

**POLITICAL INSTABILITY IN PAKISTAN: CAN A DEMOCRATIC  
FEDERAL POLITICAL SYSTEM RESOLVE THE PROBLEM OF  
PREMATURE DISSOLUTIONS OF GOVERNMENT IN  
PAKISTAN?**

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## Dedication

This humble contribution I dedicate to the people of Pakistan – those who have sacrificed and endured a lot in their lives for a long time. The people of Pakistan deserve a stable country with a secure future for themselves and their children.

And

To my father for his firm faith in me that has always motivated me in my life

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## Abstract

According to the researcher's hypothesis of constitutional suitability, only a suitable political system works efficiently, a suitable political system for a democratic federal state such as Pakistan is a Democratic Federal Political System, which comprises key factors such as equal representation, separation of powers and a system of checks and balances. These factors appear to be either missing or not appropriately incorporated in Pakistan's past and present constitutional instruments. To test the hypothesis, this document uses two methods of investigation.

The first is a qualitative, interpretative evaluation of the prevalence of absolute power and self-interest in Pakistan's constitutional history by reference to historical and statutory sources. This can be traced back to colonial times. Absolute power has been carried forward either explicitly or implicitly in Pakistan's constitutional instruments to preserve self-interest that followed on from vice regal reigns, which has resulted in seven episodes of state emergency. At times, some of the key factors have been present in Pakistan, putting a temporary halt to premature dissolutions of government. However, it is concluded that the practice is likely to continue until a suitable political system is assumed.

The second is a structuralist and functionalist comparative law analysis of both the state and political structures of the USA and Pakistan. The USA's political system has great similarities to the researcher's model of a Democratic Federal Political System. This analysis shows that there appear to be several incompatibilities between the political systems. Nevertheless, there is a great deal of similarity between the state structures of both countries. It is, therefore, concluded that the initial hypothesis has been substantially borne out, and that it would be possible for Pakistan to adopt a Democratic Federal Political System, although slight variations from the US model will be required.

## **Table of Statute and Legal Instruments**

Constitution of 1962 (of Pakistan)  
Constitution of the Islamic Republic of Pakistan 1973  
Government of India Act 1912  
Government of India Act 1919  
Government of India Act 1935  
Indian Council Act 1892  
Indian Council Act 1909  
Regulatory Act 1773  
United States Constitution

## **Table of Cases**

Begum Nusrat Bhutto vs Chief of Army staff [1977] PLD [1977] SC 657.  
  
Dosso Vs Federation of Pakistan [1958] PLD [1958] SC Pak 533.  
  
Federation of Pakistan and Others vs Maulvi Tamizuddin Khan [1955] PLD 1955,  
FC 240.  
  
Marbury v Madison 5 US 137 (1803).  
  
McCulloch v. Maryland, 17 U.S. 4 Wheat. 316 (1819) 316.  
  
Miss Asma Jilani Vs. The Government of the Punjab and Another [1972] PLD [1972]  
SC 139.  
  
Sindh High Court Bar Association v Federation of Pakistan PLD (2009) SC 879.  
  
Syed Zafar Ali Shah and others vs Gen Musharraf, Chief Executive of Pakistan  
[2000] PLD [2000] SC 869.  
  
Texas v White 74 US 700 (1869).

## 1. Introduction

The central problem that this research project is designed to address is that Pakistan has gone through seven episodes of premature dissolutions of government since its inception in 1947 which, amongst other issues,<sup>1</sup> have caused an environment of great political instability in the country. The term 'premature dissolution' in this thesis refers to dissolving the legislature and executive branches of federal and provincial governments - whether constitutionally or otherwise - before the expiry of their normal term.<sup>2</sup> Key factors identified in the literature discussed in Chapter 3 which appear to contribute to premature dissolution, are:

- 1) disparity of representation, which is enshrined in the design of the constitutions;
- 2) self-interest, in creating legislation which allows or protects the acts of premature dissolution and the role of the judiciary in terms of interpretation and
- 3) use of the doctrine of state necessity.

These factors appear to be interconnected since situations in which state necessity is relied on are caused or invoked by the military, politicians and/or the judiciary in response to issues such as disparity of representation, self-interest and uneven distribution of power flow between legislature, judiciary and executive (that is, a failure in the system of checks and balances).

In contrast, the USA, also a post-colonial, democratic federal state, has not experienced a similar history of premature dissolution or constitutional crisis. It has therefore, for reasons set out in Chapter 2, been selected as a suitable comparator. It is, however, important for that comparison that the role of Enlightenment philosophy in the development of the US constitution is understood, and this is discussed in Chapter 5.

The aim of this thesis is, then, to examine as its primary hypothesis the idea that adoption of certain aspects of the US political system could resolve the problem of premature dissolutions of government in Pakistan: *A Democratic Federal Political*

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<sup>1</sup> For example, nepotism in the form of political party ownership by certain families, corruption with limited accountability, military intervention in political affairs.

<sup>2</sup> The legislature can be dissolved constitutionally by invoking Article 58 (2) (B) of the Constitution or by unconstitutional means such as military takeovers.

*System in the sense defined in this thesis, can resolve the problem of premature dissolutions of government in Pakistan.* In order to formulate possible constitutional solutions for Pakistan's problem, the researcher's starting supposition involves a hypothesis that he has called *constitutional suitability* i.e., that a country should have an appropriate political system with respect to its state structure.<sup>3</sup> For the purpose of this research an appropriate political system with respect to a federal state will be defined as a Democratic Federal Political System, with capitalisation to distinguish it from any other form of federalism. In this sense, it is proposed that a Democratic Federal Political System is one that encompasses the essential features of US democracy and federalism, such as equal representation, separation of powers, and systems of checks and balances. In this project, these features of the US system are referred as key factors, which are explored in more detail in Chapter 3 in the light of the philosophical literature.

In order to test the starting hypothesis, it is important to address its associated following sub-questions:

1. *Are premature dissolutions of government an on-going and important issue in Pakistan?*
2. *Are the present and past political systems Democratic Federal ones?*
  - 2.1. *Does the political system address issues of equal representation?*
  - 2.2. *Does the political system provide for separation of powers and checks and balances?*
  - 2.3. *Are there elements of self-interest exercised by influential individuals that can override the controls in the system?*
3. *Is there any connection between premature dissolutions of government and one party having an absolute majority?*
4. *Is the state structure of Pakistan compatible with a Democratic Federal Political System?*

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<sup>3</sup> If a political system is not suitable for, or compatible with, the state structure, it gives rise to problems for example, in the case of Pakistan, premature dissolutions and secessions.

The structure of the professional doctorate requires the research investigation to be broken into two parts, each of which is submitted as a separate document and each of which has a different methodological emphasis. In order to set the scene for the thesis, therefore, Chapter 2 sets out the methodological approaches used in answering the subsidiary research questions.

After exploring relevant literature on the key factors in Chapter 3, Chapter 4 then begins with a discussion of the historical and constitutional history of Pakistan, both as background to the study as a whole and also as a problem statement which responds to sub-question 1. This discussion not only justifies the need for research on this issue but also highlights the pattern of premature dissolutions of government.

The second sub-question addressed in Chapter 4 then begins to set the scene for the comparative exploration in Chapter 5. It does so by evaluating the situation in Pakistan, over the course of its history, by reference to the concept of the Democratic Federal Political System. The test here is comprised of a further three questions nested under the second sub-question. The first two questions will be answered in the affirmative and the last in the negative if the political system is constitutionally suitable as described above. The first two questions of this test are derived from the three key factors identified in 3.1 and 3.2 and are, as explained, in those sections, essentially drawn from the US model of democratic federalism. The third question, not obviously linked to the key factors of a federal system, is included because it is inter-linked with problems of absolute power that, it is argued, create the potential for reliance on the doctrine of state necessity, which has, as explained in Chapter 4, caused grave obstructions in the functioning of democracy and federalism in Pakistan.

For clarity, the analysis of Pakistan's constitutional history by reference to these key factors is divided into four periods, each of which will be tested against the three questions set out above as part of the second research question. As explained in Chapter 4, the current and inadequate response to such problems in Pakistan has been a reliance on the doctrine of state necessity. It is argued that the episodes of premature dissolution of government which have been a feature in Pakistan are directly related to the failure to adopt, in the country's constitution, the key factors.

It is the researcher's hypothesis, therefore, developed in the concluding Chapter 4 that incidents in which the doctrine of necessity is invoked, and governments are overthrown, could be pre-empted if the key factors were in place.

This part of the thesis involves applying the test to all legislatures including prematurely dissolved, completed term and martial law regimes. Martial law regimes' legislatures are very important, as will become apparent in Chapter 4, as these governments managed to attain their legitimacy through the judicature.<sup>4</sup> The judiciary not only supported the imposing of martial law, but also the abrogation of constitutions,<sup>5</sup> which otherwise is classed as high treason. By drawing on legal realism, exploration of the reasoning and the decisions of the judges is carried out in Chapter 4. These decisions revolve around the use of the shield of necessity to justify the dissolution of legislatures.

The third sub-question addressed in Chapter 4 is designed to determine whether there is a causal link between a legislature for the first time completing its term and the coalition government that was in place in 2008-13. The hung nature of this parliament can be seen as a coincidental adoption of one of the significant key factors at least in its essence, i.e., checks and balances. The completion of the democratically elected parliamentary terms for the first time led to another successful parliamentary term in 2013-2018 and the graph appears to be changing course in a positive direction. It is not, however, an indication that the political system has somehow been improved, as there are no significant changes of the kind that this thesis is proposing.

Having determined the extent to which, if at all, the situation in Pakistan satisfies the test, and how far, therefore, it represents a Democratic Federal Political System, the fourth sub-question is to determine the point of commonality between the state structure of Pakistan and USA, so that a thorough comparative analysis of both political systems can be carried out in the final stage of this thesis in Chapter 5.

Chapter 3 then provides a literature review of key concepts that are used in the analysis in Chapter 4. This provides the opportunity to understand these concepts fully before they are used in comparative analysis in Chapter 5.

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<sup>4</sup> Muhammad Nasrullah Virk, 'Doctrine of Necessity-Application in Pakistan- Cases of Immense Importance- A Critical Review' (2012) 2(2) International J. Soc. Sci. & Education 82.

<sup>5</sup> *ibid.*

Having explored the history of Pakistan, including that country's unique reliance on the doctrine of state necessity as a resolution to constitutional problems, Chapter 5 then pursues the question of using the US model to help resolve those problems further by conducting a structural and functional comparative analysis of the constitutional systems of these two countries.

Following this comparative analysis, Chapter 6 provides a response to the overall hypothesis, that a Democratic Federal Political System would help address the problems of political instability identified in this chapter and in chapters 3 and 4, and that an initial template can be found in the US system discussed in Chapter 5. Chapter 6 also articulates the contribution to knowledge and to practice claimed in the thesis and provides recommendations for policy, practice and future research.

The next chapter explains the overall methodology and methods employed in the two investigations that are combined in this thesis.



## 2. Theoretical and Methodological Framework

### 2.1 Ontology and Epistemology

Epistemology is the theory of knowledge as to what is known and how it comes to be known.<sup>6</sup> Ontology is the nature of reality and its characteristics,<sup>7</sup> it is 'the study of 'being' concerning with 'what is', with the nature of existence, with the structure of reality as such'.<sup>8</sup>

The researcher starts from the ontological position that there is a problem of ongoing political instability in Pakistan in which a number of factors including, ultimately, reliance by the judiciary on the doctrine of state necessity, play a part and that the existence of this problem can be objectively determined. As a realist, however, the researcher is not only evaluating the legal system but is also describing how it works in practice.<sup>9</sup>

Epistemology involves, in essence, a choice between positivist and interpretivist methods of data collection and analysis to provide results that generate a justified true belief in the answer to the research question. The researcher brings his practice experience as a litigation lawyer to the question of epistemology. He is, as a lawyer, conscious of the need to use credible, valid evidence to prove his conclusions. Epistemologies usually contain an understanding of the unit of appraisal in the sense of what is being judged. This, in litigation terms, means the application being made, the standards of judgment (in the sense of how valid judgments can be made; the standard of proof) the underpinning logic (in the sense of the form of reasoning that takes in understanding the real as rational) and the submissions and argument of the advocate.<sup>10</sup>

The researcher's unit of appraisal in this project is the contribution to premature dissolution of government of the key factors set out in the research questions. The

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<sup>6</sup> Jack Whitehead and Jean McNiff, *Action research living theory* (SAGE Publications 2006) 23.

<sup>7</sup> John W. Creswell, *Qualitative inquiry and research design: choosing among five approaches* (3rd edn, SAGE 2013) 20.

<sup>8</sup> Michael Crotty, *The foundations of social research: meaning and perspective in the research process* (SAGE 1998) 10.

<sup>9</sup> Mark Van Hoecke, 'Legal Doctrine: Which method(s) for What kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart 2011) 3.

<sup>10</sup> *ibid.*

standards of judgment include the critical evaluation of these concepts and the logic is the way in which inferences are drawn from that critical evaluation.

It is the researcher's position that, in order to demonstrate a justified true belief in his findings, he must adopt a blended epistemology in which he first uses a positivist approach in describing what the law is and has been, and the political and historical state of affairs that surrounds it in chapters 3 to 4. In order to answer the research questions, however, it is necessary to go beyond positivism into a qualitative, interpretative analysis that allows him to explore from a realist perspective, for example, the causes of the particular problem under investigation, that is premature dissolutions of government. It also allows for the structural and functionalist comparative investigation that takes place in Chapter 5.

## 2.2 The Position of the Researcher

As indicated above, the researcher brings to the project his experience as a litigation lawyer. In terms of the credibility of the research and the validity of its conclusions, however, there is an important question about whether the researcher is adequately informed to do such an evaluation and apply the necessary standards of judgment. An overview of the researcher's own academic and professional standing may be useful to give some background to illuminate the starting point for this section.

The researcher is qualified as a lawyer in several international jurisdictions. He had an opportunity to study the political systems of different countries. His areas of expertise are in English constitutional law, the constitutional law of Pakistan, India and the USA. As a political scientist the researcher also has a command of US and Indo-Pak history.

The researcher has also been a lecturer in constitutional law (of Pakistan and USA) and has a first-hand knowledge of all the constitutional events since 1992 and is something from which he has derived his hypothesis. It is this evolved belief that a state should adopt a political system that is best suited to its state structure, which he regards as a *hypothesis of constitutional suitability*. The development of his hypothesis and the driver for this project, are linked to the researcher's personal values and beliefs in fairness and justice. That is, the project is strongly informed by his axiology.

Axiology is the philosophical study of theory of values.<sup>11</sup> Modern axiology is a companion to epistemology and metaphysics<sup>12</sup> and usually confines itself to problems such as common nature of values, status of values, scientific method of inquiry applicable to the value judgment and value proposition.<sup>13</sup>

It is the researcher's hypothesis that the premature dissolution of governments in the history of Pakistan is directly linked to the consecutive adoption of several unsuitable political systems. To explore and analyse these assertions, the researcher has applied his axiology in exploring these legal concepts in the light of established jurisprudence and philosophy in Chapter 3.

