto relented and conceded in principle on a parliamentary form, a bi-cameral legislature, provincial autonomy and Islamic provisions in return for some personal safeguards to ensure against a rebellion within his own party.[458] As the constitution committee began giving concrete shape to the accord a number of disagreements on the specifics persisted. The passage of a consensus constitution became an even more distant possibility when in February 1973 Bhutto replaced the opposition-nominated Governors of Balochistan and NWFP, dismissed the NAP-JUI government in Balochistan, imprisoned the opposition's provincial leaders and began a military operation that at its peak would involve the deployment of more than a hundred thousand troops against the sparse population of that province.[459] The NAP-JUI government of NWFP resigned in solidarity, the united

[457] Burki, *Pakistan Under Bhutto,* above n 193, 93-4.
[458] Raza, above n 429, 176.
[459] Ahmad, above n 428, 102.

opposition proposed a host of amendments to the Constitution Bill in the National Assembly and threatened to boycott proceedings until these were conceded. And yet, rather surprisingly, the opposition soon reached a settlement on the constitution giving up most of its demands.

On 12 April 1973 the Constitution passed the National Assembly with the support of 125 out of its 133 members. The absence of dissent in parliament would lead to the mythology of a consensus constitution. The reality was one of an opposition showing remarkable pragmatism. The opposition saw the 1973 Constitution, despite its defects, as the preferable means of somewhat reducing Bhutto's power with the hope that in the long run defections within his own party would undermine his authoritarian rule.[460] Bhutto, the master tactician that he was, had again used threat of the indefinite operation of the Interim Constitution in the Government of India Act mould to persuade the opposition into accepting a permanent Constitution that was parliamentary in form only, and vague in its assurances of provincial autonomy and rights guarantees. However, despite its defects, for the first time Pakistan had a constitution framed by a directly-elected assembly which provided for parliamentary governance through a bi-cameral legislature with a popularly elected lower house and an upper house with equal representation of the federating units. The Prime Minister was the head of the executive in the new constitutional scheme and Bhutto occupied that office after relinquishing the presidency. The President was a mere figurehead bound to act solely on the advice of the Prime Minister.[461]

During the constitutional negotiations Bhutto had demanded a provision ensuring that the Prime Minister may be removed only by a two-third majority in a vote of no-confidence. While the opposition refused that demand, as a compromise it had agreed that for a period of 10 years or two parliamentary terms the vote of a member cast against the majority of his/her party would be disregarded.[462] This shielded Bhutto from a rebellion within his own party and made him practically irremovable until the next elections.[463] Provincial autonomy provisions were included in the Constitution but were

[460] Burki, *Pakistan Under Bhutto,* above n 193, 96.
[461] Article 48, *1973 Constitution of Pakistan*.
[462] Article 96 cl. 5 Proviso, *1973 Constitution of Pakistan*.
[463] Raza, above n 429, 184; Burki, *Pakistan Under Bhutto,* above n 193, 95.

weak and were honoured more in their breach than in their observance.[464] The opposition had grudgingly accepted a wide concurrent list of subject matters on which both the federal and provincial legislatures could legislate, with the former having precedence in case of a clash.[465] A Council of Common Interests (CCI) was envisaged to decide upon matters of inter-provincial concern, especially the historically contentious allocation of water resources between the provinces.[466] However, only one meeting of the CCI was held throughout the PPP's tenure indicating that Bhutto had nominally agreed to its creation in order to reach an agreement on the Constitution without any intent to implement the relevant provisions.[467] The central government and provincial governors also had vast emergency powers.[468]

The Constitution entrenched justiciable fundamental rights and any laws inconsistent with or in derogation of these rights were to be void.[469] While the 1973 Constitution expanded the rights guarantees provided in the previous constitutions, these remained subject to broad restrictions. There was no provision guaranteeing due process of law or natural justice. The assurance that no one 'shall be deprived of life or liberty save in accordance with law' hinted at the minimalist condition that legal rather than extra-legal means were to be adopted for such deprivation.[470] Understandably the PPP government sought to protect its land reforms and nationalization programs, and property rights had to be diluted to that extent.[471] However, the text of other rights provisions also explicitly permitted curtailment. Most notable was the allowance for preventive detention of 'persons acting in a manner prejudicial to the integrity, security or defence of Pakistan ... or public order' for an initial period of one month.[472] Reasons for the detention were required to be furnished to the detained within a week, and the continuation of the detention beyond the one-month period could only be sanctioned by a Review Board appointed by and consisting of superior court judges. Important civil

[464] Jalal, *Democracy and Authoritarianism*, above n 182, 190.
[465] Articles 141-143, *1973 Constitution of Pakistan*.
[466] Articles153-155, *1973 Constitution of Pakistan*.
[467] Raza, above n 429, 182.
[468] Articles 232-237, *1973 Constitution of Pakistan*.
[469] Article 8, *1973 Constitution of Pakistan*.
[470] Article 9, *1973 Constitution of Pakistan*.
[471] Property could be compulsorily acquired for a public purpose and compensation had to be paid. However, the adequacy of compensation could not be challenged before any court under Article 24(4). Article 8(3)(b) gave immunity to pre-Constitution economic reforms of the PPP. Article 253 enabled limits on property ownership and nationalization.
[472] Article 10, *1973 Constitution of Pakistan*.

and political rights including freedom of assembly and association were similarly subject to 'reasonable restrictions imposed by law in the interest of public order.'[473] The freedom of speech was subject to the broadest possible restrictions 'imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.'[474]

In recognition of the well-established Writ jurisdiction, and arguably assured by the courts' historical and contemporaneous promise of restraint, the Constitution used dramatically expansive language in defining the judicial review jurisdictions of the superior courts. By and large the text of precedent provisions in the 1956 and 1962 Constitutions was retained. The High Courts were granted the power to make orders in the nature of the prerogative writs of *certiorari*, *mandamus*, *prohibition*, *habeas corpus* and *quo warranto* without using the Latin phraseology, as in the 1962 Constitution.[475] The High Courts were also given a residuary power to 'make an order giving such directions to any person or authority, including any Government ... as may be appropriate for the enforcement of any of the Fundamental Rights.'[476] Likewise, the 1973 Constitution followed the earlier constitutional texts in retaining the Supreme Court's 'Original jurisdiction' – under which cases could be heard directly by the Supreme Court rather than on appeal – to pass declaratory judgments in inter-governmental disputes.[477] The court was also granted a residuary power to 'issue such directions, orders or decrees as may be necessary for doing complete justice.'[478] However, it also dramatically expanded the Original jurisdiction of the Supreme Court by granting it the power to directly issue orders or directions of the kind that the High Courts may issue in exercise of their Writ jurisdiction, if it considered that 'a question of public importance with reference to the enforcement of any of the Fundamental Rights' had arisen.[479]

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[473] Articles 16, 17, *1973 Constitution of Pakistan.*
[474] Article 19, *1973 Constitution of Pakistan*
[475] Article 199, *1973 Constitution of Pakistan*. Article 98, *1962 Constitution of Pakistan*, had defined the Writ Jurisdiction in very similar terms.
[476] Article 22, *1956 Constitution of Pakistan*, had granted the courts powers to 'issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights.'
[477] Article 184(1), (2), *1973 Constitution of Pakistan*.
[478] Article 187(1), *1973 Constitution of Pakistan*.
[479] Article 184(3), *1973 Constitution of Pakistan*.

While conceptually the judicial review jurisdictions of the superior courts had been expanded, the Constitution simultaneously sought to exclude an historically important subject matter from the courts' review. Unlike the previous constitutions, the 1973 text did not include any protections for the security of tenure and conditions of service of the bureaucracy. This was in line with the government's intent to undermine the insularity and independence of the CSP, and hence it was also necessary to exclude service matters from the purview of the superior courts. This was achieved by empowering the legislature to create administrative courts or tribunals with exclusive jurisdiction over these matters.[480] Acts of parliament immediately provided for the creation of services tribunals at the federal and provincial levels, thereby excluding the High Courts from reviewing matters related to the appointment, transfers, disciplining and terms of employment of civil servants.[481]

Judicial Opposition and the Contestation over Judicial Review

Having successfully achieved a constitutional cover, the PPP government focused on potential challenges to its rule that could arise from the opposition political parties and the press.[482] The Constitution and the command of an over-whelming majority in the National Assembly enabled Bhutto to neutralize resistance from the opposition and the press. It ingeniously used patently legal processes and the Constitution to achieve these ends.[483] On the very day after the promulgation of the constitution Bhutto, now Prime Minister, obtained an order from a compliant president which continued the state of emergency that had been imposed in 1971 at the peak of the civil war in East Pakistan. The extension of emergency ensured that the fundamental rights provisions of the new constitution remained in suspension until the end of the Bhutto government.[484]

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[480] Article 212, *1973 Constitution of Pakistan*.
[481] Service Tribunals Act, 1973; Provincial Service Tribunals (Extension of the Provisions of Constitution) Act, 1974; Provincial Service Tribunals (Extension of the Provisions of Constitution) (Amendment) Act, 1976.
[482] Martial Law authority was used to dismiss or detain critics. Contrary to election promises, NPT (which controlled several leading newspapers since its establishment by Ayub) was never abolished. A new chairman was appointed instead and all powers were transferred to his office. Raza, above n 429, 150-1. Nationalization of major advertisers gave Bhutto additional leverage. Kochanek, above n 181, 180.
[483] Lawrence Ziring, 'Pakistan: The Campaign Before the Storm' (1977) 17 *Asian Survey* 581, 583-4.
[484] Ardeshir Cowasjee, 'State of emergency', *The Dawn*, 18 November 2007.

The government's relationship with the judiciary had been fractious from the outset even though the courts appeared to subscribe to its claims of democratic legitimacy. In *Asma Jilani* the Supreme Court faced questions similar to ones it had cognizance of in the *Dosso* case.[485] In addressing the validity of Martial Law instruments of the Yahya regime the court also pronounced upon the legality of the regime itself.[486] While it did not formally reverse *Dosso*, the court jettisoned the doctrine of revolutionary legality and declared General Yahya Khan a usurper. In dismantling revolutionary legality, however, the court did not completely undo the theoretical groundings of the juridical recognition of *de facto* power. It whittled revolutionary legality down to a narrower doctrine of state necessity and created a distinction between validity and legitimacy. For a regime to be valid it must have effective control over power as well as legitimacy. The Yahya regime had efficacy but not legitimacy and was hence illegal according to the Supreme Court. Yahya Khan had stepped down before the Supreme Court's decision, but the legality of the Martial Law was by no means a dead issue. Bhutto's Martial Law regime and the Interim Constitution arrangement were direct successors of Yahya's Martial Law regime and the government perceived the case as a challenge to its own legality. It was Bhutto's Attorney-General who defended Yahya's Martial Law in proceedings before the Supreme Court, at the same time as the administration was engaged in heated negotiations with the opposition over the permanent constitution.[487] The court found that Bhutto's administration, in notable contrast to Yahya's, had democratic legitimacy and its actions including the adoption of the Interim Constitution, were thus held to be valid.

Another key issue in *Asma Jilani* and the subsequent case of *Zia-ur-Rahman* was the role of the court and its place in the state structure. As in earlier eras of transition, the courts appeared to be negotiating their position in postcolonial governance. While granting claims of validity and legitimacy, and in return for avowing a confinement to procedural legality, the courts demanded the preservation of their core jurisdiction. In *Zia-ur-Rahman*, when the courts dealt with another challenge to detentions under

[485] *Asma Jilani v. Government of Punjab*, PLD 1972 Supreme Court 139.
[486] Asma Jilani's case was largely confined to the validity of Martial Law Regulation No. 78 of 1971, and the Courts (Removal of Doubts) Order, 1969 (Presidential Order No. 3 of 1969) which purported to oust the jurisdiction of courts.
[487] The case was seen as a challenge to the legitimacy of the PPP administration. Raza, above n 429, 156-7.

Martial Law regulations dating back to the Yahya regime, the Lahore High Court bravely pronounced that there was no basis for substituting 'civilian laws and Courts by military orders and Courts' 'when the courts are open and functioning effectively.'[488] On appeal, the Supreme Court effectively weighed in on constitution-formation, which was simultaneously being negotiated, and defined its role in terms of formal rule of law.[489] It disavowed any stake in regulating politics or policy, again acknowledged the democratic legitimacy of Bhutto's interim administration, and heralded the preeminence of an elected legislature under the future constitutional scheme. The court, nonetheless, narrowly read Article 281 of the Interim Constitution, which purported to validate all actions of the Yahya Martial Law regime, and held detentions under Martial Law regulations and the decisions of military courts to be reviewable. This was not merely a rhetorical pronouncement. In several cases in the first years of the new Constitution the superior courts tried to use procedural legality to challenge the use of coercive laws and special tribunals, just as they had done in the constitutional interlude of the Ayub era.

However, the courts were fighting a lost cause as the government used its claim to democratic legitimacy and a supra-majority in the National Assembly to achieve precisely what the High Court in *Zia-ur-Rahman* had hoped would not be done: the substitution of civilian law and courts by security laws and tribunals. Seven amendments to the Constitution, made between May 1974 and May 1977, progressively curtailed the Writ jurisdiction, undermined the superior courts' authority and independence, and whittled the already weak rights guarantees of the Constitution. The First Amendment allowed the government to ban political parties 'operating in a manner prejudicial to the sovereignty or integrity of Pakistan' subject to the review of the Supreme Court, and excluded the cases of civilians prosecuted under the Army Act and other military laws from the Writ jurisdiction.[490] The Second Amendment, the only one supported by the opposition, declared Ahmadis to be non-Muslims.[491] The Third Amendment enlarged the executive's powers by expanding the grounds of preventive detention and increased the initial term to three months.[492] The Fourth Amendment

[488] *Zia-ur-Rahman v. State*, PLD 1972 Lahore 382.
[489] *State v. Zia-ur-Rahman*, PLD 1973 Supreme Court 49.
[490] Constitution (First Amendment) Act, 1974.
[491] Constitution (Second Amendment) Act, 1974.
[492] Constitution (Third Amendment) Act, 1975.

curtailed the Writ jurisdiction in cases of preventive detention and disabled the courts from granting bail or prohibiting such detention.[493] The Fifth Amendment further denuded the judicial review powers of the courts by ousting additional matters related to preventive detention from their jurisdiction, removed their power to punish for contempt and fixed the tenures of the Chief Justices of the superior courts, presumably with the intent to remove the Chief Justice of a High Court.[494] The Sixth Amendment, which extended the terms of Chief Justices of the superior courts beyond the retirement age if their fixed tenures had not been completed, was designed to extend the term of the incumbent Chief Justice of the Supreme Court.[495] This was the first instance of a government, military or civilian, directly interfering with tenures of Chief Justices.

The scope of security laws put in place during military rule was expanded even further under Bhutto. The Defence of Pak Rules (DPR), enforced during the 1969-1971 national crisis, were not only retained throughout the PPP government's tenure but were amended by the National Assembly in 1976 to grant the special tribunals constituted under this law exclusive jurisdiction to try cases.[496] In addition, a number of new laws were enacted to enhance the government's capacity to coercively suppress ethno-regional dissidence, particularly in Balochistan.[497] The enforcement of these security laws against political opponents and dissidents dragged the courts into political wranglings they had sought to avoid. Whereas the government used prosecution under the security laws in an unprecedented number of cases to suppress political dissent, the opposition increasingly relied on *habeas corpus* and other writ petitions to challenge the use of these laws. The balance of power between the executive and the petitioners was unambiguously and disproportionately unequal.

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[493] Constitution (Fourth Amendment) Act, 1975.
[494] Constitution (Fifth Amendment) Act, 1976. See Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 299-300.
[495] Constitution (Sixth Amendment) Act, 1976. See Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 302.
[496] The Defence of Pakistan (Amendment) Act, 1976; Defence of Pakistan (Second Amendment) Act, 1976. In the least this ensured that the processes provided under the Defence of Pakistan Rules had to be exhausted before the superior courts could take cognizance of a case. See *Indo-Pakistan Corporation, Ltd., Lahore v. Government of Pakistan,* PLD 1975 Lahore 1058. At the most it resulted in an almost exclusive jurisdiction being vested in the tribunals. See *Zahur Elahi, MNA v. State*, PLD 1977 SC 273.
[497] These included the High Treason (Punishment) Act, 1973; the Prevention of Anti-National Activities Ordinance, 1973; the Private Military Organizations (Abolition and Prohibition) Act, 1974; Suppression of Terrorist Activities (Special Courts) Act, 1975.

Having already defined their role in terms of positivist-procedural legality and having recognized the primacy of the elected government and legislature in the new constitutional scheme, all the courts could initially offer were rhetorical cautions against the arbitrary exercise of governmental power and occasional relief when the executive had not even bothered to comply with highly permissive statutes.[498] In *F.B. Ali*, the Supreme Court refused to question the trial of civilians under the Army Act, acknowledged the power of the legislature to exempt emergency laws from compliance with fundamental rights, and accepted the ouster of the courts' jurisdiction under the First Amendment.[499] In a characteristic display of positivist jurisprudence, the Supreme Court disavowed any principle or source of power beyond the text of the constitution to strike down a validly enacted provision. Nonetheless, in *Habiba Jilani*, a petition challenging the detention of an opposition member of a provincial assembly, the High Court did not invalidate the detention but held that the procedural safeguards as to arrest and detention provided by Article 10 could not be suspended by an emergency proclamation.[500] In *Manzoor Elahi* the Supreme Court affirmed the position that Articles 4 and 9 of the Constitution – providing for deprivation of liberty in accordance with law – also remained in operation during a state of emergency.[501] As such, the Supreme Court consolidated a minimal rule of law and procedural review jurisdiction even when substantive fundamental rights provisions were under suspension.[502]

In the next stage, the courts pushed at the boundaries between procedural and substantive review. In several cases the High Courts began to closely examine the

[498] *Khan Muhammad Yusuf Khan Khattak v. S. M. Ayub*, PLD 1973 Supreme Court 160; *Federation of Pakistan v. Manzoor Elahi*, PLD 1976 Supreme Court 430; *Liaquat Ali v. Government of Sind*, PLD 1973 Karachi 78; *Zafar Iqbal v. Province of Sind*, PLD 1973 Karachi 316; *Abdul Hamid Khan v. District Magistrate, Larkana*, PLD 1973 Karachi 344; *Fida Muhammad v. Province of N.W.F.P.*, PLD 1973 Peshawar 156; *Begum Nazir Abdul Hamid v. Pakistan (Federal Government)*, PLD 1974 Lahore 7; *Habiba Jilani v. Federation of Pakistan*, PLD 1974 Lahore 153; *Muhammad Safdar v. State*, PLD 1974 Lahore 200; *Abdus Sattar Khan Niazi v. State*, PLD 1974 Lahore 324; *Nawab Begum v. Home Secretary, Government of Punjab*, PLD 1974 Lahore 344; *Zahur Elahi v. Secretary to Government of Pakistan, Ministry of Home and Kashmir Affairs*, PLD 1975 Lahore 499; *Muzaffar Qadir v. District Magistrate, Lahore*, PLD 1975 Lahore 1198.

[499] See *F. B. Ali v. State*, PLD 1975 Supreme Court 506; *F. B. Ali v. State*, PLD 1975 Lahore 999. Also, see *Karamt Ali v. State*, PLD 1976 Supreme Court 476; *Niaz Ahmed Khan v. Province of Sind*, PLD 1977 Karachi 604.

[500] *Habiba Jilani v. Federation of Pakistan*, PLD 1974 Lahore 153.

[501] *Manzoor Elahi v. Federation of Pakistan*, PLD 1975 Supreme Court 66. A review petition filed by the government was dismissed and reported as *Federation of Pakistan v. Manzoor Elahi*, PLD 1976 Supreme Court 430.

[502] Also, see *Ghulam Jilani v. Federal Government*, PLD 1975 Lahore 65; *Zahoor Illahi v. State*, 1975 PCrLJ 1413.

grounds of detention and not just the manner of it.[503] Faced with such resistance from the courts, the state was forced to find more innovative and nuanced legal strategies for incarcerating opponents rather than merely relying on preventive detention orders. Essentially the old technique of instituting fabricated criminal charges, overlaying them with detention orders under multiple security laws, and fastidiously meeting the procedural formalities proved successful. In *Ghulam Jilani* for example, the government successfully detained leading Baluch opposition figures for more than three years during the pendency of a Writ petition.[504] This brought the courts to a hard choice between questioning the validity of security laws on some supra-constitutional grounds, or retreat. Having already defined their role in terms of positivist-procedural legality and having recognized the primacy of the elected government and legislature in the new constitutional scheme, substantive review of security legislations was a step too far. All the courts could thus demand was 'the strict performance of all functions and duties laid down by law' and offer occasional relief when the executive had not even bothered to comply with basic procedural formalities.[505] While this set up some obstacles before an oppressive rule *by* law under an elected dictatorship, ultimately it only ensured the deprivation of 'liberty ... in accordance with law.'

The courts' role in this formally democratic but substantively authoritarian form of postcolonial governance went beyond a mere inability to challenge the abuse of the coercive powers of the state. At particular moments the courts also betrayed a certain degree of complicity in the hegemonic ideation of the nation-state that perceived any demands of decentralization and devolution of political and economic powers as seditious and anti-state. To this extent, the lessons of the East Pakistan debacle had been equally lost on the judiciary, the elected executive and the military. Given that political opposition to the central government overwhelmingly came from political parties and movements that were demanding provincial autonomy and decentralization of state power, the courts' commitment to formal rule of law was further tested. This complicity in the structuring of the postcolonial state became explicit when in 1975 the government banned the NAP and filed a reference before the Supreme Court seeking the dissolution

[503] See, eg, *Nek Amal v. Political Agent, Malakand*, PLD 1975 Peshawar 67; *Ghulam Ahmad v. Punjab Province*, PLD 1976 Lahore 773; *Fazal Elahee v. Province of Sindh,* 1976 PCrLJ 634.
[504] *Ghulam Jilani v. Government of Pakistan*, PLD 1976 Lahore 38.
[505] In *F.B. Ali v. State*, PLD 1975 Supreme Court 506, for example, the Supreme Court disavowed any principle or source of power beyond the text of the Constitution to strike down a validly enacted law.

of the opposition party in accordance with the First Amendment. Despite the absence of concrete evidence of a secessionist agenda, the court granted a declaration of dissolution.[506] What was even more problematic was that rather than merely confining itself to questions regarding the capacity of the government to effect such a dissolution and the requisite evidentiary thresholds, the court assumed for itself the power to decide the merits of the dissolution.

This decision was thus very much in continuation of the tradition of *Maulvi Tamizuddin Khan*, the *Governor-General's Reference* and *Dosso*: the court acquiesced in the demands of the authoritarian executive while simultaneously reinforcing its own jurisdiction. In the immediate aftermath of the *Reference* decision and relying upon it, the government created a special tribunal to prosecute NAP leaders as well as some PPP dissidents in the *Hyderabad Conspiracy Case*.[507] The *Hyderabad Conspiracy Case*, just as the *Agartala Conspiracy Case,* remained inconclusive until the tribunal was disbanded by the successor regime but, nonetheless, symbolized the notable failure of the superior courts' half-hearted attempt at diminishing the reliance on coercive security laws and special or military tribunals.[508] It also signaled the ultimate denial of participatory politics, and inevitably pushed the opposition towards violent protest. The protests and Bhutto's downfall came surprisingly swiftly.

POSTCOLONIAL PAKISTAN: A REGIME OF COERCIVE LAWS

When in January 1977 the PPP government announced elections to be held in March, it remained sufficiently popular to retain power. The government announced further land reforms in early 1977 in an effort to appeal to its core constituency amongst the rural poor while simultaneously giving party tickets to a relatively higher number of traditional candidates and large landowners than it had in the 1970 elections. The economy had begun to improve in the preceding year even though structural problems and the shadow of nationalization remained. Bhutto had also attempted to re-energize his constituencies in the urban areas through a visible appeal to Islam in 1976, or at

[506] *Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs, Islamabad v. Mr. Abdul Wali Khan MNA*, PLD 1976 Supreme Court 57.
[507] Newberg, *Judging the State*, above n 5, 155-6.
[508] Mazari, above n 194, 234-5.

least had blunted the most vicious criticism of him by the religious right. All these factors contributed to a prevalent sense that the PPP would secure a majority in the National Assembly, even if somewhat reduced when compared to the party's first tenure, despite the emergence of a unified opposition front. However, it was also evident that Bhutto again sought a supra-majority and campaigned for a change in the constitution that was his greatest political legacy to-date. Bhutto thus sought a mandate for a presidential constitution with a greater concentration of power in the central executive than the 1973 Constitutional had formally enabled.[509]

The results of the 1977 election took everyone by surprise – the PPP was declared to have won a clear majority of the popular vote, and 155 out of the 200 seats in the National Assembly.[510] This would have given Bhutto the power to reshape the Constitution as he desired. However, the PPP's success had clearly been exaggerated through electoral malpractices and rigging.[511] The opposition refused to accept the election results and large scale protests broke out in April 1977. While the PPP still retained the support of both urban poor and large landowners, it had alienated the urban middle and lower classes, which exhibited a disproportionate power to destabilize the government.[512] On 5 July 1977, General Zia-ul-Haq, Chief of the Army Staff, affected a military *coup* citing the breakdown in law and order as justification, and promised the holding of free and fair elections within ninety days. The ease with which the military took over power once again, and retained its control of the state for another eleven years under Zia, revealed the extent to which the structures of postcolonial governance had remained intact despite the intervening period of civilian rule under Bhutto's elective dictatorship.

In the absence of democratic constitutionalism in the first three decades of Pakistan's existence military and civilian governments had continued to use law for control, coercion and centralization of power. Martial Law regulations banned protests and demonstrations under threat of serious criminal penalties had been retained. Several draconian statutes passed during this phase of Pakistan's history empowered the

[509] Burki, *Pakistan Under Bhutto,* above n 193, 182-3.
[510] Ibid, 196.
[511] Oldenburg, above n 187, 74.
[512] Alavi, above n 183, 89.

executive to suppress dissent and ruthlessly crush opposition, even enabling discretionary detention for prolonged periods. The *thana* (police station), *patwar* (land registration and revenue administration) and *kutchehri* (lower courts) were utilized in a fashion similar to the techniques of control and cooptation refined during colonial rule: little effort was made at structural reforms beyond attempts at being seen to be reform-oriented. Even the adoption of a constitution by a popularly elected assembly – after a period of tragic political turmoil, civil unrest, war and the dismemberment of Pakistan – did not fundamentally alter the nature and forms of postcolonial governance and the place of law therein. The elected Prime Minister ruled with an increasingly heavy hand, employing all of the tactics used previously by the country's military rulers: Martial Law powers; emergency regulations empowering detention and harassment of dissenters; and the strategic use of criminal prosecutions as a means to suppress the opposition. 'Although its ideological moorings' and democratic credentials 'might have suggested an attempt to triumph over the military state it inherited, the People's Party government transformed itself instead, taking on the attributes of its martial law predecessors rather than changing the state structure.'[513]

As the judiciary offered intermittent resistance, a malleable constitution and repression sanctioned by legislation provided the court with a weak playing field. While the 1973 Constitution again entrenched justiciable fundamental rights, the very first amendments were designed to undermine the independence of the judiciary and to curtail its emerging rights jurisprudence. Every notable judicial decision on individual rights was met with accusations that the judiciary was overstepping its bounds and was anti-democratic. Judicial resistance gradually whittled away in the face emergency laws and security tribunals. This was the proof of positivism – of the jurisprudence of legality *sans* legitimacy; constitutional law *sans* constitutionalism; insistence on procedural rule of law *sans* substantive rights – that the law itself was used to rule arbitrarily and ruthlessly. Such was the political and legal landscape when Zia took over power in 1977 that Pakistan had been transformed into a militaristic security state under civilian constitutional rule.

[513] Newberg, *Judging the State*, above n 5, 137.

PRAETORIAN GOVERNMENTALITY

ISLAMIZATION OF LAWS AND THE GENESIS OF SUBSTANTIVE CONSTITUTIONALISM

With General Zia-ul-Haq's *coup d'état* in July 1977 began another period of direct military rule in Pakistan. While many would trace the roots of praetorianism to General Ayub Khan's martial law regime or even earlier,[514] the military's penetration into the state and society had remained limited to the vindication of its core corporate interests. The Ayub regime had controlled a bureaucratic state from the top, leaving its structures and powers intact. General Zia's regime was fundamentally different and more martial in nature. Zia inherited an administrative state that was structurally weakened by the reforms of the Bhutto era, but at the same time functionally empowered by the large-scale bureaucratization of the economy through nationalization. The military reinforced the cadres of the apex bureaucracy, inducting Army personnel in unprecedented numbers into the civil state structure, and fostered deep commonalities in training and outlook of the military and bureaucracy. A military-bureaucratic complex, in which the bureaucracy emerged as the junior but respectable partner, not only bolstered military rule but also remained an important source of the military's continuing influence over foreign and national security domains long after the end of the Zia era.

Despite excessive coercion in the early years of Martial Law, the regime could not fully suppress the political energy unleashed by the populism of the Bhutto era. The military relied upon a hegemonic ideation of religion – principally through the Islamization of laws – to curtail the space for political dissent. It has become almost customary to describe the Zia regime's political usage of Islam as a transparent ploy to win public legitimacy and support for military rule. The Islamization of state and laws did in fact legitimize the regime to the limited extent that broad segments of the population subscribed to the underlying impulse. However, this was not likely to translate into

[514] See, eg, Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defence* (Cambridge University Press, 2007).

active political backing for the regime. More directly, Islamization was used as a means to co-opt the conservative political parties that had been part of the movement against Bhutto and bring them within the government fold, thereby delaying the demand for new elections. At a deeper level, in a technique reminiscent of early colonial rule in India, Islamization was designed to disperse political energy through the privatization and localization of politics, and through the creation of new networks of influence that the regime could employ against its opponents. Islamization was remarkably successful in achieving the regime's purposes and, along with the holding of local government and parliamentary elections on a non-party basis, ensured that dissent and opposition never consolidated into a nationwide regime-threatening movement. The resulting re-entrenchment of patronage-based politics was another lasting legacy of the Zia regime.

Islam was also used to bolster a nationalist discourse addressed to the problem of regionalism.[515] However, in this respect Islamization achieved only partial success. Whereas previously the provincialization of politics in Pakistan could be analysed in terms of conflicts between the elites of various regions – between Bengali and Punjabi elites, for example –[516] the conflicts now transformed into population-level ethno-linguistic and regional faultlines. Rural Sindh and southern Punjab, which remained the core constituency of Bhutto's Pakistan Peoples' Party (PPP) throughout the Zia era, were specifically marginalized. Balochistan and the tribal areas of the north-west had never been incorporated into the nation state's design. Islamization, in fact, super-imposed further sectarian tensions on these ethnic and regional faultlines. However, large segments of the populations of north-central Punjab and the settled parts of NWFP, and not merely the elites, increasingly bought into to this religio-nationalist ideology. Arguably this was more a consequence of unintended shifts in the political economy which resulted in the trickling down of greater benefits to these ethnic groups. Nonetheless, the support of broad sections of Punjabi and Pashtun society bolstered the praetorian state. It is this confluence of deep-state, hegemonic ideology and cooptation of important segments of society that defined praetorian governmentality as distinct from the forms of postcolonial governance that preceded it.[517]

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[515] Talbot, above n 202, 245.
[516] Noman, above n 185, 201.
[517] On governmentality, see generally Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, 1991).The Foucauldian notion of governmentality refers to sophisticated modes of

The consolidation of praetorian governmentality not only ravaged Pakistan's socio-political landscapes but also provided the impetus for a fundamental restructuring of the foundations of law. Islamization in particular compelled the superior courts to re-orient their public law jurisprudence in ways that have not been fully appreciated even now. The unsettling consequences of Islamization were felt most directly in Pakistan's out-dated criminal justice system. Islamization exacerbated the rule of difference embedded in the postcolonial legal system and opened up new possibilities for the abuse of law for coercion and harassment not only by the state but also local elites, especially in the rural hinterlands. Islamization also created tensions between the different parts of the legal system by creating jurisdictional conflicts and doctrinal confusion – between the lower court hierarchy and the superior courts; between the old appellate courts and the new Shariat courts. However, Islamization also enabled the superior courts to re-orient their public law jurisprudence and utilize Islamic legality to bolster their legitimacy. Pakistan's appellate courts learnt to capitalize on this new rhetoric and indigenized mode of thinking about law to challenge the ideas of procedural legality that had continued to constrain them. In Islam the superior courts found the normative grounding for a substantive constitutionalism and due process beyond the text of the *de jure* Constitution. This was a discourse which even a military regime was forced to grudgingly respect and provided the superior courts with the anchoring to affect gradual but fundamental changes in the institutional balance of powers within the state.

ISLAMIZATION AND THE CONSOLIDATION OF PRAETORIAN GOVERNMENTALITY

State Necessity and Judicial Review

At the time of the military takeover, General Zia-ul-Haq initially appeared to be a 'reluctant coup-maker' whose hand had been forced by the protest movement as well

statecraft which involve the use of legitimating idioms, rhetoric and discourses, and not just governmental institutions – bureaucracy, military, police and law – to create conditions in which the 'identification of interests' and ideologies operate 'to ensure that the new rights-bearing and self-governing subjects do as they ought.' It creates altered relations between the rulers and the ruled in which the focus is relatively less on coercion and law, and more on 'the emergence of a new field for producing effects of power – the new, self-regulating field of the social.' *See* David Scott, 'Colonial Governmentality' (1995) 43 *Social Text* 191, 203.

as pressure from the officer cadres of the military.[518] Prime Minister Bhutto, who had been placed under 'protective custody' on 5 July 1977, was released two weeks later and fresh general elections were scheduled for October. Bhutto announced that the PPP would contest these elections and held large public rallies upon his release from custody, demonstrating his continuing popularity. Election preparations were underway, electoral rolls and nomination of candidates had proceeded smoothly, but General Zia announced the postponement of elections in order to hold the Bhutto government 'accountable' for its actions. The postponement of elections was supported by the anti-PPP coalition, which foresaw the likelihood of Bhutto's return to power and a consequent backlash against the opposition parties, and the classes from which they derived their support.[519] The promise of elections bought the military regime vital space in its early days as even the PPP was lured by this tactic and avoided outright confrontation with the regime.[520] Soon after the postponement of the elections, however, the regime issued Martial Law regulations banning all political activity and imposed serious penalties for dissent.[521] Exemplary punishments such as public hangings and lashings were thus introduced long before the Islamization agenda unfolded.[522]

Having effectively managed the early and most precarious phase of military rule through the promise of elections and strategic repression, the Martial Law regime began consolidating its hold on power. The first step was by then a familiar one. The Laws (Continuance in Force) Order, issued concurrently with the proclamation of Martial Law, placed the 1973 Constitution in abeyance and stated that the country would be governed as nearly as possible under the provisions of the suspended Constitution. In *Nusrat Bhutto*, the Supreme Court refused to entertain a petition challenging the

[518] Mushahid Hussain, *Pakistan's Politics: The Zia Years* (Konark Publishers, 1991) 111. *Contra* Noman, above n 185, 118.
[519] Craig Baxter, 'Restructuring the political System' in Shahid Javed Burki and Craig Baxter (eds), *Pakistan under the Military: Eleven Years of Zia-ul-Haq* (Westview Press, 1991) 31.
[520] Noman, above n 185, 120.
[521] Baxter, above n 518, 32; Noman, above n 185, 122.
[522] Noman, above n 185, 122-4. Also, see Mushahid Hussain, above n 517, 113; Shahid Javed Burki, 'Zia's Eleven Years' in Shahid Javed Burki and Craig Baxter (eds), *Pakistan under the Military: Eleven Years of Zia-ul-Haq* (Westview Press, 1991) 2. Notably, however, the Martial Law regime of General Zia not only used state apparatuses to quell dissent but also employed the political opposition to the PPP, in particular the student wing of the Jamaat-e-Islami, to counter anti-regime protests. Saeed Shafqat, *Civil-Military Relations in Pakistan: From Zulfikar Ali Bhutto to Benazir Bhutto* (Westview Press, 1997) 196-97.

promulgation of Martial Law and subversion of the constitution under its Original jurisdiction.[523] In its decision against the maintainability of the petition the court gave credence to the fact that the Constitution had only been placed in abeyance and had not been abrogated. While the court refused to resurrect the *Dosso case* and the doctrine of revolutionary legality, which would have granted the military regime unfettered capacity to engineer a new governance arrangement, it also distinguished the *Asma Jilani case* on facts.

The court invoked an expanded version of the doctrine of state necessity to grant the military regime the authority to promulgate any laws that could be passed by a legislature under the 1973 Constitution and to undertake executive measures necessary to achieve the 'declared objectives of the proclamation of Martial Law, namely, restoration of law and order, and … the earliest possible holding of free and fair elections.'[524] It found that protests against rigged elections had in fact created a scenario in which the military was compelled to take over power for a limited duration in order to restore order and hold fresh elections. The court also held that the superior courts would 'continue to have the power of judicial review to judge the validity of any [legislative] act or [executive] action of the Martial Law Authorities, if challenged, in the light of the principle underlying the law of necessity.'[525] The Supreme Court thus provided the military regime of General Zia with conditional authority to govern the country so long as the declared state of necessity persisted. While the Supreme Court's decision in *Nusrat Bhutto* was generally seen as validation of Martial Law, it was also a partial setback for the military regime as the court claimed the jurisdiction to decide whether an action was within the 'law of necessity' or not.[526]

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[523] *Begum Nusrat Bhutto v. Chief of the Army Staff and federation of Pakistan*, PLD 1977 Supreme Court 657.
[524] Ibid.
[525] It is notable that the Laws (Continuance in Force) Order, 1977 had in fact expanded the writ jurisdiction by nullifying all changes to Article 199 made by the Bhutto-led parliament, with the exception of the First Amendment's prohibition on review of matters related to military personnel which was retained. See Laws (Continuance in Force) Order, 1977, Clause 2(1)(b).
[526] Baxter, above n 518, 34. Sheikh Anwarul Haq, former Chief Justice who headed the Supreme Court bench in *Nusrat Bhutto*, denounced the subsequent constitutional changes made in 1985 and stated that the court had thought that martial law would be a temporary arrangement designed to restore law, order and democracy. See Shahid Javed Burki, *Pakistan: A Nation in the Making* (Oxford University Press, 1986) 91.

It was not so much the *Nusrat Bhutto* decision but the subsequent trial of Zulfiqar Ali Bhutto that gave the military regime the political space to entrench praetorian rule. Bhutto's conviction in March 1978 for conspiracy to murder an opposition politician, in a failed attempt that led instead to the killing of his father, was exceptional on several counts. The trial was held directly before the Lahore High Court whose Chief Justice was widely perceived as antagonistic to the former prime minister. Principal evidence against Bhutto consisted of 'approver testimony' by Federal Security Force (FSF) officials which was likely to have been coerced. The High Court not only convicted Bhutto for conspiracy to commit murder based on such questionable evidence but, in clear disregard of established precedent and judicial norms, sentenced him to death.[527] The Lahore High Court's decision was widely seen as problematic and it was expected that the Supreme Court would either overturn the conviction or, in the least, reduce the sentence to life imprisonment. In February 1979, however, the Supreme Court denied Bhutto's appeal after a prolonged and fractious trial which also suffered from notable procedural impropriety. The court not only upheld the conviction but also the sentence of capital punishment.[528] On 4 April 1979, Bhutto was hung in Rawalpindi jail. The ethnic make-up of the Supreme Court (four out of the seven members of the bench that decided to maintain capital punishment were Punjabi) and its decision along ethno-linguistic lines cast a long and dark shadow over Pakistan's legal and political terrain.