As is normally the case in a professional doctorate project, therefore, the researcher's position as (to some extent) an insider to the topic becomes relevant.

### **2.3 The Researcher as both insider and outsider**

The outsider concept describes researchers who research as impartial investigators and who are independent. Outsiders are valued for their objectivity, 'which permits the stranger to experience and treat even his close relationships as though from a bird's-eye view'.<sup>14</sup>

The insider principle, however, suggests that 'outsider researchers ... never truly understand a culture or situation [as] they have not experienced it'.<sup>15</sup> Insider researchers are therefore uniquely positioned to 'understand the practices of their community and perhaps the reasoning behind such practices'.<sup>16</sup> Insider researchers are often able to 'engage research participants more easily and use their shared experiences to gather relevant information'.<sup>17</sup>

The researcher is not a complete insider or a complete outsider: he positions himself somewhere in the 'space between the insider/outsider dichotomy'.<sup>18</sup> He has

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<sup>11</sup> Samuel L. Hart, 'Axiology--Theory of Values' (1971) 32(1) *Philosophy and Phenomenological Research* 29 31.

<sup>12</sup> Richard Fulkerson, 'Axiology' in Theresa Enos (ed), *Encyclopedia of Rhetoric and Composition: Communication from Ancient Times to the Information Age* (Routledge 1996).

<sup>13</sup> Samuel L. Hart, 'Axiology--Theory of Values' (1971) 32(1) *Philosophy and Phenomenological Research* 29.

<sup>14</sup> Georg Simmel and Wolff Kurt, *The Sociology of Georg Simmel* (New York: The Free Press 1950) 405.

<sup>15</sup> Katie Kerstetter, 'Insider, outsider, or somewhere in between: the impact of researchers' identities on the community-based research process' (2012) 27(2) *Journal of Rural Social Sciences* 99.

<sup>16</sup> *ibid.*

<sup>17</sup> Sonya Dwyer and Jennifer Buckle, 'The Space Between: On Being an Insider-Outsider in Qualitative Research' (2009) 8(1) *International Journal of Qualitative Methods* 54.

<sup>18</sup> *ibid.*

assumed a responsibility to understand and realise where he is positioned within this space and to explore how his status may affect the research process and its outcomes in this thesis.<sup>19</sup>

The researcher is an insider to some of the issues being researched such as Pakistan's constitutional history, especially the events that occurred in his lifetime. This leads him to take a realist/interpretivist approach to his analysis in chapters 4 and 5 that evaluates not just what the law is, but how it actually operates, and the influences, political or otherwise, that cause it to operate in that way. Where he conducts a comparative analysis in Chapter 5, he uses a model that explicitly requires him to consider the cultural context of the two systems being compared.

However, he is testing a hypothesis drawn from his own insider/professional perspective and needs to remain open to ideas and evidence that might tend to weaken or disprove the hypothesis. The researcher is an outsider at the same time as he has knowledge and working understanding of other legal systems, for instance, the UK where he resides and has been practising law for years.

The researcher realises that being an insider and outsider at the same time can raise issues of maintaining impartiality. The major concern of partiality is only associated with the researcher being an insider. To overcome his position as an insider he is determined to show 'familiar things in an unfamiliar aspect'.<sup>20</sup>

Being an insider raises concerns of objectivity, reliability and validity.<sup>21</sup> In the context of this thesis, these terms refer to impartiality, consistency and rationality. These concerns are based on a reasonable assumption that researchers run the risk of 'going native' i.e. over-identifying with the subject matter under observation, 'getting too close or staying too long'.<sup>22</sup>

'Going native' in the context of this thesis, refers to the researcher's adopting the same standpoints or perception of two contrasting groups i.e. those who founded or

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<sup>19</sup> Laura Serrant-Green, 'Black on Black: Methodological Issues for Black Researchers Working in Minority Ethnic Communities' (2002) 9 Nurse Researcher 30.

<sup>20</sup> Bertrand Russell, *The Problems of Philosophy* (Oxford University Press 1971) 91.

<sup>21</sup> Pat Sikes and Anthony Potts (ed), *Researching Education from the Inside: Investigations from Within* (Routledge 2008) 7.

<sup>22</sup> Michael Stein, 'Your place or mine: the geography of social science' in Dick Hobbs & Richard Wright (ed), *The Sage Handbook of Fieldwork* (Sage 2006) 72.

still support the existing political system of Pakistan, and over identifying with those who are in support of a presidential system for Pakistan.

The researcher understands that being an insider and outsider are not only positions but also identities. For example, the researcher has been following the political events as they happened and have established his views based on what he perceived, however at the same time being located in the UK and practising law in England and Wales interprets these events differently than those who are located in Pakistan. Researchers are always 'insiders in some contexts and outsiders in other situations'.<sup>23</sup> Insider research has its advantages and can be both scholarly and rigorous.<sup>24</sup> The researcher maintains his objectivity in Stenhouse's sense, when he states:

Whilst I acknowledge the need to take up the issue of objectivity in social research, it is not an issue I am well equipped to handle. Partly because I personally have been untroubled by the problem.<sup>25</sup>

The researcher regards himself as a realist evolving in the spaces and connections not only between his roles as insider and outsider but also between his several other identities as a lawyer and researcher.

As stated earlier, it is the researcher's hypothesis that the problems in Pakistan arise from fundamental failings in the design and operation of its constitution. He is sceptical about the way the judges approach the doctrine of state necessity. A common law system may be particularly prone to this issue simply because the judges are required to make decisions on the basis of already set precedents, and on the basis of imperfect facts and submissions, where human frailties can play out in practice.<sup>26</sup> As an insider this is interpreted differently, educated in Pakistan, the researcher knows that these approaches by judges have always been criticised. However, as an outsider, the researcher takes a different view by plunging into the rationale behind these decisions explained in Chapter 4.

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<sup>23</sup> Susan Matoba Adler, 'Multiple Layers of a Researcher's Identity: uncovering Asian American Voices' in Kagendo Mutua & Beth Blue Swadener (ed), *Decolonizing Research in Cross-Cultural Contexts: Critical Personal Narratives* (State University of New York Press 2004) 107.

<sup>24</sup> Pat Sikes and Anthony Potts (ed), *Researching Education from the Inside: Investigations from Within* (Routledge 2008) 7.

<sup>25</sup> Jean Rudduck and David Hopkins, *Research as a Basis for Teaching: Readings from the Work of Laurence Stenhouse* (Heinemann 1985) 14.

<sup>26</sup> Joseph William Singer, 'Legal Realism Now' (1988) 76(2) California Law Review 465.

In the next section, the researcher explains the methodology and methods used in this project.

## 2.4 Methodologies and Methods

Methodologies used in this thesis are influenced by the researcher's epistemology in the light of Realism, Positivism, Instrumentalism and Interpretivism. This thesis comprises two parts, the first from chapters 3 to 4 that establishes the concepts (such as federalism, the key factors used for the purpose of analysis and the doctrine of state necessity) and tests the phases of Pakistan's constitutional history against the key factors. The second, in Chapter 5, compares an established concept to another existing concept (i.e. the US presidential system). Since both the tasks are distinct, the researcher cannot achieve this without employing two different techniques to serve the purpose.

As Hutchinson and Duncan point out, conventional legal analysis is positivist *first* and then interpretivist *next*, when one looks at the meanings and uses of the statutes, events and cases and at the way they are shaped by and interpreted by people, including the researcher. The research technique for the first part of the thesis, in Chapter 4, is taken from the doctrinal model. The researcher's position as a realist bridges the gap and explains why he cannot take the positivist information at face value.

The initial positivist evidence is straightforward to locate – the statutes and the cases already exist and explored. The researcher has used the test in Chapter 4 to keep the analysis consistent and coherent to help connect the first part of the analysis with the second part to ensure that the comparison is like with like. The test embedded in the second sub-question is both positivist and interpretivist in nature. The researcher is relying on the argument that a Democratic Federal Political System or something similar (such as the political system of the USA) can correct the issues in Pakistan's political system.

Some, for example Greenberg<sup>27</sup> and Brink,<sup>28</sup> argue that legal interpretivism is an amalgam of legal positivism and natural law theory. Dworkin also sees positivism

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<sup>27</sup> Mark Greenberg, 'How Facts Make Law' (2004) 10 Legal Theory 157.

<sup>28</sup> David Brink, 'Legal Interpretation and Morality' in B Leiter (ed), *Objectivity in Law and Morals* (Cambridge University Press 2001).

and natural law theory as rules and as having a normative attribute.<sup>29</sup> However, legal interpretivism emphasises that legal interpretation is tempered by legal tradition.<sup>30</sup> The researcher's view is that factors and rules collectively form both what the law is and how it can be interpreted. Such an approach, according to Feldman, is known as the interpretive turn in jurisprudence.<sup>31</sup>

As an experienced practitioner, the researcher is familiar with the conventional doctrinal approach used in legal analysis and, therefore, brings a practice perspective to the analysis. However, this thesis is not entirely dedicated to exploring statutes and case law, therefore the approach used in chapters 3 and 4 is analogous to the doctrinal method, rather than used in its entirety.

However, the subsequent comparative law analysis needs variables which will come from the analysis in the first part of the thesis, these variables include federalism, separation of powers, checks and balances and necessity. The comparative law part of the thesis in Chapter 5 is therefore dependent upon the outcome of the first part of the thesis.

## 2.5 Techniques used in the First Part of the Thesis

This thesis analyses the problem of premature dissolution of government and proposes a solution which can address the recurrence of such episodes. The doctrinal approach is relied upon in order to examine the case law and legislation that support or have supported premature dissolution of government. As indicated above, doctrinal approach is not only about the concepts but also allows for problem-solving by incorporating both positivist and interpretivist approaches.<sup>32</sup> The test used in Chapter 4 incorporates these two main concepts alongside classic realism. Legal realism challenges the classical legal claim of law as being 'separate and autonomous from moral and political discourse'.<sup>33</sup> It is not possible to just look

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<sup>29</sup> Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

<sup>30</sup> Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157.

<sup>31</sup> Stephen Matthew Feldman, 'The New Metaphysics: The Interpretive Turn in Jurisprudence' (1991) 76 *Iowa Law Review* 661.

<sup>32</sup> Mark Van Hoecke, 'Legal Doctrine: Which method(s) for What kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart 2011) x.

<sup>33</sup> William Fisher, Morton Horwitz and Thomas Reed, *American Legal Realism* (Oxford University Press 1993) 49.



at the law in a positivist way without understanding the surrounding political context.

Chapter 2, where Pakistan's constitutional history is assessed by reference to the key factors, has divided the constitutional history into four periods, each of which involves legal systems already established by (political) authority, that is, constitutional law, in Hart's positivist sense.<sup>34</sup> These implemented legal systems are then subject to an interpretivist interpretation so as to answer the research questions.

The researcher is aware that challenging the existing political system can be of an interdisciplinary nature. Since the thesis employs two research techniques, the researcher admits that not only jurisprudential and philosophical approaches are central to the challenge but there may be some alignment of sociological and anthropological approaches too. Those two approaches are not explored in detail except where they are already incorporated in the chosen methods, for example, comparative law involves an anthropology element and legal realism involves an element of sociology.<sup>35</sup> The researcher like authors in interdisciplinary approaches (such as Vick<sup>36</sup> and Balkin<sup>37</sup>) use both philosophical and sociological standards to cover multiple disciplines.

The researcher is aware of the possibility of inappropriate shifts in focus if he tries to involve himself in too many disciplines. In Chapter 3, the researcher explores the relevant concepts (as indicated above) from philosophy and integrates them with the hypothesis of constitutional suitability and the concept of a Democratic Federal Political System as a result of his investigation into his initial hypothesis.<sup>38</sup> To draw a boundary and maintain focus, he very briefly resorts to legal instrumentalism i.e. 'the view that the law should be used as a tool to achieve social purposes and to balance competing societal interests'.<sup>39</sup> As indicated in Chapter 1 and explored in much more detail in Chapter 4, state necessity is an important feature in Pakistan's

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<sup>34</sup> HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard Law Review 593.

<sup>35</sup> Reza Banakar, *Merging Law and Sociology: Beyond the Dichotomies of Socio-Legal Research* (Galda and Wilch 2003).

<sup>36</sup> Douglas Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 Journal of Law and Society 163.

<sup>37</sup> J. B. Balkin, 'Interdisciplinarity as Colonization' (1996) 53(3) Washington and Lee Law Review 949.

<sup>38</sup> *ibid.*

<sup>39</sup> Thomas Richard Harry, *The Gathering of the Clan: An Independent Political Option for America* (iUniverse 2009) 45.



constitutional history and especially its judicial interpretation. Gardner discusses instrumentalism by reference to its extension to necessity.<sup>40</sup> He believes that 'it may seem unacceptable even to contemplate the replacement of the norms of a democracy by the acceptance of refractory conduct as being justified'.<sup>41</sup> The refractory conduct as indicated by Gardner, in the context of this thesis, is the conduct of the judges in applying the doctrine of state necessity in Pakistan. The researcher, therefore, does not fully agree with Gardner, as the constitutional history of Pakistan as critically evaluated in Chapter 3 has proved that democracy can be compromised to safeguard the unity and integrity of the state.

The researcher for the first part of his thesis applies the list of steps set out by Hutchinson and Duncan to solve a specific legal problem using the doctrinal method.<sup>42</sup> The researcher has adapted those steps into a four-step approach to conduct the research in this document. The first two steps are related to positivism and the remaining two steps to interpretivism. These steps are:

1. Reading and evaluating background material
2. Collecting relevant facts
3. Analysing the issues
4. Drawing a tentative conclusion

In the context of this project, the background material entailed a broad stream of material and there was always a potential risk of focus shifting. To stay focused the researcher's rationale for selection was confined to the material directly related to the research questions. The other important issue was the authenticity and reliability of the background material.

The scope of the background material to be considered was, therefore, limited to primary sources such as case law, and theoretical and analytic sources such as jurisprudence, philosophy and political science. The areas that came within the

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<sup>40</sup> Simon Gardner, 'Instrumentalism and Necessity' (1986) 6(3) Oxford Journal of Legal Studies 431-431.

<sup>41</sup> *ibid.*

<sup>42</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 106.

scope of the investigation were necessity, premature dissolution of legislatures, democratic federalism and the key factors chosen for analysis as discussed above.

In the doctrinal method, sources of the law are located and then the law is interpreted and analysed.<sup>43</sup> Locating the source of law is an attempt to determine an objective reality by the researcher.<sup>44</sup> The researcher is locating the objective reality of what the law is rather than what it should be.

The next step is to separate the relevant facts from the background material. In the context of this thesis, the facts are premature dissolutions in the name of necessity and self-interest.

The third step is analysis. This is carried out throughout chapters 4 and 5 leading to the fourth step i.e., the conclusion given in Chapter 6.