By end 1979 the Zia regime began consolidating praetorian governmentality. Zia had again announced general elections scheduled for November 1979 immediately after Bhutto's hanging, but these too were cancelled at the last moment.[529] The Martial Law regime began directly incorporating the political opposition to the PPP into the governance arrangement through minor ministerial appointments and advisory positions in the federal and provincial governments. Without the support of the political right the Zia regime would have remained on thin ice. Unlike General Ayub Khan, Zia had taken power from a popularly elected government and the military had lost much of its prestige and public support in the process. However, the cooptation of the political

[527] *State v Zulfiqar Ali Bhutto*, PLD 1978 Lahore 523.
[528] *Zulfiqar Ali Bhutto v State*, PLD 1979 Supreme Court 53. The court subsequently unanimously dismissed a review petition on the basis that the sentence could not be altered upon review. *Zulfiqar Ali Bhutto v State*, PLD 1979 Supreme Court 741. See Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 336-40.
[529] Baxter, above n 518, 33.

right was bound to be an interim arrangement as the demands for holding general elections and relinquishing power to elected politicians persisted. The military regime adopted a technique from the Ayub era of diffusing some of this political pressure and undermining both the PPP and the anti-PPP political parties. The local government system of the Ayub regime was resurrected with significant modifications in an attempt to further fragment the political sphere as well create a new breed of loyal politicians through direct patronage. While the creation of local government structures necessitated the devolution of some functions and limited powers to this level, real control of local bodies remained with the district bureaucracy which, like in the Ayub era, acted as 'a surrogate political party.'[530] Many of the new local body members had little or no prior political experience and remained dependent on access to the military regime and the bureaucracy to secure benefits and services for their constituents.[531] Nonetheless, the results of the local body elections in September 1979 confirmed continuing support for the PPP despite Bhutto's execution, which was disconcerting both for the military regime as well as the coalition of conservative and religious political parties which had opposed Bhutto.

Unlike the Ayub regime, Zia did not distance the military from the executive and continued to involve military personnel in regular governance functions. This created unprecedented strains, especially as charges of misconduct, abuse of authority and corruption against Martial Law authorities began to appear before the courts. During their first experience of Martial Law from 1958-1962, the superior courts had navigated the treacherous transition from direct to indirect military rule by relying on a clear distinction between constitutional and administrative law. Whereas the courts had enabled the Ayub regime to create a new constitutional arrangement and desisted from judicial review of legislation, they had retained the Writ jurisdiction and the capacity to undertake judicial review of executive action. This had avoided a direct confrontation between the courts and the military. However, the much greater involvement of the military in executive and judicial functions of the Martial Law regime under Zia,

[530] Burki, *Pakistan: A Nation in the Making*, above n 528, 99.
[531] Robert LaPorte Jr, 'Administrative Restructuring During the Zia Period' in Shahid Javed Burki and Craig Baxter (eds), *Pakistan under the Military: Eleven Years of Zia-ul-Haq* (Westview Press, 1991) 125-6.

especially extensive use of Martial Law regulations and military tribunals, rendered even the writ jurisdiction a contested terrain.

It was arguably the courts' extended interaction with the Bhutto government's heavy handed use of security and detention laws that contributed at least partially to the lack of sympathy they displayed to the overthrow of the Bhutto government by General Zia. However, the blatant abuse of Martial Law regulations to suppress political dissent caused dismay amongst the courts which had sanctioned the military takeover on the grounds of state necessity. The unprecedented level of involvement of the military in the administration of justice through the extensive use of military courts and tribunals caused direct tensions with the judiciary. The Writ jurisdiction of the High Courts emerged as a site of low level judicial resistance to Martial Law.[532] The difficulty for the court was that the proclamation of Martial Law had suspended all Fundamental Rights, including Article 10, which provided safeguards against arrest and detention.[533] The court, nonetheless, examined the grounds on which the detainees had been held and found their continuing incarceration to be unwarranted. In several cases the High Court then invoked their precedents on the application of the Security of Pakistan Acts to bear on preventive detentions under Martial Law and found the detentions to be unmerited.[534] Furthermore, the courts also challenged the use of Army Act to try civilians for protesting against the Martial Law regime, refusing to equate such actions

[532] In *Mumtaz Ali Bhutto* a larger bench of the Sindh High Court examined the petition of two PPP stalwarts who had been in near-continuous detention since the proclamation of Martial Law and noted that preventive detention was 'an issue of gravest constitutional importance.' *Mumtaz Ali Bhutto v. Deputy Martial Law Administrator, Sector 1, Karachi*, PLD 1979 Karachi 307. Earlier, in *Mumtaz Ali Bhutto v. Deputy Martial Law Administrator*, PLD 1979 Karachi 125, the court had asserted its jurisdiction to review preventive detentions but had validated the detention order.

[533] Martial Law Order No. 12, 1977, provided for the detention of a person in order to prevent them 'from acting in any manner prejudicial to the purposes for which the Martial Law was proclaimed, and the maintenance of peaceful conditions in Pakistan.' Initially only the CMLA could authorize such detention. Martial Law Order No. 24, 1977 empowered any martial law Administrator to issue a detention order. Martial Law Order No. 55, 1977, restricted the maximum term of a detention order to 90 days, and the maximum term of successive orders to 1 year. Martial Law Order No. 55, 1978 extended the maximum term of successive orders to 2 years.

[534] See, eg, *Akhtar v. Deputy Martial Law Administrator, Sector 2, Hyderabad*, PLD 1979 Karachi 680 [boycotting of classes by students not prejudicial conduct]; *Mahmood Alam Khan v. Chief Martial Law Administrator*, PLD 1979 Lahore 53 [absence of objective grounds of detention]; *Nasreen Rao Abdul Rashid v. District Magistrate, Rawalpindi*, PLD 1979 Lahore 923 [second detention order not based on new grounds]; *Kishwar Sultana v. Chief Martial Law Administrator*, 1979 PCrLJ 757 [absence of objective grounds of detention]; *Abdul Rashid v. Sub-Martial Law Administrator, Sector 2, Rawalpindi*, PLD 1980 Lahore 356 [detention punitive, not preventative]; *Ali Ahmed v. Deputy Martial Law Administrator, Sector 2, Hyderabad*, 1980 PCrLJ 609 [grounds of detention vague and insufficient].

with bringing the armed forces into hatred or contempt, or exciting disaffection towards them.[535]

By 1979, the High Courts also appeared to have become uneasy with the extensive use of military courts and tribunals to try ordinary criminal offences, and began to question the legality of convictions on procedural and jurisdictional basis.[536] The courts' legitimacy had suffered a serious setback as a result of the *Nusrat Bhutto* case and Bhutto's trial, and perhaps it was also in an effort to salvage some of their independence and authority that the superior courts gradually began to challenge the actions of Martial Law courts and tribunals.[537] Furthermore, with relative political calm and absence of major threats to the regime, the justification of stringent Martial Law measures had begun to wear thin. A full bench of the Peshawar High Court thus lamented that while 'the ordinary Courts of the land were properly functioning and were allowed to function there were no imperative reasons for the creation of parallel Courts to try civilians.'[538] The High Courts looked to reassert their control over the administration of criminal justice and clawed back jurisdiction from the military courts and tribunals.[539] Increasing references and attempts to tentatively test Martial Law regulations and orders on the touchstone of the doctrine of state necessity, however, caused strains with the military regime because this doctrine could provide the jurisprudential basis for a more significant challenge to the legality of the regime at some stage.[540]

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[535] See, eg, *Muhammad Akram Beg v. State*, PLD 1979 Lahore 935; *Saleh Muhammad v. Presiding Officer, Summary Military Court, Karachi*, PLD 1980 Karachi 240.

[536] See, eg, *Essa Noori v. Deputy Commissioner Turbat*, PLD 1979 Quetta 188 [conviction overturned because of procedural irregularity and lack of evidence]; *Muhammad Manzur Ahmad Ayyaz v. Lt. Col. Muhammad Ajmal*, 1979 PCrLJ 642 [lack of territorial jurisdiction]; *Kasim Shah v. Major Khalid Mahmood*, 1980 PCrLJ 498 [convictions of college students set aside for failure to provide an effective opportunity for defence]; and *Muhammad Issa v. Summary Military Court, Thatta*, 1980 PCrLJ 550 [conviction of high school students for protesting under Martial Law regulation banning political activity set aside].

[537] See Newberg, *Judging the State*, above n 5, 175-79; Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 343.

[538] *Satar Gul v. Martial Law Administrator, Zone B, N.W.F.P., Peshawar*, PLD 1979 Peshawar 119.

[539] See, eg, *Shaukat Anwar v. Martial Law Administrator, Punjab*, PLD 1980 Lahore 133 [Military Courts lack jurisdiction over an ordinary case of murder which did not threaten public order, etc.]; *Muhammad Ilyas v. Martial Law Administrator, Zone A, Punjab, Lahore*, PLD 1980 Lahore 165 [transfer of case to Military Court illegal as no threat to public order or tranquility arising out of the incident]; *Jamil Ahsan Gill, Advocate v. The State*, PLD 1980 Lahore 184 [High Court may grant bail before arrest in case before Military Court]; *Munir Hussain v. Station House Officer, Burewala*, 1980 PCrLJ 161 [Martial Law official not authorized to direct investigation and arrest in an ordinary trial].

[540] The Baluchistan High Court was particularly assertive in the judicial review of military courts and tribunals and went further than any other superior court in challenging the Martial Law. See, eg, *Muhammad Akbar Bugti v. Chief Secrtetary, Baluchistan*, PLD 1979 Quetta 233. Also see Hamid Khan, *A History of the Judiciary in Pakistan* , above n 178, 210-11. In another case the court laid down

The hanging of a student leader in direct violation of an interim injunction issued by the Baluchistan High Court brought the tussle over the Writ jurisdiction to a head. In *Suleman v President Special Military Court*, the petitioner had challenged his trial by a military court.[541] While the case was pending, a Presidential Order sought to provide constitutional cover to the military tribunals and barred the courts from reviewing their decisions.[542] Another Presidential Order amended Article 199 to further restrict the High Courts from judging the validity of Martial Law Regulations or Orders as well as questioning the jurisdictions of military courts.[543] The Baluchistan High Court, questioned the validity of these Presidential Orders and found the amendments to the Constitution to be *ultra vires* the powers of the Chief Martial Law Administrator (CMLA) for violating the test of necessity laid down in *Nusrat Bhutto*.[544] This decision was potentially deeply destabilizing for the military regime which responded by issuing a Provisional Constitution Order (PCO) in 1981, effectively a new constitutional dispensation.[545] The PCO retroactively invalidated all the adverse decisions of the High Courts, restricted the judicial review jurisdictions of the courts and empowered the CMLA to dismiss any judge. The regime also required the judges to take a new oath under the PCO. Several judges of the superior courts either declined to take the oath or were not invited to do so.[546] This was the first purge of the superior judiciary in Pakistan's history.

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the most restrictive interpretation of the jurisdiction of military courts and tribunals and held that the ttrial of citizens for offences, other than the offences created by martial Law Regulations or Martial Law Orders, cannot take place before Military Courts unless such offences are committed while resisting the Martial Law itself. *Muhammad Niaz v. Martial Law Administrator, Zone D, Quetta*, PLD 1979 Quetta 179. An appeal before the Supreme Court became infructuous when the state backed down and decided to try the respondent before an ordinary court. *Martial Law Administrator, Zone D v. Muhammad Niaz*, PLD 1979 Supreme Court 921.

[541] *Suleman v. President Special Military Court*, NLR 1980 (Civil) Q 873.

[542] Constitution (Second Amendment) Order, 1979 (President's Order No. 21 of 1979) which inserted Article 212-A in the Constitution.

[543] Constitution (Amendment) Order, 1980 (President's Order No. 1 of 1980). *Abdullah v. Presiding Officer, Summary Military Court*, PLD 1980 Karachi 499, a full bench of the Sindh High Court accepted the validity of the amendment and refused to test it according to the doctrine of state necessity.

[544] See Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup D' Etat and Common Law' (1994) 27 *Cornell International Law Journal* 49, 81.

[545] Provisional Constitution Order, 1981 (President's Order 5 of 1981). Baxter, above n 518, 34. Through it the regime practically abrogated the Constitution and replaced it with a new constitutional arrangement which essentially amounted to the rule of the military led executive. See Newberg, *Judging the State*, above n 5, 180; Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 358-9.

[546] See Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 217-8.

Islamization of Law, State and Politics

Concurrently with the suppression of a tentative judicial resistance and the cooptation of the right of the political spectrum, the military regime adopted the strategy of Islamization of the law and state policies in Pakistan.[547] The Islamization program also coincided with Bhutto's trial and execution, and thus partially reflected the regime's attempt at deflecting attention away from that saga. There were also regional and international dimensions to the saga. The Islamic revolution in Iran had emboldened the religious right across the Muslim world, and the Zia regime was forced to placate the Islamist parties at a time when their patience with the regime was running low. With Bhutto's execution the threat of a resurgent PPP winning the elections, and the justification for postponing them was beginning to wear thin. The Zia regime had been under American sanctions because of the *coup* and for human rights violations. However, the American position on the disruption of democracy in Pakistan dramatically changed when in December 1979 Russian troops invaded Afghanistan. Pakistan's resulting involvement with the Afghan *mujahideen*'s resistance to the Russian occupation in partnership with the US gave a further impetus to state-sponsored Islamization, given the military's need to cultivate a favourable political environment and popular backing for the *jihad*. The free flow of Saudi money and Arab volunteers in aid of the Afghan *jihad* also brought with it patronage of a particular shade of orthodoxy, namely *Wahabbism*,[548] which did not fit too comfortably either with the *Barelvi-Sunni* tradition dominant in most of Pakistan or the minority *Shias*.[549]

The Islamization program unfolded with the promulgation of the *Hudood* laws which introduced Islamic criminal laws related to adultery and fornication, theft, highway

[547] See Seyyed Vali Reza Nasr, 'The Rise of Sunni Militancy in Pakistan: The Changing Role of Islamism and the Ulama in Society and Politics' (2000) 34:1 *Modern Asian Studies* 139.
[548] The spread of Wahabbism-driven orthodoxy with Saudi backing, the patronage of militant outfits for usage as proxies in campaigns in Afghanistan and Kashmir and the proliferation of conservative ideology through madrassahs continued long after the state lost its appetite for the Islamization of laws until the course had to be reversed post September 11, 2001. See generally Zahid Hussain, *Frontline Pakistan* (Penguin, 2008).
[549] See generally, Seyyed Vali Reza Nasr, 'International Politics, Domestic Imperatives, and Identity Mobilization: Sectarianism in Pakistan, 1979-1998' (2000) 32:2 *Comparative Politics* 171, 181-7; Muhammad Qasim Zaman, 'Sectarianism in Pakistan: The Radicalization of Shi'i and Sunni Identities' (1998) 32:3 *Modern Asian Studies* 689, 705-14; Zahid Hussain, above n 547, 89-101.

robbery and consumption of alcohol.[550] These laws also provided for supposedly Islamic punishments of stoning to death for adultery, amputation of limbs for theft and injury to person, and whipping for various crimes.[551] These laws included evidentiary standards that were overtly discriminatory against women and religious minorities. Within the first few years of their enforcement it was evident that the *Hudood* laws had opened up avenues of abuse and harassment at an unprecedented level, particularly against women and men who dared to defy conservative norms of gender interaction.[552] While the Islamization of law remained the centrepiece of the regime's program, Islamization was also extended to various facets of state policy and social life, and was thus hegemonic. The Islamization program included such measures as the state enforcement of fasting, appointment of prayer wardens to ensure that government officials prayed at the prescribed times, and dress codes for women in public life.[553] The curricula of public schools were also Islamized, and *madrassahs* and mosque schools were formally recognized.[554] History was re-cast to project an Islamic hue on nationalism and included the transformation of the founding fathers, including Jinnah, into religious ideologues.[555] Armed forces were re-indoctrinated as soldiers of Islam, converting military men into the guardians of Pakistan's geographical as well as religiously-reinforced ideological frontiers.[556]

An even more significant structural change in the legal system that Islamization wrought was the creation of separate appellate *Shariat* courts. Initially the regime created Shariat benches at the provincial High Courts in 1979.[557] Within a year, the Shariat Benches were dissolved and a separate and an independent Federal Shariat

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[550] Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance VII of 1979); Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance VIII of 1979; Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (Ordinance VI of 1979); Execution of the Punishment of Whipping Ordinance, 1979 (Ordinance IX of 1979); Prohibition (Enforcement of Hadd) Order, 1979 (Ordinance IV of 1979).

[551] Talbot, above n 202, 250. Although sentences of stoning and amputation were awarded by the lower courts, these were reversed on appeal. There were, however, several instances of the award of and execution of sentences of flogging. Baxter, above n 518, 37.

[552] See Moeen Cheema and Abdul Rahman Mustafa, 'From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan' (2009) 8 *UCLA Journal of Islamic & Near Eastern Law* 1, 14-8. Also, see generally, Asma Jahangir and Hina Jilani, *The Hudood Ordinances: A Divine Sanction?* (Rohtas Books, 1990).

[553] Noman, above n 185, 124, 142.

[554] Talbot, above n 202, 278-9.

[555] Noman, above n 185, 149.

[556] Ibid, 148.

[557] Shariat Benches of Superior Courts Order 1978, as amended by the Constitution (Amendment) Order 1979.

Court (FSC) was created through the insertion of new Chapter 3-A into the 1973 Constitution. The creation of the FSC, as well as the Shariat Appellate Bench of the Supreme Court (SAB), provoked constitutional controversy as it was achieved through constitutional amendments made in pursuance of self-assumed powers by General Zia, which was difficult to justify under the doctrine of state necessity.[558] Furthermore, the creation of a separate Shariat court coincided with the regime's tussle with the appellate judiciary and appeared to further undermine the judicial review jurisdictions of the High Courts as the FSC was placed above them in the judicial hierarchy, and its decisions were held binding upon the High Courts and the lower judiciary.[559] Transfers to the FSC were used as a means to sideline recalcitrant High Court judges, and any judge who refused appointment to the FSC was deemed to have retired.[560] The appointment of religious scholars (*ulema*) to the Shariat courts and the grant of wide powers of judicial review of legislation on the grounds of repugnancy to the injunctions of Islam raised fears of the reign of an orthodox and anti-democratic Islamist judiciary.[561]

Despite the rhetoric and visibility of these Islamization measures, there appeared to be lack of broader vision, and arguably even commitment to bring about a deeper Islamization and/or indigenization of the postcolonial legal system.[562] The FSC was created with considerable limitations on its jurisdiction and was barred from taking up matters of Muslim personal law, fiscal laws, taxation, banking and insurance. A majority of the appointees to the FSC were regular judges of the High Court who were 'Islamic moderates,' and the classically-trained *ulema* invariably remained in the

[558] See Ann Elizabeth Mayer, 'Islam and the State' (1991) 12 *Cardozo Law Review* 1015, 1042–7.
[559] Article 203GG, *1973 Constitution of Pakistan*.
[560] Article 203C, cl 5, *1973 Constitution of Pakistan*. See Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 353 and 355.
[561] The Federal Shariat Court (FSC) consisted of eight Muslim judges, of which three were to be *ulema* (religious scholars) while the remaining five were legally-trained and were appointed from the same pool from which regular High Court judges were to be chosen. Article 3A, cl 2, *1973 Constitution of Pakistan*. The Shariat Appellate Bench of the Supreme Court (SAB) was created to hear appeals against the decisions of the FSC. Article 203F, cl 1, *1973 Constitution of Pakistan*. The SAB was also to have a majority of legally trained judges as three of its members were to be Muslim judges of the Supreme Court but two ad hoc ulema members were to be appointed as well by the President from amongst ulema members of the FSC, or from a panel of ulema nominated by the President in consultation with the Chief Justice of the Supreme Court. Article 203F, cl 3, *1973 Constitution of Pakistan*. In addition to acting as the appellate court of in Hudood cases, the FSC had the power to review any and all Pakistani laws to determine whether they were repugnant to the injunctions of Islam. Article 203D, cl 1, *1973 Constitution of Pakistan*..
[562] See generally Charles H Kennedy, 'Islamization and Legal Reform in Pakistan, 1979-1989' (1990) 63 *Pacific Affairs* 62.

minority on the Shariat courts.[563] Even the notorious Hudood laws appeared to have been designed as purely symbolic measures intended to exist solely on the books and, with the exception of the provisions relating to sexual crimes which acquired a tragic dynamic of their own, the other laws had little practical relevance or impact. From the outset the FSC also pressured the Zia regime to bring about more significant Islamization of the criminal laws, but that was resisted. In as many as eleven petitions the FSC took up challenges to the legality of the Pakistan Penal Code (PPC) provisions relating to homicides and offences against the person on the bases that these provisions violated the Islamic principles of *qisas* and *diyat*.[564] No progress, however, was made on this front during the existence of the Zia regime, providing strong evidence that the regime had intended the Islamization of laws to be of symbolic significance only. As a consequence, the alliance between the military regime and the religious right became progressively strained.[565]

Furthermore, the military regime had failed to grasp the complexity of the postcolonial legal system; and its faulty assumption, that the entire legal system would fall in line with military-style command and discipline exercised through the appellate courts and new substantive laws, was quickly exposed.[566] The regime's inability to fully reign in the courts, and control the interpretation and enforcement Islamic legality, became embarrassingly evident in the very first case the FSC adjudicated. In *Hazoor Bakhsh*, the FSC decided by a narrow majority that the punishment of stoning to death for *zina* (adultery or fornication) was not the prescribed *hadd* (*i.e.* mandatory) punishment under Islamic law, but was rather a *tazir* (*i.e.* discretionary) penalty.[567] This decision undermined the Islamic credentials of the *Hudood* laws which had already engendered vociferous protests from human rights and women's rights activists. The regime was compelled to amend the Constitution and grant the FSC the power to review its own decisions, even though the avenue of an appeal to the SAB already existed. In a blatant

[563] Kennedy points out that eighteen of the twenty-three judges appointed to the FSC between 1980 and 1989 were former High Court judges out of twenty possessed Western-style law degrees. Ibid, 66.
[564] See Rubya Mehdi, *The Islamization of Law in Pakistan* (Curzon, 1994) 151.
[565] Seyyed Vali Reza Nasr, 'Islamic Opposition to the Islamic State: The Jamaat-i Islami, 1977-88' (1993) 25:2 *International Journal of Middle East Studies* 261, 267.
[566] For example, noticeable differences of approach emerged between the Shariat Benches initially created in the four provincial High Courts within a year which provided the impetus for their substitution by a unified and independent FSC. See Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden, 2006) 126.
[567] *Hazoor Bakhsh v. Federation of Pakistan*, PLD 1981 Federal Shariat Court 145.

intervention in judicial process, the regime filed a review petition before the FSC and removed the three judges who had formed the majority in the first *Hazoor Bakhsh* case. Although, the reconstituted FSC overturned its earlier decision and unanimously upheld stoning to death as the valid *hadd* punishment for adultery/fornication, the damage to the credibility of the Islamization program was evident.[568]

In another bold move in 1983, even the reconstituted FSC nullified the President's authority to dismiss senior bureaucrats without cause or retire them after twenty-five years of service at his discretion.[569] In 1979, Zia had retired several senior bureaucrats who had been appointed or promoted by the Bhutto government. The FSC held that Islamic law principles required that the civil servants subject to compulsory retirement be provided with due process, and invalidated the relevant statutory provisions for failure in this regard. The FSC's decision did not pose a direct challenge to the military regime's control over the bureaucracy as it did not direct the reinstatement of these bureaucrats. However, the court did set prospective limitations which even the military regime would be forced to countenance as the court had re-styled Common Law principles of natural justice as core principles of Islamic legality. This decision was by no means exceptional: around the same time, the FSC had reviewed a range of statutes on its own accord (*suo motu*) and had consistently found issues with those statutes that did not provide for fair hearings prior to the taking of any disciplinary or adverse action against a party.[570] As such, the FSC performed a similar role as the High Courts during Pakistan's first Martial Law interregnum by constructing a basis for the continuity of judicial review powers even when the Constitution, the High Courts' judicial review powers and fundamental rights were formally suspended.

It would be incorrect to claim that the Shariat courts mounted a serious challenge to the Zia regime or its Islamization program for these courts continued to accord a certain degree of respect and deference to the regime, and considerable fidelity to the basic structures of the Islamization program, throughout the 1980s. Nonetheless, the policy conundrums thrown up by the hasty and ill-considered implantation of Islamized laws,

[568] See Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 355.
[569] *In re: The Civil Servants Act 1973*, PLD 1984 Federal Shariat Court 34.
[570] *In re: Islamization of Laws*, PLD 1985 Federal Shariat Court 193; *In re: Islamization of Laws*, PLD 1986 Federal Shariat Court 29.

the strains imposed by the vocal and visible opponents of Islamization, and the demands of the internal logics of Islamic legal discourse compelled the Shariat courts to chart an increasingly independent course, particularly in the later years of the Zia regime. Islamization had legitimized and empowered a new discourse on public power that could not be controlled but only contained so long as the institutions of the state and the channels of public communication were strictly regulated. As the regime's control over the state and the polity began to falter during the transitional period to limited democracy (1985-1988), the superior courts increasingly used Islamic legality to expand their powers of judicial review. In adjudicating upon the validity of legislation for repugnancy to the injunctions of Islam the FSC and the SAB acquired and learnt to use the power to review legislation, a hitherto largely unfamiliar experience for Pakistan's courts. In exercising its *suo motu* powers of review, the FSC gave the courts their first taste of novel and imaginative adjudicative methodologies.

However, while the FSC managed to salvage a new kind of public law jurisdiction, Islamization entrenched and formalized the rule of difference as explicit differentiations and discriminations were legalized, particularly against women and religious minorities. More significantly, Islamization reinforced implicit and *de facto* biases in favour of the privileged and the powerful by further empowering the police and courts with greater discretion through law as well as morality. The defiance of social norms was disciplined through the *Hudood* laws, and not only *jirgas* and *panchayats* but also lower courts and military tribunals were empowered to wield cultural understandings backed up by a particular brand of religion. Not only the technology of law but also the normative vocabulary of Islam were used to re-crystallize social stratifications that had been shaken up by the populism and the idealism of the early Bhutto years, which was the late Prime Minister's most significant political legacy.[571] In essence, this was less a strategy to legitimize military rule, as often speculated, and more an effort to reinforce the *status quo* by licensing a new breed of power brokers – dependent upon the state for patronage and wielding limited influence and moral authority at the local level – in

[571] On Bhutto's self-contradictory legacy, which includes the political empowerment of the poor as well as the simultaneous entrenchment of the elite, see Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 340-41.

order to keep the attention away from the larger political struggles.[572] As such, Islamization did not legitimize the military regime but nonetheless provided it with space through the fragmentation and dispersal of political energy.

THE CONSTITUTIONAL DESIGN OF INDIRECT PRAETORIANISM

The Eighth Amendment and a Civilian Façade

By 1983 the various strategies for exerting political and social control, such as the cooptation of the political right and Islamization, had begun to run their course without building the regime a broader support base beyond its prime constituencies in the military, bureaucracy and coopted political classes. In 1983, the PPP finally launched a robust protest program under the banner of the Movement for the Restoration of Democracy (MRD), which had been created in 1981 as a coalition of anti-regime political parties. While the MRD remained essentially a PPP-led grouping and was largely confined to Sindh,[573] even the religious parties that had backed the Zia regime supported the demand of transition to civilian rule. In August 1983, coinciding with the launch of MRD protests, and clearly designed as an effort to wean support away from it, General Zia announced plans for an eventual transition to civilian rule. Zia announced a referendum to elect a President in December 1984 in which he was the sole candidate and, in a Kafkaesque move, the referendum question asked the public to decide whether it endorsed the Islamization program. A 'yes' vote on the referendum ensured that General Zia would become the President for a 5-year term,[574] while he also remained the chief of the armed forces as unlike General Ayub he did not contemplate giving up the command of the military.

The decision to hold the referendum and secure the presidency before parliamentary elections indicated that the regime could not count on sufficient political support in the

[572] See Jalal, *Democracy and Authoritarianism*, above n 182, who asserts that this was a variant of the colonial strategy of 'divide and rule' based upon the creation of newer rival classes of collaborative local-level politicians.
[573] Talbot, above n 202, 252-3.
[574] According to the official results, 98 per cent of the 34 million registered voters who cast their votes supported General Zia's policies. The opposition claimed that these were mostly ghost ballots and the real voter turnout was no more than 10 per cent. Burki, *Pakistan: A Nation in the Making*, above n 528, 86-7.

general elections.[575] The voter turnout in the parliamentary elections held in February 1985 was much higher than in the referendum, even though the PPP boycotted the elections in the hope that a low turnout would undermine their credibility.[576] The elections were held on a non-party basis and the campaigns were thus essentially conducted around kinship networks and local issues.[577] The elections invariably privileged dominant landholders and local power brokers in the rural constituencies, and the composition of the assemblies reflected the resurgence of these classes in Pakistan's electoral politics.[578] As in the Ayub era, the primary organizing principle of federal politics was 'proximity to power' and influence over bureaucracy, police, and licensing regimes.[579] A majority of the parliamentarians were a product of the Zia era, especially the local body system, and in the absence of the PPP were by and large pro-regime in their ideological and political outlook. Nonetheless, a protracted tussle between the military regime and its coopted political classes was inevitable as the politicians demanded a greater share of power. In contrast, the military regime's principal aim was to retard the seepage of power to the extent manageable.[580]

As in the Ayub era, the military regime sought a constitutional mechanism to achieve such a balancing of power. Since the Zia regime had not formally abrogated the constitution in order to avoid a charge of high treason for its subversion, it had to construct a new governance arrangement while nominally remaining within the 1973 framework. The Revival of the Constitution of 1973 Order, 1985 (RCO), while purporting to resurrect the original constitution, amended it out of recognition. It effectively created a semi-presidential constitution and dampened hopes of a swift and genuine transfer of power to elected politicians.[581] In a two-step process reminiscent of Bhutto's strategy in constitutional negotiations, the RCO provided the backdrop to the Eighth Amendment to the constitution passed by the new parliament. The Eighth Amendment validated all actions of the Martial Law regime and enabled General Zia

[575] Ibid, 85.
[576] Noman, above n 185, 128.
[577] Ibid, 127-8.
[578] Shafqat, above n 521, 214; Burki, *Pakistan: A Nation in the Making*, above n 528, 89-90; Noman, above n 185, 127.
[579] Mushahid Hussain, above n 517, 164.
[580] Noman, above n 185, 130.
[581] Revival of the Constitution of 1973 Order, 1985 (President's Order No. 14 of 1985). See Kamal Azfar, 'Constitutional Dilemmas in Pakistan' in Shahid Javed Burki and Craig Baxter (eds), *Pakistan under the Military: Eleven Years of Zia-ul-Haq* (Westview Press, 1991).

to simultaneously remain the president and the Chief of Army Staff (CoAS).[582] The Amendment formally vested executive authority of the federal government in the President,[583] and gave him non-reviewable discretionary authority to appoint the caretaker cabinet, the Chief Election Commissioner, and the services chiefs.[584] It also retained a new Article 58(2)(b) inserted by the RCO, which enabled the president to dismiss the parliament if in his opinion 'a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.'[585]

However, the Eighth Amendment also significantly toned down several provisions of the RCO. The RCO had removed the original requirement that the president be bound by the advice of the prime minister, and had substituted it with the condition that he merely consult the prime minister, the cabinet or just the 'appropriate minister.' Furthermore, the consultation would have been privileged, and the entirety of the president's powers would have been deemed discretionary and unjusticiable. the eighth amendment removed the possibility of consulting just the appropriate minister and omitted Article 48(3) inserted by the RCO which gave the president blanket cover in the exercise of his discretionary powers. The Amendment also attempted to whittle down Article 58(2)(b) powers by adding the requirement of breakdown of constitutional governance, and added a *non obstante* clause which implicitly rendered the exercise of the dissolution power potentially amenable to judicial review. Thus, while the Eighth Amendment retroactively provided constitutional cover to Martial Law era actions and transferred considerable constitutional power to the President, it appeared tolerable in comparison to the RCO.

Although political parties were banned and the elections had been conducted on a non-party basis, an 'official group' nonetheless emerged in the National Assembly under Prime Minister Junejo's leadership.[586] In addition to re-negotiating the constitutional

[582] Articles 270A, 41 cl 7, *1973 Constitution of Pakistan*.
[583] Article 90 cl 1, *1973 Constitution of Pakistan*. In the original 1973 Constitution, the president was a mere rubber-stamp and his orders needed prime minister's counter-signature as per Article 48.
[584] Art. 48 cl 1(b), *1973 Constitution of Pakistan.*
[585] Provisions similar to Article 58 cl (2)(b) were found in the sections 45 and 93 of the Government of India Act, 1935 and Article 23 cl 4 of the 1962 Constitution. However, under the 1962 Constitution the president also lost office after a dissolution and under Article 23(3) could not be used to dissolve parliament if impeachment proceedings were pending.
[586] Burki, *Pakistan: A Nation in the Making*, above n 528, 92.

arrangement through the Eighth Amendment, the new government displayed unanticipated independence on several issues.[587] Prime Minister Junejo immediately revived political parties and announced the lifting of Martial Law. The third Martial Law in Pakistan's history, and the longest, thus ended in December 1985. As the government exercised its fiscal powers and control over the appointment and transfers of bureaucrats, tensions with the presidency emerged.[588] The government's move to return military officers appointed on deputation in the civil bureaucracy caused further friction.[589] Differences also appeared between the prime minister and president over the appointment of the chief of the Intelligence Bureau,[590] and the removal of ministers who had been appointed by President Zia.

The emergence of two power-centres in the post-1985 framework was not tenable so long as General Zia remained on the political scene. As an increasingly strident Prime Minister Junejo insisted on having a role not only in bureaucratic but also in military appointments, extensions and promotions, tensions threatened to boil over.[591] The tussle between the prime minister and president over military appointments exposed the glaring absurdity of General Zia's constitutional architecture – General Zia as CoAS was formally responsible to Prime Minister Junejo, who also held the portfolio of defence minister; Prime Minister Junejo was in turn answerable to General Zia as president.[592] In May 1988, General Zia suddenly dismissed the Junejo government and dissolved the National Assembly in the first ever exercise of Article 58(2)(b) powers. Although fresh elections were scheduled for November, to be held again on a non-party basis, it is highly likely that General Zia would have reneged on that promise and reverted to an overtly presidential system.[593] General Zia's continuing hold over the military and the absence of broad-based popular support for a civilian government that had been elected on a non-party basis appeared to suggest that the Zia regime would be able to manage yet another term in power. However, in August 1988 General Zia died in a plane crash in mysterious circumstances, his demise unexpectedly opening up the space for a more genuine transition to democratic governance.

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[587] Ibid, 91-2; Baxter, above n 518, 43; Mushahid Hussain, above n 517, 186-90.
[588] Azfar, above n 581, 71.
[589] Talbot, above n 202, 263.
[590] Shafqat, above n 521, 216.
[591] Shafqat, above n 521, 216.
[592] Burki, 'Zia's Eleven Years', above n 523, 16.
[593] Ibid, 9.

In order to understand how the space for civil democracy was significantly constrained by indirect praetorianism in the following decade, one must deconstruct General Zia's lasting political legacy. Important clues can be found in the reasons why the Zia regime survived as long as it did, despite having limited proactive political support throughout his rule. An important contributor to the regime's longevity was a fundamental shift in governance that the Zia regime engineered, giving the military significant inroads in the state structure and economy.[594] The regime made an unprecedented number of appointments of serving and retired military personnel at all levels in the civilian bureaucracy.[595] The Zia regime also transformed the bureaucracy into a junior but respectable partner in praetorian governmentality.[596] While it did not formally reconstitute the CSP, it implicitly resurrected an elite cadre by placing former CSPs in key positions.[597] Contrary to expectations, the Zia regime effected only limited de-nationalization and reverted instead to the bureaucratic model of economic policymaking like that employed by the Ayub regime in the 1960s.[598] Such heavy involvement of the military in administrative and economic management also enabled it to forge lasting alliances with the mercantile classes of north-central Punjab and the settled parts of the NWFP.[599]

Another significant contributor was the growth in the economy in aggregate terms.[600] More importantly, while redistribution of resources along class and regional lines was never on the agenda, the middle and lower-middle classes of Pakistan also expanded considerably.[601] This was largely the fallout of a key element of Bhutto's economic and social policies, which only began to bear fruit in the 1980s. In the aftermath of the 1971 war, Bhutto had specifically realigned what remained of a dismembered Pakistan with

[594] See Alavi, above n 183, 90-91.
[595] See Charles H Kennedy, *Bureaucracy in Pakistan* (Oxford University Press, 1987) 122-5. Also see Alavi, above n 183, 67; Shafqat, above n 521, 201-3, 225. The regime also appointed an unprecedented number of serving and retired Army officers to public corporations. LaPorte Jr, above n 530, 127.
[596] Shafqat, above n 521, 201-3; LaPorte Jr, above n 530, 129.
[597] See Alavi, above n 183, 77. Also see Kochanek, above n 181, 320; LaPorte Jr, above n 530, 122.
[598] Noman, above n 185, 172-3; Shahid Javed Burki, 'Pakistan's Economy under Zia' in Shahid Javed Burki and Craig Baxter (eds), *Pakistan under the Military: Eleven Years of Zia-ul-Haq* (Westview Press, 1991) 96, 104-5.
[599] Burki, *Pakistan: A Nation in the Making*, above n 528, 115; Mushahid Hussain, above n 517, 115; Noman, above n 185, 131-3.
[600] Burki, 'Pakistan's Economy under Zia', above n 604, 87, 106.
[601] Ibid, 100, 107-9.

oil-rich Muslim-majority states in Middle East. The migration of Pakistani workers in large numbers provided Pakistan with vital capital inflows in the form of remittances.[602] Migrant workers mostly belonged to the peri-urban and rural middle and lower-middle classes, and remittances thus resulted in positive wealth distribution outcomes without the praetorian state having to undertake tough policy decisions regarding capital reallocation, land reforms, human and infrastructure development.[603] In addition to these belated consequences of Bhutto era policies, Pakistan's involvement in the US-backed Afghan jihad resulted in the dramatic growth of an informal economy. The Afghan war left a lasting legacy not only of undocumented procurement and distribution of weaponry, but also of related networks of goods smuggling and narcotics trade.[604] The expansion of the informal economy generated by the Afghan war led to conspicuous consumption, the import of luxury goods and a real estate boom.[605]

While Pakistan's middle classes benefited, the distribution of economic outcomes was not uniform. This was partially a consequence of the labour migratory patterns —such that migrants from north-central Punjab and the settled parts of the NWFP were disproportionately represented while those from rural Sindh in particular were grossly underrepresented. The positive wealth distribution effects of remittances undermined the opposition in the heartlands of north-central Punjab.[606] The elites and middle classes of the NWFP were also historically much better integrated in the power structures, with the Pashtuns having a significant representation in the army and the bureaucracy. The benefits of labour migration and the formal and informal economies related to the Afghan war brought the settled parts of the NWFP firmly within the core of the Pakistani state.[607] The Zia regime even brought Baluchistan temporarily in from the periphery, and the successful pacification of the Baloch elites was one of its significant political achievements.[608] However, while the military regime ended the military operation in Baluchistan and successfully appeased the Baloch political leadership, which had suffered immensely under Bhutto, longstanding causes of Baloch resentment

[602] Noman, above n 185, 157.
[603] Ibid, 159-63.
[604] Ibid, 165-6, 188.
[605] Ibid, 166-7.
[606] Ibid, 164.
[607] Talbot, above n 202, 252; Noman, above n 185, 186-7.
[608] Talbot, above n 202, 252.

remained unresolved.[609] It were the rural areas of Sindh and southern Punjab which faced the greatest marginalization under Zia, enhancing the sense of alienation from the Pakistani state.[610]

The exacerbation of the ethno-linguistic fault-lines in Pakistan and the resulting exacerbation of provincialization left a legacy of fractious politics in the decade following Zia's death. The Punjab had been the PPP's most significant support base in the 1970 elections, and the Zia regime worked hard to forge a coalition of mercantile, feudal and religious classes that would significantly dilute the support for the PPP in that province.[611] The regime had deliberately cultivated various factions of the Muslim League, especially the PML (N) led by a young Nawaz Sharif. The scion of a middling industrial family of the Punjab, Nawaz Sharif served as the finance minister and the chief minister of Punjab during the Zia era, and successfully formed an extensive patronage network within the provincial bureaucracy and police. This set the stage for fierce electoral competition between PML (N) and the PPP led by Benazir Bhutto, the strong and politically refined daughter of Zulfiqar Ali Bhutto. In the following decade, the fractious political landscape ensured that incumbent governments would face violent opposition both in the legislatures as well as on the streets. The resulting political instability and a constitutionally empowered presidency thus enabled a still powerful military to exert indirect influence from behind the scenes in the post-Zia years. Such indirect praetorianism was the most significant legacy of the Zia era.