## **2.6 Techniques used in the Second Part of the Thesis (Comparative Law)**

Having focused in the first part of the analysis on the history and challenges facing Pakistan, the second part tends towards the future by investigating the extent to which the US template, already relied on to generate the key factors used in the first part of the analysis, could provide a solution. Here a comparative law approach was used. Comparative law is not to be confused with any branch of law, since it is a methodology and not itself a system of law but merely an approach to a legal inquiry.<sup>45</sup> Comparative law is the comparison of the different legal systems of the world.<sup>46</sup> It focuses on the similarities and differences between the laws or legal systems of two or more countries.<sup>47</sup>

In order to address the hypothesis, the key topics of comparison in this case therefore include: as a similarity, the federal nature of both countries, their colonial origin (using a structural approach) and as a difference, their culture and identity

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<sup>43</sup> *ibid* 110.

<sup>44</sup> Terry Hutchinson, *Researching and Writing in Law* (3rd edn, Reuters Thomson, 2010) 37.

<sup>45</sup> Morris L Cohen, Robert Berring and Kent Olson, *How to find the Law* (9th edn, West Publishing Co 1989) 561.

<sup>46</sup> Konrad Zweigert, Hein Kötz and Tony Weir, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 2.

<sup>47</sup> *ibid.*

and their political system including the structure of government (using a functionalist approach).

This technique should not be confused with comparative federalism. Comparative federalism comprises two main elements, i.e. a comparison of views on how governments operate their policies such as social welfare or immigration; and how case law compares from other federal systems in terms of their impact on policies and people.<sup>48</sup> Neither of these two elements are under the microscope of this project.

This research in the second part of the thesis does, however, benefit from comparative constitutionalism in 5.4. Comparative constitutional law is a concept that 'seeks to canvass ensuring answers to common constitutional questions'.<sup>49</sup> Comparative law not only determines universal principles required to understand legal systems to facilitate legal reform but also provides a logical argument to support any inference.<sup>50</sup> Methods and techniques used in comparative analysis such as the historical, empirical, functional, structural, statistical, thematic and evolutionary are borrowed from other disciplines and applied to the issues of comparative law research.<sup>51</sup> As indicated above, the researcher employs both structural and functional approaches to conduct his comparative inquiry.

Structural Approach: 'Black-letter-law-oriented' and 'rule-based' comparative research combined is a kind of comparative law approach that is structural, because it relies on statutes, case law and doctrinal output.<sup>52</sup> Data derived from the doctrinal analysis is used to identify similarities and differences from which to draw a conclusion.<sup>53</sup> This kind of comparative law methodology compares a less functional system with a 'better law' and the rationale of determining a system 'better law' is plausible, as it can be regarded as going beyond the 'common core' and thus beyond the limits of neutral comparativism.<sup>54</sup> Better law implies a determination by the evaluative criteria set by the researcher.

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<sup>48</sup> Francesco Palermo KK, *Comparative Federalism: Constitutional Arrangements and Case Law* (1st edn, Hart Publishing 2017) 1.

<sup>49</sup> R Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 117(8) *Harvard Law Review* 2570, 2573.

<sup>50</sup> Maurice Adams and Jacco Bomhoff (ed), *Practice and Theory in Comparative Law* (Cambridge University Press 2012).

<sup>51</sup> Ivan Vallier (ed), *Comparative Methods in Sociology: Essays on Trends and Applications* (University of California Press 1971) 31.

<sup>52</sup> Esin Orucu, 'Methodological Aspects of Comparative Law' (2006) 8(1) *European Journal of Law Reform* 29, 31.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

Functional Approach: A functional approach is usually applicable at the level of micro-comparison from a broader perspective.<sup>55</sup> A 'functional comparison' is the 'study of how the same thing may be brought about, the same problem may be met by one legal institution or doctrine or precept in one body of law and by another and quite different institution or doctrine or precept in another'.<sup>56</sup> A functional approach serves several goals such as: understanding law, comparing, focusing on similarities, building a system, determining the 'better law', unifying law, critical appraisal of the legal orders.<sup>57</sup> There is a variety of functional methods such as problem-solving and institutional approaches that point to the importance of the research aim and research question for choosing an appropriate comparative method.<sup>58</sup>

The problem-solving approach to comparative law used in this thesis looks at the way practical problems are dealt with in the two different countries according to their different legal systems.<sup>59</sup> This approach allows those problems to be seen independently from the doctrinal framework of each of the compared legal systems. Legal concepts and legal procedures may sometimes deviate, but still the solutions given to some problems may be similar or even identical.<sup>60</sup>

The institutional approach is a utilitarian approach to comparative law that determines points of counterpart in the two systems being compared, such as the political systems in the context of this thesis.<sup>61</sup> This is also known as having 'functional comparability' or carrying out 'functional juxtaposition' of comparable solutions.<sup>62</sup> The institutional approach looks into 'functional equivalents' at the level of solutions. For example, in this thesis it is key to consider what arrangements the US political system offers to uphold equal representation, separate the three branches of government and counter any potentiality of self-interest that can improve the problem of Pakistan.

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<sup>55</sup> Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1, 11.

<sup>56</sup> R Pound, 'What May We Expect from Comparative Law' (1936) *American Bar Association Journal* 56, 22.

<sup>57</sup> Ralf Michaels, 'The Functional Method of Comparative Law' (2006) 339-382 (2006) *The Oxford Handbook of Comparative Law* 339, 342.

<sup>58</sup> Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1, 9.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

Functional-institutional analyses are made in many different ways, on the basis of a large variety of distinctions and criteria.<sup>63</sup> All legal systems structurally have a commonality, which is linked to the definition of law as an identifiable system in any society.<sup>64</sup> It becomes easy to identify those secondary rules in a legal system and compare them as to: who has the power to make law or to change the laws, such as (independent and separated legislature);<sup>65</sup> who has the power to finally decide about the application of the law such as independent/separated judiciary; and who has to implement the law, such as separate/independent executive.

The researcher combined these approaches to conduct his comparative inquiry, as the multiplicity of approaches enriches research possibilities.<sup>66</sup> A structural approach is used to investigate similarities in the infrastructure of Pakistan and the USA in 5.1. A functional institutional approach is used in 5.2 to 5.3 to investigate the operational differences in the way the two systems are operated. A functional problem-solving approach is used in 5.5 to explore compatibility and adoption.

In order to carry out the research reported in this document, Edward Eberle's four-step process for comparative law has been used.<sup>67</sup> This approach is concise, simple, and both structural and functional.

- The skills of a comparativist
- Evaluating external law
- Evaluating internal law
- Determining comparative observations

### ***2.6.1 The Skills of a Comparativist***

The researcher is sufficiently well-informed to carry out a comparative law approach effectively for a number of reasons. First, he has a background in academic study of political systems, including that of the USA, so is able to guard against the problems of lack of deep level knowledge referred to in the initial paragraph of this

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<sup>63</sup> Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1, 12.

<sup>64</sup> *ibid* 1.

<sup>65</sup> The term independent and separated is an indication of separation of powers.

<sup>66</sup> Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1, 9.

<sup>67</sup> Edward Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 451, 457.

section. Second, he has not only studied the political system of Pakistan but is qualified to practise as a lawyer in that jurisdiction, providing a useful insider insight into not only the political system, but the functioning of the political system in that country.

There are limits to comparativism.<sup>68</sup> Usually there is a risk that the lawyer attempting the comparison lacks a deep level of knowledge of culture specific concepts in one of the jurisdictions being studied and, as a result, has a 'culture deficit'.<sup>69</sup> This limitation has already been addressed in 2.3 whilst exploring the position of the researcher as insider and outsider.

The researcher proposes a completely different political system, in order to address an on-going issue of political instability. With such a proposition, the researcher is aware of the fact that a thorough knowledge of the systems to be compared is required. It is a calculated risk that, if the two systems 'are socio-culturally and legal-culturally diverse, then more problems are likely to be encountered'.<sup>70</sup>

Through a functional-institutional approach, an institution is highlighted to a comparable equation of two objects, then the next step is to determine '[h]ow is a specific social or legal problem, encountered both in society A and society B, resolved?'<sup>71</sup> This is to be achieved through a problem-solving approach. For instance, how is the issue of democratic federalism implemented in both countries? Schmitthoff argues that, 'the fact that the problem is one and the same warrants the comparability'.<sup>72</sup> In this thesis the 'problem' Schmitthoff refers to is interpreted and used as the subject of the comparative exercise, i.e. post-colonial history and similar state structure.

With the help of the comparative law approach, the legal rules and patterns of a given polity are understood.<sup>73</sup> Whilst maintaining an impartial stance it is equally essential to understand a foreign culture, since its law really cannot be understood without this.<sup>74</sup> For example, in order to understand the US political system, it is

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<sup>68</sup> Esin Orucu, 'Methodological Aspects of Comparative Law' (2006) 8(1) *European Journal of Law Reform* 29, 40.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.* 32.

<sup>71</sup> *ibid.* 33.

<sup>72</sup> M Schmitthoff, 'The Science of Comparative Law' (1939) 7(1) *The Cambridge Law Journal* 94, 96.

<sup>73</sup> Edward Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 451.

<sup>74</sup> *ibid.* 458.

necessary to understand the influence of the Enlightenment on Republicanism on US constitutional law. This is discussed in Chapter 3.

### ***2.6.2 Evaluating External Law***

Since the object of the research is Pakistan's political system, the 'external' in this context is the US political system and the 'internal' Pakistan's.

In this step the emphasis is on external law as written or stated (positivist) and what meaning the words have within the context of the case, statute, or other legal factor (interpretivist).<sup>75</sup> In positivist terms, the political system of Pakistan is designed to function properly, but in interpretivist terms an examination of how it is interpreted shows it does not. In simpler terms, it is really an exercise of compare and contrast. The compare and contrast approach raise the following questions to be addressed in Chapter 5:<sup>76</sup>

- What is the meaning of the similarity and what provides its basis?
- How do the similarities and differences translate across legal cultures?

If the proposal was to adopt a complete US political constitution in its entirety as a reform to address the issues for the Pakistan, it would have been relevant to consider whether a transformation of the legal and political culture of Pakistan would be required. However, the hypothesis is that a Democratic Federal Political System (as defined in this thesis) might be adopted. The test shows in Chapter 5 that the US political system closely complies with the Democratic Federal Political System. Nevertheless, the legal culture is one of the attributes for comparison in Chapter 5 at 5.2.2 whilst addressing the theological factors that are a significant factor of the culture of Pakistan.

### ***2.6.3 Evaluating Internal Law***

This is an important step and comprises analysing the legal culture of the system being compared, in this case that of Pakistan.

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<sup>75</sup> ibid 460.

<sup>76</sup> ibid 460.

The key questions for this stage are:<sup>77</sup>

- What set of rules do the two political systems follow?
- How do these rules function?
- How do these rules influence and form the legal culture?
- What does the culture consist of?
- How do the elements of the culture influence the law?

These questions are answered in 5.1 to 5.4 under comparative analysis.

#### **2.6.4 Determining Comparative Observations**

According to the concept of 'contrarian challenge', the comparativist is expected to only consider differences and ignore the similarities.<sup>78</sup> However, without grounds of similarity, any analysis of comparison is futile, for example, without the USA and Pakistan having a similar state structure, the application of the proposed system to the latter would not be practicable or convincing. The researcher is therefore more inclined to agree with Schmitthoff, according to whom similarities are the main focus of comparability.<sup>79</sup>

This step assembles all the discoveries and draws a realistic conclusion. The focus in this step is on the key points. The questions below are answered taking into consideration similarities and differences in the legal systems.<sup>80</sup>

The approach to comparative analysis in Chapter 5 is, as explained above, both structural and functional and involves answering the questions raised in the preceding paragraphs. However, as there is a large number of such questions, in order to make them practically useful, they have been merged and summarised as:

***What is the basis and the meaning of the similarity and differences and how do these translate across legal cultures?***

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<sup>77</sup> *ibid* 461.

<sup>78</sup> Pierre Legrand, 'How to Compare Now' (1996) 16(2) *Legal Studies* 232, 242.

<sup>79</sup> M Schmitthoff, 'The Science of Comparative Law' (1939) 7(1) *The Cambridge Law Journal* 94, 96.

<sup>80</sup> Edward Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 464.



According to the researcher's position and in line with Schmitthoff, points of commonalities between two states are required to conduct a thorough and useful comparative analysis of the presence or absence of the key democratic federal factors and their application in the political systems of Pakistan and the USA. The investigation in this thesis has narrowed down the key points of similarities as the structure (state/government) of both countries.

In this question, the 'basis' refers to the rationale for the researcher's selection of the key points for comparison, which is the pragmatic implementation of the proposed political system, since a political system operates in a state and by extension in a government. It is therefore important to conduct a structural comparative analysis between the state and government structure of both countries. The 'meaning' in this question refers to the parameters of comparison of key points between the comparing countries. The outcome of the first stage analysis defined and set the parameters for the comparative analysis, i.e. the key factors of democratic federalism. The similarity in state structure shown in Chapter 5 reveals the implied presence of, or tendency towards, these key factors. The study of similarity or difference is therefore important for both states in terms of their origin, how they evolved, how, why and if they adopted these key factors.

***What set of rules do the both constitutions follow, their function, effectiveness and rationale?***

In Chapter 2, the constitutional history of Pakistan is divided into four phases and tested against the key factors drawn in part from the US template. The results of this test reveals whether the political systems it applied to were suitable systems according to the hypothesis of constitutional suitability.

***How do these rules influence the legal culture or law (if they do)?***

This question is explored in Chapter 4, that is, whether Pakistan's legal culture is influenced by any recognised and effective set of rules. There also appears to be occurrence of problematic practices such as varied actions of the judiciary, military rulers and politicians.

In the case of the USA, explored further in Chapter 5, there are rules that played an important role in restructuring the country's political system, for example, by moving from a unicameral to a bicameral legislature and from indirect election of

the upper house to a direct one. Likewise, the separation of powers and checks and balances that are one of the key factors are enshrined in the country's constitution.<sup>81</sup>

***Can the key factors now be understood better? Is there something in the external law that can benefit or lead to improvement?***

The key factors are explored in Chapter 4 through a philosophical and jurisprudential lens, where their application, practical framework and implementation are recognised. Conclusions are drawn in Chapter 6.

In the next chapter these key factors are thoroughly explored to lay the foundation for the further investigation in subsequent chapters.

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<sup>81</sup> The earlier government of the USA (1781 – 1787) was a unicameral body, Steven S. Smith, Jason M. Roberts, Ryan J. Vander Wielen, *The American Congress* (4th edn, Cambridge University Press 2006). The unicameral congress was replaced with a bicameral congress in 1787, William E. Nelson, 'Constitutional History' 1966 Annual Survey of American Law 687. In the bicameral institution, through the Connecticut Compromise, the Senate was to be directly elected.

### 3. Literature Review

This chapter discusses key concepts that are relevant to the analysis in the thesis as a whole. The first of these is federalism, because the key factor of equal representation (in the sense used in this thesis) derived from the US political system stems from federalism. The chapter then moves on to discuss the key factors that are selected for the analysis in Chapter 3. It then discusses the doctrine of state necessity which forms a significant part of the analysis in Chapter 3, and finally, concludes with a discussion of the concept of state structure to lay the foundation for the structural comparative analysis in Chapter 5.

#### 3.1 Federalism

The test employed in the first part of this thesis is, however, not one of federalism alone but one of democratic federalism. Democracy is a wide term which advocates *rule of the majority* or *one man one vote*. The researcher argues that in a federal arrangement this rule of majority manifests in a two dimensional paradigm. The first dimension is the rule of the majority relating to people of the entire polity (i.e. a democratic concept) and the second dimension relates to its federal character, i.e., the same people but classified as a sub unit or federating unit. Federalism and democracy therefore go side by side in a balanced manner in a democratic federal state. In this two-dimensional paradigm, in the first dimension, units with a larger population take advantage and in the second dimension the advantage of the first dimension is balanced by equal seat allocation of units regardless of their size or population. If this equation is not balanced, the disparity of representation discussed at 3.2 is a likely result.

Consequently, the concept of federalism is significant for this thesis as the key factor of "equal representation" in the sense described below is a specifically federal concept.

Federalism is an agreement to form a union providing for distribution of political powers on the territorial basis under some kind of charter, compromise or

constitution.<sup>82</sup> In federalism, the powers and functions of the government are divided by a constitution between the central government and its federating units.<sup>83</sup> Sovereignty in a federal system is surrendered by the federating units to form a common sovereignty which can then be shared by them equally.<sup>84</sup> An important feature that differentiates federalism from other arrangements is the preservation of the identity of people and the autonomy of the federating units. Livingstone notes that a federal government is a form of political and constitutional organisation that unites into a single polity a number of diversified groups or components of politics, so that the personality and individuality of the components are legally preserved, while created, in the new totality, as separate and distinct political constitutional units.<sup>85</sup>

Several semi-autonomous federating units were united for a common purpose, i.e. to acquire independence from British colonial rule.<sup>86</sup> The circumstances behind forming the federations of the USA and of Pakistan are set out in detail in Chapter 4. In this section therefore, it is important to explore the philosophical reasoning behind the concept of federalism. It is argued that there are certain implied conditions that have to be met before forming a federation, the most important of which is the willingness to form a community. This spirit of community, as Dicey puts it, could be produced when these federating units have points of commonality amongst them.<sup>87</sup> Alongside such commonality, the federal system must be designed in a way that the forming units can retain their individual regional identity and exercise some autonomy to shield the union from becoming a unitary state. According to Dicey, a federation is:

'a body of countries so closely connected by history, by race, or the like, as to be capable of bearing in the eyes of their inhabitants an impression of common nationality, a very peculiar state of sentiments

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<sup>82</sup> Carl J Friedrich, 'Constitutional Government and Democracy: Theory and Practice in Europe and America' (1941) *World Constitutions Illustrated* 187.

<sup>83</sup> Roger Hilsman, *To Govern America* (Harry & Row 1979) 52.

<sup>84</sup> James Q Wilson Jr et al, 'The American System' in *American Government: Institutions and Policies* (Wadsworth 2013) 58

<sup>85</sup> William S Livingstone, 'A Note on the Nature of Federalism' (1952) 67(1) *Political Science Quarterly* 81, 83.

<sup>86</sup> For example, the USA, India and Pakistan.

<sup>87</sup> Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E. Michener ed, 6th edn, Macmillan & Co 2005) 144.

among the inhabitants of countries which it purposes to unite. They must desire union and must not desire unity'.<sup>88</sup>

In situations where there are wide differences among the individuals in terms of, for example, their political identity, culture, religion, or language, the unitary system becomes less effective. According to Ebenstein, federalism is the best option for states with large territories and cultural diversities.<sup>89</sup> It is reasonable to assume therefore that a federal arrangement is the best possible model for a newly forming country (with diverse federating units) to adopt, especially in situations where a unitary system cannot be embraced.

In the case of Pakistan, there are five completely different ethnicities who all have completely different traditions, habitat, culture and language.<sup>90</sup> The issue of disparity in Pakistan remains unaddressed and present in its political. Pakistan has always been a polity of multiple geographic, economic and demographic variations. Khalid observes attributes such as multiple geographic, economic and demographic variations in Pakistan.<sup>91</sup> Khalid rightly suggests that such attributes require special governance, for which her solution is a federal system.<sup>92</sup> She observes that federalism is a delicate compromise between unity and autonomy that requires political maturity.<sup>93</sup> She proposes equal representation of federating units in a federation where they surrender only a partial sovereignty and keep control of their local affairs.<sup>94</sup> She claims that in the absence of equal representation, a successful federation can never operate, and maintains her argument by referring to the dominance of Prussia in the downfall of the German Empire and relating it to the secession of East Pakistan in 1971.<sup>95</sup>

Khalid may, however, have weakened her position by relying on Dicey's view since he supported parliamentary sovereignty,<sup>96</sup> which is to be contrasted with the doctrine of separation of powers, one of the factors in a democratic federal state.

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<sup>88</sup> Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E. Michener ed, 6th edn, Macmillan & Co 2005) 101.

<sup>89</sup> William Ebenstein et al, *American Democracy in World Perspective* (Harper & Row 1970) 60.

<sup>90</sup> From the researcher's personal knowledge: Pashtuns, Baloch, Sindhis, Bengalis and Punjabis.

<sup>91</sup> Iram Khalid, 'Politics of Federalism in Pakistan: Problems and Prospects' (2013) 28(1) *A Research Journal of South Asian Studies* 199 199

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.* 200.

<sup>95</sup> *ibid.*

<sup>96</sup> Parliamentary sovereignty, parliamentary supremacy or legislative supremacy is a concept that the legislature has absolute sovereignty over all other institutions (executive or judiciary).

Nevertheless, her notion of Pakistan (being a federation) operating as a unitary system leads the researcher to deduce that Pakistan in principle fulfils the factors of democratic federalism in its structure but is operating a political system that is not a suitable one. Khalid rightly observes, therefore, that political instability in Pakistan is the result of a discrepancy between the theory and practice of the federal arrangements in the political system.<sup>97</sup>

### 3.2 Equal Representation

In the context of this thesis, equal representation derives from a federal, rather than a democratic discourse. The concept of two dimensional representation in this thesis (as indicated in 3.1) connotes representation of people in a federation and representation of federating units in a state. In the first dimension as Locke agrees that there is an anthropological feature, which relates to the equality of individuals and their tendency to be recognised as free and equal.<sup>98</sup> In Hobbes's state of nature, he proposes that individuals should create an authority (a sovereign) who can enforce laws for their good.<sup>99</sup> Locke shares Hobbes's views but with a slight deviation as he proposes an established government instead of a sovereign.<sup>100</sup>

Montesquieu, on the other hand, believes that the people are sovereign and should govern through chosen representatives.<sup>101</sup> The common point in the theories of these Enlightenment philosophers is that it is for the individuals to create or choose a body (sovereign or government) to govern them and/or enforce laws for their good. This raises a question whether one particular subgroup of individuals can choose a body for the rest of the group. This question is relevant since this practice is observed in Pakistan where, as described in Chapter 4, one group of people such as the electors of Punjab can form a government for the rest of the state. This question of unbalanced and one dimensional representation is addressed by Rousseau to some extent, as he believes that a state can be legitimate only if it is guided by the general will of its members.<sup>102</sup> Rousseau's views can be seen as indicative of

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<sup>97</sup> Iram Khalid, 'Politics of Federalism in Pakistan: Problems and Prospects' (2013) 28(1) A Research Journal of South Asian Studies 199.

<sup>98</sup> John Locke, *Second Treatise of Government* (Peter Laslett ed, 2nd edn, Cambridge University Press 1967).

<sup>99</sup> Thomas Hobbes, *Leviathan, with selected variants from the Latin edition of 1668* (Edwin Curley ed, Hackett 1994) 26.

<sup>100</sup> *ibid.*

<sup>101</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989).

<sup>102</sup> Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts tr, Oxford University Press 1994).

employing second dimension but explicit like Montesquieu (discussed later in this section). Rousseau's views are slightly different from some of the other Enlightenment philosophers insofar as the tenure of that representation is concerned.<sup>103</sup> However, in any case, the majority of the Enlightenment philosophers advocated the concept of equal representation.

It is argued that sovereignty is equivocal under the constitutional law of Pakistan, since there is a theological element to it as clearly stated in the Objectives Resolution described in 4.2, which serves as the preamble to the current constitution. It asserts that sovereignty belongs to God and is delegated to the people to execute it as a sacred trust.<sup>104</sup> The first Prime Minister Khan's views about representation are aligned with those of Montesquieu as Khan stated in his third postulate of the Objectives Resolution that '[t]he state shall exercise its powers and authority through the chosen representatives of the people'.<sup>105</sup>

The Objectives Resolution is a generic document and does not allude to a particular political system and/or type of legislature (i.e. unicameral or bicameral). It is important to note, therefore, in the context of the hypothesis tested in this thesis, that a democratic federal political system is not necessarily inconsistent with the Objectives Resolution.

To the researcher, it makes logical sense to have two dimensional representation in the form of two houses in the legislature of a federal state, one to represent the population and the other to represent the federating unit. Without such two dimensional representation, a disparity in representation is caused which ultimately compromises equal representation in a federal discourse. Equal representation in both dimensions is important as in this way the autonomy of the federating units is preserved. The latter is an implied stipulation of the federal units before becoming a part of the union: after all federalism is about division of powers between the centre and units. It is the responsibility of the state to serve its federating units equally.<sup>106</sup> Failing that, there is always a potential risk of resistance

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<sup>103</sup> Armando Navarro, *The Cristal Experiment: A Chicano Struggle for Community Control* (University of Wisconsin Press 1998) 9.

<sup>104</sup> The Constitution of Pakistan 1973, Preamble.

<sup>105</sup> *ibid.*

<sup>106</sup> John Locke, *Second Treatise of Government* (Peter Laslett ed, 2nd edn, Cambridge University Press 1967).



under the cloak of necessity and governments as a result can be, and are, overthrown in Pakistan.

It is argued that disparity of representation also leads to secession attempts. This assertion is substantiated by the following examples:

- In Pakistan, the Sindhudesh movement for the creation of an independent Sindhi state, first emerged in 1972 under the leadership of G M Syed.<sup>107</sup> In March 2012 hundreds of thousands of people gathered to demand independence.<sup>108</sup>
- Also in Pakistan, Baluchistan may be on the verge of secession as it 'poses what is widely seen as a near East Pakistan like threat'.<sup>109</sup>
- The Scottish secession attempt of 2014, where some Scottish people demanded full decision-making power in regard to the political affairs of their nation. In the words of Alex Salmond 'the people who live in Scotland are best placed to make the decisions that affect Scotland'.<sup>110</sup>

Pakistan faces the problem of disparity of representation of the provinces as an established fact, as discussed in 4.3 in more detail. One province alone – Punjab, hence the concerns of the groups in the first two bullet points above - can form a government in the lower house. This is due to its large population and ultimately the seat allocation reflects the unbalanced nature of this majority population in a single province. This might not have been such a huge issue had the upper house been directly elected. The problem is due to the indirect election of the upper house by the provincial assemblies.

Montesquieu in addition to the first dimension of representation also envisaged about the second dimension as he argued that the legislature should be composed of two houses, each of which can prevent acts of the other from becoming law.<sup>111</sup> The checks and balances are therefore not only associated with the separation of

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<sup>107</sup> Farhan Siddiqi, *The Politics of Ethnicity in Pakistan: The Baloch, Sindhi and Mohajir Ethnic Movements* (Routledge 2012) 88.

<sup>108</sup> Zeeshan Azmat, 'JST demands Sindh's independence from Punjab's 'occupation' *The News* (Karachi, 19 March 2012).

<sup>109</sup> Malik Akbar, *The Redefined Dimensions of Baloch Nationalist Movement* (Xlibris 2011) 173. As described in 4.3.1, East Pakistan seceded to form Bangladesh.

<sup>110</sup> Brian Currie, 'Scotland's future will be in Scotland's hands' *Herald Scotland* (25 May 2012).

<sup>111</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989) 204.



powers discussed in the next section but also between both houses of a bicameral legislature. These checks and balances ultimately protect the smaller states against the larger states, ensuring equal representation or, in other words, the integrity of the federation. The concept of a bicameral legislature is effective in almost all the federations in the world, however, in some countries such as the UK, the upper house serves a different purpose and is not the bicameral legislature envisaged by this thesis or by Montesquieu.

The USA has been through this phase of disparity, which is explored in much more detail in Chapter 5 but can be summarised here as being the result of the earlier governments of the USA being unicameral bodies. This issue was addressed in the revised constitution which provided for a bicameral congress,<sup>112</sup> and through the Connecticut Compromise, whereby members for the upper house were also to be directly elected by the people of that federating unit.<sup>113</sup> The USA therefore incorporated the system of equal representation, a feature that is, as shown in Chapter 5, missing in Pakistan's political system.

The researcher agrees with Montesquieu that the legislature should comprise two houses, because each of these houses can prevent inappropriate acts of the other. Montesquieu argues for confederal merger of small and large states within a country equally.<sup>114</sup> The merger provides advantages to smaller states such as democratic participation and security against abuse of power.<sup>115</sup>

### 3.3 Doctrine of Separation of Powers

The doctrine of separation of powers is a key factor of a democratic federal system in the sense proposed in this thesis, because it ensures power is equally distributed within a state, which in turn pre-empts the abuse of power and maintains democracy.

The separation of powers is useful for any state but especially plays a vital role in a democratic federal arrangement. Separation of powers is a doctrine advocated by Montesquieu, who supported the idea of separate government branches that would

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<sup>112</sup> William E. Nelson, 'Constitutional History' 1966 Annual Survey of American Law 687.

<sup>113</sup> Steven S. Smith, Jason M. Roberts, Ryan J. Vander Wielen, *The American Congress* (4th edn, Cambridge University Press 2006).

<sup>114</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989) 157.

<sup>115</sup> *ibid.*

check and be independent of each other to prevent abuse of power.<sup>116</sup> In Montesquieu's original doctrine of separation of powers there are essentially two branches of government i.e., the executive and the legislature.<sup>117</sup> The third branch, the judicature, according to Montesquieu, is invisible as judicial power rests with the jury.<sup>118</sup>

According to Montesquieu, a government must have certain features to provide its citizens with the greatest possible liberty.<sup>119</sup> People invested with power are likely to abuse it and it is therefore important to define boundaries.<sup>120</sup> Separation of the executive, legislative and judicial powers of government can prevent the abuse of powers. Different bodies exercising these powers can check the others if they try to abuse their powers.

Locke also claims that legitimate government is based on the idea of separation of powers.<sup>121</sup> He does not mention judicial power as a separate power and says that the legislative is supreme over the executive.<sup>122</sup>

If Locke's formulation of separation of powers is compared to the ideas of Montesquieu, they do not appear very different. Montesquieu also reaffirms the superiority of the legislative power and describes the executive power as having to do with international affairs and the judicial power as concerned with the domestic execution of the laws.<sup>123</sup> One aspect of Locke's theory of separation of powers is that it does not preclude unelected officials from having some of the legislative power.<sup>124</sup> The researcher believes that it is important in a federation to have elected members in the upper house so that they can best protect the interest of their federating unit. Locke's theory is more relevant to the British constitutional system where, unlike the US Senate, the upper house is composed of unelected members. Locke's theory

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<sup>116</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989).