The Contours of an Islamic Judicial Review

It is during the period of tension between the civilian government of Prime Minister Junejo and the Zia presidency that the superior courts most forcefully reasserted their administrative law powers, especially as regards bureaucratic appointments, transfers and dismissals. As Martial Law had been lifted, the Writ and fundamental rights jurisdictions of the courts stood restored. However, it was the Shariat Courts, in particular the SAB, which drove this judicial agenda. An important factor which emboldened the Shariat Courts to assert Islamic legality was the incorporation of the

[609] Noman, above n 185, 64, 190.
[610] Ibid, 182-3.
[611] Shafqat, above n 521, 231.

Objectives Resolution as a substantive part of the Constitution in the form of Article 2-A in 1985.[612] The Objectives Resolution of 1949, Pakistan's first text of constitutional import which had been the Preamble to the 1973 Constitution, opened with the grand assertion, 'sovereignty over the entire Universe belongs to Almighty Allah alone' and that authority were to be exercised by the people of Pakistan 'within the limits prescribed by Him.' Its incorporation as a substantive and enforceable provision of the Constitution caused alarm amongst the critics of Islamization who feared that it may be used by the Shariat courts as a supra-constitutional provision (or *grundnorm* in Kelsen's terminology) to re-interpret the entire constitutional framework in an Islamic light. The provincial High Courts dangerously flirted with the possibilities inherent in the incorporation of the Objectives Resolution and began to question the validity of legislative measures, at times even constitutional provisions, for lack of conformity with Islamic law.[613] Such reliance on Article 2-A deeply divided the appellate courts and shook 'the very Constitutional foundations of the country.'[614] Contrary to expectations, the Shariat courts largely stayed away from this particular source of controversy until it came to rest in 1992 with the settlement that conflicting constitutional provisions must be read in harmony with each other, and no part of the Constitution (such as Article 2-A) was superior to the other parts.[615] In the process, the courts imperceptibly affirmed and solemnized the Constitution with the legitimacy of Islamic legality.

The Shariat courts' use of the Objectives Resolution, now Article 2-A, was not to re-interpret other constitutional provisions but to assert that the executive did not enjoy

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[612] Article 2A, inserted by Presidential Order No. 14 of 1985. In the *Asma Jilani* case, Hamood-ur-Rehman CJ had stated obiter that the Objectives Resolution was the *grundnorm* of Pakistan's constitution. In *State v Zia-ur-Rehman*, PLD 1973 Supreme Court 49, Hamood-ur-Rehman CJ clarified however that the Objectives Resolution was not a substantive part of the Constitution and was unenforceable. This gave rise to the view that if it were included as a substantive part of Constitution it would become the enforceable *grundnorm*.

[613] See, eg, *Bank of Oman Ltd. v. East Trading Co. Ltd.*, PLD 1987 Karachi 404; *Irshad H. Khan v. Parveen Ajaz*, PLD 1987 Karachi 466; *Mirza Qamar Raza v. Tahira Begum*, PLD 1988 Karachi 169; *Shahbazud Din Chaudhry v. Services I.T. Ltd.*, PLD 1989 Lahore 1; *Aijaz Haroon v. Inam Durrani*, PLD 1989 Karachi 304.

[614] *Hakim Khan v. Government of Pakistan*, PLD 1991 Supreme Court 595, 629, quoted in Lau, above n 565, 48.

[615] In *Hakim Khan v. Government of Pakistan*, PLD 1991 Supreme Court 595, dealing with presidential power to pardon under Article 45, the Supreme Court ruled that Article 2-A did not override other provisions of the Constitution. In *Kaneez Fatima v Wali Muhammad*, PLD 1993 Supreme Court 901, the court further held that Article 2-A was not a 'self-executory' provision and did not empower courts to strike down a law.

unlimited prerogative powers, but only limited powers that were to be exercised as a sacred trust in public interest. Furthermore, the Shariat courts opened the doors for a wider permeation of Islamic legality into Pakistan's legal system by interpreting the term 'injunctions of Islam' in an expansive fashion.[616] The SAB ruled that repugnancy to the injunctions of Islam did not only entail a violation of direct and explicit rulings found in the *Qur'an* and the *Sunnah*, but also included violation of broader principles that may be derived from these sources as well as Islamic history. One remarkable example in this regard was the development of the principles of natural justice. In 1987 the SAB decided several consolidated appeals filed by the Government of Pakistan against the 1983 decision of the FSC in *Pakistan v. People at Large*.[617] This case stemmed from the compulsory retirement of several senior bureaucrats by the Zia regime in 1979.[618] The SAB held that Islamic law principles required that the civil servants subject to compulsory retirement be provided notice and opportunity for a fair hearing and directed that the impugned statutory provisions be repealed.[619]

The SAB's 1987 decision in *Pakistan v People at Large* was not unanimous; the bench was split with three judges supporting the majority opinion while two forcefully dissented. Interestingly, the two *ulema* members of the bench disagreed with each other. The disagreement between the majority and minority on the bench was not only over the interpretation of the textual sources of Islamic governance principles, but extended also to policy implications. The majority was in favour of protecting the bureaucracy, to some extent at least, from the pressures exerted on the senior bureaucrats, often unduly and for improper purposes, by the politicians heading their departments. The goal was to restore to the bureaucracy some of its old status as an independent pillar of the state by effectively reading the safeguards of tenure – that had been a part of the 1956 and 1962 constitutions – implicitly into the 1973 framework under the guise of Islamic legality. The minority judges, on the other hand, were of the opinion that a

[616] *Pakistan v. Public at Large*, PLD 1986 Supreme Court 240.
[617] *Pakistan v. People at Large*, PLD 1987 Supreme Court 304.
[618] In addition to mandating retirement at the age of 60 years, §13(i) provided for the compulsory retirement of senior civil servants, of the rank of Additional Secretary and above, at the discretion of the government. Likewise, §13(ii) empowered the government to remove from service bureaucrats who had completed public service of twenty-five years or more. It is notable that the power to compulsorily retire under the above provisions was in addition to the power to remove civil servants on grounds of misconduct, and the affected bureaucrats were entitled to receive pension and retirement benefits.
[619] A similar conclusion was also reached by the FSC in *Muhammad Ramzan Qureshi v. Federal Government*, PLD 1986 Federal Shariat Court 200.

civilian government ought to exercise greater control over the bureaucracy, and that the bureaucracy ought not to be allowed to become a strong part of the 'establishment' which remains largely impervious to political accountability even during times of elected rule. Despite the doctrinal divisions in the 1987 case, the SAB quickly closed ranks. Less than a year later, the same bench decided that the chairman of a semi-autonomous public authority could not be removed without first being granted a hearing.[620] Not only were due process requirements made applicable to public authorities of all kind, including statutory bodies and public corporations, but their reach was extended to a whole range of governmental actions as well. In *Province of Sind v. Public at Large*, the SAB extended the right to hearing to a co-operative society facing adverse action by the government for failure to perform its responsibilities. Justice Nasim Hasan Shah observed that 'this Court has now made it quite clear that any provision of law whereunder someone can be harmed or condemned without affording such person an opportunity of defence against the said action, is against the Quranic Commands as supplemented and interpreted by the Sunnah of the Holy Prophet.'[621]

This particular line of cases is by no means a unique aspect of the Shariat courts' jurisprudence. In one line of cases the FSC and the SAB steadfastly held that the exemption granted to members of legislatures from appearance before courts during sessions of legislatures could effectively result in immunity from prosecution and declared it to be repugnant to the injunctions of Islam.[622] The Shariat courts made several references to instances in Muslim history to demonstrate that the rulers were subject to the law and answerable to the courts.[623] In one case the FSC stated *obiter* that even the 'head of state cannot claim any immunity from prosecution or from appearance in a court during the tenure of his office.'[624] In another case, the SAB invalidated provisions of the West Pakistan Press and Publications Ordinance, 1963, which were designed to maintain a strict control over the licensing of publications on the basis of

[620] See *Pakistan v. Public at Large*, 1989 SCMR 1690.
[621] *Province of Sind v. Public at Large*, PLD 1988 Supreme Court 138.
[622] *In re: Islamization of Laws*, PLD 1985 Federal Shariat Court 193, 199-200; *In re: Members of the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance IX of 1963*, PLD 1989 Federal Shariat Court 3; *In re: Members of the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance IX of 1963*, PLD 1989 Federal Shariat Court 8.
[623] *In re: Islamization of Laws*, PLD 1984 Federal Shariat Court 40, 53.
[624] *In re: The Civil Servants Act (LXXI of 1973)*, PLD 1984 Federal Shariat Court 34, 37.

an Islamic right to freedom of expression. The court noted that 'propagating virtue and righteousness is not only a right in Islam but also an obligation,' and that the ruler who 'tries to deny this right to his people is openly at war with God.'[625] The Shariat courts also found various statutory provisions under scrutiny to be in violation of the Islamic principle of equality, holding that while 'classification' or discrimination between similarly situated people or groups was not forbidden *per se*, it was nonetheless subject to a test of 'reasonableness and intelligibility' and 'must have a reasonable relation to the object or the purpose sought to be achieved' by the legislation.[626]

The Shariat courts' emergent jurisprudence on Islamic rule of law and political rights appeared to be rooted in an intellectual milieu of a distrust of power, 'a presumption that those authorized to exercise discretion are unlikely to carry out their discretionary powers fairly and equally.'[627] In a 1984 decision reviewing the Contempt of Court Act, the FSC had also defined the independence of the judiciary as a fundamental principle highlighted by the prestige and prominence of judges in the Islamic legal tradition.[628] Building on this principle, the Shariat courts insisted upon the granting of a right to appeal against executive decisions, and challenged the ouster of the courts' jurisdiction.[629] In a most remarkable extension of Islamic due process rights, the FSC held that the Islamic right to a hearing mandated the existence of an independent judiciary and the judicial review of administrative action.[630] 'It is thus a guarantee of the rule of law … that … every person has the right to get his dispute decided … by a body which is not only not (*sic*) the executive authority but is independent of it.'[631] In other words, review and appeal processes within the executive were not sufficient, and an opportunity for a hearing before an independent and impartial court or tribunal was a fundamental Islamic requirement. The Shariat courts even found the statutes governing military court martials wanting, because they did not provide for a

[625] *Federation of Pakistan v. Public at Large*, PLD 1988 Supreme Court 202, 209.
[626] See *Muhammad Ramzan Qureshi v. Federal Government*, PLD 1986 Federal Shariat Court 200, 228-31; *Abdul Majid Qureshi v. Islamic Republic of Pakistan*, PLD 1989 Federal Shariat Court 31.
[627] Lau, above n 565, 181.
[628] *In re: Islamization of Laws*, PLD 1984 Federal Shariat Court 40.
[629] See, eg, *In re: Islamization of Laws*, PLD 1985 Federal Shariat Court 193; *Federation of Pakistan v. General Public*, PLD 1988 Supreme Court 645.
[630] See *Zafar Awan v. Islamic Republic of Pakistan*, PLD 1989 Federal Shariat Court 84.
[631] Ibid, 88.

meaningful review or appeal.[632] These decisions, though handed out towards the end of the Zia regime, were nonetheless particularly significant given that Islamic legality would not be suspended even in periods of Martial Law or emergency, even when fundamental rights and the Writ jurisdiction of the courts were taken away. As the SAB reiterated, limitations imposed on fundamental rights were themselves 'subordinated to the most fundamental of all human rights in Islam, the one which cannot at all be abridged by any limitation … namely, [the] right to justice.'[633]

As such, during this brief period of controlled democracy, the Shariat courts laid a more solid groundwork for judicial review. Through Islamic legality the courts achieved what Justice Cornelius had sought to do in *Dosso*, that is ground fundamental rights and the Writ jurisdiction of the courts in a form of natural law that existed beyond a written constitution. However, the courts were able to get away with this assertion of judicial review powers not only because they successfully coopted the dominant Islamic rhetoric pushed by the regime. They also found the political space to assert a greater role because of the friction between the Zia presidency and the Junejo government. The courts' decisions had ambivalent outcomes for both General Zia and the government, and thus provided less reason for either the presidency or the government to push back. The Shariat courts reviewed, and in many cases overturned the actions of the civilian government, which helped the Zia presidency develop its narrative of an inept civilian government. However, such judicial review did not directly benefit the Zia regime as the courts left the decision-making power in the hands of the civilian government, merely requiring better or more transparent administrative procedures. The only institution that was a clear beneficiary of this Islamic brand of judicial review was the judiciary itself.

JUDICIALIZATION OF POLITICS UNDER INDIRECT PRAETORIANISM

In Pakistan's first four decades the courts had found themselves repeatedly under pressure at moments of extra-constitutional regime change and were compelled to

[632] *Pakistan v. General Public*, PLD 1989 Supreme Court 6. In another instance, the Shariat courts ruled that martial law regulations were subject to review for repugnancy to the injunctions of Islam and did not enjoy any special status or constitutional protection. *Nusrat Baig Mirza v. Government of Pakistan*, PLD 1991 Supreme Court 509.
[633] *Federation of Pakistan v. General Public*, PLD 1988 Supreme Court 645, 655.

validate such naked exercises of power through creative constitutional law. However, they had succeeded in preserving their judicial review jurisdiction and had learnt to mediate between the dominant executive and political opposition to push for a minimalist form of constitutionalism and rule of law even during periods of Martial Law. The courts' efforts in this domain were ultimately feeble and fruitless as successive military and civilian governments commanded the power to amend the constitutional and legislative frameworks at will. Nonetheless, the courts had managed to win occasional concessions for political opposition creating expectations of more robust forms of constitutionalism in favourable times. More significantly, the courts had progressively expanded the judicial review of bureaucratic action under the Writ jurisdiction. Furthermore, the courts were also able to preserve procedural review of security and preventive detention laws, even in the face of executive defiance through the first few decades of postcolonial existence.

Under Zia the courts had followed the blue print of validating extra-constitutional takeover, and were even complicit in the execution of the first popularly elected prime minister of the country. However, the courts had also attempted to exercise their review powers quite robustly when faced with an unprecedented number of detentions and trials before military courts and tribunals. As a result, they had forced the regime to curtail their judicial review powers and effect the first ever purge of the superior judiciary. Nonetheless, through the transition to a controlled democratic façade and subsequent tensions with the civilian government, the Islamization of laws provided the courts with a normative bedrock within which to ground a more substantive brand of constitutionalism and rule of law. The courts used the dominant narrative of Islamic law and political morality to rebrand the existing constitutional framework, judicial independence, and judicial review of executive action as being compliant with fundamental Islamic precepts. Such was the historical and jurisprudential backdrop to the first significant expansion of judicial power that unfolded in the 1990s. In the decade post-Zia the courts encountered for the first time in Pakistan's tortuous history a highly contentious and fragmented political landscape, and hence greater space to expand judicial power.

INDIRECT PRAETORIANISM

'PUBLIC INTEREST LITIGATION' AND THE FIRST WAVE OF JUDICIAL ACTIVISM

The Zia era gave rise to fundamental contradictions in the Pakistani state and society. On the one hand the Pakistani state transformed into a truly over-developed military-bureaucratic complex with coercive capacity as well as deeper penetration into the political economy and society. The military's relationship with the bureaucracy, strengthened during the Zia regime, enabled it to exert immense influence over foreign policy and national security in the decade of civilian rule that followed General Zia's sudden death in August 1988. The military's continuing covert power was strengthened further by the permeation of the religious-nationalist idiom amongst the majority Punjabi-Pushtun population. Punjab came to dominate electoral politics like never before in Pakistan's history; and as large segments of the middle and lower-middle classes of north-central Pakistan bought into the military's narrative of nationhood, it became increasingly difficult for any of the major political parties to deviate from the hegemonic definition of national interest.[634] This in turn fuelled ethno-linguistic resentment in the smaller provinces and the regional periphery of the state. With the balkanization of politics along provincial and ethno-linguistic faultlines, the military-bureaucratic complex took on the mantle of the guarantor of the nation state's existence. Pakistan transformed into a 'fearful state' in which pluralism equated with weakness.[635]

Another contradiction of the Zia era that left an indelible imprint on the constitutional politics in the following decade was the consolidation of civilian elites. Like other postcolonial states Pakistan too was not only caught up in this core-periphery or power-

[634] However, one must avoid a simplistic notion of 'Punjabization' of politics. The demographic significance of Punjab and the size of its economy does not simplistically translate into a dominance of Punjab as there isn't a monolithic Punjabi interest. See Ian Talbot, 'The Punjabization of Pakistan: Myth or Reality?' in Christophe Jafferlot (ed), *Pakistan: Nationalism without a Nation?* (Zed Books, 2002) 59-61.

[635] S Mahmood Ali, *The Fearful State: Power, People and Internal War in South Asia* (Zed Books, 1993).

fragility dynamic, but was also characterized by a 'sharp dichotomy between the political cultures of elites and that of masses.'[636] While the populace fragmented along ethno-linguistic, regional and sectarian faultlines, the elites consolidated. Pakistan's feudal-political, military-bureaucratic, religious, industrial and urban professional classes began to transform into a 'trans-regional elitist alliance.'[637] Economic associations established through industrialization, state licensing regimes, urban real estate, loan write-offs by public banks, and tax evasion were reinforced by cultural commonalities cultivated through private schooling at elite institutions, foreign education, inter-marriages, *etc*. Although large segments of these elites, especially in the Punjab and NWFP, were the product or beneficiaries of Zia era economic policies, they would in time seek to assert their influence over the aggrandized state, thereby challenging the military's influence. The state and the bureaucratic apparatus thus became a site of fierce elite competition over resources, and the various modes of institutionalized corruption between the military and Pakistan's political classes.

These contradictions were contained so long as a powerful military-bureaucratic complex remained at the helm of affairs during the Zia regime. General Zia's unexpected demise not only opened up greater space for democratic politics but also for these contradictions to be played out in bitter political contestations. A decade of political turmoil followed; successive elected governments found themselves locked in power struggles not only with political opposition, but also a presidency backed by the military-bureaucratic complex. Four civilian governments, alternatively formed by the PPP and the PML (N), were elected and dismissed from power – the first three by the use of Article 58(2)(b) powers by the presidency and the fourth through a military coup. All three dissolutions under Article 58(2)(b), and a range of other issues of pure politics, were vindicated before the courts The referral of recurrent political disputes by the superior judiciary brought the courts to the center of political action. By the end of the decade, no consistent constitutional logic or doctrine rationalizing the political cases was discernible, as the Supreme Court appeared to be relying on changing interpretations of various constitutional provisions at stake. The only consistent progression during this extended saga of political instability was in the power of the

[636] Mehran Kamrava, *Politics and Society in the Third Wo*rld (Routledge, 1993) 168.
[637] See Iftikhar H Malik, *State and Civil Society in Pakistan* (MacMillan Press, 1997) 82.

superior judiciary, which had become a key player in the constitutional politics it was mediating.

Strengthened by their moorings in a widely shared Islamist public morality, which at least rhetorically demanded the accountability of the executive and justice for all, the courts engineered a dramatic expansion in public law and carved a role for themselves as the third most significant institution of the state, in addition to the political executive and the military. The Supreme Court began to use its Original jurisdiction for the first time, and developed the framework of 'Public Interest Litigation' following the model of the Indian judiciary. This rise to unprecedented prominence was not an unqualified good, however. The adjudication of governmental change took its toll as by the end of the 1990s the courts laboured under a perception of politicization. More significantly, the rhetoric of rights, rule of law and judicial independence rooted in an Islamic public morality created expectations the courts had no capacity to meet: while they could obstruct executive fiat through judicial review, their ability to compel the state to deliver tangible outcomes remained negligible. Even more debilitating was the superior courts' inability to compel the reform of the lower judiciary, which remained fully imbricated in the bureaucratic-police framework that traced its lineage directly to colonial rule.

THE CONSTITUTIONAL POLITICS OF INDIRECT PRAETORIANISM

Judicial Review of Government Dissolutions

With General Zia's sudden death in a plane crash in 1988, Pakistan's political forces found unexpected space to push for a return to democracy. However, the prospects of meaningful electoral politics were overshadowed by the legacy bequeathed by the Zia era: a deeply entrenched civil-military imbalance in national politics; a state structure built around a military-bureaucratic nexus and shared Islamo-nationalist ideology; re-emergence of patronage-based electoral politics focused on provincial, local, kinship and class interests; and a political economy suffering the blowbacks of the Afghan *jihad* in the form of an expanding informal economy, rampant corruption, weaponization of society and heightened sectarianism. It is these dynamics which played out most visibly

in the constitutional politics of Pakistan in the decade of instability that followed the end of the Zia regime. The undercurrents of praetorianism were evident in the very process of transition after General Zia's death as Ghulam Ishaq Khan, a seasoned bureaucrat who played a pivotal role in the economic management of the Zia regime, became acting president.

In a significant move, President Ghulam Ishaq Khan announced fresh elections to be held in November 1988, instead of restoring the Junejo government. The decision not to restore the Junejo-led assembly was challenged before the Lahore and Sindh High Courts, casting the superior judiciary into a central role in fashioning and legitimizing the difficult transition process. Such a role for the superior courts in mediating issues of pure politics – governmental change, transfer of power and electoral processes – would be a hallmark of the constitutional politics of the following decade. Both the Lahore and Sindh High Courts dismissed the petitions challenging the dissolution and refused to restore the assemblies.[638] In *Muhammad Saifullah*, a twelve-member bench of the Supreme Court unanimously dismissed the appeals against the High Court decisions.[639] The court interpreted Article 58(2)(b) to hold that there must first be an objective basis for findings to the effect that constitutional machinery had broken down, or that there was a stalemate or a deadlock, in which case the President would have the discretion to either dissolve the assemblies or choose some other means of resolving the crisis. While the court found no objective basis for such a finding, it questioned the constitutional and democratic credentials of the Junejo-led assembly. Echoing the sentiments raised in the High Court decisions, the Supreme Court noted the delay in approaching the court, the fact that the dismissed Prime Minister Junejo had not filed the petition, and that fresh elections were imminent. This decision was thus quintessentially reminiscent of *Maulvi Tamizuddin* – the court simultaneously sought to draw a constitutional redline under presidential exercise of discretion while facilitating what it saw as a move towards greater democratization.

The 1988 elections were essentially a two-party contest along distinct ideological lines between the PPP, which still avowed its leftist leanings, and the *Islami Jumhoori Ittehad*

[638] *Muhammad Sharif v. Federation of Pakistan*, PLD 1988 Lahore 725; *M. P. Bhandara v. Pakistan*, 6 MLD 2869.
[639] *Federation of Pakistan v. Muhammad Saifullah*, PLD 1989 Supreme Court 166.

(IJI), a coalition of right-leaning Muslim League factions and religious parties. The IJI leadership had been initiated in politics and governance in the 1980s, had roots in landowning and mercantile classes that had benefited immensely under Zia, and had also developed familial and social links with military and bureaucracy through marriages, working cooperation and other interactions.[640] The most significant opposition to the PPP, however, came from the military which had been indoctrinated in the Zia years to see it as a threat to national interest and security.[641] The military had been instrumental in cobbling together the various factions and parties of the IJI, and reportedly provided funding and other support to various candidates.[642] Other forms of pre-election rigging against the PPP included the abuse of office and public funds by the caretaker Chief Minister of Punjab, Mian Muhammad Nawaz Sharif. Nawaz Sharif, who as the head of the IJI was also a prime contender for the office of Prime Minister, fully leveraged his control over the provincial bureaucracy and monetary resources.

Despite a low turnout, various forms of pre-election rigging and military support for the rightist coalition,[643] the PPP emerged as the largest single party in the National Assembly. However, the PPP was allowed to form the government only after a tacit deal to share power, especially as regards national security and foreign affairs, with the military. Another challenge for the Benazir Bhutto led PPP's federal government was the emergence of a hostile provincial government in the Punjab, where the opposition had managed to win the largest number of seats. For the first time in Pakistan's history Punjab was in confrontation with the federation.[644] These tensions quickly transformed into open hostility with failed attempts by the PPP and the IJI to engineer reciprocal votes of no-confidence against the prime minister and the Punjab chief minister.[645] Talk of 'horse-trading' – purchasing the loyalty of independent members of legislatures or those belonging to another political party – entered Pakistan's political lexicon. With the persisting political instability at the centre and in the Punjab, the PPP's

[640] Shafqat, above n 521, 236.
[641] Ibid, 228.
[642] Seyyed Vali Reza Nasr, 'Democracy and the Crisis of Governability in Pakistan' (1992) 32 *Asian Survey* 521, 523. Also see *Air Marshal (R) Muhammad Asghar Khan v. General (R) Mirza Aslam Beg*, PLD 2013 Supreme Court 1.
[643] See R B Rais, 'Pakistan in 1988: From Command to Conciliation Politics' (1989) 29 *Asian Survey* 203.
[644] Talbot, above n 202, 298-302.
[645] Shafqat, above n 521, 232.

accommodation with the *Muhajir Qaumi Movement* (MQM),[646] an important ally in the Sindh province, also began to unravel. The PPP government in Sindh had failed to reconcile itself with the MQM's emergence as the leading political player in the urban areas of the province. The law and order situation in urban Sindh deteriorated dramatically and much of the blame was placed on the MQM. The MQM sided with the IJI in the no-confidence motion against Prime Minister Benazir Bhutto marking a complete breakdown in their alliance, and even though the PPP government managed to survive it was exceedingly vulnerable without the MQM's support.

The fatal strike against the PPP government, however, came from the military-backed president who prematurely terminated Benazir Bhutto's first stint in power in August 1990 through another exercise of Article 58(2)(b) powers. Tensions between the elected government and the presidency were inevitable in a hybrid presidential-parliamentary system that was the bequest of the Zia era. Differences of opinion had emerged over foreign policy, particularly relations with India.[647] Bhutto also challenged the appointment of judges appointed by Ghulam Ishaq Khan as interim president prior to the elections. The Lahore High Court upheld such appointments as valid, but the confrontation continued until the federation withdrew its appeal before the Supreme Court.[648] The biggest point of contention between the prime minister and the president was over appointments and promotions in the military. Bhutto asserted a right to have the final say on the appointment of the services chiefs, which was vociferously resisted until she backed down.[649] The prime minister did succeed in appointing a retired army officer to replace the outgoing Director-General of the Inter-Services Intelligence, the military's premier intelligence agency. The prime minister's perceived intrusion into the domain that the military had marked for itself became the ultimate cause of her downfall.

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[646] The MQM first rose to prominence in the local elections of 1987 in the urban centres of southern Sindh, had its roots in the diminishing socio-economic opportunities of the *muhajirs* (descendants of migrants from India). The PPP's rule in 1970s had considerably expanded Sindhi rural interest at the expense of *muhajir* influence at the provincial level, a phenomenon extended at the federal level by the rise of the Pashtuns under Zia. Yunas Samad, 'In and out of Power but not Down and Out' in Christophe Jafferlot (ed), *Pakistan: Nationalism without a Nation?* (Zed Books, 2002) 65-68.
[647] Shafqat, above n 521, 234-5.
[648] *M. D. Tahir v. Federal Government*, 1989 CLC 1369; *Federal Government of Pakistan v. M. D. Tahir*, 1990 SCMR 189. See Azfar, above n 581, 77-8; Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 256-57.
[649] Azfar, above n 581, 77; Talbot, above n 202, 309-10.

In issuing the order of the dissolution of parliament under Article 58(2)(b), President Ghulam Ishaq Khan presented a detailed charge sheet against the PPP government. The order cited lack of legislation in parliament; failure to convene the Council of Common Interests (CCI) and formulate the National Finance Commission (NFC) Award;[650] confrontations with provincial governments, the Senate and the judiciary; improper appointments in the bureaucracy and public corporations; and law and order breakdown in Sindh, amongst other grounds.[651] This second exercise of Article 58(2)(b) powers was challenged again before the Lahore and Sindh High Courts under the Writ jurisdiction. Both High Courts upheld the dissolution and in doing so appeared to have expanded the discretion available to the President, contrary to the Supreme Court's earlier decision.[652] In *Khawaja Ahmad Tariq Rahim*, a twelve-member bench of the Supreme Court refused to even grant a leave to appeal.[653] The majority provided an expanded interpretation of Article 58(2)(b), which empowered the president to dissolve the assembly not only in case of a constitutional deadlock but also 'extensive, continued and pervasive failure to observe not one but several provisions of the Constitution.'[654] The majority found two of the grounds cited in the dissolution order to have been substantiated – namely the failure to legislate in parliament and confrontation with the provinces, which resulted in a failure to convene the CCI and formulate the NFC Award. The court also held that while the other charges were not sufficient by themselves, they nonetheless buttressed the president's exercise of his discretion.

This, however, was not a unanimous decision, and the two dissenting opinions provided the first indications of the emergent politicization of the court. In his dissent A S Salam, J argued that the Eighth Amendment was personal to General Zia, and expired naturally with his demise. As a result, the constitution should revert to its original form without

[650] The Council of Common Interests (CCI) is a constitutional body with equal representation from federal and provincial governments which is tasked with policy formation on a number of matters of federal and inter-provincial interest. Articles 153 and 154, *1973 Constitution of Pakistan*. The National Finance Commission (NFC) is another constitutional body with representation from federal and provincial governments which is tasked with the responsibility of making a bi-annual award for the distribution of revenues between federal and provincial governments. Articles 160, *1973 Constitution of Pakistan*.
[651] Talbot, above n 202, 303-7.
[652] *Ahmad Tariq Rahim v. Federation of Pakistan*, PLD 1991 Lahore 70; *Khalid Malik v. Federation of Pakistan*, PLD 1991 Karachi 1.
[653] *Khawaja Ahmad Tariq Rahim v. Federation of Pakistan*, PLD 1992 Supreme Court 642.
[654] Ibid, 664-5.

Article 58(2)(b). Another notable argument in this dissenting opinion was that if the president was not a neutral party, and had a role in creating the constitutional deadlock in the first place, Article 58(2)(b) powers should not be available to him. Nonetheless, even Salam, J refused to grant relief in this case as fresh elections were imminent. The time it took for a petition to make its way as an appeal before the Supreme Court, after the case had first been heard by the High Courts under the Writ jurisdiction, meant that the chances of successfully challenging an exercise of Article 58(2)(b) powers would be slim even if a majority of the court were thus inclined. The second dissent by Sajjad Ali Shah, J was even stronger. He found the grounds of dissolution to be weak on the merits, and indicated that the president did not have to resort to such a catastrophic measure as there were several other options of resolving a constitutional deadlock. Most remarkably, in a telling sign of the times to come, Shah, J openly voiced concerns that even the court was acting politically and victimizing the PPP.[655]

The 1990 elections were blatantly rigged, fueling cynicism about electoral politics in Pakistan. With a low voter turnout disadvantaging the PPP, the Nawaz Sharif led coalition won a clear majority in the National Assembly.[656] Given the rightist coalition's ties with the military-bureaucratic establishment, the government was expected to continue to cede space to the military, but soon began to assert itself.[657] With emerging differences with the military leadership the coalition began to fragment, and even several members of Nawaz Sharif's own faction of the Muslim League also defected or resigned. However, just as with Benazir Bhutto's first government, it was not the loss of parliamentary support but a confrontation with the president over the appointment of the army chief which ended Nawaz Sharif's first tenure as prime minister.[658] It is intriguing that despite a clear post-Zia constitutional configuration, whereby the president was the ultimate decider, both Benazir Bhutto and Nawaz Sharif chose to fight disastrous battles over the appointment of army chiefs. This reflected the continuing political importance of the top military post. The resulting conflicts between the apex civilian offices, in turn, made the CoAS even more powerful as the arbiter of the tussle.[659]

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[655] *Khawaja Ahmad Tariq Rahim v. Federation of Pakistan*, PLD 1992 Supreme Court 642, 721.
[656] Talbot, above n 202, 313.
[657] Shafqat, above n 521, 236.
[658] Ibid, 238; Talbot, above n 202, 325.
[659] Shafqat, above n 521, 238-9.

In April 1993, President Ghulam Ishaq Khan exercised Article 58(2)(b) powers for the second time in his tenure to dismiss the Nawaz Sharif government. While the charges in this instance were similar to those made earlier against Benazir Bhutto's government, the dissolution order seemed to have been put together somewhat hurriedly. The Prime Minister had made a defiant speech to the nation the evening before the dissolution of his government, which may have precipitated the final action. Nawaz Sharif immediately challenged the dissolution of parliament and, unlike the previous instances, moved the Supreme Court directly through its Original jurisdiction under Article 184(3). In *Muhammad Nawaz Sharif*, the Supreme Court not only admitted the petition for hearing but also overturned the dissolution of the government by an overwhelming majority.[660] The majority reviewed the grounds for dissolution on their merits, and held that that the breakdown of the relationship between the president and the prime minister could not be a basis of dissolution of parliament as the prime minister was not constitutionally accountable to the president. Sajjad Ali Shah, J again dissented, citing the discrepancy in the majority's present stance and the *Khawaja Ahmad Tariq Rahim* decision. However, he appeared to have reversed his own position, as he argued that the dissolution of parliament was warranted in both cases.[661]

Despite the Supreme Court's intervention, the Nawaz Sharif government did not last. The tussle between the restored prime minister and the president shifted to the provincial government in Punjab. The PML (N) government in Punjab had also fallen apart during the period when Nawaz Sharif's federal government was in dissolution, and the president's camp was able to engineer a sufficient number of defections to form a coalition government. With the restoration of the federal government, Nawaz Sharif's party was able to win back the allegiance of several defectors in the Punjab Assembly. As the PML (N) tabled a motion of no-confidence against the interim chief minister, the governor dissolved the provincial assembly. A full bench of the Lahore High Court found the dissolution of the provincial assembly to be *mala fide*, as it was intended to defeat the no confidence motion and frustrate the Supreme Court's decision to restore

[660] *Muhammad Nawaz Sharif v. Federation of Pakistan*, PLD 1993 Supreme Court 473.
[661] Another judge who appeared to have flipped his position was Rafiq Tarar, J. In *Khawaja Tariq Rahim*, then CJ of Lahore High Court, he had supported a generous reading of presidential discretion.

Nawaz Sharif's federal government.[662] The crisis escalated as within hours of the High Court decision the governor dissolved the provincial assembly for the second time, pursuant to the advice of the chief minister. In retaliation, the prime minister attempted to impose federal rule in the province without the approval of the president.[663] This constitutional deadlock was only broken when the CoAS intervened and secured the resignations of both the prime minister and the president in July 1993.[664]

Public Interest Litigation and a Dramatic Expansion in Judicial Review

The Supreme Court decisions in the first three dissolution cases cannot be seen in isolation. These cases were adjudicated during a brief period of intense activism during which the Supreme Court laid the foundations of 'Public Interest Litigation' under its Original jurisdiction.[665] In a landmark decision delivered in the lead up to the 1988 election, the court allowed unregistered political parties to contest the forthcoming elections and held that elections based on non-party basis violated the fundamental rights provisions of the Constitution.[666] The petition, brought by Benazir Bhutto, gave substance to the freedom of association provided in Article 17, and paved the way for the PPP's return to electoral politics. An elaborate judgment by Haleem, CJ in the *Benazir Bhutto* case is seen as the genesis of Public Interest Litigation in Pakistan. The court loosened the requirement of *locus standi*, and held that any individual with a *bona fide* interest in challenging a law or executive fiat could bring a petition. In another petition brought by Benazir Bhutto, the Supreme Court further paved the way for party-based elections. It held that electoral symbols had to be allotted to political parties and

[662] *Parvez Elahi v. Province of Punjab*, PLD 1993 Lahore 518.
[663] Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 422.
[664] Talbot, above n 202, 328-9.
[665] For example, in what was by then a rather typical post-dictatorship reclamation of jurisdiction, the Supreme Court held Martial Law authorities' actions and sentences of military tribunals to be reviewable despite Article 270-A, inserted by the Eighth Amendment, which had sought to retrospectively validate and shield such actions from judicial review. See *Federation of Pakistan v. Malik Ghulam Mustafa Khar*, PLD 1988 Supreme Court 26. Also see *Muhammad Bachal Memon v Government of Sindh*, PLD 1987 Karachi 296; *Ghulam Mustafa Khar v Pakistan*, PLD 1988 Lahore 49.
[666] See *Miss Benazir Bhutto v. Federation of Pakistan*, PLD 1988 Supreme Court 416. Although provisions comparable to Article 184(3) existed in the 1956 and 1962 Constitutions, there was only one notable case in which the courts considered their original jurisdiction. See *Begum Zabunnisa Hamidullah v Pakistan*, PLD 1958 Supreme Court (Pak) 35. The first notable case under Article 184(3) of 1975 Constitution was *Manzoor Elahi v. Federation of Pakistan*, PLD 1975 Supreme Court 66, but even there it was stated that normally the High Courts should be made recourse to first.

not to individual candidates, as General Zia's amendments to the Representation of the People Act, 1976 required.[667]

As the polity emerged from the shadows of the Zia regime, and while the Supreme Court made the first tentative strides in developing Public Interest Litigation, it was the Shariat Appellate Bench of the Supreme Court (SAB) which displayed the most potent form of judicial activism. In a spate of decisions the SAB threatened to dramatically alter Pakistan's legal landscape declaring land reforms, interest-based financial instruments, and customary and statutory laws providing for pre-emption to be un-Islamic.[668] The most significant change brought about by the SAB, however, was in criminal law. In *Gul Hassan*, the SAB finally decided on the fate of the Pakistan Penal Code (PPC) provisions relating to homicide and hurt, declaring the entire chapter of the PPC to be in violation of the injunctions of Islam.[669] In a remarkable exercise of judicial power the court not only declared the concerned provisions to be null and void, but also outlined in considerable detail the key parameters of the legislation that must replace the voided provisions. As noted earlier, Islamization of law had left a tragic of rule of difference, which was further exacerbated by the new *qisas* and *diyat* laws – Islamic provisions concerning homicides and other offences against the person which provided for strict retribution and pardon in *lieu* of compensation.[670]

While many of the SAB's decisions tended to curtail individual rights, the use of Islamic legality had also expanded the domain of public rights. The SAB built upon the earlier jurisprudence of the Shariat courts concerning the development of public law in the 1980s. During its period of intense post-Zia activism, the SAB furthered the particular strand of Islamic jurisprudence that extended due process requirements. The Shariat courts bolstered the legitimacy of judicial review of executive action, and declared that an opportunity for a hearing before an impartial court or tribunal was not only a 'guarantee of the rule of law' but also a fundamental requirement of Islamic

[667] See *Benazir Bhutto v. Federation of Pakistan*, PLD 1989 Supreme Court 66.
[668] For a summary of some of the leading cases, see Nasim Hasan Shah, 'Islamisation of Law in Pakistan' (1995) PLD 1995 Journal 37.
[669] *Federation of Pakistan v. Gul Hasan Khan*, PLD 1989 Supreme Court 633. Appeals from 11 petitions had been pending since as early as 1980.
[670] See Moeen Cheema, 'Beyond Beliefs', above n 4, 892-900..

injunctions concerning due process.[671] The SAB reinforced the right to equality,[672] demanded the accountability of government officials, access to justice and independence of judiciary.[673] For example, the SAB held that requiring prior sanction of government to prosecute civil servants was contrary to the Islamic principles of the accountability of the executive.[674] Amidst the political turmoil of the early 1990s, and widespread allegations of political corruption, the Shariat courts extended the demands of accountability to the political executive.[675] Even the Shariat courts' conservative property rights jurisprudence emerged as a meaningful safeguard against the abuse of executive powers in several cases of land acquisition.[676] For instance, the SAB declared un-Islamic the practice of requisitioning private property for use by bureaucrats as official residences.