<sup>117</sup> Pierre Manent, 'Modern democracy as a system of separations' (2003) 14(1) *Journal of Democracy* 114.

<sup>118</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989) 157.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid* 162.

<sup>121</sup> John Locke, *Second Treatise of Government* (Peter Laslett ed, 2nd edn, Cambridge University Press 1967) 71.

<sup>122</sup> *ibid.*

<sup>123</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989) 157.

<sup>124</sup> John Locke, *Works*, 10 vols. London, 1689, *Two Treatises of Government*, P. Laslett (ed) (Cambridge: Cambridge University Press, 1988) 149.

is therefore less functional when it comes to equal representation in a bicameral legislature in the sense discussed in this thesis.

Montesquieu's separation of powers greatly influenced the framers of the constitution of the United States of America, the comparator jurisdiction in the comparative analysis in Chapter 5.<sup>125</sup> In September 1787, when the US Constitution defined the new government, it resolved the differences among the federating units on the issue of equal representation by adopting a bicameral legislature.<sup>126</sup> The Constitution provides for a government composed of three branches: the legislative, executive, and judicial. Each is given certain powers over the others to ensure that there are appropriate checks and balances.<sup>127</sup>

The Constitution balances the authority of the states and the federal government and collectively the federal government being divided into three branches safeguards the nation by ensuring that no one gains too much control.<sup>128</sup>

Each branch of government can change acts of the other branches. Below are the examples from the US model, which are explained in more detail in Chapter 5, but briefly highlighted here as:

- The president's power to veto laws passed by Congress and vice versa.
- The president's power to appoint Supreme Court judges.
- Congress has the power to ratify appointments made by presidents.
- Congress has the power to impeach the president, for example three presidents have been tried historically, nevertheless, none of the presidents has ever been impeached.
- The Supreme Court can nullify unconstitutional laws.

Unlike the USA, judicial power in the sub-continent, along with other powers, was all vested in the executive (Sultan), i.e. the monarch until 1858, when, as described

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<sup>125</sup> Facts On File Library of American History, 'Montesquieu, Charles-Louis de Secondat, Baron de La Brède et de' in Michael A Genovese (ed), *Encyclopedia of the American Presidency* (Revised edn, Infobase 2010) 348.

<sup>126</sup> Hastings Lyon, *The Constitution and the Men Who Made It: The Story of the Constitutional Convention* (The Riverside Press Cambridge 1936) 94.

<sup>127</sup> William E. Nelson, 'Constitutional History' 1966 Annual Survey of American Law.

<sup>128</sup> *ibid.*

in Chapter 3, the British took over from the Mughals.<sup>129</sup> To govern and effectively rule this new colony, the British parliament passed some items of legislation such as the Government of India Act 1858, the Government of India Council Act 1861, the Minto-Morley Reforms of 1909, the Government of India Act 1919 and finally the Government of India Act 1935.<sup>130</sup>

Discussed in more detail in Chapter 4, In the early constitutional history of Pakistan, the Governor General (or later the President), enjoyed enormous powers.<sup>131</sup> He, as an executive head, had the power to appoint the prime minister, the federal ministers, the heads of the armed forces, the governors of the provinces and the judges of the higher judiciary.<sup>132</sup>

Discussion in Chapter 4 and then Chapter 6 will show that the unbalanced distribution of powers between the three branches has caused instances of political instability in Pakistan, which has not only diminished the growth of democracy in the country but also caused one successful and several attempted secessions. These secession attempts are explored further in detail in Chapter 4.

In the next section, the doctrine of state necessity is discussed. For the purpose of this thesis, it is particularly important to understand the concept of equal representation in terms of its relationship with this doctrine in the Pakistani context.

### 3.4 Doctrine of State Necessity

The discussion of state necessity is important for this thesis. As shown in Chapter 4, the judicial recourse to the doctrine of necessity in Pakistan appears to be at the apex of a pyramid and the factors leading to it are what appears to be the missing key factors of democratic federalism.

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<sup>129</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (OUP, 2004) 3.

<sup>130</sup> *ibid.* The most important piece of legislation of all of these, for the purposes of this thesis, was the 1935 Act which can be construed as an evolution of previous Acts. It was also in place at the time of the creation of Pakistan and so served as the constitutional instrument in the pre-constitutional era. According to the 1935 Act, the executive enjoyed extraordinary legislative and executive powers, including the power to dismiss the prime minister.

<sup>131</sup> Sultana Tasneem, 'Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan' (2012) 28(2) *Journal of European Studies* 55.

<sup>132</sup> *ibid.*

Necessity is a common law doctrine that provides a justification for otherwise illegal government actions during an emergency.<sup>133</sup> It therefore bridges the gap between what the law allows the government to do and the government's actual response to an emergency: 'It has no relevance where emergency state[s] action is taken pursuant to specific statutory or constitutional [authorisation]'.<sup>134</sup>

According to Schmitt, a state of exception is similar to a state of emergency (necessity) but based in the sovereign's ability to transcend the rule of law in the name of the public good. Schmitt argues that no legal factor such as a political system or constitution can govern an extreme case of emergency or state of exception.<sup>135</sup> According to Schmitt, legal factors cannot be applied to chaos, they require a 'homogeneous medium'.<sup>136</sup> In an emergency, the application of the laws through the usual administrative and judicial channels leads to chaotic consequences.<sup>137</sup>

In the light of Schmitt's assertion, the sovereign in the case of Pakistan would be the person or institution that invokes necessity, and therefore the state of exception is the same, in practice, as a circumstance in which a state of necessity determination is justified.

According to Schmitt, the issue is whether it is possible to establish legal conditions for declaring a state of emergency along with constraints.<sup>138</sup> If the decision of declaring an emergency is not subject to any legal constraint it becomes discretionary.<sup>139</sup> Therefore if the judges in Pakistan will always endorse the actions of the politicians or the military, it in effect creates discretionary power in the Pakistani judiciary, in the absence of the factors such as separation of powers discussed further in Chapter 4.

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<sup>133</sup> *Manby v. Scott*, 1 Lev. 4 (1672), 'the law for necessity dispenses with things which otherwise are not lawful to be done. . . ' in Mark M. Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983) 16(2) Cornell International Law Journal 341.

<sup>134</sup> Mark M. Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983) 16(2) Cornell International Law Journal 341.

<sup>135</sup> Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (G Schwab tr, University of Chicago Press 2005) 11.

<sup>136</sup> *ibid* 13.

<sup>137</sup> *ibid*.

<sup>138</sup> Lars Vinx, 'Carl Schmitt' (2014) The Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/win2014/entries/schmitt>> accessed 24 October 2018.

<sup>139</sup> Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (G Schwab tr, University of Chicago Press 2005) 13.

Schmitt believes it to be impossible to anticipate the nature of future emergencies and predict a solution. In his view it is not important to have a law in place that determines who can take a decision in the state of exception: <sup>140</sup> 'There can be a 'sovereign authority, even where such an authority is not recognized by constitutional law'.<sup>141</sup>

The quotation above seems to suggest a highly realist or cynical analysis in that it depends who has the greatest power (possibly the military). All that matters is whether there exists a person or institution (i.e. a sovereign) with the ability to take a decision on the exception. The sovereign's act of suspending the law does not require legal recognition since 'the law's applicability itself depends on a situation of normality secured by the sovereign'.<sup>142</sup> This situation, when seen through the lens of the constitutional history of Pakistan, leaves the country in an untenable position. In theory the armed forces of Pakistan are subordinate to the government, but history has proved otherwise, for example, in the case of the three military regimes described in Chapter 4.

Schmitt believes that the act of emergency must be supported by a sufficiently large and powerful constituency, otherwise such acts could hardly possess the factual capability to suspend the law and to act successfully against the perceived emergency.<sup>143</sup> Most of the time, dictators in Pakistan have initially ratified their act of dissolution through the judiciary in the name of necessity,<sup>144</sup> then formed a government with a sufficiently large and powerful constituency,<sup>145</sup> albeit one which is un-representative of the country as a whole and in particular, certain provinces that have only a minority of the population.

The Latin maxim *necessitas legem non habet* (i.e. 'necessity has no law') used in the cases mentioned in Chapter 4 was interpreted by Giorgio Agamben in setting out his theory of state of exception in two different ways, i.e. 'necessity does not recognize any law' and 'necessity creates its own law' (*nécessité fait loi*).<sup>146</sup> He argues

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<sup>140</sup> *ibid* 5.

<sup>141</sup> Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (G Schwab tr, University of Chicago Press 2005) 12.

<sup>142</sup> *ibid*.

<sup>143</sup> *ibid* 5.

<sup>144</sup> For example in the *Nusrat Bhutto* case [1977] PLD [1977] SC 657 and *Syed Zafar Ali Shah* case [2000] PLD [2000] SC 869,

<sup>145</sup> For example, Zia's PML (now PMLN) and Musharraf's PMLQ.

<sup>146</sup> Giorgio Agamben, 'Chapter 1: The State of Exception as a Paradigm of Government' in *State of Exception* (Kevin Attell (tr), Chicago: University of Chicago Press 2005) 24.

that the state of exception, which was meant to be a provisional measure, has become a normal practice of government in the twentieth century.<sup>147</sup>

Agamben traced the evolution of the state of exception at least in part to the views of Carl Schmitt. The state of exception depends, he argued, on a conception of necessity, usually the survival of the state.<sup>148</sup> It stems, he concluded, from the Roman law of *iustitium*, where the suspension of law was legitimate during times of necessity.<sup>149</sup>

The state of exception is, therefore, the enhancement of the executive power to have the force of law. The separation of powers no longer limits the executive branch. Separation of powers is one of the key factors of a democratic federal state and when it is compromised due to a state of exception, the situation is paradoxical, because state of exception, it is argued is created due to factors being either missing or operating in a diminished form. Although there has never been any separation of powers in the constitutional history of Pakistan, nevertheless, the executive has had authority over the other two branches by dissolving one (i.e. the legislature) and obtaining support from the other (i.e. the judiciary). In the case of a military coup, the military dictator is *de-facto* the executive branch. Agamben observes that the continuous application of the state of exception will eventually lead to a (global) civil war.<sup>150</sup> The relevance of this phenomenon to this thesis is that when a state of exception is created in Pakistan, those in power try to pre-empt any potential civil war, secession or outbreak by invoking necessity in a way which justifies premature dissolution of government as demonstrated in Chapter 4.

Another key writer relevant to the discussion of state necessity is Stanley de Smith. Although de Smith's version of necessity does not correspond to the state of exception mentioned by Schmitt and Agamben, the views of de Smith are important as his ideas were relied on by the judiciary in Pakistan in the *Asma Jilani* case discussed at 4.3. De Smith also commented on CJ Munir's decision that there was not a situation of necessity in 1955 in the *Maulvi Tamizuddin* case, also discussed at 4.3, which was the first time necessity was ever used to justify an act of dissolution of the legislature in Pakistan. The act of dissolution of the constituent

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<sup>147</sup> *ibid.*

<sup>148</sup> *ibid* 30.

<sup>149</sup> *ibid* 41.

<sup>150</sup> *ibid* 87.



assembly by the Governor General was not seen by de Smith as an instance of necessity, it was mainly related to self-interest as the Governor General objected to the constitution the Assembly was about to pass.<sup>151</sup>

De Smith observed that state necessity had been accepted by the Pakistani judiciary as a legal justification for unconstitutional actions 'to fill a vacuum'.<sup>152</sup> He did not, however set out any criteria to identify what unconstitutional actions are. Article 6 of the 1973 constitution lists unconstitutional acts and their punishments, but in spite of their presence General Zia and General Musharraf were, as explained at 4.3, granted immunity from those repercussions.<sup>153</sup>

De Smith believed necessity is an 'implied exception to the letter of the constitution'.<sup>154</sup> Again he gives no rationale for, or limitation of, the state of exception (necessity). Nevertheless, de Smith is, it is argued, justified in asserting that in order to carry out an action arising out of necessity, an implied exception requires implied powers. In other words, and arguably, the constitution of Pakistan, like that of the USA, also carries implied powers in the form of implied exceptions. De Smith's position is contrary to that of Schmitt, who appeared to think that a legal framework justifying an exception to itself could not exist.

Virk believes that it was not appropriate to justify any of the acts of dissolution that have occurred in Pakistan on the basis of state necessity.<sup>155</sup> On the basis of the argument set out above, however, it is suggested that, on the contrary, some element of justifiable reliance on the doctrine of necessity is identifiable in each of the acts of dissolution. Those elements of necessity included, for example, in the *Nusrat Bhutto* and *Musharraf* cases discussed in 4.3, serious political crises leading to a breakdown of the constitutional machinery and risk of dissension among the armed forces threatening the integrity and sovereignty of the country respectively.

The final section of the literature review is about state structure, which is the basis of the structural comparative analysis in Chapter 5.

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<sup>151</sup> Leslie Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity' (1979) 1(4) Third World Quarterly 98.

<sup>152</sup> *ibid.*

<sup>153</sup> Zia and Musharraf were both cleared by the judiciary and their acts justified in the name of necessity.

<sup>154</sup> Stanley A. De Smith, *Constitutional and Administrative Law* (Penguin 1986) 80.

<sup>155</sup> *ibid* Muhammad Virk, 'Doctrine of Necessity-Application in Pakistan- Cases of Immense Importance - A Critical Review' (2012) International J. Soc. Sci. & Education 2(2).



### 3.5 State Structure

The concept of state structure is significant because it serves as a variable of commonality for comparative analysis. The working hypothesis, as described in 2.2 above, is that the USA and Pakistan have similarity in their state structure, yet they adopted different political systems. For the purposes of this thesis, 'state structure' refers to the composition and origin of a country. According to Montesquieu, a 'confederate republic' with separation of powers allows equality and identity within or between small member units which serve as checks on each other.<sup>156</sup>

Hume does not agree with Montesquieu's suggested advantages of smaller states. He recommends a federal arrangement for deliberation of laws involving both member unit and central legislatures, whereby member units enjoy several powers and participate in central decisions, but their laws and court judgments can always be overruled by the central bodies.<sup>157</sup> However, in order to safeguard the unity of the state, it is argued that the (federal) state should have priority above the individual units. This argument is supported by Hume's contention that central government should have powers to overrule the laws and judgments of units.<sup>158</sup>

It is worth mentioning in this section that in 1869, a secession attempt during the civil war by Texas was invalidated by the Supreme Court of the USA in the famous case of *Texas v White*.<sup>159</sup> In this judgment the Supreme Court declared that the United States was 'an indestructible Union, composed of indestructible states'.<sup>160</sup> The opinion of the Chief Justice in *Texas v White* has been 'widely accepted as being the final word on the issue of the legality of secession from the perspective of US constitutional law'.<sup>161</sup>

In *Texas v White*, the Court seems to have categorically blocked the prospect of secession in a way that has not been the case in Pakistan. The reasons why this has been the case in the USA and not in Pakistan are explored further in Chapter 5. It is however worth noting the consequences of unlimited overruling powers of

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<sup>156</sup> *ibid.*

<sup>157</sup> David Hume, *Essays : Moral, Political, and Literary* (Eugene F Miller ed, 2nd edn, Liberty Fund Inc. 1985).

<sup>158</sup> *ibid.*

<sup>159</sup> *Texas v White*, 74 US 700 (1869).

<sup>160</sup> *ibid.* 725.

<sup>161</sup> Peter Radan, 'An Indestructible Union... of Indestructible States: The Supreme Court of the United States and Secession' (2006) 10 *Legal History* 187.

the federal government against individual federating units as a potential danger to the entire concept of equal representation of the provinces.

The early US anti-federalists such as Patrick Henry, Richard Henry Lee and Samuel Adams were highly concerned about the unlimited powers that the federal government could exercise.<sup>162</sup> Their concerns give rise to the introduction of the US Bill of Rights ratified in 1791.<sup>163</sup> The Bill of Rights in the first ten amendments guarantees a number of freedoms, limits the government's powers and reserves some powers to the states and the people.<sup>164</sup>

The authors of *The Federalist Papers*, James Madison and Alexander Hamilton agreed with Hume that the risk of potential tyranny by 'passionate majorities' was reduced in larger republics where member units of shared interest would check each other.<sup>165</sup> Madison and Hamilton were concerned to address issues of undue centralization and their solution was the appropriate composition of the central authority.<sup>166</sup>

The philosophical discussions concerning federalism and form of government set out above have addressed several issues such as the reasons and need for federalism, equal representation, the legitimate division of powers between member units and the centre and the systems of checks and balances. In order to understand how the founding fathers of the USA addressed these issues and incorporated federalism, a further exploration is carried out at 5.1.1.

The next chapter explores the evolution of the constitution of Pakistan within its historical context, the instances of irregular regime change and the unusual recourse to the doctrine of necessity to justify it.

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<sup>162</sup> Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxford University Press 2006) 15.

<sup>163</sup> *ibid.*

<sup>164</sup> The Charters of Freedom. 'Constitution of the United States' <<http://www.archives.gov/exhibits/charters/constitution.html>> accessed on 25 October 2018.

<sup>165</sup> Yale Law School Lillian Goldman Law Library. 'The Federalist Papers : No. 10' (2008) <[http://avalon.law.yale.edu/18th\\_century/fed10.asp](http://avalon.law.yale.edu/18th_century/fed10.asp)> accessed on 25 October 2018.

<sup>166</sup> Yale Law School Lillian Goldman Law Library. 'The Federalist Papers: No. 31' <[http://avalon.law.yale.edu/18th\\_century/fed31.asp](http://avalon.law.yale.edu/18th_century/fed31.asp)> accessed on 25 October 2018.

## 4. Constitutional, Historical and Political Background

In order to understand the more analytical sections of the thesis in 4.3 and chapter 5, it is necessary first to include an overview of the key constitutional, historical and political events to which they refer.

Constitutional law and its practice in Pakistan have evolved over a period of decades, during the course of which there has been a background of ongoing political instability for many reasons. However, so as to retain the focus on the research questions of this thesis, this section discusses only the extent to which this evolution demonstrates, or fails to demonstrate, the key factors of equal representation and separation of powers which are amongst those chosen for the purposes of subsequent analysis over that period.

Pakistan is a federal parliamentary republic,<sup>167</sup> which is comprised of four provinces.<sup>168</sup> At the central level, the powers are shared and co-ordinated between the executive, the legislature and the judicature.<sup>169</sup> The central legislature, known as parliament, is comprised of two houses, i.e. the National Assembly (lower house) and the Senate (upper house). Members of the national assembly (MNAs) are directly elected, whereas the members of the Senate (Senators) are indirectly elected by the four provincial assemblies. The Prime Minister is the leader of the party in the majority in the lower house of parliament and is the sole head of executive government. The President is indirectly elected by the parliament and is a ceremonial figurehead who represents the unity of the state. Parliamentary seats are allocated by way of proportional representation, there are a total of 342 seats in the National Assembly, out of which 174 are allocated to the most populous province Punjab.<sup>170</sup> The majority required to form a government is 172 seats.<sup>171</sup> Whether one party can win in Punjab is irrelevant, but technically, if a party wins all the National Assembly seats allocated to Punjab, it can form a government. This seat allocation clearly shows the supremacy of one province, which can in turn

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<sup>167</sup> Part I, The Constitution of the Islamic Republic of Pakistan 1973.

<sup>168</sup> Punjab, Sindh, Baluchistan and Khyber Pakhtunkhwa (KP).

<sup>169</sup> *ibid* Part III.

<sup>170</sup> *ibid*. Note also that out of the total 342 seats, 10 are allocated to the non-Muslim minority.

<sup>171</sup> Rob Crilly, 'Pakistan election guide: How does it work?' *The Telegraph* (Islamabad, 10 May 2013) <<http://www.telegraph.co.uk/news/worldnews/asia/pakistan/10047665/Pakistan-election-guide-How-does-it-work.html>> accessed 25 October 2018.

control all the other provinces by forming a government, that is a source of the problem defined at 3.2 as disparity of representation.

The problem of premature dissolutions in Pakistan is a matter of its constitutional history explored in the next section. In the next section it is therefore very important to analyse the evolution of federalism in British India, and how it is related to Pakistan's present political instability.

#### 4.1 Launch of Federalism in British India

This section covers the aspects of federalism and its evolution before and after the creation of Pakistan. These analyses will demystify the core causes behind the country's struggle in adopting the factors of democratic federalism selected for the purpose of analysis in this thesis. These findings will also distinguish between federalism as adopted by Pakistan and how the researcher analyses it according to his hypothesis of constitutional suitability in 4.3.5 and in Chapter 6. It is important to contextualise pre-Pakistan federalism as practised during British Rule and how the current model of federalism in Pakistan has been evolved from that concept. It is argued that the federalism implemented by the British Empire was to benefit the colonial arrangement and not necessarily the post-colonial countries. This section will also show how the British applied the concept of federalism in a completely different way from that of any other prominent federal democracy. This section supplements the theoretical discussion of federalism in Chapter 3 by exploring the varied or applied form of federalism used in Pakistan, along with its evolutionary origin that traces back to the later 1700s.

At that period, the British colonised and ruled India, through the East India Company initially, and then three independent presidencies were set up, each responsible for their own remit.<sup>172</sup> After the fall of the Mughal dynasty, the British introduced for the first time a system of devolution of powers from the centre to the provinces where the interest of the Empire was ultimate.<sup>173</sup> The Office of Governor General was created by the Regulatory Act 1773 to subordinate all these presidencies.<sup>174</sup> The Governor General was assisted by a council called the executive

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<sup>172</sup> Lucy Sutherland, *The East India Company in Eighteenth Century Politics* (The Clarendon Press 1952).

<sup>173</sup> Asok Chanda, *Federalism in India* (London: George Allen & Unwin 1965).

<sup>174</sup> *ibid.*

council,<sup>175</sup> which had legislative powers vested in it by the British Parliament. Further reforms to the act enhanced the position of the Governor General in the executive council.<sup>176</sup> The presidencies were later given the status of provinces or dominions and given certain administrative and legislative powers.<sup>177</sup> A judiciary was already present to interpret law.<sup>178</sup> Consequently, the government was comprised of a legislative body, an executive (council) and a judiciary where powers were also devolved to provinces. This arrangement could only benefit the rulers rather than the subjects or the federating units as it gave the Crown better control over the colony to enact laws and impose lagans (taxes). Another reason for its non-federal aspect was that the central government had enormous overriding powers with the result that the factor of equal representation described at 3.1 as a necessary element of a truly democratic federal state, was missing.<sup>179</sup> There is a great similarity between this arrangement and Pakistan's federal arrangements since Pakistan's inception to date, therefore the model of federalisation adopted by Pakistan is not the one envisaged by this thesis.

#### 4.2 History of Constitutional Instruments

The constitutions of Pakistan have evolved from these preceding colonial constitutional instruments. It is important, before evaluating the four phases of Pakistan's constitutional history using the key factors, to describe the constitutional instruments in some detail.

The British attempt to articulate and define the province-centre relationship resulted in the creation of the Indian Council Act 1892. According to this Act, local representatives were involved in the government. This Act also incorporated enlargement of legislative councils and elective elements to the government,<sup>180</sup> which resulted for the first time in the adoption of elections (albeit indirect). Nevertheless, this Act also retained the overriding powers of the Governor General in Council.

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<sup>175</sup> Ibid.

<sup>176</sup> For example the Regulatory Acts of 1784, 1793, 1833, 1853.

<sup>177</sup> Asok Chanda, *Federalism in India* (George Allen & Unwin 1965).

<sup>178</sup> Ibid.

<sup>179</sup> Lucy Sutherland, *The East India Company in Eighteenth Century Politics* (The Clarendon Press 1952).

<sup>180</sup> Arthur Berriedale Keith, *A Constitutional History of India 1600 - 1935* (Halcyon Press 1961) 208.

Soon after the adoption of the 1892 Act, the British Government realised the need for decentralisation and for the involvement of locals in the government.<sup>181</sup> The Royal Commission of Decentralisation (1907), appointed by Edward VII, recommended limiting the role of the Government of India, which resulted in the Indian Council Act 1909.<sup>182</sup> This Act enhanced the first dimensional representation feature of the country. Nevertheless, it did not improve the relations, or co-ordination, between the centre and the provinces.<sup>183</sup> The 1909 Act modified through the Government of India Act 1912, gave some financial powers to the provinces to frame their budget. As a result of the continuous motivation and struggle of the two largest political parties i.e. Congress and the Muslim League, and the break out of the First World War, a declaration was made by the British Government promising new constitutional reforms.<sup>184</sup> These reforms resulted in the creation of the Government of India Act 1919.

The Act of 1919 introduced a bicameral legislature at the centre,<sup>185</sup> which comprised at the time the Legislative Assembly (lower house) and the Council of State (Upper House). The Act also divided powers between the centre and the provinces, leaving the Governor General with residuary powers.<sup>186</sup> The Governor General also appointed provincial governors who would report to him. The same rule is in place to date in Pakistan, which appears redundant now since their offices do not have operational powers under the constitution.

It is reasonable to suggest that the Government of India Act 1919 made some progression towards provincial autonomy by sharing some of the federal powers - including financial powers - between the centre and the provinces. Nevertheless, the reform did not address the issue of disparity of representation amongst federating units.<sup>187</sup> The political parties AIML and Congress were not satisfied with the distribution of powers and launched movements against British Imperialism, i.e. the Khilafat Movement and the non-cooperation movement respectively.<sup>188</sup>

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<sup>181</sup> Asok Chanda, *Federalism in India* (London: George Allen & Unwin 1965).

<sup>182</sup> S R Sharma, *Panchayati Raj and Education*, vol II (New Delhi: Mittal Publications 1994) 97.

<sup>183</sup> Asok Chanda, *Federalism in India* (London: George Allen & Unwin 1965).

<sup>184</sup> Edwin Montagu's announcement of "Responsible Government" (1917) in Hermann Kulke and Dietmar Rothermund, *A History of India* (Routledge: 2016)

<sup>185</sup> Government of India Act 1919.

<sup>186</sup> *ibid.*

<sup>187</sup> For example, the partition of Bengal and uneven representation in provinces such as Sindh and Bombay.

<sup>188</sup> Asok Chanda, *Federalism in India* (George Allen & Unwin 1965).

From 1927, both the prominent parties AIML (ethnic minority party) and Congress (majority party) started demanding a federal model in India.<sup>189</sup> AIML wanted a federation with a weaker centre whereas Congress was in favour of stronger central government as they were in the majority and could therefore dominate the centre. This unsettling dispute triggered the Simmon Commission in 1930 favouring a federal government in a united India and ultimately the Government of India Act 1935 was passed by the British Government.<sup>190</sup>

Although the Government of India Act 1935 can be regarded as the first ever federal constitution for India and later for Pakistan too, it is argued that it lacked the key factors of democratic federalism identified in Chapter 3. Critically, there were no provisions for the second dimensional representation or separation of powers.

After its creation in 1947, it took Pakistan nine years to produce the first Constitution in 1956.<sup>191</sup> The country was run under the Government of India Act 1935 during the early stages after its partition from India. The 1935 Act did not have significant influence over the running of the governmental machinery because it was not a piece of legislation which was passed by the sovereign legislature of Pakistan. Until 1956, the country only had a document called the 'Objectives Resolution' adopted in 1949 that laid down the foundations of future constitutions in Pakistan.<sup>192</sup> This also served as a preamble for the constitutions of 1956, 1962 and 1973 and has been annexed to the current constitution of Pakistan since 1985.<sup>193</sup>

#### **4.3 Testing against the key factors of a Democratic Federal Political System**

As indicated in Chapter 1, the second sub-question, "*Are the present and past political systems Democratic Federal ones?*" contains three further questions. This test will be applied to the political system as it was in place in each of four consecutive periods starting from 1935. Although Pakistan was created in 1947, the first period for the analysis starts from 1935 because, as described in the

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<sup>189</sup> George Dunbar, *A History of India from the Earliest times to the Present Day*, Vol II (London: Nicelson & Waltson 1943)

<sup>190</sup> *ibid.*

<sup>191</sup> National Assembly of Pakistan, 'Composition, National Assembly' (31 January 2014) <<http://www.na.gov.pk/en/content.php?id=2>> accessed 28 November 2018.

<sup>192</sup> *ibid.*

<sup>193</sup> *Ibid.*



preceding section, the first legislation Pakistan ever adopted was the Government of India Act 1935.

The questions for the sake of clarity are reiterated below:

1. Does the political system address issues of equal representation?<sup>194</sup>
2. Does the political system provide for separation of powers and checks and balances?<sup>195</sup>
3. Are there elements of self-interest exercised by influential individuals that can override the controls in the system?<sup>196</sup>

The first question, whether there is or is not equal representation can be examined by taking a subjective, interpretivist approach. This factor was selected for the purpose of this test because it is important for a Political System to have a balanced representation whereby not only the population but also the federating units are, as explained at 3.2, equally represented. It is also, as explained in Chapter 5, a key component of the US political system.

The answer to the second question can be established objectively. In this question reliance is placed on a positivist approach to determine whether or not a rule exists in an established system.<sup>197</sup> This factor was selected for the purpose of this test because this factor adds to political stability and reduces the risks of premature dissolution. It is also, as explained in Chapter 5, a key component of the US system.

The third question is not a question of fact and can be examined only by taking a subjective, interpretivist approach alongside a legal realist approach in which any possible influences behind the judges' reasoning are examined. This factor was selected for the purpose of this test because of its detrimental nature towards the progression of democracy since this element stems from the vice regal time.

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<sup>194</sup> Equal Representation: refers to democratic representation of people of the state and federal representation of federating units, resulting in formation of a government based on balanced representation at both democratic and federal level.