By early 1990s, when successive PPP and PML-N governments had begun to successfully dismantle the independence and the integrity of the bureaucracy and police to develop their own patronage networks in the cadres, the High Courts and the Supreme Court picked up the mantle of administrative law from the Shariat Courts.[677] At the same time the Shariat courts had begun to disappear from the scene, ceding the expanded terrain of judicial power to the High Courts and the Supreme Court. This transition happened in contradictory, though related ways. The displacement of the

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[671] *Zafar Awan v. Islamic Republic of Pakistan*, PLD 1989 Federal Shariat Court 84, 88.
[672] See, eg, *Government of N.W.F.P. v. I. A. Sherwani*, PLD 1994 Supreme Court 72.
[673] See, eg, *Akbar Ali v. Secretary, Ministry of Defence, Rawalpindi*, 1991 SCMR 2114; *Nusrat Baig Mirza v. Government of Pakistan*, PLD 1991 Supreme Court 509.
[674] *Federation of Pakistan v. Zafar Awan*, PLD 1992 Supreme Court 72.
[675] See *Federation of Pakistan v. Public at Large*, PLD 1991 Supreme Court 459. Also see *In re: N.W.F.P. Provincial Assembly*, PLD 1991 Federal Shariat Court 283; *In re: Members of the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance IX of 1963*, PLD 1989 Federal Shariat Court 3; *In re: Members of the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance IX of 1963*, PLD 1989 Federal Shariat Court 8.
[676] See *Province of Punjab v. Amin Jan Naeem*, PLD 1994 Supreme Court 141. Also see *Nazir Ali Shah v. Capital Development Authority*, PLD 1992 Federal Shariat Court 361; *In re: Land Acquisition Act (I of 1894)*, PLD 1992 Federal Shariat Court 398.
[677] See, eg, *Al-Jehad Trust v. Manzoor Ahmad Wattoo*, PLD 1992 Lahore 855; *Al-Jehad Trust v. Manzoor Ahmad Wattoo*, PLD 1992 Lahore 875; *Pervaiz Elahi v. Province of Punjab*, PLD 1993 Lahore 595; *Muhammad Muqeem Khoso v. President of Pakistan*, PLD 1994 Supreme Court 412; *Chairman, Pakistan Broadcasting Corporation v. Nasir Ahmad*, 1995 SCMR 1593. Notably, however, in most such cases Islamic law arguments were used *obiter*, to bolster the moral foundations and the legitimacy of the court's position, rather than as the core legal basis for decisions. The incorporation of Article 2-A, which made the Objectives Resolution a substantive part of the Constitution, also enabled the High Courts and the Supreme Court to interpret any legislation in the light of Islamic law principles. See Lau, above n 565, 70-1. See, for example, *Sindh High Court Bar Association, Karachi v. The Islamic Republic of Pakistan*, PLD 1991 Karachi 178; *M. D. Tahir v. Federation of Pakistan*, 1995 CLC 1039; *Dr. Hameed Ahmad Ayaz v. Government of Punjab*, PLD 1997 Lahore 434.

SAB by the regular Supreme Court was a relatively smooth process. The SAB was not an independent court, but only a special bench of the Supreme Court on which *ad hoc* (*ulema*) members sat alongside the regular Supreme Court judges. These *ulema* members often appeared to be applying standard judicial reasoning techniques on Islamic texts and legal materials. Emboldened by the commonalities in the judicial methodology, Supreme Court judges began to increasingly adopt Islamic law arguments not only in their judgments on the SAB but also in regular Supreme Court decisions. A notable example is of Justice Nasim Hasan Shah, who sat regularly on the SAB benches in the early 1990s – his elevation as the Chief Justice of Pakistan coincided with the displacement of the SAB as more and more issues of Islamic law began to be adjudicated by the regular benches of the Supreme Court.

The displacement of the FSC by the High Court was, on the other hand, a product of overt jurisdictional conflict. The High Courts were embroiled in a jurisdictional tussle with the FSC, virtually from the outset. Many defendants in Hudood and blasphemy cases, who had been aggrieved by the operation of these Islamized criminal laws, brought procedural challenges in the High Court in preference over substantive appeals to the FSC.[678] This forum shopping was the result of the speed with which writs were adjudicated, in months rather than years, and the perceived liberalism of the High Courts as opposed to the orthodoxy of the FSC.[679] The adoption of the *qisas* and *diyat* laws in the early 1990s expanded the terrain of confrontation between the High Courts and the FSC, and empowered the High Courts to adopt Islamic legal principles applicable across the entire spectrum of criminal law and procedure such as grant of bail, police investigations, evaluation of evidence, prison conditions, and the inability of indigent prisoners to pay fines or *diyat* (compensation for victims).[680] The adoption

[678] See, eg, *Muhammad Bashir v. State*, 1989 PCrLJ 459; *Riaz Elahi v. State*, 1989 PCrLJ 1588; *Ameeran Bibi v. Superintendent of Police*, Bahawalnagar, 1989 PCrLJ 2012; *Miandad Ghanghro v. S.H.O., P.S. Kandhra*, 1989 PCrLJ 1945; *State v. S.S.P. Islamabad*, PLD 1993 Lahore 112; *Mushtaq Raj v. Magistrate 1st Class*, 1994 PCrLJ 497; *Naseer Khatoon v. S.H.O. Police Station City, Mianwali*, 1994 PCrLJ 1111; *Amer Habib v. Senior Superintendent of Police*, 1995 CLC 29.

[679] See *Riaz v. Station House Officer, Police Station, Jhang City*, PLD 1998 Lahore 35, where it was held that the police had no authority to enter and search premises on the report of an informer or an anonymous complaint for that would violate an individual's right to privacy under Islamic law. Also see *Noor Muhammad v. S.H.O. Police Station Klurkot, District Bhakkar*, 2000 YLR 85; *Abdul Majeed v. Superintendent of Police*, PLJ 1998 Lahore 1158; *Nasreen v. Station House Officer, Police Station Batala Colony, Faisalabad*, 2001 PCrLJ 685.

[680] The Qisas & Diyat laws not only specifically mandated the High Courts to adopt Islamic law precepts in writs or appeals in murder and hurt cases, but also "in respect of matters ancillary or akin thereto." §338-F, Pakistan Penal Code, 1860. See, eg, *Niamat Ali v. State*, PLD 2001 Lahore 105.

of Article 2-A, which made the Objectives Resolution a substantive part of the constitution, also enabled the High Courts and the Supreme Court to interpret any legislation in the light of Islamic law principles.[681]

It was the contradictory confluence of Islamic public law and the High Courts' aggressive interventions challenging the enforcement of Islamized criminal laws that enabled the High Courts to engineer a dramatic expansion of their Writ jurisdiction – a public law explosion – in the early 1990s. A range of public law matters were raised before the High Courts under the Writ jurisdiction, many of which ultimately ended up before the Supreme Court upon appeal.[682] Islamic law arguments and principles began to increasingly feature in the decisions of the High Courts and the Supreme Court in matters as diverse as constitutional law, administrative law, criminal procedure, civil procedure, family law, taxation, contracts, torts and environmental law. Notably, however, in most such cases Islamic law arguments were used *obiter*, to bolster the moral foundations and the legitimacy of the court's position, rather than as the core legal basis for decisions.[683] The courts also sought to bolster their own independence as well as push for the belated separation of the lower judiciary from the bureaucracy. In *Sharaf Faridi*, the Supreme Court upheld the Sindh High Court's earlier directions

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[681] See Lau, above n 565, 70-1. See, eg, *Sindh High Court Bar Association, Karachi v. The Islamic Republic of Pakistan*, PLD 1991 Karachi 178; *M. D. Tahir v. Federation of Pakistan*, 1995 CLC 1039; *Dr. Hameed Ahmad Ayaz v. Government of Punjab*, PLD 1997 Lahore 434.

[682] The courts enhanced the standards of transparency and procedural fairness required of the bureaucracy. See, eg, *Nawab Khan v. Government of Pakistan*, PLD 1994 Supreme Court 222. In matters related to criminal process, the courts asserted wide powers of directing the registration, quashment and conduct of criminal cases short of active control or supervision of trials. See *Shaukat Ali Dogar v. Ghulam Qasim*, PLD 1994 Supreme Court 281. The courts also scrutinized preventive and illegal detentions, torture and abuse of police powers, and granted remedies such as orders for the disciplining, suspension and dismissal of officers or award of compensation for the victims. See, eg, *Shazia Parveen v. District Magistrate*, PLD 1988 Lahore 611; *Mrs. Arshad v. Government of Punjab*, PLJ 1994 Supreme Court 393; *Mazharuddin v. State*, 1998 PCrLJ 1035.

[683] See *Muhammad Shabbir Ahmad Khan v. Federation of Pakistan*, PLD 2001 Supreme Court 18 (customary law of inheritance inapplicable); *Mrs. Anjum Irfan v. LDA*, PLD 2002 Lahore 555 (Islamic law arguments on environmental issues); *M. D. Tahir v. Provincial Government*, 1995 CLC 1730 (wildlife protection); *Dr. Capt. Muhammad Aslam Javed v. The Secretary, Government of Punjab Health Department*, 1997 MLD 498 (allotment of official residence); *Hussain Bakhsh Khan v. Deputy Commissioner, D.G. Khan*, 1999 CLC 88 (liability for issuing false divorce deed); *Qazi Akhtar Ali v. Director of Agriculture*, 2000 PLC (CS) 784 (payment of back salary tantamount to forced labour contrary to injunctions of Islam); *Abu Bakr Haider Shah v. Member (Colonies), Board of Revenue Punjab*, 2004 CLC 834 (appointment of prayer leader in mosque); *Habibullah v. The State*, 2009 MLD 1162 (right to appeal); *Ch. Mubashar Hussain v. Returning Officer, Kharian, District Gujrat*, PLD 2008 Lahore 134 (disqualification from becoming a member of parliament on account of a default of bank loan guarantee); *Anjuman Jamia Islamia, Jamia Masjid, Garden Block, New Garden Town, Lahore v. Lahore Development Authority*, 2005 MLD 215 (payment of purchase price of land on which mosque had already been built).

to the provincial government to separate judicial magistracy from the executive and place judicial magistrates under the authority of the High Court.[684] In *Azizullah Memon*, the courts declared the vesting of criminal trial jurisdictions in the bureaucracy unconstitutional.[685] The High Courts also curtailed the powers of the executive to legislate through ordinances.[686]

While the High Courts considerably expanded the judicial review of executive action with the backing of the Supreme Court, the text of Article 199 and historical practice imposed notable constraints. Writs could be brought only if there was no suitable alternate remedy and, except in cases of *habeas corpus* and *quo warranto* type writs, on the application of an 'aggrieved person.'[687] While the High Courts began to loosen both the requirements of a lack of alternate remedy and *locus standi*, particularly in cases falling under their fundamental rights jurisdiction,[688] the Original jurisdiction of the Supreme Court emerged as the more suitable avenue for a truer form of Public Interest Litigation. During the 1990s the Supreme Court further began to waive procedural requirements,[689] and whittled down the criteria of standing to the point that any *bona fide* representative could bring a petition on behalf of an effected group or class.[690] The court also adopted the practice of initiating Public Interest Litigation cases

[684] See *Government of Sindh v. Sharaf Faridi*, PLD 1994 Supreme Court 105; *Sharaf Faridi v. The Federation of Islamic Republic of Pakistan*, PLD 1989 Karachi 404.
[685] See *Government of Balochistan v. Azizullah Memon*, PLD 1993 Supreme Court 341. The Supreme Court upheld the High Court's decision that a 1968 Ordinance was unconstitutional to the extent it gave powers to the bureaucracy to take cognizance of and try certain offences.
[686] See, eg, *Rehmat Khan v. Federation of Pakistan*, PLD 1993 Lahore 70; *Mahmood Hasan Harvi v. Federation of Pakistan*, PLD 1999 Lahore 320; *Government of Punjab v. Ziaullah*, 1992 SCMR 602.
[687] Historically, the term 'aggrieved person' was understood to mean a person who had suffered a legal wrong or whose direct interest was involved. In *Tariq Transport Company v. Sargodha-Bhera Bus Service*, PLD 1958 Supreme Court (Pak) 437, the Supreme Court had held that a legal right was the requirement for standing in mandamus and a direct personal interest in other writs. In *Fazal Din v. Lahore Improvement Trust, Lahore*, PLD 1969 SC 223, the court held that there was no need for a right in a strict juristic sense so long as there was a personal interest in the performance of a legal duty. However, the courts denied *pro bono publico* or taxpayer standing in *The Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 Supreme Court (Pak) 387; *Abdul Hameed v. Settlement and Rehabilitation Commissioner*, 1971 SCMR 711.
[688] On the loosening of the requirement of no adequate alternate remedy, see *Adamjee Insurance Company v. Pakistan*, 1993 SCMR 1798; *Muhammad Ismail v. Fazal Zada*, PLD 1996 Supreme Court 246. Contrast from *Kalsoom Malik v. Assistant Commissioner*, 1996 SCMR 710; *Muhammad Shahbaz Sharif v. The State*, 1997 SCMR 1361. On the relaxation of the rules of standing, see *Multiline Associates v. Ardeshir Cowasjee*, 1995 SCMR 362; *Ardeshir Cowasjee v. Karachi Building Control Authority*, 1999 SCMR 2883.
[689] See, eg, *Ghulam Ali v. Ghulam Sarwar Naqvi*, PLD 1990 Supreme Court 1; *Fazal Jan v. Roshan Din*, PLD 1990 Supreme Court 661.
[690] See, eg, *Shrin Munir v. Government of Punjab*, PLD 1990 Supreme Court 295; and *I. A. Sherwani v. Government of West Pakistan*, 1991 SCMR 1041.

suo motu and the methodology of 'rolling review' – that is, supervising executive action on a periodic basis through interim orders rather than issuing a final decisive judgment – from the Indian Supreme Court.[691] Furthermore, the court appointed judicial commissions investigating various facets of governance, and began to grant expansive remedies.[692]

The broadening array of public law concerns brought to the Supreme Court in its appellate jurisdiction encouraged the court to take up similar matters directly under its Original jurisdiction as well. Given the text of Article 184(3), for any case to be brought under the Original jurisdiction it must raise an issue of enforcement of fundamental rights provisions in the constitution. The Supreme Court notably expanded the ambit of fundamental rights to include socio-economic rights within the umbrella of the right to life and scrutinized government action, regulation and increasingly even policymaking in areas that were hitherto considered non-justiciable.[693] However, a review of the Supreme Court's jurisprudence in the 1990s reveals a relatively weak record on the substantive protection of individual and civil rights. Apart from the initial freedom of association decisions which paved the way for electoral politics, some notable pronouncements against gender discrimination represented the only other strand of substantive rights-advancing jurisprudence by the Supreme Court.[694] Beyond that, the

[691] See *Darshan Masih v. The State*, PLD 1990 Supreme Court 513. Decided in 1989, this was a suo motu case based on a telegram sent to the court by a bonded brick kiln labourer which was converted into a petition.

[692] See, eg, *General Secretary Salt Mines Labour Union v. Director, Industries*, 1994 SCMR 2061, which held that the court has the power to conduct investigations into facts, record evidence, and appoint commissions, *etc*. In *M. Ismail Qureshi v. M. Awais Qasim*, 1993 SCMR 1781, a petition brought against an individual was converted into a general inquiry into student politics leading to a direction to ban student politics. *Rashid Ahmad Khan v. President of Pakistan*, PLD 1994 Supreme Court 36, was a case concerning individual loan default but the court also issued a direction to frame policy and regulations on loan write-offs. In *Al-Jehad Trust v. Federation of Pakistan*, 1999 SCMR 1379, the Supreme Court extended fundamental rights to the northern areas even though they were not formally part of the territory of Pakistan and to which the Constitution didn't apply.

[693] See, eg, *Shehla Zia v. WAPDA*, PLD 1994 Supreme Court 693.

[694] In *Fazal Jan v. Roshua Din*, PLD 1990 Supreme Court 661, the court noted difficulties that women faced in accessing their inheritance under Islamic law particularly in the rural setting and created a right to representation before the courts in such cases. In other decisions handed out around the same time, the court expanded the rights of access to inheritance and property rights of Muslim, Christian and Hindu women. See *Ghulam Ali v. Ghulam Sarwar Naqvi*, PLD 1990 Supreme Court 1; *Shirin Munir v. Government of Punjab*, PLD 1990 Supreme Court 295; *Moolchand v. Mohammad Yousaf (Udhamdas)*, PLD 1994 Supreme Court 462; *Inayat Bibi v. Isaac Nazir Ullah*, PLD 1992 Supreme Court 385. In a couple of cases the courts also tackled gender discrimination in employment. See *Chairman, Pakistan International Airline Corporation v. Sherin Dokht*, 1996 SCMR 1520; *Muhammad Iqbal Khan v. Chancellor, Gomal University*, 1995 CLC 510; *Naseem Firdous v. Punjab Small Industries Corporation*, PLD 1995 Lahore 584. However, the Supreme Court's record on minority rights generally was particularly weak and was distinctly tarnished by *Zaheeruddin v. The State*, 1993

operative parts of the cases invoking fundamental rights essentially addressed grievances against the administration, and scrutinized the propriety and procedural fairness of bureaucratic action.[695] It appears that the court was utilizing the notion of constitutional rights principally to extend its Original jurisdiction to adjudicate matters of formal constitutionalism, administrative law and security laws directly rather than indirectly through appeals from High Courts' decisions in Writs.

However, collectively the High Courts' Writ jurisdiction and the Supreme Court's Original jurisdiction emerged as an effective avenue for challenging adverse government action. One key factor in the expansion of the courts' jurisdiction was the increasing reliance by Pakistan's expanding urban middle, professional and industrial classes on judicial review to challenge the full gamut of executive operations and decisions.[696] The superior courts thus found their constituency expanding in these influential and vocal classes, beyond the traditional support base of the legal profession. While this provided the courts with the political capital necessary to withstand pressures and pushback from the executive, there was also the risk of elite capture of the Writ jurisdiction and Public Interest Litigation. By the end of the decade of 1990s such concerns were validated.[697] Nonetheless, in the interim, the emergence of such robust

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SCMR 1718. In that case the Supreme Court upheld the constitutionality of discriminatory Zia-era amendments to the penal code which criminalized certain religious practices of the minority Ahmadi community and forbade them from proselytizing publicly. For discussions of the case, see Jeffrey A Redding, 'Constitutionalizing Islam: Theory and Pakistan' (2004) 44 *Virginia Journal of International Law* 759, 793-96; Lau, above n 565, 112-9

[695] This was invariably the case when the challenge was made through the Writ jurisdiction. See, eg, *In re: Abdul Jabbar Memon*, 1996 SCMR 1349; *Province of Punjab v. Abdur Rehman Shaukat*, 1999 SCMR 2610; *Ghazi v. M. Abdul Khaliq*, 1999 SCMR 2308; *Abdul Hameed v. Province of Punjab*, 1991 CLC 1666; *Nazim F. Haji v. Commissioner*, PLD 1993 Karachi 79; *Asif Iqbal v. Karachi Metropolitan Corporation*, PLD 1994 Karachi 60; *Muhammad Yaqub v. Government of Punjab, Colonies Department, Lahore*, 1996 CLC 264; *Dr. Fawad Anwar v. Government of N.W.F.P.*, PLD 1995 Peshawar 1; *Fakhar Zaman v. Secretary to the Government of Punjab*, PLD 1996 Lahore 577; *Sughran Begum v. Metropolitan Corporation Lahore*, 1996 CLC 472; *Zaib-un-Nisa v. Government of Punjab, Department of Education*, 1996 CLC 1281; *Metropolitan Corporation v. Imtiaz Hussain*, PLD 1996 Lahore 499; *Zahida Bano v. Government of Punjab*, 1997 PLC (CS) 662; *Sobho Gianchandani v. Federation of Pakistan*, 1996 MLD 1569; *Wajid Shamsul Hassan v. Federation of Pakistan*, 1996 MLD 1569; *Intisar Shamim Ahmed v. Secretary, Labour and Manpower, Government of Punjab, Lahore*, 1997 PLC (CS) 860; *Aziz Ahmad v. Chairman, Board of Intermediate and Secondary Education, Gujranwala*, 1997 PLC (CS) 356; *Mukhtar Fatima v. Deputy Commissioner, Multan*, 1997 MLD 1792; *Mushtaq Ali v. Government of Sindh,* PLD 1998 Karachi 416; *Mussarrat Afza v. Shaukat Iqbal, Deputy Commissioner, District Mandi Bahauddin*, 1998 CLC 733.

[696] See, eg, *Pakistan v. Salahuddin*, PLD 1991 Supreme Court 546; *Adamjee Insurance Company (Ltd.) v. Pakistan*, 1993 SCMR 1798; *Shehla Zia v. WAPDA*, PLD 1994 Supreme Court 693; *Gadoon Textile Mills (Ltd.) v. WAPDA*, 1997 SCMR 641.

[697] See Werner Menski, 'Public Interest Litigation: A Strategy for the Future' in W. Menski, R. Alam and M. Raza (eds), *Public Interest Litigation in Pakistan* (Pakistan Law House, 2000) 122-4.

judicial review jurisdictions positioned the superior judiciary as a key component of the trichotomy of state powers.

JUDICIALIZATION OF POLITICS AND THE POLITICIZATION OF JUDICIAL REVIEW

From a Mediator to a Party in Constitutional Conflict

The tenure of President Ghulam Ishaq Khan had demonstrated the unworkability of Zia's constitutional bequest. However, the simultaneous dismissal of parliament and president, and with that the prospects of the first relatively free and fair elections post-Zia, promised a respite from the inherent contradictions of this constitutional scheme. The incoming government would be able to appoint its own president, thereby assured of completing its term relatively safe from the harassment of an assertive presidency and military. The PPP re-emerged as the largest single party in the 1993 elections, although it again lacked a simple majority in the National Assembly. The 1993 elections also marked the consolidation of distinct provincial and regional divides in Pakistan's electoral politics. The PPP found its support base largely reduced to the predominantly rural and peri-urban areas of southern Pakistan – it did not win a single seat in Punjab's seven largest urban centres.[698] Nonetheless, Benazir Bhutto was able to form a coalition government even in the Punjab and managed to elect a stalwart of the party, Farooq Leghari, as the president. Even the politically treacherous process of appointing a CoAS was successfully negotiated – the president appointed the senior-most officer upon the advice of the prime minister.[699]

A new destabilizing dynamic in Bhutto's second tenure, however, were the tensions with the superior judiciary over the appointment of judges. The government had justifiable suspicions of an anti-PPP bias in the superior judiciary, given particularly how the dissolution cases had been decided. Since the 1970s the party had not been in power long enough to have a significant say in judicial appointments. In an effort to counterbalance the ideological and political biases of the judiciary, the PPP government

[698] Talbot, above n 202, 332-3.
[699] Shafqat, above n 521, 241.

appointed nearly forty judges in the Lahore and Sindh High Courts without consulting the chief justices, transferred disliked judges to the FSC, and made several *ad hoc* appointments to the Supreme Court.[700] The government, violating the convention of elevating the senior-most judge of the Supreme Court as the Chief Justice, appointed Sajjad Ali Shah in that position arguably swayed by his dissenting judgments in the earlier dissolution cases. The appointments and transfers of High Court judges were challenged in the Supreme Court, leading to overt friction between the prime minister and Shah, CJ because of the latter's decision to proceed with the case contrary to expectations and the prime minister's wishes.[701]

In *Al-Jehad Trust* (known as the *Judges' case*) the Supreme Court examined a range of questions related to judicial appointments. The key issue was whether the president had unfettered discretion in appointing judges to the superior courts. The relevant constitutional provisions – Articles 177 and 193 – required the president to make appointments to the Supreme Court 'after consultation with' the Chief Justice of Pakistan, and with the concerned chief justice in case of appointments to a High Court. Relying upon the principle of judicial independence in Islam and Indian precedents, the Supreme Court held that the consultation required for appointments to the superior judiciary had to be effective, meaningful, purposive, and consensus-oriented.[702] The court also held that the president could not reject a chief justice's nomination without giving cogent objective reasons, nor appoint someone whose nomination had been rejected by the Chief Justice of Pakistan or the Chief Justice of the High Court, effectively giving them the final say in judicial appointments. As such, several recent appointees to the High Court were effectively dismissed or forced to resign. The Supreme Court further reduced the role of the president by holding that in making judicial appointments the president was also bound by the advice of the prime minister.

The court also shut the door on a number of ways the executive had historically used to pressurize superior judiciary. Even in the absence of express constitutional text the court mandated fixed timeframes within which a vacancy on the bench had to be filled.

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[700] Hamid Khan, *Constitutional and Political History of Pakistan,* above n 46, 317-20, 327-8.
[701] Sajjad Ali Shah, *Law Courts in a Glass House* (Oxford University Press, 2001) 240-1; Hamid Khan, *Constitutional and Political History of Pakistan*, above n 5, 785-94.
[702] *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 Supreme Court 324.

The court also held that the senior-most judge of a High Court had the legitimate expectation of being appointed as the chief justice, unless sound reasons for a contrary decision were recorded. An acting chief justice of the Supreme Court or a High Court could not be a consulted for judicial appointments. Lastly, a sitting chief justice or a judge of the High Court could not be transferred to the FSC without his consent. The decision, however, left two important issues unaddressed: whether the seniority principle was also applicable to the appointment of the Chief Justice of the Supreme Court; and whether the appointments of superior court judges after presumably notional consultation with acting chief justices during Zia's Martial Law were to be similarly voided. The government filed a President's Reference raising these very questions in an effort to embarrass Shah, CJ. When appointed as the Chief Justice of the Supreme Court in 1994, Sajjad Ali Shah had superseded two senior judges, and his initial appointment to the High Court in 1978 had been made after consultation with an acting chief justice.[703]

Benazir Bhutto initially refused to follow the Supreme Court's order of removing improper appointees and reversing the transfers, and even though ultimately relented, this exacerbated emergent tensions with President Leghari. Leghari filed another President's Reference seeking the Supreme Court's guidance on whether he could fill the existing vacancies on the bench without the advice of the prime minister.[704] In November 1996, President Leghari dismissed his own party's government and dissolved the parliament utilizing Article 58(2)(b) powers for the fourth time within a decade. He presented detailed grounds for the dissolution, which included confrontation with the judiciary over appointments and the refusal to implement its orders. In *Benazir Bhutto v President of Pakistan*, the Supreme Court faced yet another challenge to the dissolution of parliament under Article 58(2)(b). However, this time around the court itself appeared to be a concerned party in the entire episode and behaved in a patently partisan way.

[703] Hamid Khan, *Constitutional and Political History of Pakistan*, above n 5, 335-6.
[704] *President's Reference (No. 2 of 1996)*, PLD 1997 Supreme Court 84. See Hamid Khan, *Constitutional and Political History of Pakistan*, above n 5, 337-38.

An unusually small seven-member bench of the Supreme Court upheld the dissolution of Benazir Bhutto's second government.[705] The chief justice employed delaying tactics and prioritized other petitions, including an old one in which the constitutionality of the Eighth Amendment was ultimately upheld.[706] The delay in the decision – handed merely four days before the elections were scheduled to be held – proved disastrous for the PPP's prospects. Shah, CJ wrote the main opinion for the majority and made a futile attempt to rationalize the earlier dissolution cases. A close analysis of the four Supreme Court decisions on the exercise of Article 58(2)(b) powers reveals that any such attempt to find a coherent set of principles from these cases would require a flight of imagination. The Supreme Court appeared to be relying not only on changing interpretations of Article 58(2)(b) but also differential understandings of the role of this provision in Pakistan's constitutional scheme. During this extended saga of political instability, the superior judiciary had itself become a key player in the constitutional politics it was mediating, and its judgment was thus clouded by its perceived institutional interests.

The 1997 elections, faulty as they were, again appeared to promise the end of political uncertainty.[707] This time Nawaz Sharif's PML (N) emerged as the clear winner with a two-third majority in both houses of parliament. This supra-majority enabled the government to make constitutional amendments. Within two months of the elections the parliament passed the Thirteenth Amendment which repealed Article 58(2)(b), and transferred the power of appointing provincial governors and services chiefs to the prime minister.[708] Pakistan's constitutional scheme thus reverted to a parliamentary system of government, as opposed to the quasi-presidential system that had been in place since the Eighth Amendment in 1985. The Fourteenth Amendment passed shortly thereafter provided for the disqualification of members of parliament who defected or 'committed a breach of party discipline.'[709] This ended the practice of floor-crossing, which had dogged parliamentary politics since 1985. It also insulated Nawaz Sharif from a vote of no confidence during the five-year term of the parliament. Prime Minister

[705] *Benazir Bhutto v. President of Pakistan*, PLD 1998 Supreme Court 388.
[706] *Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 Supreme Court 426. See Hamid Khan, *Constitutional and Political History of Pakistan*, above n 5, 343.
[707] There were serious issues with 1996 elections. See Talbot, above n 202, 349-50, 355-6.
[708] Constitution (Thirteenth Amendment) Act, 1997.
[709] Constitution (Fourteenth Amendment) Act, 1997.

Sharif was thus firmly in charge within a few months of ascension to power, and the president had been reduced to an essentially ceremonial role.

Despite the constitutionally secure position of the government, a fractious relationship with the Supreme Court dogged Nawaz Sharif's second government as well. The first significant contention arose over the Fourteenth Amendment. Even though in an earlier case it was the Supreme Court which had recommended such measures to curb floor-crossing, the court entertained a petition challenging the constitutionality of the amendment.[710] A Supreme Court bench headed by Shah, CJ took the unprecedented step of issuing an interim order suspending the operation of the amendment.[711] The prime minister criticized the court for suspending the amendment and was served with a contempt notice. While the contempt proceedings were underway, a group of PML (N) supporters protesting in front of the Supreme Court building broke the police cordon and entered the premises chanting slogans against the chief justice. This was seen as a deliberate ploy by the government to intimidate and humiliate the chief justice. The chief justice requested the Army to depute military personnel for the security of the court and the judges. Noticeably, the military declined to intervene.

Two days before the attack on the court a split had emerged in the Supreme Court. A two-member bench of the court sitting in the Quetta registry admitted a petition under Article 184(3) challenging Shah, CJ's ascension as the chief justice and issued an order for his suspension. Three such petitions had been pending at various registries of the court claiming that his appointment as chief justice violated the principles articulated in the *Judges' case*. The chief justice immediately passed an administrative order declaring the Quetta bench's order to be without lawful authority. Two separate benches of the court declared the chief justice's administrative order to be invalid. The matter was taken up by a larger bench of Supreme Court led Saeeduzzaman Siddiqui, J in *Malik Asad Ali*.[712] While the case was being heard, a separate three-member bench headed by the chief justice purportedly struck down the Thirteenth Amendment, thereby restoring Art 58(2)(b). It was rumoured that President Leghari would dismiss the government and dissolve parliament. The larger bench of the Supreme Court

[710] *Pir Sabir Shah v. Shah Muhammad Khan*, PLD 1995 Supreme Court 66.
[711] *Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan*, PLD 1998 Supreme Court 1263.
[712] *Malik Asad Ali v. Federation of Pakistan*, PLD 1998 Supreme Court 161.

immediately restrained Shah, CJ from performing any judicial or administrative functions, and appointed an acting chief justice in his place. President Leghari tendered his resignation citing his refusal to de-notify Sajjad Ali Shah as chief justice.

In its final decision in *Malik Asad Ali*, the larger bench unanimously held Shah, CJ's appointment as unconstitutional, extending the seniority principle laid down in the *Judges' case* to the appointment of the Chief Justice of Pakistan as well. The court noted that if each judge of the court were eligible for the highest office that might create the possibility or perception of certain judges attempting to win the government's favour through their decisions. The seniority principle was justified as necessary for safeguarding the independence, impartiality and the collegiality of the court. Nonetheless, the entire saga left the credibility and public perception of the court in shambles. The court quickly moved to dispose of any outstanding issues in the aftermath of this disaster. In *Wukala Mahaz Barai Tahafuz Dastoor*, the Supreme Court rejected the basic structure doctrine and disavowed the power to suspend or strike down a constitutional amendment.[713] The court also vacated the contempt notice issued to the prime minister, holding that the contempt provision in the constitution had to be read harmoniously with the freedom of speech and privileges of parliamentarians in order to allow reasonable criticism of the court.[714]

Elective Dictatorship and Constitutional States of Emergency

As the judicial strife unfolded, Pakistan appeared to be headed towards another elective dictatorship. The Thirteenth and Fourteenth amendments had given the prime minister unassailable sway over the parliament. Even the military appeared to have been considerably reduced in stature when the incumbent Chief of Army resigned over differences with the prime minister.[715] The prime minister appointed a relatively junior officer of his choice, General Pervez Musharraf, as the military chief. While these developments were good in form, the highly personalised style of party leadership and patronage-based control of the bureaucracy that the PML (N) had managed to develop

[713] *Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan*, PLD 1998 Supreme Court 1263.
[714] *Masroor Ahsan v, Ardershir Cowasjee*, PLD 1998 Supreme Court 823.
[715] Earlier, the caretaker government had established a Council for Defence and National Security (CDNS) which the new government could, and did, disband. Talbot, above n 202, 351.

did not augur well for the prospects of democracy and constitutionalism in the country. Having secured its dominance, the government turned its attention to the political opposition. Reminiscent of the harassment techniques of the Zia era, the PML (N) government used criminal prosecution as the principle means of hounding and discrediting the PPP. The parliament passed a new set of accountability laws – the Ehtesab Act, 1997. More than a dozen cases were selectively filed against Benazir Bhutto and her spouse, Asif Zardari, conviction in any of which would have led to their disqualification from being a member of parliament. In 1999, the Lahore High Court found Benazir Bhutto and Zardari guilty of corrupt practices in one such accountability reference and sentenced them to five years' imprisonment. [716] On appeal, the Supreme Court found sufficient evidence that the judges had been pressurized, and overturned the convictions.[717] The government also displayed limited tolerance for criticism and was not averse to intimidating the press.[718]

Despite its plummeting credibility and an apparent resolve to avoid political questions after the removal of the removal of Sajjad Ali Shah as CJ, the Supreme Court repeatedly found itself in confrontation with the elected government. At the core of contention was the government's continuing attempts to undermine the superior courts by creating special courts and alternatives to regular judicial proceedings. In Nawaz Sharif's second term in office his government displayed a penchant for *ad hoc* measures and special tribunals that had not been witnessed since Zia's Martial Law. As sectarian and political violence reached an unparalleled level, the government sought the remedy in the creation of a broad range of terrorism offences and new anti-terrorism courts through the Anti-Terrorism Act.[719] The Act made confession before police admissible in anti-terrorism trials and provided for entry into premises and searches without warrant, amongst other dilutions of due process,. Judges of the anti-terrorism courts were appointed by the federal government and lacked tenure. In *Mehram Ali*, the Supreme Court invalidated several provisions of the Anti-Terrorism Act for being in violation of

[716] See Zulfiqar Khalid Maluka, 'Reconstructing the Constitution for a COAS President: Pakistan, 1999-2002' in Craig Baxter (ed), *Pakistan on the Brink* (Lexington Books, 2004) 65-6; Martin Lau, 'The Islamization of Laws in Pakistan: Impact on the Independence of the Judiciary' in Eugene Cotran and Mai Yamani (eds), *The Rule of Law in the Middle East and the World* (I. B. Taurius & Co. Ltd., 2000) 150.
[717] See *Asif Ali Zardari v The State*, PLD 2001 Supreme Court 568.
[718] S. M. Zafar, 'Constitutional Developments in Pakistan, 1997-99' in Charles Kennedy and Craig Baxter (eds), *Pakistan 2000* (Lexington Books, 2000) 21.
[719] Anti-Terrorism Act, 1997.

the Constitution.[720] The court interpreted Article 203 broadly and held that the anti-terrorism and other special courts created under Article 175(1) were subordinate courts, hence subject to the High Courts' supervision.[721] The Supreme Court reiterated that the separation and independence of judiciary from the executive were cardinal principles of Islamic law, and decried the tendency to create parallel court systems that were not subject to review. It directed the government to amend the Act in order to place the anti-terrorism courts under the High Courts' supervision and provide their judges with security of tenure.[722]

The use of emergency powers by the Nawaz Sharif government caused further tensions with the Supreme Court. In May 1998 India conducted tests for nuclear explosions, thereby destabilizing the military and strategic balance in South Asia. Pakistan followed suit despite tremendous international pressure. Pakistan had been labouring under US sanctions for development of nuclear capacity for nearly a decade. The nuclear tests prompted further sanctions and cuts in foreign assistance taking the country to the brink of bankruptcy.[723] The government declared a state of emergency which entailed the suspension of all fundamental rights, including most pertinently in the given context the protection of private property. The government also issued an order under Article 233(2) for the suspension of the judicial review jurisdictions of the superior courts. Citing fears of large scale withdrawals from foreign currency accounts in Pakistan's banks the government passed an ordinance which enabled it to confiscate all foreign currency accounts, and forced an exchange into Pakistan rupees at a significantly lower rate.[724] There were widespread rumours that key government functionaries had liquidated their own accounts or transferred funds overseas, thereby benefitting from their insider knowledge of imminent nuclear tests. The ordinance was challenged and held to be unconstitutional by a full bench of the Supreme Court in *Shaukat Ali Mian*.[725]

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[720] *Mehram Ali v. Federation of Pakistan*, PLD 1998 Supreme Court 1445.
[721] This interpretation of the provisions is somewhat stretched. Articles 201-203 use the term subordinate courts while Article 175(1) empowers the executive and the legislature to create "other courts." The intent arguably was that not all other courts mentioned in Article 175(1) were meant to be subordinate courts.
[722] These changes were implemented through the Anti-terrorism (Amendment) Ordinance, 1999 [Ordinance XIII of 1999].
[723] Syed Mubashir Ali and Faisal Bari, 'At the Millenium: Macro Economic Performance and Prospects' in Charles Kennedy and Craig Baxter (eds), *Pakistan 2000* (Lexington Books, 2000) 25.
[724] See §2, Foreign Exchange (Temporary Restrictions) Ordinance, 1998.
[725] See *Shaukat Ali Mian v. Federation of Pakistan*, 1999 SCMR 1229.

The promulgation of emergency and suspension of fundamental rights was also challenged before the court by former president, Farooq Leghari.

In *Farooq Ahmed Khan Leghari*, the Supreme Court upheld the imposition of emergency but invalidated the suspension of fundamental rights and the courts' judicial review jurisdictions.[726] Relying on the 58(2)(b) cases, the court held that satisfaction of the President regarding the existence of a grave emergency was not purely subjective, and the courts could review whether the President's judgment was perverse, absurd, *mala fide* or based on irrelevant considerations. Further, the court held that the purported ouster of its jurisdiction did not shield a promulgation of emergency that was *coram non judice*, *mala fide* or based on irrelevant considerations. As such, the court departed from the settled understanding that the promulgation of emergency was not amenable to judicial review.[727] The court's position that the suspension of fundamental rights jurisdictions of the courts under Article 233(2) was subject to a proportionality test represented an even more radical departure from precedent. It further held that the suspension order must have a direct nexus with the aims of the promulgation of emergency, and should lead to minimal interference with the citizens' rights. Most significantly, as Article 233(1) already enables derogation from certain fundamental rights, and several of the fundamental rights provisions allow for reasonable restrictions, an order for the blanket suspension of rights and judicial review under Article 233(2) must be based on an exceptional justification, thereby effectively reading the provision into a nullity.

In October 1998, the relations between the PML-N and the MQM reached breaking point. The MQM was widely blamed for mafia-style killings, extortions and kidnappings for ransom in Karachi during Nawaz Sharif's second term.[728] When the MQM was implicated in the murder of notable philanthropist and former Governor of Sindh, Hakim Said, the federal government imposed governor's rule in the province

[726] See *Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 1999 Supreme Court 57. The court held that the purported ouster of its jurisdiction to review a promulgation of emergency did not shield a promulgation that was *coram non judice*, *mala fide* or based on irrelevant considerations. Ibid, 72. As such, the court departed from the settled understanding of the emergency provisions that the court could not review the merits of promulgation of emergency. Zafar, above n 718, 14.
[727] Zafar, above n 718, 14.
[728] Yunas Samad, above n 646, 78.

and began a crackdown against MQM activists.[729] The government also dismissed its minority government, suspended the functioning of the provincial assembly, called in the military in aid of civil powers, and set up military courts for the trial of civilians.[730] In *Jalal Mehmood Shah*, the Supreme Court held that while the provincial government could be dismissed under Article 232, the provincial assembly could not be made non-functional.[731] In *Liaquat Hussain*, the Supreme Court also declared the setting up of military courts through this device to be unconstitutional.[732] The court noted that the armed forces are part of the executive. The 'creation of courts outside the control and supervision of Supreme Court or High Courts, therefore, not only militates against the independence of judiciary but it also negates the principle of trichotomy of power which is the basic feature of the Constitution.'[733]

Faced with recalcitrant courts that offered the powerful elected government its only meaningful opposition, the government attempted to play the well-worn religious card from General Zia's playbook. In August 1998, the government moved the Constitution (Fifteenth Amendment) Bill in the National Assembly. The bill sought to add Article 2B to the Constitution, which would explicitly make the *Qur'an* and *Sunnah* the supreme law of the land. More significantly, it would empower the parliament to pass a constitutional amendment 'providing for the removal of any impediment in the enforcement of any matter relating to Shariah and the implementation of the Injunctions of Islam' by a simple majority of both houses, and thereby override several of the thorny decisions of the superior courts. The government presently lacked the requisite two-third majority in the Senate to pass such a constitutional amendment bill and also faced vociferous criticism in the media. The constitutional amendment provision of the bill was removed, and only a watered down version passed by the National Assembly in October. Nonetheless, the government had shown the extent to which it was prepared

[729] Ibid, 79.
[730] Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998 [Ordinance XII of 1998].
[731] *Jalal Mehmood Shah v. Federation of Pakistan*, PLD 1999 Supreme Court 395.
[732] *Liaquat Hussain v. Federation of Pakistan*, PLD 1999 Supreme Court 504. The court held that when the military is called in aid of civil power under Article 245(1) it cannot set up military courts. Zafar, above n 718, 12-3.
[733] *Liaquat Hussain v. Federation of Pakistan*, PLD 1999 Supreme Court 504, 656. Notably, there is no explicit provision of separation of powers in the Constitution. In *Fauji Foundation v. Shamimur Rahman*, PLD 1983 Supreme Court 457, the Supreme Court had suggested (at 628 and 635) that there was no separation of powers principle in the Constitution. However, in *Mehram Ali v. Federation of Pakistan*, PLD 1998 Supreme Court 1445, 1466, the court stated that the Constitution was founded on a "trichotomy of powers."

to go in the quest for power, and it was only a matter of time when it would have the final piece of the puzzle in place. The next round of elections for the Senate scheduled for March 2000 would provide the governing PML-N with a two-third majority in the Senate, and hence the power to amend the constitution at will.

Despite such high profile interventions, by the end of the decade judicial activism, Public Interest Litigation and judicial review had lost much of their sheen. In the domain of constitutional law, the courts' efforts at instilling the basics of formal constitutionalism had achieved little in terms of fostering political stability. The courts were seen as political an institution as any other, prone to rapidly changing and at times visibly self-serving positions. In administrative law, the courts' aggressive attempts to instil rule-boundedness and meritocracy in bureaucratic appointments, transfers, disciplining and conduct had no impact in terms of impeding the progressive politicization of the bureaucracy and the police. The visible pronouncements challenging the misuse of anti-terrorism laws and military courts masked the norm of police brutality, impunity of the paramilitary forces during extended security operations, and the frequent use of staged 'encounters' or extra-judicial killings by the police and security forces. Public Interest Litigation was on the decline by the end of the decade, as a Supreme Court overburdened with pending cases deliberately scaled back its interventions.[734] These cases cases appeared to be mere symbolic assertions of judicial review jurisdiction wrapped in glorious language of fundamental rights, but which delivered little in terms of concrete changes in state practices. Both the Original and Writ jurisdictions also appeared to be suffering from elite capture, as their speedier processes became useful avenues of vindicating private rights under the banner of public law by urban upper and middle class litigants who could afford the better and more expensive champions of access to justice.[735]

END OF CIVILIAN RULE AND THE LEGACY OF JUDICIAL ACTIVISM

In May and June 1999, Pakistan and India faced off in a localized military confrontation in the Kargil sector of Kashmir, which threatened to escalate into a full-fledged war

[734] By 1996 the court had started becoming mindful of increase in caseload. See *Tariq Saeed v. Director Anti-Corruption Establishment*, 1996 MLD 1864, 1880.
[735] See Menski, above n 697, 122-4.

between the now-nuclear neighbours. Pakistan's troops had successfully infiltrated across the border during the winter months, and set up *ad hoc* military posts that choked India's only supply line to hundreds of thousands of troops stationed further north of the Kargil sector. India threatened an aggressive military response, not just in Kargil or Kashmir but across the entirety of the India-Pakistan border, and the prospects of a nuclear apocalypse loomed over South Asia. It appeared that Pakistan's military had devised and undertaken the operation in Kargil without the knowledge or approval of the prime minister. On 5 July 1999, the Prime Minister Nawaz Sharif announced the unilateral withdrawal of Pakistan's troops under pressure from the US. This was seen as a humiliating betrayal by the military and set the stage for the inevitable civil-military confrontation. On 12 October 1999, the prime minister dismissed General Pervez Musharraf from the post of the CoAS and appointed a relatively junior officer in his place. General Musharraf was aboard a Pakistan International Airline flight, returning from an official overseas visit, when the decision to sack him was announced. The military command refused to accept the dismissal of General Musharraf, took over Pakistan Television and other state installations, and placed the prime minister under house arrest. By the time military troops cleared Karachi airport for the landing of General Musharraf's plane, a bloodless *coup* was well underway.

As Pakistan entered another cycle of military rule, the ideology at the core of praetorian governmentality appeared to have been deeply entrenched. Nonetheless, the notable changes in state structure and society during a decade of civilian rule presented as much a challenge to direct military rule as it had been to civilian governance. The consolidation of Pakistan's political and economic elites, and the expansion of urban and professional segments of Pakistan's middle classes, presented a more complex and pluralistic social reality that military rule would have to contend with. The increasing radicalization of segments of Pakistan's population, a long-term consequence of Islamization-related policies and the blowback of participation in the Afghan war, also presented mounting social and governance challenges. A more immediate obstacle to prolonged military rule came from within the state itself. While the bureaucracy had been reduced in stature and independence, the emergence of the superior courts as an important player in constitutional politics required accommodation. The public law jurisprudence of the superior courts, developed in a context of protracted engagement

with political controversies and increasing confrontation with the executive, imposed considerable constraints on unchecked military rule.

In the years leading up to the Musharraf *coup* the superior courts had asserted their independence, had held military courts and specialist tribunals to be unconstitutional, circumscribed emergency powers, and whittled away considerable areas of executive prerogative. The judiciary's role in previous eras of military rule provided sufficient indications that the courts would cede considerable space to the military, especially during the early years. However, the progressive rise in the stature and power of the judiciary in the post-Zia era entailed that the extent and duration of such constitutional space would be relatively limited. Through their Writ and Original jurisdictions, the courts had also cultivated a specific constituency amongst urban elite, professional and middle classes, who had become used to pressing their demands and interests upon the state through the judiciary. These classes would inevitably thrust the courts in the role of mediating their political, economic and governance concerns with the military-led state. Public law thus emerged as the forum for prosecuting and resolving many political controversies at a time when the space for electoral politics was constrained once again in Pakistan.

MILITARY-CIVIL COMPOSITE

'MILITARY INCORPORATED' AND THE FOUNDATIONS OF THE LAWYERS' MOVEMENT

Pakistan entered its third consecutive cycle of military rule with General Musharraf's *coup d'état* in October 1999, to be followed inevitably by yet another transition to civilian-democratic governance. While the technology of political control and constitutional machinations of the Musharraf era resembled those of the Zia years, the state structure and social landscape that the military regime inherited had been fundamentally transformed in ways that demanded an altogether different mode of governance. The enhanced degree of elite consolidation in Pakistan, in particular, constrained the space for overt authoritarianism, and important sections of the dominant classes had to be meaningfully accommodated or coopted. Furthermore, the judiciary's emergence as an important institutional player, and the public law jurisprudence of the 1990s, also necessitated at least nominal adherence and superficial commitment to basic principles of constitutionalism and the rule of law. On the converse, the military's deeper penetration into the state structure and political economy had also engendered within the officer cadres some recognition for the need to maintain a stable civil-democratic façade.

Over the decade of General Musharraf's rule, the 'Military Inc.' displayed increasing sophistication as a key stakeholder in the political dispensation.[736] Unlike previous military regimes, martial law was not formally imposed nor military courts created to suppress dissent. The Musharraf regime was successful in pacifying large segments of Pakistan's urban middle and upper-middle classes through economic liberalization. A program of structural change in the bureaucracy, lower judiciary and the police, as well as the creation of a functional local government system enabled General Musharraf to present himself as a reformer, both domestically and at the international stage. Maintaining a politically liberal stance through de-Islamization of laws, proclaiming an

[736] Ayesha Siddiqa, *Military Inc.: Inside Pakistan's Military Economy* (Pluto Press, 2007).

outlook of 'enlightened moderation' in matters of religion, loosening state control over electronic media, and countering religious radicalization in Pakistan's tribal areas also enabled the regime to woo the civil society. Most significantly, unlike General Zia, the Musharraf was successful in holding elections and managing a symbiotic relationship with the civilian government, whereby real power remained with the military but a credible semblance of transitional democratic governance could be upheld.

In the decade leading up to General Musharraf's *coup* the superior courts had dramatically expanded their role and powers. The superior courts, which had experienced firsthand Nawaz Sharif's dictatorial tendencies in his second term, appeared to be sympathetic to the Musharraf regime and once again validated the military takeover on the touchstone of the doctrine of state necessity. This was the first period of military rule where the courts' judicial review jurisdiction had not been suspended or formally curtailed. The continuing judicial review of executive action aligned with the regime's proclaimed agenda of the structural reform of the state and anti-corruption drive. This accommodation between the military regime and the courts was, however, unlikely to last. Given the unprecedented number of serving and retired military personnel who were appointed to key positions in the bureaucracy, regulatory bodies and state corporations, the line between military and civil branches of the state had been blurred. Furthermore, the Musharraf regime's close relationship with the civilian government operating under it meant that judicial review of the government's actions increasingly got too close to the regime's core interests.

The inevitable tension over the contours of judicial review arose when Iftikhar Muhammad Chaudhry took over as the twentieth Chief Justice of Pakistan in June 2005. As per the rules of superannuation and the principles laid down by the Supreme Court in the *Judges' case*, Justice Chaudhry was likely to become one of the longest-serving chief justices of the apex court, with a scheduled tenure of more than seven years. As Justice Chaudhry began to lead the court in a more assertive brand of judicial review, the contradictions between the authoritarian base and liberal façade of the military-dominated state became more evident. Unlike General Ayub or Zia, Musharraf was dependent on the electoral success of political parties and groups allied with him in order to effect a tenuous transition to another term in office. Such robust judicial review in the buildup to an election, which undermined the perceptions of good governance,

thus threatened an existential crisis for the regime. In March 2007, General Musharraf unceremoniously dismissed Justice Chaudhry from office, precipitating a 'Lawyers' Movement' that paved the way for more democratic forms of governance, and ultimately the ouster of General Musharraf. More significantly, the Lawyers' Movement created the conditions precedent for the second wave of judicial assertion of power, as Pakistan entered yet another phase of fractious political competition.

THE CONSTITUTIONAL POLITICS OF MILITARY INCORPORATED

Transition to Hybrid Government

When Prime Minister Nawaz Sharif had attempted the dismissal of General Musharraf, the Chief of Army Staff (CoAS) was aboard a passenger aircraft returning to Pakistan from an official visit of Sri Lanka. The timing of his dismissal had been orchestrated to ensure that General Musharraf would not be in a position to actively command a military *coup*, and a relatively junior officer who was nominated to replace him would have the space to affect a successful takeover of military command. However, even when the CoAS was thus incapacitated, soldiers of the notorious 111 Brigade stationed close to the nation's capital successfully completed a bloodless overthrow of the civilian government, with the full support of a high command unhappy with such blatant intervention in its affairs. This wasn't a 'banana republic' military *coup*. Pakistan's military, heir to the colonial British India Army's structure and traditions, has historically displayed great discipline and coherent action in safeguarding its institutional interests. This was yet another occurrence that demonstrated the extent to which the military's institutionalized power could dominate the state structure if its corporate interests were threatened.

Upon taking power, the military regime began to unveil a refined version of the constitutional blueprint of military rule developed by Pakistan's earlier military dictators. A Proclamation of Emergency was issued, the constitution was put in abeyance, and a Provisional Constitution Order (PCO) was promulgated to provide a temporary governing framework.[737] However, this time around martial law was not

[737] Provisional Constitution Order, 1999 (Order No. 1 of 1999).

formally declared, and General Musharraf assumed the self-styled office of the 'Chief Executive' of Pakistan. A spate of decisions in the late 1990s in which the Supreme Court had declared the setting up of military and anti-terrorism courts beyond the supervision of superior courts, and the suspension of fundamental rights during periods of emergency, to be unconstitutional constrained the space for more overt authoritarianism. Requiring the Supreme Court to overturn such recent pronouncements would have embarrassed the court as well as undermined the image of a softer form of military rule that General Musharraf needed to maintain. Nonetheless, in January 2000, when the Supreme Court entertained a challenge to the validity of the military *coup* and the interim governance framework, the regime moved to undermine the independence of the judiciary. The judges of the superior courts were compelled to take a new oath of office pledging to serve under the PCO.[738] Six out of a total of thirteen judges of the Supreme Court, including the incumbent chief justice, refused to take the oath and resigned from the bench. A reconstituted Supreme Court decided the case of *Zafar Ali Shah* in May 2000 and validated the military takeover on the basis of the doctrine of state necessity.[739] The court granted virtually unlimited powers to the military regime, including the power to amend the constitution so long as its salient features – parliamentary form of government, federalism and the independence of the judiciary – were left intact. The court, however, imposed one potentially meaningful restriction by assigning a fixed term to the state necessity phase: the military regime had to hold general elections no later than three years from the date of the *coup*.

While there was little public dissent, except for sporadic protests by the bar, the regime faced an adverse international environment. When General Musharraf assumed power in 1999, Pakistan's macroeconomic situation was woeful and the country was on the verge of bankruptcy. Pakistan was also reeling from economic and military sanctions imposed after the nuclear weapons tests in 1998. Diplomatically, the *coup* was a disaster and the possibilities of a thaw in relations with major Western powers, which had been soured by the nuclear tests, evaporated under the military regime. As such, the first two years were extremely perilous for the regime's existence. Fortunately for the Musharraf regime, however, public exhaustion with the political instability of the

[738] Oath of Office (Judges) Order, 2000 (Order No. 1 of 2000).
[739] *Zafar Ali Shah v. General Pervez Musharraf*, PLD 2000 Supreme Court 869.

1990s, allegations of corruption and malgovernance against both major political parties, and economic stress had created a measure of domestic support for, or rather indifference towards, military rule. It was during this early period that the regime undertook major initiatives designed to portray a picture of grassroots democratization and structural reform of the state that would appease alienated international allies, as well as win some political support at home.[740]

In November 1999, barely a month after taking over, the regime created two new institutions designed to implement its promised structural reforms. The National Accountability Bureau (NAB) was tasked with the responsibilities of prosecuting politicians and bureaucrats for corrupt practices and wilful default of loans borrowed from public banks.[741] Notably, serving armed forces personnel and judges were exempted from the jurisdiction of the NAB.[742] The National Reconstruction Bureau (NRB) was created to recommend major reforms in the bureaucracy, police and lower judiciary. It fulfilled its mandate by designing and implementing long-awaited separation of the lower judiciary from executive magistracy. A new Police Order also sought to grant the police independence from the control of the bureaucracy. In 2000, the NRB introduced its 'Devolution Plan,' and unveiled a hierarchical system of local government whereby officials elected on a non-party basis would be made responsible for many aspects of administration and service delivery. The provincial bureaucracy and the local police were subjected, at least formally, to the supervision of the new local governments. This local government structure appeared reminiscent of General Zia's attempts to erect a façade of a grassroots level democratization process, and to cultivate a new breed of local politicians who may use their limited powers and control over public resources to influence a general election in favour of the regime. However, unlike General Zia's local government system, the extent of fiscal powers and decision-making capacity allowed to elected officials betrayed an appreciation of the much greater need to accommodate these political classes particularly in rural and peri-urban areas.

[740] Immediately after the *coup* General Musharraf unveiled a seven-point agenda for the regime. See Pervez Musharraf, *In the Line of Fire* (Free Press, 2006) 149-50.
[741] National Accountability Bureau Ordinance, 1999 (Ordinance No. XVIII of 1999).
[742] §5(m)(iv), National Accountability Bureau Ordinance, 1999.

Managing the elections for which a firm deadline had been set by the Supreme Court also remained a key priority, and other elements of General Zia's legal and political playbook were employed to that end. In June 2001, General Musharraf dismissed the lame duck president and assumed that office through a decree.[743] In April 2002, he held a stage-managed referendum claiming to win 97 per cent of the votes cast, and securing the presidency for a five-year term that would end in October 2007. The NAB was used strategically to exclude major opposition figures from forthcoming electoral processes under threat of prosecution and disqualification. Many first and second tier leaders belonging to the major political parties, the PML-N of Nawaz Sharif and PPP of Benazir Bhutto, were weaned over by the regime to cobble together a loyalist faction, the Pakistan Muslim League (Q). The PML-Q was buttressed by the inductees in the local government system. It was hoped that these local politicians dependent on the regime's patronage would bring together vital political capital and local government resources, which would enable the candidates belonging to the PML-Q to win a sufficient number of rural constituencies. The local government system, the accountability mechanism and the structural reforms in the state were also used to break down the relative insularity of the bureaucracy from influence and control.[744] In another step towards the subjection of the state structure, the military regime appointed an unprecedented number of serving and retired armed forces personnel to positions in the bureaucracy, state authorities and public corporations.

In August 2002, just prior to holding the general elections mandated by the court, the Musharraf regime issued a Legal Framework Order (LFO) which consolidated a number of constitutional changes. The LFO revived the notorious Article 58(2)(b) to the constitution, empowering the president to dismiss the incoming parliament at will.[745] The LFO also barred the leaders of PML-N and the PPP from contesting the elections held in October 2002. Nawaz Sharif, who had been charged with and convicted of terrorism and hijacking charges for directing the diversion of General Musharraf's airplane at the time of the *coup*, had already been sent into exile in Saudi Arabia pursuant to a deal brokered by the Saudi royals. Benazir Bhutto and Asif Zardari

[743] President's Succession Order, 2001 (Chief Executive's Order No. 3 of 2001).
[744] International Crisis Group, *Devolution in Pakistan: Reform or Regression?*, Asia Report No. 77 (2004).
[745] Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002).

had also been in self-imposed exile since the late 1990s in order to avoid corruption charges. Despite the absence of key leaders of both parties, the best efforts of the intelligence agencies and the use of local government resources, the PML-Q failed to win an outright majority in the national legislature.[746] An alliance of conservative religious parties, *Muttahida Majlis-e-Amal* (MMA), emerged as the prime beneficiary of the regime's efforts to undermine the mainstream political parties, and won a substantial presence in the legislatures for the first time in the country's history.

For over a year the MMA and the other opposition parties succeeded in disrupting the business of parliament, thereby denying the military regime the masquerade of a stable legislature and a popularly elected government. Questions regarding the legal validity of the LFO, the referendum and other actions taken during the three years of direct military rule continued to hound the regime in this interregnum. In December 2003, the regime finally reached an agreement with the MMA and with its support mustered the two-thirds majority in parliament necessary to pass the Seventeenth Amendment to the constitution.[747] The Seventeenth Amendment validated almost all of the actions taken during the state necessity phase, including the referendum and the revival of the presidential power to dismiss the parliament. In return the MMA secured a promise from General Musharraf to give up the office of CoAS by the end of the year 2004. The Seventeenth Amendment formalized that understanding by making the relevant disqualification clause in the constitution applicable to the office of the President as of the first day of 2005.[748] Article 63(1)(d) of the constitution mandates that a person is disqualified from becoming a member of parliament or president if 'he holds an office of profit in the service of Pakistan *other than an office declared by law not to disqualify its holder*.' In simpler words, it appeared that as of 1 January 2005, General Musharraf would be disqualified from holding the office of the president if he continued to remain the army chief.

In November 2004, General Musharraf reneged on his promise to give up the command of the armed forces. Efforts to provide legal cover to the occupation of 'dual office' – the president and army chief – culminated in the President to Hold Another Office Act,

[746] See Hamid Khan, *Constitutional and Political History of Pakistan*, above n 5, 490.
[747] Constitution (Seventeenth Amendment) Act, 2003.
[748] §2, Constitution (Seventeenth Amendment) Act, 2003.

2004 (PHAOA).[749] Without the support of the religious alliance of the MMA the regime could only muster a simple majority to pass ordinary legislation which stated that the office of the CoAS was, under this law, declared to be an office that did not disqualify its holder from assuming the office of the president. This neat piece of legalism was made applicable to only one person, General Musharraf, and for one term of presidential office only. In the *Pakistan Lawyers Forum* case the Supreme Court was called upon to judge the validity of the Seventeenth Amendment as well as the PHAOA, 2004.[750] The court validated both the Amendment and the Act on the basis of arguments which were essentially an extension of the doctrine of state necessity. The court refused to question the validity of the LFO, and other actions undertaken in the first three years of the regime, since these had been validated prospectively by the Supreme Court in *Zafar Ali Shah*, and retroactively by parliament *via* the Seventeenth Amendment. Most significantly, the court ruled that it would not question the Seventeenth Amendment as it had been passed by an elected legislature, nor would it take any measure that might de-track the transition to democracy in Pakistan. The court also validated the PHAOA, 2004 and the holding of dual office on a strictly positivist and literal reading of the constitutional provisions in question.

Political Economy of Military Incorporated

Despite notable commonalities in the way constitutional cover was provided to the military takeover and its antecedents, the Musharraf regime was different from its predecessor military regimes in fundamental respects. General Ayub had used his military office to take over power, but gave up the command of the army upon becoming the CMLA. After consolidating power he distanced the army from governance, and in the post-martial law period essentially ruled as a civilian president under a presidential constitution with the backing of the military. Unlike Ayub, General Zia remained the CoAS throughout his rule and needed the direct command of the military to stave off political challenges both from the opposition as well as the civilian government that he had created as a cover for military rule. General Zia's failure to effectively share power with the Junejo government in the post-Eighth-Amendment

[749] Article 63(1)(d), *1973 Constitution of Pakistan*.
[750] See *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 Supreme Court 719.

phase meant that the regime remained overtly military and dictatorial despite the holding of elections. Unlike his predecessors, General Musharraf not only remained in the command of the military but was also able to develop a hybrid military-civilian paradigm of governance. While the military remained the ultimate source of his power, General Musharraf was able to forge a workable power-sharing arrangement with the PML-Q government that resulted from the 2002 elections.

The Musharraf regime's ability to forge a military-civil governance arrangement was more than a matter of pragmatic politics or effective patronage. The façade of a civilian government was essential to the regime's survival in a precarious regional and international strategic environment as much as it was a requirement imposed by the Supreme Court. After the international isolation and economic difficulties of the first two years, the events of 11 September 2001 proved to be an unexpected windfall for the military regime. The attack on US soil brought Afghanistan and Pakistan from the periphery to the centre of world attention. As the Bush administration decided to unleash war on the Taleban regime in Afghanistan in retaliation for harbouring *Al-Qaeda* leadership, it needed the support of the Pakistani state and national security organizations. The choice was reportedly presented in a rather stark manner: if Pakistan did not cooperate in the war in Afghanistan, and the broader 'War on Terror', the country would be bombed 'into the Stone Age.'[751] Cooperation in the US-Afghan war was a hard pill for Pakistan's military to swallow, as it entailed the reversal of long-standing policies that rested on strong linkages with the Taleban government of Afghanistan. It, nonetheless, brought the regime out of its international isolation and paid dividends in terms of the lifting of sanctions, foreign debt rescheduling and renewed military and development assistance.

The economic benefits extended far beyond the easing of military expenditure's burden on the national budget. Policing and national security initiatives taken by the US government in the aftermath of the terrorist attacks sent ripples of insecurity amongst expatriate Pakistanis. This resulted in significant increases in foreign remittances, and the sudden influx of capital fuelled a boom in urban property and securities markets, as well as visible consumerism. Pakistan also experienced temporary reversal of a long-

[751] Tim Reid, 'We'll bomb you to Stone Age, US told Pakistan' *The Times*, 22 September 2006.

standing brain drain, as foreign educated and qualified expatriates found a suitable social and economic environment to return to in times of rising Islamophobia in the US and other western countries. The regime used the façade of seemingly functional elected governments at federal, provincial and local government levels to project an image of political liberalization to the international order. The NRB in particular generously employed the development sector's lexicon of 'good governance,' devolution, and 'grassroots empowerment' in an effort to win the support of the international development agencies, as well as an influential NGO sector that is tied in heavily with the socially cohesive conglomeration of urban civil society. The increasing support for state-structure reorganization was further strengthened by the military regime's cooptation of the urban upper classes through the creation of opportunities for experts in government and the economy. A parallel program of economic liberalization through the facilitation of foreign investment and a friendly environment for multinational corporations garnered further international acceptance, and led to the creation of high-end employment and business opportunities. This program of bottom-up state restructuring and trickle-down economic reorganization bolstered the regime's support, both amongst powerful rural elites and rising urban professional classes.

In addition to these elite groups, the military was able to strengthen its support amongst its traditional constituency in rural and peri-urban middle classes of north-central Punjab and settled areas of NWFP. During the Musharraf era, the military was able to dramatically expand its already large footprint in the economy.[752] The military's economic interest was defined not just in terms of the defense allocation in the budget, but more importantly in preferential treatment in the award of state contracts, exemptions from regulations, and other privileges secured for an array of military-owned engineering, defense production, banking, finance, construction, logistics, cement, fertilizer and other corporations. These industrial and finance units form the bedrock of the military's extensive welfare system for retired military personnel and their families. This welfare system extends beyond the payment of generous pensions and benevolent funds schemes, which are far better than those provided to retirees from civilian public services. The military cares for more than ten million retired personnel and their dependents, providing for health and education facilities through profits

[752] See Jalal, *State of Martial Rule*, above n 515.

generated from its commercial ventures. The military allots agricultural land, urban commercial and housing plots, and constructed houses or units in its own housing societies, at hugely subsidized rates to its serving and retired employees. Given that the overwhelming majority of military personnel retire at a relatively young age and need second careers, the military's welfare institutions and corporations provide re-employment to a significant portion of its retired personnel.

Military retirees, their extended families and networks thus form one of the largest coherent political community and voting populace with shared interests and ideological outlook. This is especially the case in north-central Punjab and the settled areas of NWFP, areas from where the military got most of its recruits. It is this constituency, as much as its coercive capacity and penetration into the state structure, which accounts for the military's political relevance and power, especially during civilian rule. However, the military class is not a uniform or monolithic group. Notable differences in the distribution of benefits between the soldier ranks, mid-ranking officer cadres and the top brass of the military have progressively split the military-allied classes. While military service has been the vehicle of upward mobility or consolidation of the soldier ranks in lower-middle, and junior officer cadres into middle to upper-middle classes, the upper brass of the military has emerged as a distinct elite group.[753] The upper cadres of Pakistan's armed forces retire with considerable property and wealth, obtain lucrative post-retirement employment in military and public corporations or other state institutions, and also gain entry into electoral politics in many cases. This class has progressively merged with other elite groups through business partnerships, children's education in elite private schools and foreign universities, and marriages. The enhanced visibility of this elite military class during Musharraf enabled other political and economic players to increasingly criticize certain actions of the military command group as self-serving, and driven by parochial as opposed to national interest.

As long as the economic outlook remained good, the military-civilian government under General Musharraf remained assured of the support of a broad coalition representing rural elites invested in the local government system, urban middle and upper classes that benefited from the economic and political liberalization engineered

[753] Siddiqa, above n 736, 106 and 244-6.

by the regime, and the military-allied classes in north-central Punjab and NWFP that were a direct beneficiary of the Military Inc.'s expansion. Pakistan's sudden prosperity was an economic bubble, however, and a classic case of growth without development. While the state's capacity to incur development expenditures increased dramatically, vital resources were spent on building infrastructure rather than on human development. With the increased circulation of capital new wealth was created, but its distribution was grossly unequal. The number of people below or barely above the poverty line increased to more than half of the population. In addition to the economic divide between the *haves* and the *have-nots*, social and cultural rifts also deepened during military rule. General Musharraf sought to play to the international gallery by portraying the image of a liberal military dictator. The military regime aggressively pursued a programme of 'Enlightened Moderation' designed to bring about a change in religious thought so that Muslims may 'shun militancy and extremism.'[754] The regime pushed through changes in the country's controversial Islamic laws, and supported a 'modernist' Islamic discourse in the print and newly-independent private electronic media. The success of this program was limited, however, as the regime's support for the war in Afghanistan resulted in a backlash with the rise of religious sentiment and tacit support for the Taleban insurgents.

As international pressure increased on Pakistan to curb such space for Taleban insurgents, who increasingly utilized Pakistan's tribal areas to seek refuge, foreign military and development assistance was threatened. At the same time, increasing domestic terrorism and the prospects of the armed forces getting embroiled in anti-terrorism operations in the tribal areas hounded the military regime. As the Musharraf regime closed in on a difficult transition, a slowdown in economic growth and increasing discontent with the unequal distribution of the benefits of such growth threatened the regime's prospects of electoral success. Unlike previous military regimes, General Musharraf's military-civil hybrid was dependent on a victory in the elections scheduled for end of 2007, which needed to appear a more credible exercise than the 2002 polls. The regime also needed to re-engineer constitutional accommodations for the continuing occupation of dual office by Musharraf and the

[754] See Sadaf Aziz, 'Making a Sovereign State: Javed Ghamidi and 'Enlightened Moderation'' (2011) 45 *Modern Asian Studies* 597.

exclusion of the apex leadership of the opposition political parties to effect a successful transition to another term in power. In such circumstances, the re-emergence of an assertive brand of judicial review under Iftikhar Chaudhry had potentially far-reaching political ramifications for the Musharraf regime.

JUDICIAL REVIEW AND THE CONTRADICTIONS OF THE HYBRID COMPOSITE

The First Tenure of Chaudhry, CJ and the Lawyers' Movement

In the first half decade of direct and indirect military rule, the superior courts fundamentally adhered to the blueprint of judicial review devised under the earlier periods of martial law. As noted earlier, the Supreme Court validated the military takeover, approved the LFO and Seventeenth Amendment,[755] enabled General Musharraf to retain dual office, and denied a petition questioning the constitutionality of General Musharraf's election as President through the referendum.[756] The court also refused to brook any challenge to key policies and interests of the regime. The court upheld the accountability law and denied a strong challenge to several key precepts of the National Accountability Bureau Ordinance.[757] At the same time the courts continued to conduct judicial review of executive action in low-key cases involving the junior rungs of bureaucracy, police and other state institutions. Such exercise of judicial review powers was tolerated by the regime, as in earlier periods of military rule. Thus, when Justice Chuadhry assumed the office of Chief Justice he looked set for a tenure of more than seven years with the Supreme Court undertaking business as usual. After all, Justice Chaudhry had undertaken an oath of office under the PCO, and had been a member of several benches which had facilitated the regime. As such, there were no indications of a marked shift in the court's position.

Within the first week of his ascension as Chief Justice, the Chaudhry-led court initiated a more aggressive brand of judicial review, calling into question actions or inactions of

[755] *Watan Party v. Chief Executive*, PLD 2003 Supreme Court 74.
[756] *Hussain Ahmed v. Pervez Musharraf*, PLD 2002 Supreme Court 853.
[757] *Khan Asfandyar Wali v. Federation of Pakistan*, PLD 2001 Supreme Court 607.

the highest levels of bureaucracy.[758] In the immediate aftermath of a devastating earthquake which caused widespread damage in parts of northern Pakistan, the court entertained a petition challenging the Capital Development Authority's (CDA) complicity or negligence in the collapse of a high rise residential building complex in Islamabad. In the *Margalla Towers* case, the court conducted an investigation into the enforcement of regulations and construction standards by the CDA, and directed the authority to provide temporary accommodation and compensation to the victims.[759] In early 2006, in another highly publicized case of *Iqbal Haider*,[760] the Supreme Court nullified a lease of a public park to a private developer by the CDA on the grounds that it violated the guarantee of equal access to public places under the constitution.[761] Beyond this rights analysis, the court was swayed by several aspects of the transaction which indicated collusion and corruption between the developer and responsible officials of the public authority. Likewise, the Supreme Court thwarted attempts to convert public parks in other large cities into lucrative private development projects.[762]

These high profile cases began to provide important evidence of the nexus of power and corruption between the bureaucracy, large commercial interests and the federal and provincial governments elected under the umbrella of the military regime. In the *Steel Mills* case, the Supreme Court pushed the envelope further and voided the privatization of the Pakistan Steel Mills, to the embarrassment of the prime minister and several members of the cabinet.[763] A finding of impropriety in the undervalued sale of this strategic national asset significantly undermined the government's claims concerning the objectives and implementation of the privatization program as well as its economic policy-making in general. Most subtly, the court pushed the boundaries of judicial review, and developed a doctrine of transparency whereby executive action was not

[758] See Tahir Wasti, 'A New Supreme Court: The Contribution of Chief Justice, Iftikhar Muhammad Chaudhry' in Moeen Cheema and Ijaz Gilani (eds), *Politics & Jurisprudence of the 'Chaudhry Court' (2005-2013)* (Oxford University Press, 2015) 6.
[759] *Saad Mazhar v. Capital Development Authority*, 2005 SCMR 1973.
[760] *Iqbal Haider v. Capital Development Authority*, PLD 2006 Supreme Court 394; *Defence of Human Rights Organization v. Federation of Pakistan* (Constitution Petition No. 29 of 2007).
[761] Article 25, *1973 Constitution of Pakistan*. The court noted that the giving up of public parks for private development would be exclusionary for people belonging to the lower socio-economic strata of society and "converting such Parks for commercial activity with the collaboration of multinational companies, would deny the rights guaranteed to them."
[762] See, eg, *Sheri-CBE v. Lahore Development Authority*, 2006 SCMR 1202; *In re: Suo Motu Case No. 3 of 2006 (Cutting Down of Trees in Jehangir Park, Saddar, Karachi)*, PLD 2006 Supreme Court 514.
[763] *Watan Party v. Federation of Pakistan*, PLD 2006 Supreme Court 697.

only required to meet the criteria laid down in the governing laws and regulations, but could also be tested on the touchstone of openness and procedural propriety in public expenditure. In a number of other cases, reported with considerable excitement in the domestic press, the court weaved a narrative of endemic corruption and crony capitalism, belying the claims of good governance and accountability by the Musharraf regime.

Through such judicial review the Supreme Court and the High Courts, which also began to engage in limited judicial activism upon the apex court's cue, began to dent the image of political and economic liberalization that the Musharraf regime had erected. However, the courts had not directly challenged the military's core interests. That appeared to change when the Supreme Court admitted a petition filed by the Human Rights Commission of Pakistan (HRCP) challenging the enforced disappearance and illegal detention of hundreds of people by the country's national security and intelligence agencies, either in the context of the War on Terror or the separatist insurgency in the province of Balochistan.[764] Large scale use of enforced disappearances by the intelligence agencies was a relatively recent phenomenon. Whereas historically both military and civilian governments had used state security and preventive detention laws or trials before military courts, that option had been curtailed by the Supreme Court's decisions in *Mehram Ali* and *Liaquat Hussain* in the late 1990s. In dealing with Taliban militants in the tribal areas and a renewed insurgency in the remote parts of Balochistan, the Musharraf regime had begun to dispense with legal process altogether. While the Supreme Court could not compel military authorities to account for the so-called 'missing persons', regular hearings in the *HRCP case* brought attention to the human rights violations in the military's counter-insurgency and anti-terrorism actions in the western parts of the country. When the court began to call high ranking military officers, threatening to undermine their impunity, it caused unease amongst the military hierarchy.