<sup>195</sup> Separation of Powers and checks and balances: where all three branches of government are independent of and keeps check on each other, in addition in a bicameral arrangement, both houses keep a check on each other in a balanced manner.

<sup>196</sup> Self-interest: where one office or official has enormous power to alter the constitution or government.

<sup>197</sup> HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard Law Review 593.



It is conceded that these factors come from the US political system, and the test may appear redundant at first glance since it can be foreseen that these factors are not present in the political systems of Pakistan and it is inevitably going to fail. However, the purpose of the test is to conduct a thorough analysis in terms of how it fails and to what extent these factors are not employed. In addition, this analysis will also uncover why these factors are so important and explore in the next section as to how useful these can be if implemented.

The constitutional history of Pakistan is divided in four phases in this section, where an analysis of the cases involving judicial encouragement (of premature dissolution) is carried out. From a legal realist standpoint, it is noted whether this judicial encouragement was affected by some coercive or other influence over the judges who made such decisions.

#### **4.3.1 The Pre-Constitution Phase (1935 – 1956)**

The Government of India Act 1935 provided for setting up a federation consisting of Indian provinces (totalling 11 in number) and princely states.<sup>198</sup> The division of powers was comprised of three lists of subjects, i.e., federal, provincial and concurrent.<sup>199</sup> Residuary powers were vested in the Governor General who exercised them as he pleased.

The 1935 Act almost gave the federating units a federal autonomy.<sup>200</sup> However, there were certain constraints provided by the special powers given to provincial governors. The Governor General had legislative powers as he could pass ordinances and governor's Acts without having to seek consent from the provincial legislature and he could also withhold his assent from the passing of provincial legislation or veto the entire bill.<sup>201</sup>

The provincial governor could also proclaim an emergency and put the whole province under federal authority.<sup>202</sup> It is remarkable to note that this power

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<sup>198</sup> George Dunbar, *A History of India from the Earliest times to the Present Day*, vol II (Nicolson & Waltson 1943) 236.

<sup>199</sup> The Government of India Act 1935, Sch 7, section 100. The Federal list contained 59 subjects, the provincial list 54 and the concurrent list 36 subjects.

<sup>200</sup> Federal autonomy is the kind the researcher argues for.

<sup>201</sup> The Government of India Act 1935.

<sup>202</sup> *ibid* section 93.

continues to be present in the evolved constitution as late as February 2009 when Governor Rule was implemented in Punjab.

The most important and relevant provision of the 1935 Act is that it gave the Governor General powers to issue a proclamation of emergency in the entire country and assume powers.<sup>203</sup> This power was, as we shall see, exercised in its original and its evolved shape several times in the constitutional history of Pakistan.

Although a bicameral legislature was adopted under the 1935 Act, there was no equal representation in the upper house.<sup>204</sup> In the lower house the dilemma was no different from that which Pakistan still faces, that is seat allocations. However, the historical position under the 1935 act was illogical in a rather different way from the current position. Allocation was distributed not on the basis of size of population but by reference to the perceived importance of the state. For example, Bombay, with a population of 18 million, was allocated 16 seats, whilst Bengal, with a population of 20 million, had 20 seats.<sup>205</sup> Likewise, in Royal India the Princely States were also given peculiar representations, their total population was 23% and yet they were given an allocation of 33% of the seats in the lower house and 40% in the upper house.<sup>206</sup> In fact, the creation of Pakistan itself can be construed as the disintegration of India as the result of lack of one of the key factors selected for the purposes of analysis here i.e. equal representation of all dominions.

As the Act of 1935 clearly and greatly empowered the agent of the Empire i.e., the Governor General, it is reasonable to infer that the legislation was designed to preserve the crown's supremacy. There is, it is argued, evidence of British self-interest behind the design of the 1935 mode. The decisive authority was vested in the British Parliament rather than the Indian parliament. The Viceroy or Governor General was granted enormous powers including, but not limited to, legislative and executive powers. The Act fails to implement equal representation to the extent that even the chief executive was unelected. There was no separation of powers as all the powers were vested in the Viceroy and, most importantly, there were no checks and balances on this chief executive. Democratic federalism and the key factors selected for the purposes of analysis, it is argued, cannot be achieved without

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<sup>203</sup> *ibid* section 102.

<sup>204</sup> *ibid*.

<sup>205</sup> S M Boss, Working Constitution in India, A Commentary on Government of India Act 1935 (OUP 1939) 89.

<sup>206</sup> *ibid*.

sovereignty, mainly because of the diminished will or say of the people. India was not a sovereign state but a colony and, on this analysis, any so-called federal constitution given to her by the Empire was therefore de facto non-federal and non-democratic.

Despite its diminished functionality, the 1935 Act was adopted both by India and Pakistan in 1947 as they did not have their own constitutions at the time.

Since the provision allowing the governor general to proclaim an emergency was still present in the 1935 Act, the first Pakistani legislature was dissolved in 1954 by the then Governor General. The Act of the Governor General was argued to be unconstitutional in the *Maulvi Tamizuddin* case.<sup>207</sup> However, it is argued here that although the act may have appeared unconstitutional, it was not strictly speaking in violation of the 1935 Act, in fact it was not unlawful at all since the act of declaring an emergency was within his powers under the prevailing legislation.<sup>208</sup>

This case was the first time in the history of Pakistan that the doctrine of necessity was invoked. The Governor General dissolved the Constituent Assembly before the expiry of its due term and Maulvi Tamizuddin Khan contested the act of dissolution and filed two petitions<sup>209</sup> in the Chief Court of Sindh seeking:

- A petition for *mandamus* against the Federation of Pakistan and the reconstituted Council of Ministers prohibiting them from interfering with his functions as President of the Constituent Assembly.
- A Writ of *quo warranto* challenging the validity of the appointment of the members of the reconstituted Council of Ministers.

In his ruling, Chief Justice Munir said that 'necessity knows no law', in line with Braxton's maxim,<sup>210</sup> 'which is otherwise not lawful is made lawful by necessity' and the Roman dictum, 'the wellbeing of the people is the supreme law'.

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<sup>207</sup> *Federation of Pakistan and Others vs Maulvi Tamizuddin Khan* [1955] PLD 1955, FC 240.

<sup>208</sup> The Government of India Act 1935, section 102.

<sup>209</sup> In the absence of any constitution, writ petitions were filed under section 223A of the Government of India Act 1935.

<sup>210</sup> Citation not given by the CJ in the case, however, a useful citation is: Giorgio Agamben, 'Chapter 1: The State of Exception as a Paradigm of Government' in *State of Exception* (Kevin Attell (tr), Chicago: University of Chicago Press 2005) 24.

Neither of the petitions was granted and CJ Munir's judgment justified the act of the Governor General. However, this was not the end of this episode, as the case would be relied on again in 1958 in support of Ayub Khan's assertion of martial law and abrogating the 1956 Constitution; in 1978 to legalise the military takeover of General Zia ul Haq, and in 2000 justifying General Pervez Musharraf's overthrow of Nawaz Sharif's Government.

As demonstrated at 3.4, both Virk and de Smith concluded that no such necessity existed in this situation.<sup>211</sup> However, timing is of the essence in this case. Pakistan was a newly formed state, which was struggling with devising its first constitution, limited resources and perpetual pressure from the Indian right wing who were not happy about the partition. Such political instability was only weakening the country and increasing the risk of being taken over by India. Not that it could be foreseen at the time, but during 1971, India took advantage of Pakistan's political crises and aided East Pakistan to secede to form Bangladesh. It is therefore suggested that, taking a legal realist approach, the very being of Pakistan was in danger and thus reliance by the judiciary on the doctrine of necessity was pragmatic, feasible, inevitable and justified.

This act of the Governor General and its ratification by the judiciary set a precedent for judicial endorsement of subsequent premature dissolutions. It is argued that, since it was within the powers of the Governor General to dissolve the legislature, the courts had limited scope to overturn the decision challenged through the *Maulvi Tamizuddin* case.<sup>212</sup> However, the judges in this case relied on the doctrine of necessity instead of adopting a purely constitutional stance. Taking a constitutional stance would have ratified the act of the Governor General under Section 102 of the Government of India Act 1935.

Although the judiciary may have seen circumstances at the time warranting necessity, nonetheless, the reason for the dissolution of the first legislature by Governor General Ghulam Mohammad was a personal one. His self-interest was based on his own objection to the constitution which the Assembly was about to adopt.<sup>213</sup> Self-interest or not, it was nonetheless at his discretion under Section 102

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<sup>211</sup> Muhammad Virk, 'Doctrine of Necessity-Application in Pakistan- Cases of Immense Importance-A Critical Review' (2012) 2(2) International J. Soc. Sci. & Education 82.

<sup>212</sup> *Federation of Pakistan and Others vs Maulvi Tamizuddin Khan* [1955] PLD 1955, FC 240.

<sup>213</sup> Leslie Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity' (1979) 1(4) Third World Quarterly, 98.

of the 1935 Act to proclaim an emergency and dissolve the legislature. It is clearly contrary to the principle of separation of powers to vest such absolute power absolutely.

After and during the ruling in the *Maulvi Tamizuddin* case and in the absence of a constitution, the judiciary had no option but to either rely on the 1935 Act or make a novel decision, and therefore the Governor General Ghulam Muhammad promulgated Emergency Ordinance IX 1955 giving himself the power to frame the constitution.

This phase clearly does not demonstrate the key factors, because:

1. There were no reforms to uphold equal representation.
2. There were no instruments creating separation of powers or a checks and balances system.
3. There were elements of self-interest, firstly vested in the Governor General in the Pre-Pakistan arrangement in favour of the British Empire and later on inherited by the Pakistani Governor General who was simply not in favour of the constitution the assembly was about to pass.<sup>214</sup>

Even if it is argued that a necessity did not exist, the Governor General had the powers to dissolve the government and assume powers over the entire country and that is exactly what he did when he gave the country its first own constitution in 1956.

#### **4.3.2 The First Constitution (1956 – 1962)**

Unlike the preceding instrument, the Constitution of 1956 provided for a unicameral legislature. As discussed in 3.2, representation in a federation should operate in two dimensions, however a unicameral legislature is a one dimensional entity. At the time, Pakistan comprised two territorial units i.e. East and West Pakistan, which were separated geographically from each other by over 750 miles. Apart from commonality in religion and the struggle for independence, everything

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<sup>214</sup> Leslie Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity' (1979) 1(4) Third World Quarterly 98.

else such as culture, habitat, traditions and language were different. In the words of Ahmad:

The two wings differ in all matters, excepting two things, namely, that they have a common religion, barring a section of the people in [the] East Pakistan and that we achieved our independence by a common struggle. These are the two points, which are common to both the wings of Pakistan; with the exception of these two things particularly everything [else] is different.<sup>215</sup>

It was therefore entirely reasonable for East Pakistan to demand equal representation in the form of a bicameral legislature due to a substantial geographic and demographic disproportion between the two wings of the country. West Pakistan, however, was in favour of one dominion, which resulted in East Pakistan being underrepresented in the legislative assembly.

Although this constitution provided for an independent supreme judiciary to settle disputes between the federal and provincial government,<sup>216</sup> nevertheless, it is argued that the arrangement did not fully conform with the factor of separation of powers. The reason is that the constitution under Article 129 provided powers to the Supreme Court to settle disputes by constituting a tribunal whose report should be considered final and binding. However, no such tribunal was ever formed during the tenure of this constitution. This arrangement was therefore ineffective since disputes over several issues did exist between the federal and the provincial governments and there was no tribunal to resolve them.<sup>217</sup>

For the purposes of this research project, in essence the new constitution was not significantly different from its predecessor, the 1935 Act. The President (formerly Governor General) still had emergency powers.<sup>218</sup> These emergency powers were unlimited, which allowed him to dissolve provincial governments as well as the federal government.<sup>219</sup>

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<sup>215</sup> The Constituent Assembly of Pakistan Deb 16 January 1954, Vol I, Page 1816.

<sup>216</sup> The Constitution of 1956 (of Pakistan) Art 129.

<sup>217</sup> Mehrunnisa Ali, *Politics of Federalism in Pakistan 1947 -1958* (Royal Book Company 1996)

<sup>218</sup> The Constitution of 1956 (of Pakistan) Part IX,

<sup>219</sup> *ibid* Art 193.

According to Article 191, an emergency could be proclaimed by the President, if he was satisfied that security or economic life was in jeopardy from external aggression or internal disturbance. Mehmood Ali of the then legislative assembly stated:

We understand threat of war, we understand external aggression, but we do not understand what is meant by internal disturbance. A movement against a particular measure of the government for the time being may be interpreted as internal disturbance.<sup>220</sup>

There is no guidance or rationale in the text of the constitution as to what constitutes an emergency. That absolute power remained unchanged from the preceding instruments, possibly to preserve the incentive of self-interest. The use of Article 193 to suspend provincial governments and to interfere in provincial affairs through governors weakened the democratic process.<sup>221</sup> The provincial governor prorogued the assembly in East Pakistan several times upon the advice of central government, for example in May 1956 over a budget crisis and in August 1956 over a dispute about legislation.<sup>222</sup>

Another example of the central government's interference with the provincial government's affairs is the presidential ordinance in September 1958 ordering the restoration of six disqualified assembly members. This created a riot in the assembly resulting in the death of the deputy speaker.<sup>223</sup>

In West Pakistan, Article 193 was also used to save a centrally favoured local government from a defeat.<sup>224</sup> The use of these emergency powers was highly contentious at the time in both of the provinces: it was regarded as highly undemocratic.<sup>225</sup> This use of these powers was a straightforward demonstration of elements of self-interest:

If the theory is accepted that the central ministry must necessarily be formed by parties which are in power in the provinces or vice versa, the working of the constitution which provides for a central government and two autonomous provincial governments will often

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<sup>220</sup> The Constituent Assembly of Pakistan Deb 26 January 1956, Vol I, Page 2069.

<sup>221</sup> Article 193 was first invoked in East Pakistan in May 1956.

<sup>222</sup> Zarina Salamat, *Pakistan 1947 - 1958, An Historical Review* (Islamabad Institute of Historical & Cultural Research Institute 1992).

<sup>223</sup> *ibid.*

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*



become impossible. The [centre] will then always be prompted to protect itself by using or misusing its power to keep only conformist governments in office in both [of] the provinces and to keep out of office the [non-conformist] group by using rough and ready methods or by resorting to intrigue and seduction or by even applying section 193 of the constitution.<sup>226</sup>

Due to continued unrest and issues in implementation of the constitution, President Iskander Mirza annulled the constitution of 1956, dissolved all the legislatures and imposed martial law in 1958. Although not directly related, but the famous case of *Dosso Vs Federation of Pakistan*<sup>227</sup> inadvertently challenged the martial law, in which a very important judgment was passed by CJ Munir:

[W]here revolution is successful it satisfies the test of efficacy and becomes a basic law creating fact. On that assumption the Laws (Continuance in Force) Order, however transitory or imperfect, was a new legal order and it was in accordance with that order that the validity of the laws and the correctness of judicial decisions had to be determined.<sup>228</sup>

The reasoning behind the Supreme Court decision in this case was the rationale put forward by CJ Munir that a '[a] successful coup d'état is an internationally-recognised legal method of changing a constitution'.<sup>229</sup> Although there are no known external factors that might have impaired his decision, it is reasonable to assume that due to military influence, the judiciary at the time was not quite independent enough to overturn or nullify an imposed martial law.