As both presidential and parliamentary elections were due to be held at the end of 2007, such judicial activism was most unwelcome. The attention to the corruption and

[764] See *Human Rights Commission of Pakistan v. Federation of Pakistan* (Constitution Petition No. 5 of 2007).

malgovernance brought on by widely reported cases of judicial review did not augur well for the re-election prospects of political parties allied with the Musharraf regime. The courts' actions touched an ever increasing number of raw nerves, its publicized decisions became regular reminders of the failure or even betrayal of the regime's reform agenda, and kindled growing public dissatisfaction and fatigue with military rule. A number of writ petitions painted an unflattering picture of the military regime, and civilian governments functioning under its umbrella: a picture of corruption and crony capitalism; of self-serving accountability charades; of governments working for an elite getting ever more prosperous without a care for either the religious sentiment or the economic woes of the broader public; and of a regime becoming increasingly ruthless in its suppression of insurgency and discontent in Balochistan, and the frontier regions of the tribal areas. Furthermore, the court's decisions and attendant popularity must have also caused some nervousness concerning the outcome of inevitable constitutional challenges to the regime's efforts at engineering another transition. One issue bound to resurface was the continued occupation of dual office by General Musharraf, as the one-off exemption granted by the PHAOA was due to expire prior to the elections.

Concurrently with the hearings in the *HRCP case*, rumours of irregularities committed by Chaudhry, CJ in securing the appointment of his eldest son to a bureaucratic post began to circulate. Complaints about his aggressive judicial style and a penchant for garnering media attention were already rife. In March 2007, in a somewhat unexpected move, General Musharraf suspended Chaudhry, CJ on charges of misconduct. In his capacity as president, Musharraf filed a reference before the Supreme Judicial Council, the body mandated by the constitution to conduct the accountability of the judges of superior courts. A particular difficulty that the president faced arose from the text of Article 209 of the constitution, which required the Chief Justice of Pakistan to head the Supreme Judicial Council. It was in order to avoid this difficulty that the president rendered Chaudhry, CJ 'non-functional' and appointed an acting chief justice in his stead.[765] The dismissal of the chief justice unleashed a wave of political dissent – frequently labelled as the 'Lawyers' Movement – that quickly threatened to spin out of the military regime's control. Indeed, the fact and the manner of the dismissal brought

[765] Moeen Cheema, 'Justice Derailed in Pakistan: The Sacking of the CJ', *Jurist*, 13 March 2007.

home to many the reality of military rule behind the façade of elected governments and transitional democratization that the Musharraf regime had successfully managed until this moment.

At the early stages it was truly the lawyers' movement only. Many the country's eighty-thousand registered lawyers held protest marches in their signature black and white uniforms. From the outset, the leaders of the bar associations that organized the protest movement insisted on an essentially apolitical agenda: restoration of the chief justice and securing the independence of the judiciary. Time and again the most vocal leaders of the movement took great pains to point out that their demands were purely legal and constitutional, for fear that widening the ambits of the demands or their ideological moorings would open the movement to both internal dissension as well as greater external resistance from the military regime. Broader political goals such as the institution of democratic governance were thus deliberately eschewed. There was clearly a tension inherent in the apolitical instinct of the movement. Without a broader political and socio-economic agenda the movement was merely a curiosity to the public and the media. Without the support of some segments of the broader public the movement had limited chances of success, as the regime could be expected to withstand the impact of dissent by a relatively small, even if vibrant and motivated legal community.

Given the specific challenge of sustaining a coherent movement as well as simultaneously cultivating popular support, the leaders of the Lawyers' Movement came up with a novel, and in many respects brilliant, strategy for social mobilization. Various bar associations around the country began to invite the non-functional Chief Justice to address their members, a task nominally within the ambit of a judge's role and decorum. As the Chief Justice travelled to address the bars, along with slow caravans of lawyers' vehicles on the country's major highways, people started turning up on the roadsides in increasing numbers. Pakistan's private television news channels, established during the Musharraf years, provided non-stop coverage and commentary, bringing unprecedented attention to these events. The Chief Justice only addressed the lawyers inside the premises of the courts, but many people gathered outside. Inside the premises cohorts of young lawyers waited for hours in rain or blazing sunshine, chanting slogans, singing songs, reciting revolutionary poems or listening to rowdy

speeches by local bar officials. While the leaders of the Lawyers' Movement spoke against the military regime, and broached a wide range of subjects from the prospects of genuine electoral democracy to social justice, whenever the Chief Justice spoke it was of the rule of law and constitutionalism, thereby maintaining a notional separation between law and politics.

With each caravan and address to the bar, the number of people lining the streets increased. The ever-increasing, even if limited populism of the movement, was partially explained by dozens of human rights cases that had been taken up *suo motu* by the Supreme Court – *i.e*. cases initiated by the Supreme Court itself on behalf of petitioners identified through a regular scrutiny of newspaper and electronic media reports by a human rights cell created by Chaudhry, CJ.[766] There were unverified stories of entire villages turning up to catch a glimpse of the deposed chief justice along with a victim of police brutality, abuse of authority and harassment who had been saved in one such *suo motu* hearing. Not even the lawyers and their leaders had appreciated the personal popularity of the Chief Justice amongst segments of the country's lower classes, especially in the rural areas. More significantly, the opposition political parties correctly saw a chink in the Musharraf regime's grip on power, and the Lawyers' Movement as an opportunity to push for greater political space. Political party activists of all opposition parties across the ideological spectrum began to turn up to the lawyers' events in large numbers.

[766] Three reported cases present a neat summary of the types of actions undertaken by the Supreme Court in *suo motu* cases pertaining to the police and the administration of the criminal justice system. In *Human Rights Case No. 13-L of 2006*, 2006 SCMR 1769, the court acted on a newspaper report on the kidnapping for ransom of two boys taking note of the alleged involvement of a local politician. The police recovered the boys, allegedly from within the territorial jurisdiction of Afghanistan after engaging cross-border networks, and earned the SC's praise. In *Human Rights Case No. 3062 of 2006*, 2006 SCMR 1780, acting on an anonymous application the court directed the police to register a case of murder and initiate an investigation into the murder of a young woman by 'influential persons.' In another *suo motu* case, *Criminal Miscellaneous Application No. 189 of 2006*, 2006 SCMR 1805, the court directed action against police officials and a judicial magistrate responsible for the detention of two young boys, one of whom was kept in chains. Also see *Human Rights Case No. 5091 of 2006*, PLD 2007 SC 232; *Human Rights Case No. 5552 of 2006*; *Human Rights Case No. 5443 of 2006*; *Human Rights Case No. 5522 of 2006*; *Human Rights Case No. 4866 of 2006*; *Human Rights Case No. 4860 of 2006*; *Human Rights Case No. 4787 of 2006*; *Human Rights Case No. 4245 of 2006*; *Human Rights Case No. 3685 of 2006*; *Human Rights Case No. 3406 of 2006*; *Human Rights Case No. 2905 of 2006*; *Human Rights Case No. 66-L of 2006*; *Human Rights Case No. 52-L of 2006*; *Human Rights Case No. 51-L of 2006*; *Human Rights Case No. 43-L of 2006*.

Before the Lawyers' Movement could snowball into a deeper social mobilization, however, the Chief Justice won a vital legal battle. Chaudhry, CJ had filed a petition before the Supreme Court challenging his dismissal. In July 2007, a Supreme Court bench declared the President Musharraf's actions to be *mala fide*, and restored Chaudhry, CJ to his office.[767] With Chaudhry, CJ restored at its head, reinforced by the overwhelming support of the bar, and energized by the broader public support for its newfound stature, the Supreme Court and the High Courts began to exhibit a level of activism hitherto unknown to Pakistani jurisprudence.[768] The courts began to venture beyond the traditionally restrictive boundaries between law, politics and policy. As the regime geared up to manage the complicated electoral transition in late 2007, the superior judiciary appeared to offer an even stronger impediment to its plans.

The Emergency and another Democratic Transition

The technical blueprint for the transition was similar to the one adopted in the lead up to the 2002 elections. One key prop had already been assembled in 2005: elections for local governments held again on a non-party basis had yielded favourable results for the PML-Q and other parties allied with the military regime. As such, local government resources and local networks of patronage were available for utilization in the general elections scheduled to be held in late 2007. Prior to the general elections, General Musharraf needed to secure another five-year term in that office. This time the device of a referendum could not be used as presidential elections had to be held under the constitution, with members of the National Assembly and provincial legislatures forming the electoral college. General Musharraf also needed to hold the presidential election prior to the general elections so that his supporters in the legislatures could

[767] See *Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan v. President of Pakistan*, PLD 2007 Supreme Court 578. The detailed judgment, authored nearly two and a half years after the issuance of the short order due to the imposition of emergency and the removal of most of the judges who sat on the bench, recounts in great detail the events surrounding the first removal of the Chief Justice. *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 Supreme Court 61.

[768] In one instance, the court effectively compelled the government to pass legislation regulating organ transplants. In another case, the courts even took up the issue of traffic congestion in the metropolis of Karachi. At the same time, the courts continued to take up human rights cases involving abuse of police powers, corruption and elite control of state apparatus, *etc*. See, eg, *Human Rights Case No. 4095 of 2007*; *Human Rights Case No. 4116 of 2007*; *Human Rights Case No. 2885 of 2007*; *Human Rights Case No. 2742 of 2007*; *Human Rights Case No. 2740 of 2007*; *Human Rights Case No. 2689 of 2007*; *Human Rights Case No. 1638 of 2007*; *Human Rights Case No. 1254 of 2007*; *Human Rights Case No. 3416 of 2006*; *Human Rights Case No. 2783 of 2006*.

muster the requisite votes, as well as pass legislation sanctioning another term in the presidency while holding dual office. There were significant legal issues overshadowing this strategy, however. The first question that bedevilled General Musharraf's re-election was whether a parliament and provincial legislatures nearing the expiry of their term may elect a president for a five-year term. While the text of the constitution was silent on the merits of such an event, forceful arguments could be made that such an election would be essentially undemocratic, and thus violate the spirit of the constitution. More importantly, the issue of the dual office, settled temporarily in *Pakistan Lawyers Forum*, could be expected to re-emerge with a vengeance. Another iteration of the PHAOA would have to be engineered in order for General Musharraf to contest another presidential election in uniform. Both issues were bound to be raised before the Supreme Court. The military regime, therefore, would have liked to see a Supreme Court bench with a positivist and strictly literalist bent, rather than the resilient court that had materialized in the aftermath of the Lawyers' Movement.

Furthermore, the political energy unleashed by the Lawyers' Movement had considerably complicated the transition for the regime. In the course of the Lawyers' Movement the opposition political parties, which had participated actively in the movement, had been considerably strengthened. Accommodation with some factions of the opposition parties had thus become a necessity. Rumours of a political deal that would ensure the continuation of the military regime had become rife since the restoration of the Chief Justice in July. It was widely speculated that the British and American governments had brokered an arrangement between the Musharraf regime and one of the leading opposition parties, the PPP, whereby General Musharraf would be allowed to continue as president for another five-year term in office. In return, the PPP would be enabled to contest relatively free and fair general elections, and form the next government if successful. The perceived benefit to the brokers of this deal was the continuation of a government with a liberal and pro-American outlook, a supportive presidency, and a cooperative military that would collectively assist in the prosecution of the war in Afghanistan and the border regions of Pakistan.

For this tri-partite contract to be completed, the military regime would have to allow Benazir Bhutto, who had been in self-enforced exile, to return to the country and organize her party in time to contest the impending elections. Long-standing corruption

charges against Ms. Bhutto and her husband (especially a case that was perilously close to a decision in a court in Switzerland), and those against several leading PPP figures, would have to be dropped to enable their political rehabilitation. Further, it was vital for the success of this project that the other major political player, Nawaz Sharif, should continue to be marginalized, and disallowed from returning to the country until after the elections. However, as the parliament neared the end of its term, the Supreme Court began to open the political space for the PML-N as well, and thus threatened the regime's accommodation with the PPP. In August 2007, the Supreme Court paved the way for Nawaz Sharif's return to Pakistan.[769] On 5 October, on the very eve of the presidential election, General Musharraf passed the National Reconciliation Ordinance (NRO) granting immunity to Benzair Bhutto, her husband Asif Zardari, and a host of leading PPP leaders from pending corruption charges. The very next day, General Musharraf contested the election for the president, and secured more than fifty-five percent of the votes cast by the members of the national and provincial legislatures. Legislators belonging to the PPP noticeably refrained from casting their votes, thereby facilitating a smooth re-election for General Musharraf.

General Musharraf's grasp on power was becoming tenuous by the beginning of November 2007. The parliament's term was set to expire in two weeks. Domestic and international pressure to allow the return of his most vocal opponent, Nawaz Sharif, was mounting. Within a week of the promulgation of the NRO, the Supreme Court had admitted a petition challenging its constitutionality, and in the process took an unprecedented step in granting an interim injunction against the operation of the ordinance.[770] General Musharraf's re-election as president had also been challenged before the Supreme Court.[771] The court initially allowed the election to proceed subject to the condition that the election results may not be formally notified until the resolution of the controversy. The most important legal question before the court was whether a serving chief of the army may validly contest the election for the presidency. A decision by the Supreme Court invalidating the presidential election would have completely rocked, and possibly capsized the boat. As the hearings in the case proceeded, General

[769] See *Pakistan Muslim League (N) v. Federation of Pakistan*, PLD 2007 Supreme Court 642.
[770] See *Dr. Mubashir Hassan v. Federation of Pakistan*, PLD 2008 Supreme Court 80.
[771] See Moeen Cheema, 'Supreme Challenge: Pakistan's Presidential Election Goes to Court', *Jurist*, 18 October 2007.

Musharraf feared an adverse verdict and on 3 November 3 2007 imposed a state of emergency.[772]

The state of emergency was deliberately imposed on a weekend in order to give the regime some breathing space within which to organize a crackdown on impending protests. Under the constitution, the president may impose a state of emergency in case of external aggression or serious domestic unrest.[773] This, however, was not such an exercise, and the misleading title of a state of emergency was a cover for what was in reality martial law. Much to the surprise of the regime, seven judges managed to make their way to the Supreme Court premises and hurriedly constituted a bench that took up the question of the validity of the state of emergency. The bench rightly anticipated that the entire legal technology of a *coup* was about to be unleashed, and issued an interim order that directed all state functionaries including judges, bureaucrats and military officers to disregard any extra-constitutional orders issued by the regime.[774] In a Kafkaesque move, these Supreme Court judges were forcibly removed from the court premises and placed under house arrest. The inconvenient existence of the interim order was denied. The Musharraf regime suspended the constitution for the second time within a decade, and issued another Provisional Constitutional Order (PCO) that purported to grant it the authority to rule as well as to make laws and constitutional amendments.[775] Judges of the superior courts were asked to take a fresh oath of office under the PCO.[776]

An unprecedented number of the judges of the Supreme Court and the High Courts either refused to take such an oath or were not invited to do so.[777] New judges were appointed in their place and Chuadhry, CJ was dismissed for the second time in a year,

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[772] See Moeen Cheema, 'Martial Law by Another Name in Pakistan', *Jurist*, 3 November 2007.
[773] The President may impose a state of emergency if he is satisfied that "a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control." Article 232 cl. 1, *1973 Constitution of Pakistan*.
[774] *Wajihuddin Ahmad v. Chief Election Commissioner*, PLD 2008 Supreme Court 25. Also see Hamid Khan, *Constitutional and Political History of Pakistan*, above n 5, 522.
[775] Provisional Constitution Order No. 1 of 2007.
[776] Oath of Office (Judges) Order, 2007.
[777] See Moeen Cheema, 'Pakistan: Mock Trials, Kangaroo Courts and Court Jesters', *Jurist*, 9 November 2007. In total 61 judges of the superior courts were thus deposed: 13 out of 18 (17 permanent and one ad-hoc) Supreme Court judges, including the Chief Justice; 18 out of 31 judges of the Lahore High Court; 24 out of 28 judges of Sindh High Court, including the Chief Justice; and 6 out of 13 judges of Peshawar High Court, including the Chief Justice.

to be replaced by Justice Abdul Hameed Dogar as the Chief Justice. After all, this was a unique *coup* intended, as it was, primarily to undermine the independence of the judiciary and reconstitute a subservient judicial organ.[778] Bracing itself for the inevitable storm of protests and condemnation, the military regime forced private news channels off air and issued an ordinance to censor electronic media. Criticism of the president or of the regime's actions was forbidden. The lawyers' and the civil society activists' protests were brutally suppressed. Hundreds of lawyers found themselves on the other side of prison bars, now themselves the victims of Pakistan's repressive public order and anti-terrorism laws.[779] Even the nation's deeply depoliticized student population showed sporadic but intense flashes of incandescence. The military regime was, however, intent on maintaining control and succeeded in suppressing the spontaneous protest movement, at least for the time it took to implement its immediate plans of achieving a legal cover for its actions.

Nonetheless, the sharp decline in popular support for the regime and the unwanted coverage of the protests by the international media took its toll, especially in terms of limiting General Musharraf's options. From the outset, therefore, the regime declared that the state of emergency would be imposed for a short duration only. It needed little time within which to obtain the necessary protection for its actions from an acquiescent judiciary, as well as to offer sufficient political incentives to take the edge off the opposition political parties' role in the protest movement. Thus, within a week of imposing the state of emergency General Musharraf announced that general elections would be held in early 2008. The presidential and parliamentary term expired on 15 November, and a caretaker government was immediately appointed. The reconstituted Supreme Court rejected the constitutional challenges to General Musharraf's re-election

[778] The Proclamation of Emergency made for an interesting reading. It accused 'some members of the judiciary' of 'working at cross purposes with the executive and legislature in the fight against terrorism and extremism' in an effort to pander to the regime's international backers. It charged the deposed judges with 'constant interference in executive functions, including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations and urban planning' which 'weakened the writ of the government.' It indicted the dismissed judges for overstepping the limits of judicial authority and taking over the executive and legislative functions, asserting that it was a matter 'of paramount importance that the honourable judges confine the scope of their activity to the judicial function and not assume charge of administration.'

[779] See Moeen Cheema, 'Musharraf's Real 'War on Terror' in Pakistan', *Jurist*, 6 November 2007.

as president on 23 November,[780] and validated the state of emergency.[781] On 28 November, feeling somewhat confident in the prospects of another term in the presidency, Musharraf reluctantly relinquished the command of the armed forces to assuage domestic and international anxieties. On 29 November, General (retired) Pervez Musharraf was sworn in as the president of Pakistan, and announced that the state of emergency would be lifted in a fortnight.

Prior to ending the emergency on 15 December, President Musharraf exercised the self-granted powers of constitutional amendment to validate the actions undertaken during the emergency period, as well as to grant constitutional cover to the forthcoming elections.[782] A presidential order purported to add article 270AAA to the 1973 Constitution. The numbering of the article, and its placement within the chapter of the constitution allocated to 'transitional' provisions was steeped in the symbolism of a constitutional text ravaged by modification at the hands of successive military regimes, as well as the never-ending transition towards meaningful democracy in Pakistan. This presidential order also sought to give permanent constitutional cover to the removal of superior court judges. Further, it declared that all orders, ordinances and other laws passed during the emergency period would be considered as having been validly enacted, and would continue to remain in force until repealed or amended. The language of the relevant clause was such that it appeared to give indefinite life even to those presidential ordinances which had been passed prior to the imposition of emergency, even though the normal term of such ordinances under the constitution is four months. This would essentially resurrect the NRO and give it the status of regular legislation.

The promise of relatively free and fair general elections, the weakened hold of Musharraf over power on account of his retirement from the command of the army, and the revival of the NRO ensured Benazir Bhutto's reluctant acquiescence to the strategy

[780] See *Wajihuddin Ahmed v. Chief Election Commissioner, Islamabad*, PLD 2008 Supreme Court 13.
[781] See *Tikka Iqbal Muhammad Khan v. General Pervez Musharaf*, PLD 2008 Supreme Court 178. The court accepted on face value the two major factual claims made by the government, namely that the country was in a state of crisis due to terrorism and that the courts under Justice Iftikhar Chaudhary had undermined the executive's efficacy in fighting against such terrorism. In agreeing with the latter assertion the court noted the inappropriate usage of powers under Article 184(3) of the Constitution, which grants an original jurisdiction to the Supreme Court to take up any matter of public interest concerning enforcement of fundamental rights and which has been interpreted as empowering the court to initiate cases *suo motu*. Chief Justice Iftikhar Chaudhary was seen as the main culprit in this regard.
[782] Constitution (Amendment) Order, 2007 [President's Order No. 5 of 2007].

of transition from a stronger form of military rule to a power-sharing arrangement with an elected government. A number of minor opposition parties, including most notably former cricketer-turned-politician Imran Khan's Pakistan *Tehreek-i-Insaaf* (PTI), and the leaders of the Lawyers' Movement discounted the possibility of fair polls under President Musharraf, and decided to boycott the elections. Nawaz Sharif, who had been allowed to return to the country during the emergency, initially contemplated joining the boycott movement but later agreed to contest, thereby enabling the forthcoming elections to have the credibility they would have otherwise lacked. However, on 27 December 2007, the assassination of Benazir Bhutto while attending a rally in Rawalpindi plunged the nation into confusion and utter grief. The assassination was immediately blamed on the Pakistani *Taleban* by the Musharraf administration, but the mysterious circumstances of her death gave rise to rumours of a conspiracy involving elements of the regime. Bhutto's death brought a dark cloud of doubt over the impending elections and planned transition to civilian rule.

Within days of Benazir Bhutto's burial, the PPP's executive committee named her son and her widower, Asif Zardari, as the co-chairpersons of the party in accordance with a hand-written will produced by her husband. This was not surprising as Pakistan's largest political parties have historically been subject to dynastic control. It was Mr. Zardari – notorious for graft in Benazir Bhutto's two terms as prime minister, and nicknamed 'Mr. Ten Per Cent' by the opposition on this count – who would lead the party in the general elections. The elections for the National Assembly and provincial legislatures were held in February 2008. Contrary to the fears of widespread rigging in favour of candidates belonging to the pro-Musharraf PML-Q, the elections were acknowledged as being by and large fair. Credit for this was given to the new army chief, who reportedly had distanced the military from close involvement in electoral politics. The PML-Q lost ground everywhere and the two largest opposition parties, the PPP and PML-N, emerged as the biggest winners. While the PPP emerged as the largest single party in the National Assembly, it once again failed to command an outright majority. Likewise, the PML-N emerged as the dominant party in the provincial legislature of the Punjab, but fell short of achieving a simple majority. This electoral result essentially transformed General Musharraf into a weak president whose grip on power was bound to progressively slip, even though the *coup de grace* would take another few months.

A Praetorian Model of Corporatist Governance

By 2007, when the Musharraf regime faced the challenging task of engineering a transition to a third term in power, something no previous military ruler had successfully managed, the institutional balance representing the political settlement amongst the elites had begun to fracture. Pakistan's political elites represented in the large national and regional political parties had also assimilated the model of corporate action that the military had established, and reached an agreement to contain political disagreement up to a certain limit in order to constrain the political space available to the military. A 'Charter of Democracy', negotiated amongst the major political parties during the first phase of the Lawyers' Movement in May 2007, outlined a range of constitutional and political measures to stabilize a future civil-democratic dispensation. More significantly, the underlying spirit was one of a minimum level of accommodation and toleration between a future elected government and opposition parties, in order to ensure that the system was never so unstable as to justify military intervention. The Charter of Democracy also laid the foundations for the ultimate obliteration of left-right distinction in Pakistan's electoral politics. The continuation of formal democracy became the common and over-arching ideological platform on which the most significant players in electoral politics achieved a consensus.

As the military regime gave way under sustained pressure to elected governments of different political parties and coalitions at federal and provincial levels, the corporatist settlement amongst the political elites ensured the distribution of power such that most political parties benefited from access to government and resources. Political parties in opposition generally tolerated the governments' patronage-oriented distribution of development and public services, corruption and crony capitalism. Furthermore, a style of politicking referred to as 'friendly opposition' by its critics ensured that political disagreement rarely reached the kind of breakdown or boiling point which had enabled the military to play the role of arbiter and regain political space in the 1990s. It was this corporatist settlement amongst the political elites which ensured a somewhat stable transition to civil-democratic dispensation post-Musharraf, such that 2013 was the first time in Pakistan's history that an elected government completed its tenure and peacefully transferred power to its successor.

The real political opposition to elected governments in the immediate post-Musharraf era came not from other political contenders but the superior judiciary. Chief Justice Chaudhry, whose restoration was resisted by the incoming PPP government for more than a year, was ultimately brought back into office after a second wave of the Lawyers' Movement and led a Supreme Court that could claim a proto-democratic mandate and popular legitimacy. The courts had experienced extra-constitutional upheaval and blatant intervention into the judicial domain, and sought security of tenure in public support. The 'Chaudhry Court' thus engaged in a kind of judicial activism (or rather proactivism) under the banner of constitutionalism and rule of law that was designed to cultivate a constituency beyond the lawyers, urban professional and upper-middle classes. The court consistently championed causes that resonated with the urban and peri-urban middle classes and elements of the dominant Islamic nationalist ideology to broaden its support base. Noticeably, the court consistently took up issues of corruption, crony capitalism and abuse of public authority highlighted in private electronic media that appealed to the middle classes. The court used the popular support that it garnered through this brand of judicial review of executive action to expand its institutional turf as well as fend off any challenges from the political executive.

Expansionist judicial review inevitably led to a protracted tussle between the judiciary and the elected executive. The narrative of corruption and malgovernance progressively constructed by the judiciary, particularly through the Supreme Court's use of self-styled powers to initiate *suo motu* actions based on media reports of governmental corruption, undermined the elected government and raised concerns that a destabilized civilian government would be forced to cede greater space to the military in order to avert the possibility of a direct intervention. While there was some justification for such concerns, the judiciary also took some political space from the military, making it a three-way jostling for institutional power. Charges of bad governance and corruption have historically provided the military with the basis of undermining elected governments; and by claiming the role of the accountability arm of the state the court in fact deprived the military of its strongest justification for covert or overt intervention in politics. Furthermore, by holding certain matters of national security justiciable, the court also mounted a direct, even if somewhat limited, challenge to the military's prerogative in this domain. The emergent era of corporatist governance would thus be

characterized by an evolving and fluid balancing of institutional interests. While the articulations of nationalism, rule of law and democracy all hark to greater public good, these would essentially become legitimating idioms of different institutional and elite group interests. A closer analysis of the class and corporatist dimensions of governance unveils the real structures of power in contemporary Pakistan.

CORPORATIST GOVERNANCE

THE 'CHAUDHRY COURT' AND 'JUDICIAL PROACTIVISM'

The February 2008 election results effectively consigned the Musharraf regime to a slow but inevitable demise. This was the third significant moment of transition from military to civilian rule in Pakistan's history. Unlike the previous occasions, this time the prospects of a stable and lasting democratic dispensation appeared promising. Pakistan's political elites represented in the large national and regional political parties had assimilated the model of corporate action established by the military, and reached an agreement to contain disagreement up to a certain limit in order to deny the possibility of political ingress and another military intervention. The 'Charter of Democracy' negotiated amongst the major political parties in 2007 represented a consensus on democratic continuity as well as major political issues necessary to stabilize a civil-democratic dispensation. Only one significant issue remained unresolved: the fate of the deposed Chief Justice Chaudhry, and by extension the role of the Supreme Court in Pakistan's governance scheme.

Justice Chaudhry was finally reinstated as the Chief Justice after another phase of the relatively populist mobilization led by the lawyers in March 2009. Although Justice Chaudhry had been dismissed by General Musharraf, it was the elected PPP government that resisted his restoration to office for more than a year, until a 'Long March' towards Islamabad by the Lawyers' Movement and the combined opposition compelled it. Thus began the second period in Pakistan's history in which the superior judiciary found the political space to exert and expand judicial power. The PPP government was based on a stable coalition that lasted a full five-year parliamentary term, but was not strong enough to suppress a resurgent judiciary that saw itself as having a populist, proto-democratic mandate. A tussle between the PPP government and the Chaudhry Court appeared imminent as the court looked to assert its perceived mandate. Unlike the 1990s this shaped up to be a jostling for power directly between

the elected and judicial institutions, rather than a scenario where the court would be called upon to mediate the tensions between other political players.

Through its expansive judicial review the Chaudhry Court constructed a narrative of corruption and malgovernance by the elected government. In particular, the Supreme Court's use of its powers to initiate *suo motu* actions based on media reports of governmental corruption threatened to destabilize a relatively weak civilian government. While the overt political tensions between the judiciary and the elected government garnered the overwhelming share of the attention, the more significant assertion of judicial power by the Chaudhry Court was predicated on a consolidation of the various strands of administrative law. Many of the constitutional controversies had administrative issues at their core as the court insisted on restoring to the bureaucracy, police and other law enforcement agencies some capacity for decision-making and action independent of political influence. The Chaudhry Court, which had experienced extra-constitutional upheaval and blatant intervention into the judicial domain, consciously sought security of tenure in public support. The causes of anti-corruption and administrative propriety resonated with the urban and peri-urban middle classes. The court also proactively engaged in judicial review in human rights cases, and challenged illegal detentions and abuse of police powers which enabled it to further broaden its support base.

The court used the popular support that it garnered through its brand of judicial review to expand its institutional role, as well as resist the anticipated pushback form the political executive. The resistance came in the form of a successful effort by the government to delegitimize its aggressive judicial review practices as politically motivated. By the end of Chief Justice Chaudhry's tenure, the criticism of judicial activism had taken a hold in public discourse. As a result, in the post-Chaudhry era the Supreme Court experienced a gradual shift in its direction under the leadership of five different Chief Justices. Except for a brief period of twenty-three poetic days in which the twenty-third Chief Justice of Pakistan briefly rekindled the legacy of Chaudhry, the court progressively curtailed its Original jurisdiction and dramatically reduced the use of *suo motu* powers. Nonetheless, the court remained a powerful institution and the centrality of its role within the governance system of Pakistan appeared to be an irreversible development. On multiple occasions the post-Chaudhry Supreme Court

was reluctantly dragged into the midst of political crises that threatened the very existence of the democratic system and the constitutional scheme on which the court claimed to found its powers. In such circumstances the court remained the only institution with the capacity to decisively and credibly resolve such crises and mediate between the key stakeholders of Pakistan's governance system.

THE 'CHAUDHRY COURT'

The Second Phase of the Lawyers' Movement

In the immediate aftermath of the election in March 2008, the PPP and PML-N reached an accord whereby the two largest parties in parliament would form a coalition government at the centre, and the judges deposed during the emergency would be restored within thirty days. Yousaf Raza Gilani, the PPP's candidate, became the prime minister with the overwhelming support of National Assembly members, and immediately ordered the release of those Supreme Court judges who had been under house arrest since the imposition of the emergency, including Justice Chaudhry. Optimism about the restoration of judges began to fade, however, as disagreement over the modalities of the reinstatement emerged between the coalition partners. The PML-N and the leaders of the Lawyers' Movement took the view that since the dismissal of the judges was unconstitutional to begin with, and hence *void ab initio*, the judges could be restored through a simple notification issued by the executive to that effect. They were also of the opinion that judges appointed to the superior courts after the imposition of the emergency had been appointed illegally, and would be removed so that the composition of the courts may be restored to the *status quo ante*.

In contrast, the government exhibited a distinct preference for restoring the deposed judges through a constitutional amendment that would also retain those judges who were appointed by President Musharraf during and after the emergency. This would indirectly acknowledge the constitutionality of the entire range of emergency actions, as well as reduce the judges removed by President Musharraf to a minority in the reconstituted courts. The motivation for this particular stance appeared to be a concern that the restoration of the judges in the manner demanded by the Lawyers' Movement would not only result in a fiercely independent judiciary, but also invalidate the

emergency and all actions taken pursuant to it, including especially the nullification of the National Reconciliation Ordinance (NRO). After two months of wrangling over this issue, PML-N members resigned from the coalition government citing the refusal of the PPP to honour its commitments with regard to the restoration of the judges. Within days, the leaders of the bar associations announced the revival of their protest movement that would culminate in a 'Long March' towards Islamabad. In June 2008, thousands of lawyers, opposition political party workers, civil society activists and ordinary citizens congregated at the federal capital's Constitution Avenue from all over the country. The Long March participants appeared to believe that a democratically elected government would have little choice but to bow before such a strong showing of popular support for the restoration of the judges.

However, the government withstood the pressure with tact and tenacity by allowing the protests to be conducted peacefully for a few days. Unable to continue the protests indefinitely, the leaders of the Lawyers' Movement unexpectedly announced a premature end of the Long March without achieving its objective. As the euphoria of a peaceful and popular Long March was overtaken by a sense of despondency, divisions appeared amongst the leadership of the movement and the political parties backing it. The issue of the judges' restoration continued to simmer as the deposed Chief Justice visited more bar associations around the country. After further talks between the government and PML-N in early August, rumours circulated that both parties had agreed upon a new deal pursuant to which President Musharraf would be impeached and the judges restored soon thereafter. As the threat of impeachment crystallized, General (retired) Musharraf was forced to resign as President. The PPP immediately announced Asif Zardari as its candidate for the vacant presidency. The agreement between the government and the PML-N broke down once again, and it appeared that in a remarkable feat of political gamesmanship Zardari had managed to win the support of the opposition in displacing President Musharraf without giving any ground on the restoration of judges. In September 2008, Zardari comfortably won the election to become the president of Pakistan, an office that carried the promise of temporary immunity from prosecution on corruption charges, even if the NRO were invalidated.

The Lawyers' Movement appeared to have lost all steam in the aftermath of President Zardari's election. A number of deposed Supreme Court and High Court judges took

the oath of office, thereby breaking ranks with the Justice Chaudhry and the Lawyers' Movement. Prominent government representatives made frequent statements on national media that Justice Chaudhry had been politicized during the movement, and he was no longer fit to act in a judicial capacity. Even the opposition PML-N appeared to have dropped the issue of the judges' restoration from the top of its list of priorities. However, as the first anniversary of the imposition of emergency approached, the lawyers announced their intent to hold another round of street protests in March 2009. In organizing the second Long March the movement appeared to have an important advantage on its side. The second Long March was deliberately intended to coincide with the retirement date of incumbent Chief Justice Abdul Hameed Dogar. It had been one of the key arguments of the government against Justice Chaudhry's restoration that it did not have the constitutional authority to demote Justice Dogar from the post of the Chief Justice. Justice Dogar's impending retirement thus provided a window of opportunity for the movement.

In the entire period from the imposition of emergency to the second Long March, the superior courts of Pakistan had played the role that could be expected of a subservient and docile judiciary. The Supreme Court under Dogar, CJ was widely referred to as the 'Dogar Court' with a distinctly derogatory connotation. Its actions betrayed a firm desire to prove the value of a compliant judiciary to the executive. Several constitutional decisions of political significance that favoured the government had discredited the Supreme Court.[783] However, the timidity of the Dogar Court extended beyond cases of political relevance, as the Supreme Court relinquished even a pretence of holding the executive accountable. The Dogar Court also attempted to undo a decade of jurisprudential development by restricting the Original jurisdiction of the Supreme Court under Article 184(3) – it defined the requirement of public importance so narrowly as to invalidate all of the Chaudhry Court's *suo motu* human rights and public interest actions.[784] A summary of the cases decided by the Dogar Court, instances of non-interference in the exercise of governmental powers, also provided a useful means

[783] For example, the Dogar Court had paved the way for Mr. Zardari's election as President by lifting the requirement of holding a bachelor's degree as minimum educational qualification to become a member of Parliament or the President. See *Muhammad Nasir Mahmood v. Federation Of Pakistan*, PLD 2009 Supreme Court 107.

[784] See *Suo Motu Case No. 13 of 2007*, PLD 2009 Supreme Court 217. Examples of *suo motu* cases undone by the Dogar court include *In re: Suo Motu Case No. 21 of 2007*, 2008 SCMR 563.

to identify vested interests that had come to dominate the Pakistani state.[785] At the time of the second Long March in 2009, the subservience of the Dogar Court thus provided the backdrop against which the promise of an independent superior judiciary led by Chief Justice Chaudhry stood out in sharp relief. In fact, the expectations invested in the Long March, and by extension in the Chaudhry Court, went far beyond the pledge of independence, impartiality, procedural propriety and justice according to law. The promise held out by the judicial activism of the Chaudhry Court in 2007, and negated so starkly by the Dogar Court in 2008, became one of a challenge to decades of elite control over state, politics and resources. This was bound to be a weighty charge.

The second Long March was a different affair from that of June 2008. Lahore, where the Long March was scheduled to begin, appeared to be under siege on the evening of 15 March 2009. All the major highways leading into and away from the sprawling metropolis had been blockaded by heavily armed police and paramilitary contingents. Several processions of lawyers and political party activists that had set off earlier from the southern and western parts of the country, with the intent to congregate in Lahore and become a part of the march towards Islamabad, had been successfully stopped by a determined state apparatus. Pockets of lawyers and activists seeking to gather at the Lahore High Court premises had been dispersed by police battalions wielding tear gas and wooden sticks. Supporters of the PML-N appeared increasingly resigned to their inability to break the police cordon around the Sharif family home in Lahore. Most of the other prominent opposition leaders had also been placed under house arrest on the preceding days, or had gone in hiding like Imran Khan. It appeared that the federal government had managed to choke the Long March and stifle the Lawyers' Movement.

As millions sat glued to their television screens across the country, surfing Pakistan's several private news channels that were providing live coverage and commentary of the

[785] For instance, the Dogar Court protected the grant of lucrative leases of farms on the outskirts of the capital city ostensibly for the cultivation of cheaper produce but in reality used to benefit politicians, bureaucrats, generals and wealthy businessmen with the necessary links. See *In re: Suo Motu Case No. 10 of 2007*, PLD 2008 Supreme Court 673. In another case, it stamped approval on the practice of dispensing patronage to senior bureaucrats through the discretionary allotment of valuable residential property. See *In re: Human Right Case No. 5818 of 2006 (Action on Press Clipping)*, 2008 SCMR 531. In yet another reversal of the Chaudhry Court's *suo motu* action, the Dogar Court refused to hear a challenge to the alleged irregularities of a rich and politically well-connected property developer in compulsorily acquiring land for a private housing development project. See *In re: Suo Motu Case No. 13 of 2007*, PLD 2009 Supreme Court 217.

unfolding political drama, the tense calm suddenly shattered. Somehow against the run of play, the barriers around the Sharif residence were overrun and thousands of protesters poured onto the streets of Lahore. By midnight, as a procession slowly moved past the old walled city towards the northern exits, the prospect of a bloody struggle between the participants of the Long March and the security forces at the disposal of the federal government loomed large over Pakistan's political horizons. Merely hours later, as the caravan had moved barely beyond the outskirts of Lahore, the government relented and agreed to restore Iftikhar Muhammad Chaudhry as the Chief Justice of Pakistan, as well as reinstate the other judges of the superior courts who had still held out. As the prime minister appeared on national television in the early hours of 16 March to address the nation and formally announce the decision to restore the judges, rumours were rife that the military chief had intervened behind the scenes and brokered a deal on the judges' restoration.

The NRO Saga and Judiciary-Executive Tensions

On 24 March 2009, Iftikhar Chaudhry became once again the *de facto* and *de jure* Chief Justice of Pakistan. The restoration of the judges had been formally accomplished through a notification and without the need for a fresh oath, thereby acknowledging the strength of the claim that legally Justice Chaudhry and the other judges had never been removed from office. Contrary to the fears of an immediate backlash against the elected government, the Supreme Court proceeded cautiously in the first few months after its restoration and ensured a sense of political equilibrium.[786] The court began the task of dismantling the legal legacy of the emergency in a measured fashion. First, the Supreme Court nullified the decision of the Dogar Court in *Tikka Iqbal Muhammad Khan* and declared the imposition of emergency by General Musharraf to be unconstitutional.[787]

[786] On March 29, President Zardari ended governor's rule in the Punjab, imposed earlier to prevent the support of the provincial government for the Long March, thereby cooling the political temperatures by one more degree. On March 31st, the Supreme Court reversed an earlier decision on the disqualification of Mian Shahbaz Sharif by the Dogar Court which had provided the basis for governor's rule, enabling him to resume the office of the Chief Minister of Punjab. See *Federation of Pakistan v. Mian Muhammad Nawaz Sharif*, PLD 2009 Supreme Court 644. On July 17, the Supreme Court acquitted Mian Nawaz Sharif of all charges in the hijacking case, thereby enabling his complete political rehabilitation. See *Mian Muhammad Nawaz Sharif v. The State*, Criminal Petition No. 200 of 2009.

[787] *Tikka Iqbal Muhammad Khan v. General Pervez Musharraf Chief of Army Staff*, PLD 2009 Supreme Court 6.

The court then began to put its own house in order. In *Sindh High Court Bar Association* it held that the deposed judges 'shall be deemed never to have ceased to be ... judges, irrespective of any notification issued regarding their reappointment or restoration.'[788] Since the office of the Chief Justice had never fallen vacant, the purported appointment of Justice Dogar as Chief Justice was thus *void ab initio*. As Justice Dogar was never the lawful Chief Justice, all appointments to judicial office made in consultation with him were, therefore, also null and *void*.[789]

The Supreme Court did not, however, automatically invalidate all of the decisions of the Dogar Court on the grounds that these were past and closed transactions. In a show of respect for the democratic process unfolding in the aftermath of the emergency, the court accepted the validity of the February 2008 elections, the formation of federal and provincial governments thereafter, and the presidential election of Zardari. Further, while the court stripped the presidential ordinances promulgated by General Musharraf immediately before and during the emergency of permanence granted by the PCO, it did not immediately declare them to be null and void. In a remarkable show of ingenuity, the court held that the constitutional life of these presidential ordinances would commence from the date of the judgment and not the date of issuance, after which period these ordinances would have to be laid before parliament for adoption as an Act. Barring such parliamentary approval, the ordinances would lapse. Of these ordinances the NRO was of vital significance to the presidency and the federal government, as noted earlier. In October, the government tabled the NRO before the parliament only to withdraw it when even its allies refused to support the legislative measure.

In November, the ordinances promulgated by General Musharraf, including the NRO, lapsed. In December, the Supreme Court finally began re-hearing petitions challenging the constitutionality of the NRO. Upon the Supreme Court's insistence the country's

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[788] *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 Supreme Court 879.

[789] See *Justice Khurshid Anwar Bhinder v. Federation of Pakistan*, PLD 2010 Supreme Court 483. The court was particularly severe on those judges who had held office prior to the emergency and had taken oath under the PCO in contravention of the seven-member bench's direction issued on the eve of the emergency. Contempt of court notices were issued to these judges compelling resignations by most of them. See *Abdul Hameed Dogar v. Federation of Pakistan*, 2010 SCMR 312; *Abdul Hameed Dogar v. Federation of Pakistan*, Intra Court Appeals No. 3, 4, 6 to 11 of 2011; Criminal Original Petitions No. 93 To 98, 100 & 104 of 2009 and 2, 3 & 4 of 2011; *Justice Hasnat Ahmed Khan v. Registrar, Supreme Court Of Pakistan*, PLD 2010 Supreme Court 806.

corruption watchdog, the National Accountability Bureau (NAB), presented a list of the beneficiaries of the legislative disposal of criminal cases achieved through the NRO. The list included three distinct categories of beneficiaries: prominent politicians belonging to the PPP government implicated in corruption charges; senior bureaucrats, some of whom occupied key posts in the federal and provincial governments, accused of graft; and politicians and workers belonging to the MQM, an important ally of the government, indicted for violent crimes. Most notably, the list of beneficiaries included President Zardari, who stood accused of serious corruption in Pakistan and related money-laundering charges in Switzerland, Spain and the UK. The government decided not to defend the NRO before the Supreme Court. The thinking behind this legal strategy appeared to be a desire to placate the court, and to end the case and surrounding notoriety as soon as possible.

After barely a week of the hearings, the Supreme Court issued a short order declaring the NRO to be *void ab initio* and resurrected all criminal cases covered by the ordinance.[790] In its short order pending a detailed judgment, the court nullified the NRO as unconstitutional for violating several clauses of the constitution. Of the bare references to constitutional provisions made in the short order, the strongest possible ground for invalidating the NRO appeared to be a violation of Article 25 which guarantees the equality of all citizens and the equal protection of the law.[791] The NRO, by providing a preferential treatment to certain classes of politicians and bureaucrats, had contravened the equality guarantee. Other reasonable bases for nullifying the NRO appeared to be a contravention of the separation of powers and judicial independence principles of the constitution. The NRO had essentially operated as a 'legislative judgment' dispositive of cases pending before the courts. As such, the short order in the NRO case was likely to receive widespread recognition as having been based upon robust constitutional arguments. However, additional constitutional references in the short order caused nervousness in some sectors of the legal community, and sent ripples of anxiety across Pakistan's political landscape.

[790] See *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 Supreme Court 1.
[791] See Article 25 cl. 1, *1973 Constitution of Pakistan*.

A reference was made to Article 227 which contains a general statement that all laws 'shall be brought in conformity with the Injunctions of Islam ... and no law shall be enacted which is repugnant to such Injunctions.'[792] This provision had been historically interpreted as being declaratory in nature.[793] The reference to this provision in the short order created a doubt that the court might grant indirect justiciability to this provision, thereby unleashing a new wave of Islamization. This touched raw nerves for liberal lawyers and human rights activists, many of whom had been at the forefront of the Lawyers' Movement. Furthermore, the court referred to constitutional provisions governing the qualification and disqualification of parliamentarians and the president, requiring them to be 'sagacious, righteous and non-profligate, honest and *ameen*.'[794] These provisions had been inserted by General Zia at the height of the Islamization drive in the 1980s. A reference to the provisions suggested that the beneficiaries of the NRO, most notably President Zardari, might be subject to disqualification from holding public office. The possibility that the Supreme Court might unseat an elected president unleashed a storm of political speculation.

The detailed judgment of the Supreme Court in the NRO case, issued in January 2010, laid to rest some of the concerns regarding resurgent Islamization and the imminent disqualification of the president to a considerable extent.[795] Nonetheless, one aspect of the judgment ensured that political volatility and wrangling between the elected executive and the judiciary would continue. This related to the withdrawal of corruption and money-laundering charges against the president in Switzerland, UK and other European jurisdictions (the so-called *Swiss case*). These cases had been initiated through a mutual legal assistance request by the Government of Pakistan in 1998. The examining Magistrate in Geneva, Switzerland, had convicted Mr. Zardari and Ms. Bhutto of the offence of money-laundering after the accused failed to appear before his court, and froze bank accounts worth approximately US$ 60 million. Pursuant to a subsequent appeal by the defendants, the Attorney-General of Geneva had set the conviction aside and initiated another investigation on a more serious charge of

[792] Article 227 cl. 1, *1973 Constitution of Pakistan*.
[793] As clause 2 of the said article clearly stipulated that effect to the above direction may only be given through the mechanism stipulated in subsequent provisions of that chapter of the Constitution, which dealt with the creation, operation and powers of an advisory council composed of religious scholars.
[794] Article 62 cl. 1(f) and Article 63 cl. 1(p), *1973 Constitution of Pakistan*.
[795] See *Dr. Mobashir Hassan v. Federation of Pakistan, Pakistan*, PLD 2010 Supreme Court 265.

aggravated money-laundering. The second investigation was nearing conclusion in April 2008 when, pursuant to the NRO, the Attorney-General of Pakistan had written a letter to the Attorney-General of Geneva stating that the charges against President Zardari were 'politically motivated.' In August 2008 the Swiss prosecutors had dropped all charges against President Zardari as the Government of Pakistan withdrew the declaration of its interest as a civil party in the case.

While invalidating the NRO, the Supreme Court took exception to the manner in which the *Swiss case* had been closed. In its short order the court declared that the Attorney-General's action in withdrawing the request for mutual legal assistance was illegal, and directed the government to take immediate steps to reverse this action.[796] This would require the federal government to play a role in re-initiating cases against the president and the leader of the ruling party in a foreign jurisdiction. Not unexpectedly, the federal government resisted. The government also dragged its feet in implementing other aspects of the judgment, including the dismissal of all bureaucrats who had availed the benefit of the NRO. This resulted in a protracted battle with the Supreme Court, which saw contempt and insubordination in the government's dilatory tactics. In the government's defence, at least as regards the order affecting the *Swiss case*, there was room to argue that the president was covered by international law principles of sovereign immunity in the proceedings before the Swiss courts. Another thorny issue was that of the immunity of the president from criminal prosecution under Article 248 of the constitution.

The immunity clause of Article 248 states that '[no] criminal proceedings whatsoever shall be instituted or continued against the President ... in any court during his term of office.'[797] While several leading lawyers argued that the president's immunity was limited to *bona fide* exercises of presidential powers only, the text of the constitutional provisions appeared to protect him from any prosecution, at least in Pakistan. Questions remained, however, as to whether the immunity clause protected the president from prosecution in foreign courts at the behest of the Government of Pakistan, as would be the consequence of the Supreme Court's directive in the NRO case. However, the

[796] See *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 Supreme Court 1.
[797] Article 248 cl. 2, *1973 Constitution of Pakistan*.

president never formally claimed immunity before the court. As the NRO order remained unimplemented for months, pressure also built upon the court to enforce its judgment. It was asserted by some that the court could call the Army in its aid, raising the spectre of yet another kind of military intervention.[798] As rumours of a military-judiciary nexus circulated, the government pushed back even harder against the Supreme Court. The government attempted fruitlessly to take on the court on the issue of judicial appointments, but had to retreat.[799] In addition to resisting the enforcement of court directives, it appeared that the government's strategy was to politicize the actions of the superior courts, and to create an impression of victimization at the hands of the judiciary, and indirectly the military establishment.

CORPORATIST DEMOCRACY AND THE JUDICIALIZATION OF POLITICS

Politicization of the Chaudhry Court

There was some circumstantial evidence pointing towards a tacit military-judiciary nexus. Concurrently with the unfolding of the NRO saga, the military had also begun to reclaim lost space in the national security and foreign policy domains. The immediate point of contention between the military and the government concerned the terms of the US foreign aid program in Pakistan. The Enhanced Partnership with Pakistan Act of 2009, passed by the US Congress just prior to the start of hearings on the NRO, appeared to have shifted the focus to political and development assistance to Pakistan, and somewhat away from the historical military and security-oriented partnership between the two countries. Certain conditionalities in the draft legislation, known popularly as the Kerry-Luger Bill, which related to strengthening civilian control over the military, and in particular its intelligence agency ISI, had prompted the military to react publicly. The bill was seen by the military and its allied groups on the right of the political spectrum as an attempt by the US to intervene in Pakistan's internal affairs, at the behest or instigation of the PPP government. Given this backdrop, the Supreme Court's aggressive stance in the NRO case justified the government's paranoia about

[798] Article 190, *1973 Constitution of Pakistan*.
[799] See Moeen Cheema, 'Pakistan: New 'Judges' Case' in the Making?', *Jurist*, 14 February 2010. Also, see *Nadeem Ahmed Advocate v. Federation of Pakistan*, Constitution Petitions No.2, 3 & 4 of 2010, Order dated February 13, 2010.

an impending judicial *coup*. Seeing a two-pronged push, the government preferred to largely cede national security policymaking to the military in order to gain some breathing space.

In another strategic move, the PPP government managed by a politically astute president, laid the constitutional foundations of a broad based accommodation amongst the political classes. The devolution of power from the centre to the provinces had been longstanding demand of the PPP and smaller, mostly regional, parties. The transfer of some powers to the provinces would give the governments of different political parties in the federating units a share of power, as well as a stake in the continuation of the civil-democratic dispensation. This would also enable the PPP government to forge a stable coalition with some of these regional parties with presence in both provincial legislatures and the federal legislature at the centre. Even the PML-N, the largest opposition party at the federal level, would acquire a significant share of power and resources through the government in Punjab, disincentivizing the kind of political brinkmanship that had led to the political instability of the 1990s. This broad based political accommodation achieved through devolution thus essentially froze out only those parties which had boycotted the 2008 elections in support of the Lawyers' Movement. Such corporatism on the part of the political elites, waged under the banner of stable democracy, provided the PPP government under President Zardari the wherewithal to withstand the real opposition to its governance style that came increasingly from the courts.

The devolution of powers to provinces was affected through the Eighteenth Amendment to the Constitution, passed by the parliament in April 2010 with widespread support from across the political spectrum.[800] The amendment looked to somewhat redress the historical imbalance of powers between federation and provincial units by abolishing the 'Concurrent List,' thereby transferring a range of legislative powers to the provinces. The Concurrent List had previously specified legislative powers common to both federal and provincial legislatures, which effectively granted ascendancy to the federation over these subjects.[801] The Eighteenth Amendment also

[800] Constitution (Eighteenth Amendment) Act, 2010.
[801] Article 142, *1973 Constitution of Pakistan*, amended by §49 of Constitution (Eighteenth Amendment) Act, 2010. Only the areas of criminal law, criminal procedure and evidence were left as

undid several aspects of the Seventeenth Amendment passed by the Musharraf era legislature that had transferred key powers to the presidency, and tilted the balance of powers back towards the parliament and the elected executive, at least as regards constitutional form. Most notably, Article 58(2)(b) was expunged from the constitutional text yet again, and the president's powers of dismissing the federal government and dissolving the legislature was confined to the narrow circumstances of a loss of majority in the National Assembly or advice of the prime minister to that effect.[802] The authority to appoint provincial governors and military chiefs, a significant power in the context of the historical ascendancy of the military within the state structure, was reassigned to the prime minister.[803] Similarly, the presidential power of proclaiming a state of emergency was rendered subject to the approval of provincial or federal legislatures.[804] The Eighteenth Amendment also introduced significant reforms to the electoral process and clarified matters that had earlier been the cause of some controversy.[805] Presidential discretion in the appointment of the Chief Election Commissioner was taken away, and the appointment to this office of vital significance to fair electoral processes was entrusted to a parliamentary committee with equal representation of the treasury and opposition benches.[806] Similarly, the opposition was given an equal say in the selection of caretaker governments.[807] The bill of rights was bolstered with the addition of a right to 'fair trial' and 'due process' that may have far

common domain. Other provincial concerns of long standing, such as federal control over natural resources and decision making on the construction of mega hydro-electric projects were also addressed. See Articles 157 and 161, *1973 Constitution of Pakistan*, amended by §§58 and 60 of Constitution (Eighteenth Amendment) Act, 2010, respectively.

[802] See §17 of Constitution (Eighteenth Amendment) Act, 2010.

[803] See Articles 243 and 101, *1973 Constitution of Pakistan*, amended by §§90 and 33 of Constitution (Eighteenth Amendment) Act, 2010, respectively.

[804] See Article 232, *1973 Constitution of Pakistan*, amended by §86 of Constitution (Eighteenth Amendment) Act, 2010.

[805] While the 18th Amendment undid most of the constitutional changes brought about by General Musharraf, it retained several positive aspects of the military regime's initiatives. Reserved seats for women and minorities in the national and provincial legislatures were maintained. The age of voting, lowered to eighteen years, was also incorporated. See Article 51, 59 and 106, *1973 Constitution of Pakistan*, amended by §§16, 18 and 36 of Constitution (Eighteenth Amendment) Act, 2010, respectively.

[806] See Article 213, *1973 Constitution of Pakistan*, amended by §77 of Constitution (Eighteenth Amendment) Act, 2010.

[807] See Article 224, *1973 Constitution of Pakistan*, amended by §83 of Constitution (Eighteenth Amendment) Act, 2010.

reaching impact on the rights jurisprudence of Pakistan's courts.[808] The amendment also added rights to information and compulsory education.[809]

The Eighteenth Amendment was seen by many as a watershed for democratic politics in Pakistan. However, while there was much to commend about the amendment, it also attracted immediate controversy. Petitions were filed before the Supreme Court to challenge several aspects of the amendment.[810] To note one issue, the amended provision governing disqualification on the grounds of defection from political parties effectively handed over the power to disqualify defecting members to the heads of political parties, even if they were not members of parliament or heads of the parliamentary group of their party. This appeared to strengthen the dynastic control over the major political parties often from outside the parliament. Most significantly, the Eighteenth Amendment totally revamped the process of judicial appointment.[811] The Amendment entrusted judicial appointments to a newly-created judicial commission and a parliamentary committee. If the Parliamentary Committee were to reject a nomination of the Judicial Commission with a three-fourth majority, the Judicial Commission would be required to recommend another candidate.[812] This change in the appointment procedure, so soon after the superior judiciary had won its hard-earned independence, aroused suspicion that the real aim of the amendment was the subjugation of the judiciary, rather than meaningful reform of the appointment process.

In *Nadeem Ahmad*, the Supreme Court entertained arguments that the Amendment was designed to undermine the independence of the judiciary and thus violated the basic structure of the constitution.[813] The court issued an interim order identifying aspects of the amendment – which undermined the role of the Chief Justice, gave the executive an equal say in judicial nominations, and the parliamentary committee virtual veto powers

[808] Article 10A, *1973 Constitution of Pakistan*, added by §5 of Constitution (Eighteenth Amendment) Act, 2010.
[809] Articles 19A and 25A, *1973 Constitution of Pakistan*, amended by §§7 and 9 of Constitution (Eighteenth Amendment) Act, 2010, respectively.
[810] Article 63A, *1973 Constitution of Pakistan*, amended by §22 of Constitution (Eighteenth Amendment) Act, 2010.
[811] See Article 175A, *1973 Constitution of Pakistan*, amended by §67 of Constitution (Eighteenth Amendment) Act, 2010.
[812] See Article 175A cl. 12, *1973 Constitution of Pakistan*.
[813] *Nadeem Ahmad v. Federation of Pakistan*, PLD 2010 Supreme Court 1165.

over the recommendations of the Judicial Commission – as problematic. Under pressure, the parliament adopted most of the court's recommendations through the Nineteenth Amendment, and gave the judges a larger representation in the Judicial Commission.[814] In a follow-up decision, the court whittled down the role of the parliamentary committee, holding that its reasons for refusing a nomination made by the Judicial Commission were reviewable. This effectively brought the judicial appointment process in line with that of India with a collegium of senior judges deciding on appointments, subject to a requirement of some consultation with the executive. Just as in the 1990s, the court had asserted judicial power to enhance its institutional independence in a patently self-serving manner.

By 2012, as the government approached a difficult election year, the Supreme Court charged, convicted and disqualified the incumbent prime minister with contempt of court for defying the court's directions in the *NRO case*.[815] This was another remarkable assertion of judicial power and gave rise to immense controversy. The PPP's replacement in the office of the prime minister found himself in a similar situation, facing contempt proceedings before the Supreme Court.[816] The tension was finally diffused when the successor prime minister finally wrote a letter to Swiss prosecutors in accordance with the instructions of the court. The ease with which the controversy was ultimately resolved reflected badly on both the elected institutions and the court. In addition to Prime Minister Gilani, the Supreme Court disqualified several other members of parliament for submitting fake academic degrees in the 2008 elections, and for possessing dual citizenship.[817] However, the protracted tussle with the executive had begun to take its toll on the court's credibility and its public perception as well. In a little more than three years after the successful Lawyers' Movement, fundamental divisions also appeared to have split the lawyers' communities virtually down the

[814] In particular, judicial representation on the Commission was increased from two to four, the Parliamentary Committee was required to give reasons in case of a rejection of the Judicial Commission's nomination, and the Committee's hearings were mandated to be held in camera. See §4 of Constitution (Nineteenth Amendment) Act, 2010.
[815] *Criminal Original Petition No. 06 of 2012 in Suo Motu Case No. 04 of 2010*, PLD 2012 Supreme Court 553; *Siddique v. Federation of Pakistan*, PLD 2012 Supreme Court 660.
[816] See *Criminal Original Petition No. 74 of 2012, In Suo Motu Case No. 04 of 2010*, PLD 2012 Supreme Court 1086.
[817] See *Muhammad Rizwan Gill v. Nadia Aziz,* PLD 2010 Supreme Court 828; *Mian Najeeb-ud-Din Owaisi v. Amir Yar Waran,* PLD 2013 Supreme Court 482; *Syed Mehmood Akhtar Naqvi v. Federation of Pakistan*, PLD 2012 Supreme Court 1089.

middle, mostly along party-political and rural-urban lines. While many of the district and peri-urban bar associations continued to support the judiciary's robust anti-government stance, the more prominent High Court and Supreme Court bar associations became increasingly critical of the exercise of judicial power, and accused the court of having over-stepped its constitutional bounds.

In addition to the prime minimiser's contempt saga, other Supreme Court decisions in 2012 courted extensive controversy. The *Memo case* raised once again the spectre of collusion between the court, the military, and this time even the PML-N, to destabilize the PPP government.[818] The case arose out of an allegation that the ambassador of Pakistan to the US had sent a secret missive to the US government, urging certain actions against Pakistan military. The manner in which the ISI chief submitted an incriminating affidavit against the ambassador leading to his removal, fuelled suspicions of a conspiracy between the military and the court against the government. However, the controversy which ultimately deflated the Chaudhry Court's drive to hold the government accountable concerned allegations of financial impropriety against the Chief Justice's son.[819] A bench headed by the Chaudhry, CJ took notice of allegations that a property tycoon had bribed his son to curry favour with regard to a host of cases concerning forcible and improper acquisition of property being heard by the court. While the tycoon admitted in open court that no such favours had actually been forthcoming, details of lavish foreign trips and the unaccountable wealth of his son significantly undermined the Chaudhry, CJ's claim to a high moral ground in the crusade against governmental corruption.

The Crisis of Governance and Judicial Review of Executive Action

While the overt political tensions between the judiciary and the elected government garnered the overwhelming share of the attention, the real turf of institutional struggle was in the domain of administrative law. In several cases the Supreme Court aggressively pursued charges of corruption and crony capitalism against ministers and affiliates of the federal government, senior members of the federal bureaucracy, and

[818] See *Watan Party v. Federation of Pakistan*, PLD 2012 Supreme Court 292.
[819] *Suo Motu Case No. 5 of 2012*, PLD 2012 Supreme Court 664.

appointees to public corporations and regulatory authorities. Many of these cases were taken up *suo motu* upon reports of alleged corruption in print and electronic media, and had a dramatically negative impact on the public perception of the executive's integrity and competence. The court's insistence upon impartial investigations into these allegations, and periodic public disclosures on progress before the court, made these cases the stuff of almost daily news reports and political talk shows. As the investigations initiated on the court's insistence and subjected to its supervision were resisted at every step by the incumbent government, the court's proactive use of its Original jurisdiction to exercise the judicial review of executive action became highly visible as well as politicized.

The NRO saga was arguably the quintessential example of the Supreme Court's administrative law jurisprudence. In addition to the constitutional questions concerning the validity of the NRO as a legislative measure, the organization and workings of NAB came under intense scrutiny by the court. In the interregnum between the *NRO case* and the Prime Minister's disqualification, the Supreme Court remained preoccupied with the failure of NAB chairmen and senior prosecutors to effectively reinstate and pursue the corruption cases that the NRO had sought to end in one legislative swoop. In a succession of cases the Supreme Court sought to wrest control of the NAB from the government, disqualified incumbent chairmen, and attempted to force the appointment of independent officials in their place.[820] The government attempted to retain control over the NAB through subsequent appointments of beholden individuals to these posts, leading to continuous friction between the court and NAB. The government's control over NAB also ensured that individual defendants secured acquittals through the special accountability courts set up to try corruption cases as NAB prosecutors presented weak cases, withdrew vital evidence and granted important concessions. As such, the government achieved indirectly and piecemeal through NAB what it could not get through the NRO.

As the court's attempts to compel independent investigations by NAB through rolling review and active supervision failed, it looked to alternatives. In several cases the court

[820] See *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd*., PLD 2010 Supreme Court 1109; *Shahid Orakzai v. Pakistan through Secretary Law, Ministry of Law, Islamabad*, PLD 2011 Supreme Court 365; *Ch. Nisar Ali Khan v. Federation of Pakistan,* PLD 2013 Supreme Court 568.

painstakingly undertook the task of supervising investigations into corruption and other criminal cases by other federal agencies such as the Federal Investigation Agency (FIA),[821] regular police and the Anti-Narcotics Force (ANF). These agencies also became the turf of a protracted battle between the Supreme Court and the federal government over the appointment of independent officials and the conduct of impartial investigations.[822] The court took cognizance of the ease with which influence over the provincial police and prosecution services enabled the government to shield its affiliates from efficient prosecution. Frustrated with its inability to leverage existing institutions, the court began to directly investigate corruption charges against ministers and high officials by appointing *ad hoc* fact-finding commissions composed of superior court judges or trusted bureaucrats. However, as these commissions lacked any judicial capacity, and the court itself lacked the authority to make conclusive findings of fact in its judicial review jurisdiction, even these cases had to be sent back for investigation and prosecution to the various law enforcement and anti-corruption agencies.

A prime example of this kind of judicial review, which involved important members of the political executive, was the *Rental Power Plants case*.[823] The court took *suo motu* notice of allegations of corruption and deliberate loss to the exchequer in the award of contracts to nineteen rental power projects (RPPs). After hearing *prima facie* evidence of wrongdoing, the court directed the NAB to initiate criminal investigations against the concerned federal minister and senior officials in the ministry of water and power. While the court was successful in undoing the contracts with RPPs and ensured the return of funds to the exchequer, NAB investigations against the federal minister and other officials remained pending throughout the PPP government's tenure. Raja Pervaiz Ashraf, the concerned minister, was even made the replacement prime minister upon the disqualification of Prime Minister Gilani by the Supreme Court. Other notable examples of cases in which the court initiated investigations into corruption scandals, which revealed a nexus with key appointments in regulatory agencies and public corporations, included the *OGRA case*.[824] This case concerned impropriety in the appointment of the chairman of the Oil and Gas Regulatory Authority (OGRA) in clear

[821] See, eg, *Suo Moto Case No. 18 of 2010*.
[822] See, eg, *Suo Motu Case No. 24 of 2010 (Regarding Corruption in Hajj Arrangements in 2010)*, Orders dated 20 January and 1 March 2011.
[823] *In the matter of Alleged Corruption in Rental Power Plants etc.*, 2012 SCMR 773.
[824] *Muhammad Yasin v. Federation of Pakistan,* PLD 2012 Supreme Court 132.

disregard of the established process and required qualifications. The court dismissed the chairman and directed the NAB to initiate criminal prosecution for alleged corruption in policymaking and the award of concessions and licences by OGRA. Likewise, in other cases the court invalidated the appointments of the president of the National Bank of Pakistan,[825] and the chairman of the Securities and Exchange Commission of Pakistan.[826] This strand of judicial review reached its high point in a remarkable exercise of judicial power in *Khwaja Muhammad Asif*.[827] In a petition brought by an opposition politician, the Supreme Court directed the establishment of an independent commission for overseeing and advising on key appointments to regulatory bodies and public corporations.

The court's struggles with ensuring independent investigation and prosecution in corruption cases against executive officials embroiled it in wider struggles over the nature and form of state structures, especially the civil bureaucracy, regulatory agencies and public corporations. As the court attempted to break the shackles of political control over the state apparatus, and coax a culture of rule-bounded and autonomous action, it faced constant attrition and evasion. These battles took a similar form to the accountability cases, with the Supreme Court insisting upon transparency and merit in appointments to key posts in the bureaucracy to be countered by claims of executive prerogative in postings, promotions and incentives. The political executive had historically developed several techniques of ensuring the subservience of the administrative setup, including discretionary promotions to the senior-most ranks, discretionary transfers to powerful and lucrative posts in disregard of seniority, transfers to minor or sidelined positions as disincentive, and the retention of retired bureaucrats on key posts on short-term contracts. The Supreme Court persevered in insisting upon transparent processes in promotions to the senior ranks, and in *Tariq Aziz-ud-Din* and *Anita Turab*, for example, resisted the claims of executive prerogative in postings, promotions and transfers.[828]

[825] *Mir Muhammad Idris v. Federation*, PLD 2011 Supreme Court 213.
[826] *Muhammad Ashraf Tiwana v. Pakistan*, 2013 SCMR 1159.
[827] *Khwaja Muhammad Asif v. Federation of Pakistan*, 2013 SCMR 1205.
[828] See, eg, *In re: Tariq Aziz-ud-Din*, 2010 SCMR 1301; *Syed Mahmood Akhtar Naqvi v. Federation of Pakistan*, PLD 2013 Supreme Court 195.

One visible weakness in the Supreme Court's role as the regulator of the state, however, was that the effects of the court's administrative law jurisprudence were limited to either discursive gains or minimal changes at the top of the administrative hierarchy. Beyond obstructing or reversing questionable transactions and highlighting the nature and extent of the elected government's control over the apex bureaucracy, the court achieved little. While these cases also developed a public perception of endemic corruption amongst the political classes and the apex bureaucracy, by and large the government was successful in thwarting the court's campaign of de-politicizing the administration. Since the court was dependent upon the executive for the enforcement of its actions, when its decisions were unpalatable a prolonged tussle involving all manner of dilatory and avoidance tactics was inevitable. This involved the court in the exasperating task of going up the bureaucratic hierarchy, step by step in subsequent enforcement and contempt proceedings, in an effort to identify the stumbling blocks and over-ride them with the threats of sanction. As these cases dragged on, the court also became visibly frustrated with its inability to counter this perceived culture of governmental impunity and lawlessness. Arguably, it is this frustration which ultimately manifested itself in the contempt proceedings against two prime ministers, and the conviction and disqualification of an elected head of government. Ultimately, however, the court failed in its endeavour as most of the corruption-related and other administrative law cases dragged on without an end in sight.

Just as in the domain of administrative law, the court also built up on the groundwork historically laid down by the superior courts in challenging detentions and abuse of police powers. The court took up such issues *en masse*, and exercised its Original jurisdiction much more liberally than at any previous juncture in its history. The court did that through a creative interpretation of Article 184(3), as it subtly defined any violation of an individual's fundamental rights as also a matter of public importance, thereby merging the two threshold requirements for a case to fall under the Original jurisdiction. The court also employed a novel device, or rather virtually created a new institution in the form of a Human Rights Cell (HRC), tasked with the responsibility of sifting through the daily newspapers, electronic media reports and hundreds of letters sent to it from potential petitioners, in order to identify human rights cases suitable for the court's cognizance. Many of these grievances concerned blatant abuse and torture

by police,[829] and the court expanded the ambit to include refusal to address honour crimes and domestic violence against women.[830] The court also took up grievances against administrative action such as illegal dispossession of land by revenue officials,[831] and causing of death or personal injury through negligence and regulatory failure.[832] While the court converted a relatively small number of these into formal proceedings,[833] the threat of a *suo motu* hearing, public humiliation by the court and possible disciplinary consequences terrorised police and executive officials implicated in alleged violations. This gave the HRC tremendous powers, which by its own account disposed more than 180,000 such grievances, wielding a threat of conversion into a *suo motu* human rights case.[834]

The court's human rights activism served to garner a populist legitimacy, which the court leveraged in its administrative, accountability and constitutional domains. On one level, the court's human rights crusade was an unquestionable good, for how could the redress of grievances that no other institutional was willing or able to meaningfully address be wrong! However, the long-term effectiveness of the court's actions in challenging the culture of illegality, impunity and corruption in the police and the bureaucracy were questionable. Instead of pushing for structural reforms in the postcolonial state that might over time develop a culture of rights protection, the court offered an *ad hoc* mechanism for individual petition and redress. The failure to institutionalise rights protection meant that which and how many *suo motu* actions were to be initiated, and the role that the HRC was meant to play, remained the prerogative of the incumbent chief justice. Nonetheless, the court's efforts at regulating the administrative apparatuses unmasked the full extent of the illegalities of the

[829] *See*, eg, *Human Rights Case No. 5466-P of 2010; Suo Moto Case No. 66 of 2009*; *Human Rights Case Nos. 44 of 2008 & 14 of 2009*; *Human Rights Case No. 1109-P/2009.*
[830] See, eg, *Human Rights Case No. 5466-P of 2010*; *Human Rights Case No. 57 of 2009*; *Human Rights Case No. 4181-N of 2009*; *Human Rights Case No. 12912-P of 2009*; *Suo Moto Case No. 1 of 2009*.
[831] See, eg, *Human Rights Case No. 29 of 2009*; *Human Rights Case No. 11108-P of 2009*.
[832] See, eg, *Human Rights Case No. 2041-P of 2009*; *Human Rights Case No. 2435 of 2006*; *Human Rights Case No. 4805 of 2006*; *Human Rights Case No. 8207 of 2006*.
[833] The Chaudhry Court took up around 200 such cases for hearing. See Asher A Qazi, 'Suo Motu: Choosing not to Legislate, Chief Justice Chaudhry's Strategic Agenda' in Moeen Cheema and Ijaz Gilani (eds), *Politics & Jurisprudence of the 'Chaudhry Court' (2005-2013)* (Oxford University Press, 2015).
[834] Faisal Siddiqi, 'Public Interest Litigation: Predictable Continuity and Radical Departures' in Moeen Cheema and Ijaz Gilani (eds), *Politics & Jurisprudence of the 'Chaudhry Court' (2005-2013)* (Oxford University Press, 2015).

postcolonial state, the mass of *de jure* and *de facto* discretionary and unaccountable powers built into the state structures, which have historically rendered them amenable to the political purposes of both military regimes and elected governments. Furthermore, the court's actions revealed the absence of any other redress mechanism, whether internal to the administrative state or in the form of administrative tribunals or effective ombudsman system.

The most remarkable, and at times controversial, aspect of the court's methodology was the level of media attention that the hearings garnered, magnifying the court's impact far beyond individual cases. While it appeared that it was beyond the court to undo the structures and culture of patronage-based administration that appeared to have reached crisis proportions, the court did manage to keep the crumbling state structure at the centre of judicial, and hence public, attention. It is this aspect of media attention which imparted a remarkable discursive power to the court's jurisprudence. However, it is also this aspect that fuelled the criticism and brought on a concerted attempt by the PPP government to politicize the court's actions in response.

POSTSCRIPT: A FRACTURING OF THE POLITICAL SETTLEMENT

As Pakistan moved towards another general election in May 2013, and an elected government neared the completion of its term for the first time since the 1970s, there was considerable optimism for the holding of free and fair elections and a peaceful transfer of power to the next government. Pursuant to the Twentieth Amendment, an independent chairperson of the Election Commission and caretaker governments were appointed with the agreement of the PPP and the opposition PML-N.[835] While the Pakistan *Tehreek-i-Insaaf* (PTI), led by former cricketer-turned politician Imran Khan who had finally emerged as a serious electoral contender, expressed reservations over the neutrality of the caretaker set-up and certain actions of the Election Commission leading up to the elections, it decided to fully participate in the elections. The PTI appeared to invest considerable faith in the superior judiciary to act as guarantor of free and fair elections, and even demanded that the vital roles of returning officers be entrusted to members of the lower judiciary rather than the bureaucracy, as had been

[835] See Constitution (Twentieth Amendment) Act, 2012.

the case in previous elections. The PTI was rightly concerned that both the PML-N and the PPP had successfully formed deep roots and cultivated loyal factions in the state's bureaucratic apparatuses.

By the eve of the 2013 elections it appeared that the real contest would be between the PML-N and the PTI, especially in the heartlands of Punjab and the north-western province of Khyber Pakhtunkhwa (previously NWFP). The PML-N, which had effectively ruled the Punjab for more than two-third of the previous three decades, was the front runner. However, another hung parliament and a weak coalition government appeared to be the most likely post-election scenario. Contrary to this expectation, however, the May 2013 elections resulted in a resounding victory for the PML-N. Not only had the PML-N emerged as the largest party in the National Assembly, it was set to command an outright majority, despite having little support outside Punjab. The party had won the Punjab, with more than fifty percent of the population and hence constituencies in the National Assembly, in such a landslide that it would be able to form the federal government without the support of any other party. Although all major political parties other than the PML-N complained about large scale organized rigging in the election, all but the PTI agreed to accept the results in accordance with the parameters of the corporatist accommodation forged during the PPP's tenure.

In July 2013, the PTI began a concerted campaign to call in question the credibility of the elections claiming widespread and systematic rigging. PTI candidates filed election petitions before the election tribunals in several constituencies. The party's central leadership demanded a thorough investigation into four constituencies as a means to test whether rigging had taken place, and demanded that the Supreme Court take *suo motu* notice of, and initiate an inquiry into the conduct of the elections. Frustrated with the Supreme Court's refusal to initiate such a *suo motu* hearing, Imran Khan criticized the 'shameful' role played by the judiciary. Deeming the comments as scandalous and prejudicial to the prestige of the judiciary, the Supreme Court instead initiated contempt proceedings against the chairman of the PTI.[836] The contempt proceedings were discharged accepting Imran Khan's application that the comments were directed

[836] See *Criminal Original Petition No. 92 of 2013 (Contempt Proceedings against Imran Khan, Chairman PTI)*.

exclusively at the role of the members of the lower judiciary acting in an administrative capacity as the Returning Officers. Ironically, the decision of the Chaudhry Court which left the most significant political legacy for the contemporary political landscape of Pakistan was this rare instance of non-intervention in the conduct of elections. Relying on Article 225 of the constitution, which vests exclusive jurisdiction to determine election disputes in specially-constituted election tribunals, the Supreme Court declined to set-up a commission to investigate the charges of large-scale electoral fraud.[837] While strictly in accordance with the text of the constitution and the established practice of not interfering in individual single-constituency disputes in electoral matters, the decision appeared to be a clear departure from the court's more interventionist stance in electoral matters prior to the elections.[838]

With the end of the Chaudhry Court era in December 2013, the Supreme Court began to retreat from the strong form of judicial review that it had developed, and slipped away from the public gaze. The charge of judicial activism had resonated to such an extent that the post-Chaudhry Supreme Court felt compelled to adopt a position of judicial restraint on a range of political questions that were raised before it. The *suo motu* and human rights jurisdictions dwindled, and the Supreme Court progressively resettled in a more traditional judicial role. The issue of election rigging simmered in the political domain as the court repeatedly declined the call to act as the arbitrator in this dispute. In August 2014, more than a year after the conduct of elections and while the overwhelming majority of election petitions remained unresolved, the PTI launched a protest movement beginning with yet another Long March on Islamabad. By December 2014 a protest sit-in continued in front of the Parliament house and the Supreme Court, while the PTI also organized public meetings, and calls for strikes and protest marches in various urban centres all over the country. Speculations of tacit support of the protesters by the military, and the threat of direct military intervention, re-emerged to haunt Pakistan's political landscape. All this while Supreme Court, the

[837] The PTI filed a Civil Miscellaneous Application in a constitution petition decided earlier by the Supreme Court in 2012 to indirectly raise the matter before the court in an effort to by-pass the objection to a petition's maintainability. However, this CMA remained pending. See *C.M.A. 7679 of 2013 in C.R.P. No. 191 of 2012 in Constitution Petition No. 87 of 2011 (Application on behalf of Mr. Saifullah Nyazee, Additional Secretary PTI for recount of votes in 4 constituencies, after verification of thumb impressions)*.

[838] See generally, Moeen Cheema, ''Election Disputes' or Disputed Elections?: Judicial (Non-)Review of Elections in Pakistan' in P J Yap (ed), *Judicial Review of Elections in Asia* (Routledge, 2016).

only institution seemingly capable of resolving this toxic political deadlock in a constitutional manner, sat quietly on the sidelines holding on to a resurrected political question doctrine. This legacy of the Chaudhry Court's refusal to investigate allegations of electoral rigging provided the starkest example of political instability resulting from judicial restraint. The course of judicial restraint or quietism thus proved to be as political in its consequences as the decision to pursue judicial activism.

In January 2015, the PTI was forced to call off its protest movement in the aftermath of a gruesome terrorist attack on a school in Peshawar. In March, the PML-N government finally relented and agreed to the formation of a judicial commission comprising the chief justice and two and other judges of the Supreme Court to investigate the PTI's allegations of electoral fraud.[839] As a result, the judiciary was unwillingly thrust back into the role of mediating a question of pure politics that could possibly lead to a change in government. In July, after extended hearings, the commission found that while the electoral process had been marred by considerable irregularities, there was no evidence of systematic rigging. Despite the setback, the PTI accepted the findings of the commission. As a result, a controversy that had threatened the existence of not only the government but the entire civil-democratic system was averted. In the interim, it was evident that the PML-N government had ceded the national security and foreign policy domains to a re-energized military command. The court's inactivism had allowed a resolvable dispute to destabilize the government, and provided the military with the space to once again act as the mediator of political disputes.

In a notable concession to the military, the government and the opposition combined in parliament to pass a constitutional amendment for the creation of military courts to try civilians in terrorism cases.[840] In the *Twenty-First Amendment case*, a full bench of the Supreme Court asserted its power to review even constitutional amendments, but upheld the establishment of military courts by a majority of eleven to six. One key factor weighing upon the majority's opinions was the sunset clause in the amendment, whereby the military courts would cease to exist after a two-year period. However, in 2017 the parliament again passed the Twenty-Third Amendment extending the life of

[839] General Elections 2013 Inquiry Commission Ordinance, 2015 (Ordinance No. VII of 2015).
[840] See Constitution (Twenty-First Amendment) Act, 2015.

military courts for another two-year period. In a number of appeals against the decisions of the military courts, the Supreme Court did not question the validity of the amendment, and continued to uphold the convictions and sentences of capital punishment given to proclaimed terrorists. The court claimed a rather narrow jurisdiction to review the record of the decisions of the military courts, and disavowed appeals on the merits of individual cases. The court further held that the trials by military courts did not contravene the right to fair trial under Article 10-A of the constitution. This was highly problematic given the weak procedural safeguards, lack of transparency and the heavy reliance on confessions and secret evidence by the military courts.

The PML-N government enjoyed barely a year of stability in the aftermath of the electoral rigging controversy when in May 2016 the International Consortium of Investigative Journalists released the leaked documents of a Panama law firm. The so-called 'Panama Papers' revealed several offshore companies owned by Nawaz Sharif's two sons based in London, and proved their ownership of expensive properties in Park Lane. The Panama Papers reignited allegations of corruption, money laundering and tax evasion dating back to Nawaz Sharif's two terms as prime minister in the 1990s. Under immense pressure from the main opposition parties, especially the PTI, Prime Minister Nawaz Sharif made speeches on the floor of the parliament and on national TV offering vague explanations, and promising to make public the complete financial accounts of his family's holdings. However, negotiations between the government and the opposition over the formation of another judicial commission, to investigate corruption and money-laundering allegations against the ruling family, failed. In August 2016, Imran Khan decided to take the matter to the Supreme Court. In addition to filing a petition under Article 184(3), Imran Khan launched another campaign of public agitation against the government, calling for the resignation of the prime minister until the charges against him had been independently investigated.

Facing yet another call for protests on the Constitution Avenue of the capital, the court decided to take up the matter for expedited hearing. Curiously, however, before reaching a decision the bench disbanded in early December 2016 on account of court holidays and the incumbent Chief Justice's imminent retirement at the end of the year. A reconstituted five-member bench presided over by Justice Khosa, the senior puisne

judge who, as required by the seniority and retirement rules, will be the next Chief Justice of Pakistan, announced its final decision in July 2017 after lengthy and complicated proceedings. The Supreme Court disqualified Nawaz Sharif from holding public office for life, and directed NAB to initiate corruption charges for possessing wealth beyond known means of income against the deposed prime minister and other members of his family.[841] This was Nawaz Sharif's third term as prime minister and the *Panama Case* was the third instance of his premature dismissal. Just as during the tenure of former Chief Justice Chaudhry the court ended up in an overt tussle with a government that was determined to present itself as a victim of a 'judicial *coup*' in the year leading up to the messy business of elections. The disqualification of the head of the largest political party in Pakistan in the run-up to an election raised anxieties about a political court acting in collusion with the country's powerful military, intent on destabilizing the transitional democratic system.

After a brief hiatus, the *Panama case* marked the court's return to the centre of the political stage,[842] a position it seems likely to occupy in the foreseeable future. As Pakistan enters another election year 2018, the Supreme Court's decisions in the *Panama case* and its aftermath open the door for judicial review of a broad range of issues on electoral and other matters vital for a transition from one elected government to another. If achieved successfully, this will be a watershed moment in Pakistan's turbulent political history. The Supreme Court has carved a role for itself as a custodian of democracy in Pakistan and will increasingly be called upon to resolve disputes between the government and the opposition over electoral processes. In order to reduce the perception of political bias, confusion and misreporting of the court's decisions in such an environment, the Supreme Court needs to speak through a clearer and more coherent jurisprudence. Furthermore, the court needs to seriously reconsider the nature and purpose of its Original jurisdiction and delineate clear parameters for when it is to

[841] *Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan*, (2016) Constitution Petition No. 29 of 2016. In a similar case against Imran Khan, a three-member bench headed by the incumbent chief justice dismissed the allegations against the leader of the PTI that he had committed money laundering in the purchase of his estate on the outskirts of Islamabad and had failed to declare an offshore company in his nomination papers filed with the ECP. *Muhammad Hanif Abbasi v. Imran Khan Niazi*, (2017) Constitution Petition No. 35 of 2016.

[842] See Moeen Cheema, 'Developments in Pakistani Constitutional Law' in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds) *2016 Global Review of Constitutional Law* (I.CONnect- Clough Center, 2016).

be exercised, given that the court often decides cases of immense political import in the first instance.

CONCLUSION

JUDICIALIZATION OF POLITICS IN PAKISTAN

Over the last seven decades, the superior courts of Pakistan have evolved from peripheral state institutions to key players mediating the balance of powers in a deeply divided and politically fragmented polity. Evaluating this history of expanding judicial power, one may claim that the predominant structural effect of this progressive expansion of judicial review has been a self-referential (if not self-serving) increase in judicial power. Furthermore, the courts' exercise of their judicial review jurisdictions appears to be somewhat 'promiscuous' rather than principled.[843] Despite the larger claims, the superior courts appear to have become 'institutions of governance' and judicial review the mode of a 'delicate and political process of balancing competing values and political aspirations' …providing 'a workable *modus vivendi*' which in turn enables the courts to claim a seat at the table of high politics.[844]

Nonetheless, a closer scrutiny of the complex history of judicial review in Pakistan undertaken in this thesis reveals that the courts have essentially built upon and expanded the logics of three strands of postcolonial legality. Firstly, in the domain of constitutional law and politics the courts have by and large confined themselves to the role of mediating between the institutional complexes and allied elite groups that have at different times dominated the state structure and those social groups on the periphery of these power dynamics. This has resulted in a minimalist or formal constitutionalism, and procedural democracy. In every period of direct military rule, for example, the courts acknowledged the validity of martial law, and thereby granted a veneer of legality to military coups. In the following periods of indirect military and civilian rule, the courts pushed governments to accommodate the demands of the political opposition and cede space for electoral politics at the federal level. As such, the courts have been

[843] For a comparison with the Indian Supreme Court, see Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA (Mark Tushnet and Madhav Khosla eds., 2015).
[844] See Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18:2 JOURNAL OF DEMOCRACY 70 (2007), at 73-75.

involved in a seemingly never-ending process of compelling transitions to greater democracy. However, at the same time, the courts have been fully on board with the centralization of power in the federal state. The superior courts have thus consistently undervalued claims of inclusive federalism and constitutional requirements of provincial autonomy. Given that for much of Pakistan's history some of the most significant opposition to dominant institutions and elites have come from marginalised provincial and regional groups, the courts' failure to highlight their demands has ensured that public law remained centred on the narrow interests of the core of the Pakistani state and society.

The second, and arguably the most significant plane of judicial power, has been the progressive expansion of the judicial review of administrative action. Even as the courts ceded space to military regimes and civilian governments on their core interests, they consistently built a robust jurisprudential canon on the proper exercise of administrative power. Given that the most significant powers of government have been exercised through the career bureaucracy, and increasingly through public corporations and regulatory bodies, the courts have fought hard to extend the purview of judicial review to the regulators of the economy as well. More recently, the courts have added a doctrinal veneer of anti-corruption and transparency, and have extended the reach of this strand of judicial review to the elected executive as well. However, the core doctrine of the courts in structuring the judicial review of executive action has remained an insistence on merit in the appointment, transfers and disciplining of the bureaucratic and regulatory apparatus, with a view to ensuring independence in its decision-making. The structural independence of the bureaucracy from political influence and its rule-boundedness were proclaimed as the core principle of administration. While the courts have achieved partial success in highlighting the progressive weakening of the bureaucratic apparatus, their fidelity to the design of the postcolonial state has left them unable to compel more meaningful structural change and reorientation in the priorities of governance that such change may render possible.

The third prominent area of judicial action has been the erection of procedural protections against the abuse of police powers, including the review of state security laws. Military regimes and civilian governments have been more or less equally predisposed to utilising the regular policing regime and the criminal justice system, as

well as enacting draconian state security laws, to suppress political opposition and regional dissidence. Carrying the mantle of the rule of law, the courts have resisted the abuse of such laws, imposed procedural safeguards and exercised some oversight. Despite fighting an ever-losing battle against evolving techniques of repression through sedition, public order and anti-terrorism laws, the courts have built considerable credibility for the judicial institutions and lawyers by providing an avenue to challenge the state when none other existed. However, even on this plane the achievements have been limited, and it is the promise rather than the materialization of the rule of law that has attracted tentative support for the courts. The adherence to formal constitutionalism has disabled the courts from striking down offensive legislation. The buy-in to the nationalist narrative has resulted in a blind spot towards the blatant abuse of security legislation against militants and dissidents from the marginalized peripheries of the country. The superior courts' own tendency to arrogate greater power and prestige to the apex of the judicial hierarchy, and to normalise the supposedly extraordinary remedies of judicial review, has left the lower judiciary progressively less able to provide even a modicum of criminal justice and rights protection.

Given the significance of administrative law and procedural review of state security and police powers, the evolution of judicial power in Pakistan may thus be characterized as the judicialization of governance as much as that of politics. Much of the commentary on judicial developments in Pakistan appears to be driven by an evaluation that judicial involvement in politics is problematic *per se*, and hence the prescription that courts should eschew getting embroiled in political questions. However, there is little focus on *how* and *why* the judicialization of governance and politics has taken place. Without answering these prior questions, any evaluation or prescription will remain a mere matter of faith in liberal constitutionalism. This thesis has made an attempt to identify how the judicialization of governance and politics has been shaped by the courts through their public law jurisdictions and jurisprudence, providing the descriptive basis to undertake an in-depth analysis of the *why* question. While that is a significant project in its own right, some preliminary observations may nonetheless be made about how the Pakistan case-study may add to the regional and global discussions on the judicial of governance and politics.

THE JUDICIALIZATION OF CONSTITUTIONAL POLITICS

The increasing judicialization of politics appears to be the norm around the world,[845] and most recently courts in Asia have become noticeably activist.[846] Pakistan's courts' increasing role in mediating constitutional developments lends itself to the analysis that Pakistan has merely joined the global expansion of judicial power and the rise of 'juristocracy'.[847] The term judicialization of politics can refer to several related phenomena, but at its core denotes the 'expansion of the province of the courts or judges at the expense of the politicians and/or the administrators.'[848] It also refers to 'the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies.'[849] The hallmark or the zenith of judicialization is when the courts get embroiled in 'core political controversies and deep moral dilemmas related to areas of pure politics (such as those related to electoral politics, regime change, *etc*.).'[850]

However, the judicialization of politics is not so much new reality as changing perception. As Martin Shapiro poignantly notes, the term implies that,

> [C]ourts did not do much politics yesterday, but do a lot today. And surely there was some real global spread of and increased significance of judicial interventions in public policymaking in the latter half of the twentieth century and beyond . . . . [But] to a very large degree it is not so much that courts do more now as that students of politics now see more of what courts do.[851]

This intuition seems apt in the Pakistani context. After all, as highlighted in this thesis, Pakistan's courts were thrust in the midst of constitutional crises and put in the awkward

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[845] See generally Tate and Vallinder, *The Global Expansion of Judicial Power*, above n 6; Shapiro and Sweet, *On Law, politics and Judicialization*, above n 6; Ginsburg and Moustafa, above n 6.
[846] See generally Björn Dressel (ed), *The Judicialization of Politics in Asia*, above n 7; Andrew Harding et al (eds), *New Courts in Asia* (Routledge, 2010); Tom Ginsburg et al (eds), *Administrative Law and Governance in Asia* (Routledge, 2009).
[847] R Hirschl, *Towards Juristocracy*, above n 10.
[848] Torbjorn Vallinder, 'When the Courts go Marching in' in C Neal Tate & Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995) 13.
[849] C Neal Tate, 'Why the Expansion of Judicial Power?' in C Neal Tate & Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995) 28.
[850] R Hirschl, 'The Judicialization of Mega-Politics'; R Hirschl, 'Judicialization of Pure Politics Worldwide', above n 3.
[851] Martin Shapiro, 'Courts in Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008) 326.

situation of adjudicating regime change right from the outset. Whilst initially the courts' role was limited to merely validating and providing a veneer of legal legitimacy to exercises of naked power, this history partially explains the courts' increasing comfort with deciding such matters of pure politics of their own volition from the 1990s onwards.

Even though the judicialization of politics in Pakistan may predate much of the global development on this front, looking at the literature may nonetheless offer important clues as to the explanation and evaluation of increasing judicial power in Pakistan. This literature generally revolves around three explanatory frameworks which may broadly be relied upon to analyse judicialization in a given polity.[852] The first (and arguably dominant) 'liberal' set of explanations focus on the spread of ideals of rights and rule of law across the globe.[853] The most influential subscribers to this view see judicialization as the result of post-World War II rise in human rights discourse. For Dworkin, for example, the ascendancy of the Law's Empire is the product of rights protection by enlightened courts that have joined the long march of liberalism.[854] While the traction of rights discourse may explain aspects of judicialization elsewhere, it provides little insight into the expansion of judicial power in Pakistan. Pakistan's various constitutions, including the lasting version of 1973, have included extensive bills of rights but which are riddled with exceptions. The protection of individual rights has not been a forte of Pakistan's superior courts, which have tolerated or turned a blind eye to deep-seated discriminations along ethno-linguistic, minority religious and gender lines. Any meaningful rights jurisprudence from the 1990s onwards have essentially been built around collective rights and rule of law aspirations of accountable governments, curbing of political corruption, and protection from arbitrary use of preventive detention and security laws, all of which merit a different explanation.

Ran Hirschl, an influential theorist on the subject, challenges the valorisation of rights-based constitutionalism as inevitable and inherently valuable, and offers a critical class-based analysis of judicialization.[855] Hirschl considers the judicialization of politics to

[852] Björn Dressel, 'Towards a Framework of Analysis', above n 8, 4-5.
[853] See generally Tate and Vallinder, *The Global Expansion of Judicial Power*, above n 6; C R Epp, *The Rights Revolution*, above n 9; Anne Mary Slaughter, 'Judicial Globalization', above n 9.
[854] Ronald Dworkin, *A Bill of Rights for Britain* (Chatto & Windus, 1990). Also, see Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771.
[855] R Hirschl, *Towards Juristocracy*, above n 10, 218.

be a product of strategic interplay and alignment of the interests of otherwise competing elites. The most significant of these are the political elites who see judicialization as a means to shield policymaking from democratic political processes in which they are on the verge of losing out. The interests of political elites are matched by those of the economic elites that see constitutionalization of rights as a means to achieve security and stability of contract and private property rights.[856] Judiciaries, the most direct beneficiaries, are important but relatively minor strategic players that see judicialization as a means to improve their own position within the state structure, as well as a means to enhance the reputation and prestige of judges.[857] Hirschl thus sees judicial review centred on adjudication of constitutional rights not only in terms of unelected courts dominating political decision-making, but as part of a broader movement whereby political and policymaking power is shifted to semi-autonomous and professional institutions in general – and as a result to those classes and groups that have access to and influence upon such institutions.[858] These pro-judicialization elites are bolstered by urban intelligentsia, the legal profession, and the managerial classes, all of whom also stand to benefit from the judicialization of politics in various ways.[859]

Hirschl explains the ceding of power to judiciaries by political elites as a useful strategy to entrench policies, insure them against the vagaries of democratic process, or to avoid responsibility for politically costly decisions.[860] The motivation for such voluntary ceding is particularly strong when governments foresee losing power in the near future, and judicialization becomes a means to limit the options of political opponents and successor governments.[861] This type of judicialization happens when the judiciary already enjoys a positive repute, and the judges have been appointed by and/or share ideological commitments with the dominant elites. This 'hegemonic preservation thesis' thus concludes that the 'constitutionalization of rights is . . . often not a reflection of genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropriated by threatened elites to bolster their own position in the polity.'[862]

[856] Ibid, 12, 43.
[857] Ibid, 46.
[858] Ibid, 12.
[859] Ibid, 44.
[860] Ibid, 39-40, 47.
[861] Ibid, 41-42.
[862] Ibid, 12.

Hirschl's framework may help us understand important aspects of the judicialization process in Pakistan. The courts' assertiveness during periods of civilian rule can be partly explained by the alignment of the judiciary with the military and its allied classes that have lost the grip on the state, but find the courts as a useful vehicle to reassert some of their power. In every period of transition from military to civilian rule, the courts exhibited a renewed vigour and a conservative form of judicial activism that imposed limits on the social and economic policymaking by elected governments, especially of the supposedly progressive and left-leaning Pakistan Peoples' Party (PPP). This was notably the case in the early 1990s when the courts undermined key aspects of the social and economic manifesto of Benazir Bhutto's governments, and permanently curtailed the prospects of land reforms and large scale redistributive efforts by declaring them un-Islamic. Noticeably, most of the incumbent judiciary in the 1990s had been appointed by the military regime of General Zia and the right-leaning Muslim League factions allied with it. The judicialization of pure politics, such as governmental change, can also be partially explained through this analytical lens. The cases challenging the dissolution of governments through the exercise of Article 58(2)(b) powers in the 1990s, for example, bear the visible marks of judicial alignment with the military and/or dominant political interest. The flexing of the social and political conservatism of Pakistan's judiciary during periods of civilian rule thus fits well within the departing hegemon thesis.

However, the socio-economic conservatism of the judiciary runs deeper than overt political ties and is founded as much on the rising influence of narrow urban, professional upper-middle and managerial classes, from which the most significant groups of lawyers and judges have historically arisen. In the midst of the first wave of judicialization in the 1990s, whilst the strategies of the Public Interest Litigation deployed by the courts appeared to be similar to those developed earlier by the Indian Supreme Court to push for an egalitarian and social justice agenda, Pakistan's public law appeared to be largely aligned with the interests of urban middle classes. During the 1990s, the courts robustly policed urban development and land acquisition which impacted private property rights, thereby providing a useful forum for the middle classes to safeguard their interests from governmental intrusion. Likewise, another noted aspect of Pakistan's courts' activism, their good governance and anti-corruption stances, can also be explained through Hirschl's framework. Political corruption as a

salient political issue has not only historically resonated with Pakistan's middle classes, but has also provided justification for direct military action. The Chaudhry Court's anti-corruption campaign against the PPP government thus not only garnered it considerable populist support, it also considerably destabilised the government at a time when it looked likely to take on the military on key aspects of national security and foreign policy. Therefore, the Chaudhry Court's actions provided sufficient basis for a suspicion that the focus on high-level corruption was strategically designed to both assist the military's position as well as elicit its support for a judiciary locked in a power tussle with the elected government.

THE JUDICIALIZATION OF ADMINISTRATIVE GOVERNANCE

However, whilst Hirschl's analytical framework enables us to dissect some key aspects of judicialization in Pakistan, it does not elucidate much of the historical evolution of judicial power. In particular, Hirschl's framework fails to shed light on the developments in administrative law and the courts' consistent challenges to the securitization of the state, even under military rule.[863] As highlighted in this thesis, the Pakistan's courts safeguarded their writ jurisdictions even during periods of Martial Law, and expanded them during the following periods of quasi-military rule. In fact, the foundations of administrative law were carefully constructed by the courts under the 1962 presidential constitution of General Ayub. Even under General Zia's much more authoritarian regime, the courts used the Islamization of law to construct the very foundations of the Public Interest Litigation that represented the first wave of judicialization in the post-Zia years. As such, the judicialization of administrative governance in Pakistan demands a different framework of analysis.

A 'functionalist' strand of the judicialization literature, which accords greater weight to the strategic motivations and institutional incentives of judiciaries, may have greater explanatory power than Hirschl's departing hegemon thesis in the Pakistani context.[864]

[863] Hirschl himself identifies Pakistan as an exception to his thesis as Pakistan is a rare case of judicialization that has happened in a society that has not been a democracy for a large part of its history and was under direct military rule when Hirschl expounded his thesis. See R Hirschl, *Towards Juristocracy*, above n 10, 31.

[864] See Lawrence Baum, *Judges and Their Audiences*, above n 11; Robert H Bork, *Coercing Virtue*, above n 11; Mark Tushnet, *Taking the Constitution away from the Courts*, above n 11; Shapiro and Sweet, *On Law, politics and Judicialization*, above n 6; John Ferejohn, 'Judicializing Politics, Politicizing Law', above n 11.

According to this framework of analysis, courts gain relevance and power in weak or fragmented political systems where no one institution or class is able to exert preeminent hold over the state and political processes. In such a scenario, a number of important and highly contentious issues end up by default before the courts, giving judges the opportunity to strategically expand the role of the courts in resolving critical political and social issues. The courts may be supported in limited aspects of judicialization by diverse groups and institutional complexes, that see value in using the courts to achieve specific goals even when they have little capacity or incentive to push for or enable judicialization at a macro level. Such a process of judicialization is thus driven by the courts themselves, who seek to align with and hence use the support of various groups, classes and institutional complexes at different times and around different sets of issues.

Such a framework of analysis resonates with the political realities in Pakistan. Pakistan is a deeply divided society whose state and ruling elites have had to contend with complex and intractable ethno-linguistic, provincial/regional, class, religious/sectarian and political divisions from the beginning. As a result, it has been impossible for one state institution or political party to exercise exclusive power for long. Even the military had to rely on the support of elements of the political elite and the bureaucracy, and as a result was compelled to manage tortuous transitions to procedural democracy in which power initially seeped and ultimately flooded to the political classes. When a political party has briefly enjoyed overwhelming parliamentary support during periods of civilian rule, that has been the product of a first past the post electoral system, low voter turnout and/or rigging. Civilian rule has thus suffered from prolonged crises of legitimacy and destabilizing political opposition. As a result, not only has the Pakistani state as a whole enjoyed relative autonomy from the elites but also different parts of the state – the military, bureaucracy and judiciary – have exhibited considerable independence from each other and from the dominant political classes, as they have been able to align with different groups and constituencies. Therefore, a strategic-institutional framework of judicial empowerment in the context of a fragmentary state appears to have relevance to Pakistan's political landscape.

More importantly, Ginsburg and Moustafa's analysis of the politics of courts under authoritarian regimes may help explain the judicialization of administrative

governance, which has arguably been the most significant if not the most visible plane of judicial action in Pakistan.[865] As Ginsburg and Moustafa note, courts are often used by authoritarian regimes, both military and civil, to achieve a range of ends. These include the exercise of social control through criminal law, gain legal legitimacy in the absence of democratic support, implement controversial policies from a political distance, and ensure discipline within the administration.[866] For the courts to serve such vital political functions, they must have institutional effectiveness and coherence. For the courts to impart some legitimacy to the regime, they must have some autonomy. If courts are visibly subject to complete subservience or constant manipulation by a regime, their stamp of legal validity will provide no legitimacy to the regime. However, while somewhat autonomous courts serve important functions for authoritarian regimes, they also emerge as potential forums for 'rightful resistance' – 'a form of popular contention that … employs the rhetoric and commitments of the powerful to curb the exercise of power [and] hinges on locating and exploiting divisions within the state.'[867] Legal challenges to low level administrative action can thus emerge as an important site of day to day resistance to authoritarian regimes.[868]

Judicial review of administrative action provides the courts with a means to manage the precarious dialectics of autonomy/utility and resistance/compliance. The courts can achieve 'core compliance' to the regime's interests by imparting legal validity to the more significant interests of the regime, while still holding out limited opportunities of resistance on issues of lesser import. In fact, the interests of the regime and courts might align – judicial review of administrative action may help the regime with resolving principal-agent problems, especially at times when it is attempting to exert greater control over the bureaucracy.[869] Furthermore, the availability of judicial review to challenge some level of governmental action, without undermining the regime's core

[865] See Ginsburg and Moustafa, above n 6.
[866] Tom Ginsburg and Tamir Moustafa, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008) 4-11.
[867] Ibid, 13.
[868] As Ginsburg notes, while much of the judicialization literature focuses on constitutional issues, "most citizens are far more likely to encounter the state in the routine matters that are the stuff of administrative law." See Tom Ginsburg, 'The Judicialization of Administrative Governance: Causes, Consequences and Limits' in Tom Ginsburg and Albert H Y Chen (eds), *Administrative Law and Governance in Asia* (Routledge, 2009) 1.
[869] See Tom Ginsburg, 'Administrative Law and the Judicial Control of Agents in Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008) 59-63.

interests, may emerge as a safety valve to vent political frustration that may otherwise build up and spill over in more destabilizing fashion. As such, authoritarian regimes may see value in allowing the courts to develop robust administrative law, so long as they reciprocate by granting legal validation to the regime's existential interests in the domain of constitutional law and politics.

Such interplay of autonomy and compliance in a fragmentary-yet-authoritarian state structure accounts for the seemingly disjointed and sporadic developments in the judicial review of administrative action in Pakistan. The steady advances in administrative law during the three extended periods of military rule may be seen in terms of the alignment between the military's needs of extending control over the civilian state apparatuses and the judiciary's need to retain some credibility and legitimacy, despite the curtailment of constitutional review and human rights jurisdictions. The Ayub regime tolerated judicial review of administrative action in the 1960s as it assisted with the military's needs of cutting a still-powerful postcolonial bureaucracy down to size, and chimed with its proclaimed agenda of far-reaching administrative reform. The Zia regime, which needed to restore cohesion to a bureaucracy that had been shaken up by Bhutto-era administrative reforms, and needed to purge it of PPP loyalists, found judicial review useful in solving its principal-agent problems at a time when the bureaucracy had an enhanced economic role in managing state-owned corporations and implementing licensing regimes, in addition to traditional administrative functions. The Musharraf regime, facing a confluence of the challenges confronting earlier military regimes, needed to both break down the hidden webs of patronage and loyalty amongst the bureaucracy to the elected government it had displaced, as well as claim some quasi-democratic credentials through local government and administrative reforms. The continuing judicial review of administrative action as a bridge across the chasms of martial rule thus fitted in with the interests of both the military and the judiciary.

The visible and highly contentious waves of judicialization during periods of elected rule following military regimes have been the product of fundamental re-alignments over the judicial review of executive action. For civilian governments, much less secure in their hold over the state structure and mindful of the military's lingering presence in the background, the desperate need to establish control over the bureaucracy resulted

in a tendency to see judicial review of executive action as an existential threat. On the judicial side of the equation, however, the courts have historically been much less willing to give space to elected governments seen as less powerful, lacking full democratic legitimation and prone to political corruption.[870] While the government of Zulfiqar Ali Bhutto in the 1970s was successful in curbing the judiciary – in part because of its manifest populism, but as much due to its aggressive military-style campaign to limit the powers of the court through constitutional design – the PML-N and PPP governments post-1990 failed to achieve similar judicial compliance. Judicial activism during civilian rule invariably led to overt tensions between the executive-legislature and judiciary waged in ideologically-charged, universal-sounding, but ultimately self-serving rhetorics of democracy and separation of powers on the one hand, and constitutionalism and rule of law on the other. Juxtapose these tussles with the interests of the military as departing hegemons, vocal and at times violent opposition willing to lend public support to the judiciary, and the bureaucracy's internal incentives to win some autonomy; it should not be surprising that judicial review of administrative action has been the terrain of such political contention that it was during the 1990s and the tenure of the Chaudhry Court.

THE POSTCOLONIALITY OF CONSTITUTIONALISM AND THE RULE OF LAW

While the strategic-institutional framework of judicialization enables much more insightful analysis of how courts find the space to exert greater influence and power with the support of important segments of state and society, it still fails to fully explain what motivates the courts to expand their role. Such a framework rests on the assumption that judges are rational actors driven mostly by their class and institutional interests, and will seek to maximise their power and influence if the opportunity exists. Without denying an element of truth in the foregoing assertion, the intuition that courts act purely strategically does not sufficiently explain several cases of non-judicialization where the courts have chosen not to avail the opportunities to expand their power, despite having institutional independence.[871] On the other hand, the strategic account

[870] This phenomenon is not unique to Pakistan and has been witnessed in other jurisdictions in Asia. See Tom Ginsburg, 'The Judicialization of Administrative Governance: Causes, Consequences and Limits', above n 868, 7.

[871] See Björn Dressel, 'Towards a Framework of Analysis', above n 8, 6-7, for what are referred to as instances of the 'politicization' of judiciary.

of judicialization does not explain why Pakistan's courts chose at times to take on military rule, even on issues defined as lying within the regime's core interests, risking their independence and provoking dangerous retaliation. More importantly, looking at courts as purely strategic players does not explain how and why in moments of confrontation with military regimes and civilian governments the courts were able to push back, counting on the support of lawyers as well key segments of society, even when there were no institutional interests of the judiciary or of their backers that could be tangibly served through such action.

Such cold, structural, political science analyses of the judicialization of politics and governance canvassed so far adopt an external perspective on legal institutions. Such analyses thus overlook fundamental ideational dimensions that often drive judges, lawyers and litigants. Legal institutions are founded on the inherent normativity of law and conceptions of what ought to be law expressed in the language of grand ideals such as constitutionalism, rights and rule of law. Such ideals not only articulate and in turn shape the judges' conception of their role, but also the expectations of important elements in the state and society. The quest for legitimacy by the courts, in addition to a range of political factors and strategic alignments identified earlier, explains why courts sometimes take on a judicialization agenda even when it is not seemingly in their institutional interest to do so. The popular legitimacy, or lack thereof, also enables an understanding of why courts succeed or fail in their attempts to take on the military or civil executive, and why certain groups and classes beyond the legal complex support the courts in their attempts to exercise their role.

The quest for legitimacy should not, however, be reduced to the abstract, universalistic and deontological claims of liberal political and legal theory. There is no denying that judges' self-conceptions of judicial role and public perception of their legitimacy may be articulated by reference to dominant liberal ideals of constitutionalism and rule of law. However, the concrete form that these ideals take are the product of extended institutional engagement with particular types of controversies. Not only judges, lawyers and litigants, but also distant observers form ideas of what these grand norms are, and are worth, based on what the legal institutions can deliver in terms of tangible outcomes over the long run. The multiple, at times competing, conceptions of constitutionalism and rule of law are thus, in the broadest sense, articulations of the role

of law – the place law ought to have in society, in state and in polity. These are thus deeply contextualised accounts of the authority of legal institutions and the legitimacy of law. The resonance of particular conceptions of constitutionalism and rule of law in Pakistan, as in any other place, can then be explained only in light of the historical ways the courts have shaped expectations through actual and promised interventions in constitutional politics, state structure and social orderings.

The dominant ideational framework within which Pakistan's courts have operated, cultivated the support of specific groups, garnered an aura of legitimacy and shaped expectations of their role is that of postcolonial legality. Over the last seven decades, the judiciary has progressively expanded the logics of constitutionalism and rule of law encoded in their bequest by colonial legal institutions. With the new demands that crises in constitutional politics, changes in the state structure, reconfigured elite dynamics and global normative pressures imposed, the courts have had to adapt and define their role to meet emergent challenges. Nonetheless, they have defined their progressively expanding and more prominent role with considerable fidelity to the rationales of postcolonial legality. This has been evident in the courts' interventions in constitutional politics that were rooted firmly in a faith in parliamentary democracy and separation of powers that colonial rule promised but never delivered. Likewise, the courts increasingly assertive role in regulating the bureaucratic administration has largely been bereft of innovative ideas and success, as they have incessantly invested in restoring the mythical independence and structural integrity that the colonial bureaucracy bequeathed to the postcolonial state. The courts' commitment to postcolonial ideas of legality has been somewhat matched by the military, political elites, bureaucracy and the intelligentsia, all of whom have historically internalized related principles of postcolonial statecraft. The acceptance of key ideas of postcolonial legality partially explains why both military and civil-authoritarian governments have grudgingly tolerated, and important social groups have supported the courts' assertiveness along the axis of postcolonial legality.

The strongest evidence of the postcoloniality of Pakistan's public law is provided by the courts' consistent challenges to the securitization of the state. As military regimes and civilian governments defined over-arching narratives of existential threats to the nation, and purported to counter these with repressive security laws that principally

targeted political opponents and dissidents, the courts felt compelled to step in to impose limited procedural safeguards. That authoritarian military and civilian governments needed an imprimatur of legality through instruments such as the Security of Pakistan Act, the West Pakistan Maintenance of Public Order Ordinance, or Article 10 of the 1973 Constitution, which provides room for as well as fixes limitations on preventive detention, is similarly evidence of corresponding internalization of postcolonial legality by the ruling elites. The rituals of this dialectic of rule *by* and rule *of* law were deeply embedded by and during colonial rule, as shown by the Punjab High Court and the Federal Court's decisions on sedition both pre- and immediately post-partition show. The courts' commitment to the limited procedural version of rule of law was a lasting legacy of colonialism which drove the courts to challenge the establishment of military courts to try civilians at serious risk to their institutional interests. It was only at the turn of the century that this pattern of repressive security laws and courts' insistence on strict adherence to procedural requirements temporarily broke, when the Supreme Court declared the establishment of military courts as unconstitutional and the Musharraf regime adopted the use of completely unregulated enforced disappearances. However, with the Twentieth Constitutional Amendment authorizing the establishment of military courts to try terrorism offences the old rituals of postcolonial rule of law have been reinstated.

Other examples of rule by/of law – in India, Myanmar and Singapore, for example – indicate the existence of deep ideational structures that propel courts to define their role in former British colonies in similar ways and regardless of military, civil authoritarian and formally democratic regime types. A reliance on the 'colonial rule of law' charted in the first chapter of this thesis was a feature which distinguished the British from other European colonialisms. Along with the dependence on legal institutions for a particular form of social engagement and control, the limited legitimacy and elite loyalty that over-arching narratives of rule of law enabled the British Empire to create the most efficient and penetrating state structures of all European colonizers. That the framework of postcolonial legality developed such deep roots, and has lasted this long in Pakistan, is thus of little surprise. This insight provides the basis for a research agenda of comparative postcoloniality which would trace the evolution of public law and judicial review practices in former British colonies in Asia and Africa to the legal institutions and the ideational structures of colonial rule of law. Unlike the dominant liberal

teleology of much of the discourse on constitutionalism and rule of law, and beyond the political science analysis of recent judicialization literature, such scholarship would take the historical and contextualized normativity of law in the British postcolony seriously.

GLOSSARY

Afghan *Jihad*	Insurgency against the Russian occupation of Afghanistan in the 1980s
Afghan *Mujahideen*	Rebels fighting the Russian occupation of the country in the 1980s
Barelvi-Sunni	A doctrinal and religious movement of the Sunni sect which has been predominant in South Asia
Diwani	Revenue and bureaucratic administration of early colonial Bengal
Hadd	Mandatory criminal sanction under Islamic law
Hudood laws	Islamic criminal laws related to adultery and fornication, theft, highway robbery and consumption of alcohol
Islamization	Controversial policies, constitutional changes and legislation enacted by the Zia regime (1977-88) to enforce purportedly Islamic injunctions
Jagirdars	Holders of Mughal-era revenue estates
Jirgas	Customary dispute resolution forums in north-western Pakistan
Khilafat movement	Movement of conservative Indian Muslims protesting the dismemberment of the Ottoman Empire and the end of the Caliphate in aftermath of the First World War
Kutchehri	Court premises. The terms colloquially refers to the judicial system, especially the lower courts.
Madrassahs	Religious schools
Mofussil	Rural hinterland of the Presidency towns in early colonial period
Muhajirs	Descendants of migrants from India
Nawab	Nominally vice regents of the Mughal Empire but by the late 1700s *de facto* rulers of the provinces
Nizamat	Law, order and policing administration of early colonial Bengal
Panchayats	Local and customary arbitration forums
Patwar	Land registration and revenue administration
Qisas and *Diyat*	Islamic laws concerning homicides and other offences against the person which provided for strict retribution and pardon in *lieu* of compensation
Raj	British Crown rule in colonial India (1858-1947)
Sadr courts	Provincial appellate courts of the East India Company
Sardars	Local and tribal chiefs
Satyagraha	Indian National Congress' non-violent civil disobedience movement in the late colonial period

Sepoys	Soldiers of the East India Company armies
Shariat courts	Appellate courts and benches created in 1980 which were granted with the powers of judicial review of legislation for conformity with Islamic law
Shia	A minority sect of Islam
Sunnah	Tradition (words and actions) of the prophet Muhammad
Swaraj	Self-rule or independence for colonial India
Tazir	Discretionary criminal sanction under Islamic law
Thana	Police station. The terms colloquially refers to the entire policing system.
Thugs	Criminal gangs in early colonial India
Ulema	Islamic scholars recognized as having specialist knowledge of Islamic law
Vakil	Indian lawyer
Wahabbism	Orthodox doctrine and religious movement dominant in Saudi Arabia and some other parts of Middle East
Zina	The sin and crime of adultery or fornication

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