In other words, this unlawful and unconstitutional act was now made lawful in such a way that a single military man could walk in and subvert the will of the people, a result which CJ Munir described in his verdict as a 'legalised illegality'.<sup>230</sup>

This phase unsurprisingly does not demonstrate the key factors because:

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<sup>226</sup> Mehrunnisa Ali, *Politics of Federalism in Pakistan 1947 -1958* (Royal Book Company 1996) 101

<sup>227</sup> [1958] PLD [1958] SC Pak 533.

<sup>228</sup> *ibid* 540.

<sup>229</sup> *ibid* 533.

<sup>230</sup> *ibid*.



1. It lacked the factor of equal representation. This factor did not even exist in theory as the country's federal character was tampered with by changing the status of provinces as the country was divided into two provinces East and West Pakistan.
2. There was no separation of powers and there was no check on the central government.
3. The constitution was created according to the choice of the Governor General, thus involving the issue of self-interest. It is therefore no surprise that the constitution was dissolved within its first two years of implementation in 1958 following the first martial law regime in Pakistan headed by the Chief Martial Administrator General Ayub Khan.

#### **4.3.3 The Second Constitution (1962 – 1973)**

In 1962, the military government promulgated a new constitution. The 1962 constitution provided for a so-called presidential system.<sup>231</sup> This type of presidential system is not to be confused with the comparator US presidential system discussed in more depth in Chapter 5 because this despotic political system was unicameral, undemocratic and not federal. Although the 1962 constitution abolished the office of prime minister and delegated all executive powers to the president, at the same time the constitution also stipulated a non-party legislature with limited legislative powers.<sup>232</sup>

General Ayub Khan appointed himself as president with the powers to dissolve the legislature, promulgate legislations and ordinances and most importantly to declare an emergency.<sup>233</sup> The emergency powers were brought forward from the previous constitutional instrument. In addition, the whole constitution was based on General Khan's own views about the political system,<sup>234</sup> which is substantial evidence of self-interest playing a significant role in this phase.

Not only did this constitution provide for an undemocratic presidential system, but it also did not address the issues of disparity. This constitution also provided for a

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<sup>231</sup> The Constitution of 1962 (of Pakistan).

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.*

<sup>234</sup> Sarfraz Husain Ansari, 'Forced Modernization and Public Policy: A Case Study of Ayub Khan Era (1958-69)' 18(1) *Journal of Political Studies* 45.

unicameral legislature, with no elected representation whatsoever, which makes it even poorer than the previous one.

Perhaps unsurprisingly, given General Khan's apparent aims to remain in power and govern at his will, this constitution made no provision for separation of powers or a system of checks and balances. Although it was disguised as federal, democratic and civilian rule, nevertheless, the entire system was in fact an authoritarian one that revolved around the personality of General Khan.<sup>235</sup> In this structure and under this constitution, recourse to the doctrine of state necessity was inevitable: the 1962 constitution was suspended, and martial law imposed in 1969 by General Yahya, although this action was never challenged in or by the judiciary.

The East Pakistan crisis escalated and resulted in the Indo-Pakistan war of 1971 which, in its turn, resulted in the secession of East Pakistan. The reason given by the government of East Pakistan for its secession was the disparity of representation in the design of the earlier constitutions of Pakistan.<sup>236</sup> The Awami League party from East Pakistan province secured 160 seats in the National Assembly and PPP from West Pakistan won 81 seats and yet the leader of the Awami League party was barred from taking the office and PPP leader Bhutto was supported for the premiership.<sup>237</sup>

This evidence speaks for itself that this phase was the most unfortunate with respect to the key factors being used for analysis. There was no equal representation, no separation of powers, no checks and balance and, above all, the constitution was General Khan's own product designed to protect his interests rather than serve as a real constitution for the country. The secession was not only a necessity but also inevitable. Interestingly, Pakistan itself was created by seceding from India so that it could exercise equal representation and freedom from imperial rule.

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<sup>235</sup> Lawrence Ziring, *Pakistan in the Twentieth Century: A Political History* (OUP 1997) 271.

<sup>236</sup> Ved P. Nanda, 'Self-Determination in International Law--The Tragic Tale of Two Cities--Islamabad (West Pakistan) and Dacca (East Pakistan)' (1972) 66(2) *American Journal of International Law* 321.

<sup>237</sup> *ibid.*

#### 4.3.4 The Third Constitution (1973 – Present)

After the secession of East Pakistan, the new Pakistan adopted a new constitution in 1973 under the leadership of Zulfikar Bhutto. The salient feature of the original constitution was that the prime minister was the chief executive. The legislature was bicameral and the president (as a ceremonial figurehead) did not have emergency powers, in contrast to the position with previous constitutions. Even though the legislature was bicameral, the issue of equal representation was not entirely addressed, as the upper house was indirectly elected by the provincial assemblies. Thus, it failed to demonstrate the key factor of equal representation.

The division of powers was based on co-ordination as opposed to separation of powers principles.<sup>238</sup> Although presidential emergency powers were no longer specifically granted in the new constitution, yet there were issues of self-interest, as Bhutto had established an 'authoritarian government and one man rule, though the façade was parliamentary'.<sup>239</sup> The researcher observes a similarity between US President Trump's approach towards the government and that with Bhutto. Bhutto was, however, a public hero and instituted its first ever democratic parliamentary constitution. The similarity, therefore, between his autocracy and that arguably exerted by current US President Trump is therefore more superficial than real. Bhutto was, further, establishing new, untested, procedures. This autocracy nonetheless in the name of civilian rule ended in 1977 through another period of martial law instigated by General Zia, who dissolved the government and suspended the constitution.<sup>240</sup> The Act of General Zia was challenged by Mrs Bhutto in the *Begum Nusrat Bhutto* case.<sup>241</sup>

The petition challenged the legality of detention of Mr Bhutto. The petition in this case stated that Mr Bhutto and the ten other leaders of the Pakistan People's Party were arrested and detained. General Zia made a public statement in which he made unfair and incorrect allegations against the Pakistan People's Party Government. He indicated his intention of placing the detainees before military tribunals for trial to enforce the principle of public accountability. The petition further averred that

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<sup>238</sup> *ibid.* Co-ordination of power is used in the Pakistani constitutional context as a concept that is an opposite of absolute separation of powers.

<sup>239</sup> Sultana Tasneem, 'Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan' (2012) 28(2) *Journal of European Studies* 66, 68.

<sup>240</sup> *ibid.*

<sup>241</sup> *Begum Nusrat Bhutto vs Chief of Army staff* [1977] PLD [1977] SC 657.

his action was taken in a mala fide manner with the purpose of preventing the Pakistan People's Party from participating in the forthcoming elections.<sup>242</sup>

The court admitted the petition and ordered immediate shifting of the detainees from Lahore to Rawalpindi. The admission of the petition might have been seen by General Zia as a potential threat, therefore he amended the Constitution of 1973.<sup>243</sup> Even prior to the proceedings and the decision in the *Nusrat Bhutto* case, the Supreme Court of Pakistan had not only accorded legitimacy to the martial law regime but had also acknowledged and recognized the inherent authority of that regime to amend the Constitution.<sup>244</sup> Khan was right to observe that the reconstituted Supreme Court by virtue of the amendment had ab initio accepted the lawful authority of the regime and recognized it as the new legislature.<sup>245</sup>

The petition was eventually heard by a nine-judge bench headed by Chief Justice Sheikh Anwar-ul-Haq. The court dismissed the petition. The Supreme Court unanimously held that there was a serious political crisis in the country leading to a breakdown of the constitutional machinery for which the Constitution provided no solution. Not that he was bound to under the principle of stare decisis, but the Chief Justice applied the doctrine of necessity and deviated from the immediate *Asma Jilani* case.<sup>246</sup> In order to understand the Supreme Court's decision in the *Nusrat Bhutto* case, it is therefore necessary to discuss the *Asma Jilani* case.

The order to arrest Malik Jilani in 1971 was challenged in the Lahore High Court through a writ petition.<sup>247</sup> A day before the issue of the writ petition the order was rescinded and substituted by another order of the same day that purported to have been issued by the Martial Law Administrator General Yahya Khan. Asma Jilani challenged the validity of the order of her father's detention. The petition was resisted by the Government and an objection was raised that the High Court had no jurisdiction because of the bar contained in the jurisdiction of the Courts Order 1969 promulgated by the last martial law regime.

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<sup>242</sup> [1977] PLD [1977] SC 657 (SC) 670.

<sup>243</sup> CMLA's Order Number 6 of 1977 issued on September 22, 1977.

<sup>244</sup> Fayyaz Hussain and Abdul Khan, 'Role of the Supreme Court in the Constitutional and Political Development of Pakistan: History and Prospects: Comparative Study of Begum Nusrat Bhutto (1977) and Syed Zafar Ali Shah Case (2000)' (2012) 5(2) Journal of Politics and Law 82.

<sup>245</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (2nd edn, Oxford University Press 2009) 326.

<sup>246</sup> *Miss Asma Jilani Vs. The Government of the Punjab and Another* [1972] PLD [1972] SC 139.

<sup>247</sup> This order was made under the Defence of Pakistan Rules 1971.

CJ Rehman ruled that:

With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice [of LHC] not only misapplied the doctrine (of grundnorm) of Hans Kelsen, but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone.

Grundnorm in the judgment refers to an intrinsic source of law, in this case the constitution. The higher and supreme judiciary after CJ Munir's ruling in the *Dosso* case had held that martial law should be accepted by the constitution, as it was a successful revolution and the acceptance thereof shows the authority of the constitution as the Grundnorm.

The court in *Jilani* was pretty scathing about the decision in *Dosso*. The principle enunciated in *Dosso's* case, therefore, is wholly unsustainable, and it cannot be treated as good law either on the principle of stare decisis or even otherwise. So, it is worth making that point (as well as the point about the effect of *Jilani* on the *Bhutto* case). The court in *Bhutto* clearly had a decision to make about whether to follow *Dosso* or to follow *Jilani* and came down in favour of *Dosso*:

In the felicitous phrase of my Lord the Chief Justice, the act was more in the nature of a “constitutional deviation” rather than an overthrow of the Constitution. The Constitution of 1973 is not buried but merely suspended. It, however, continues to be the governing instrument subject to the provisions of the Laws (Continuance in Force) Order, 1977. In these circumstances neither the ratio decidendi of *Dosso v. State* nor that of *Asma Jilani v. The Punjab Government* is strictly applicable to the present case.<sup>248</sup>

In the *Asma Jilani* case, the Supreme Court also ruled that General Yahya Khan's unconstitutional actions based on the principle of necessity were unsustainable. Since the decision of the Supreme Court was promulgated after General Khan had

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<sup>248</sup> [1977] PLD [1977] SC 657

resigned, if he had still been in power, it is argued that, due to military influence, there might have been a possibility of a completely different decision. This unprecedented overruling could have provided some hope that the use of the doctrine of necessity might end.

As Jilani and Bhutto came to different conclusions, the difference in the results is not because of differences in articulation of the principle, but of application to the facts.

To return to the *Nusrat Bhutto* case, CJ Anwar-ul-Haq justified his application of state necessity by saying:

[T]he Armed Forces of Pakistan, headed by the Chief of Staff of the Pakistan Army, General Muhammad Zia Ul Haq intervened to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster. It was undoubtedly an extra-constitutional step, but obviously dictated by the highest consideration of State necessity and welfare of the people.<sup>249</sup>

He ruled that General Zia was entitled to perform all such acts and promulgate all legislative measures as they fell within the scope of the law of necessity, because the situation was a temporary “constitutional deviation” and so qualitatively different from the previous instances of martial law in *Bhutto* and *Jilani*.

The Court admitting the petition ordered immediate relocation of the detainees. To prevent the implementation of these orders, General Zia, who was empowered by the Supreme Court,<sup>250</sup> amended the Constitution of 1973.<sup>251</sup>

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<sup>249</sup> *Begum Nusrat Bhutto Vs. Chief of the Army Staff and Federation of Pakistan* [1977] PLD [1977] SC 703 (SC) 85.

<sup>250</sup> The Supreme Court had already accepted the legitimacy of the martial law regime and the authority of that regime to amend the Constitution, see Fayyaz Hussain and Abdul Khan, 'Role of the Supreme Court in the Constitutional and Political Development of Pakistan: History and Prospects: Comparative Study of Begum Nusrat Bhutto (1977) and Syed Zafar Ali Shah Case (2000)' (2012) 5(2) *Journal of Politics and Law* 82.

<sup>251</sup> CMLA's Order Number 6 of 1977 issued on September 22, 1977.

On the question of influence on the judges in this particular instance, it is reasonable to suggest that the judiciary was biased because they were reconstituted by General Zia upon a condition known as the Provisional Constitutional Order (PCO) that they had accepted *ab initio* the lawful authority of the regime and recognized it as the new legislature.<sup>252</sup> The PCO arrangement is clearly the opposite of the notion of separation of powers. Notwithstanding the absence of separation of powers, the judiciary was no match for the military regime.

The court dismissed the petition. The Chief Justice (with whom the other members of the court agreed) held that there was a serious political crisis in the country leading to a breakdown of the constitutional machinery for which the Constitution provided no solution. In the *Asma Jilani* case the court ruled that the necessity was unassailable, however, it is argued the court rightly applied the doctrine of necessity in the *Nusrat Bhutto* case.<sup>253</sup>

The 1973 constitution was not replaced by another constitution after its suspension in 1977 but was reinstated with an amendment through the same PCO.

### **The Eighth Amendment 1985:**

Since there were no reforms to the representation issue, nor was there any change to the division of powers or accountability by way of checks and balances in the 1973 constitution, the only positive point in this constitution was the absence of absolute powers.

The PCO gave the martial law regime its legitimacy and also the right to amend the constitution.<sup>254</sup> The eighth amendment moved executive power from the office of the prime minister to the president and introduced the president's discretionary powers to dissolve government by General Zia. This development therefore also fails to demonstrate the key factors.

### **The Thirteenth Amendment 1997:**

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<sup>252</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (2nd edn, Oxford University Press 2009) 326.

<sup>253</sup> The same doctrine as was applied in for example *Asma Jilani Vs. The Government of the Punjab and Another* [1972] PLD [1972] SC 139.

<sup>254</sup> Sultana Tasneem, 'Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan' (2012) 28(2) *Journal of European Studies* 66.



After the assassination of General Zia, Pakistan resumed its civilian government in which Benazir Bhutto and Nawaz Sharif successively served as prime ministers,<sup>255</sup> although their tenures were prematurely terminated. Neither of the prime ministers could serve a full term as they were dismissed by the president invoking Article 58(2)(B) created by the eighth amendment (i.e. the right to dissolve the assemblies) on the basis of constitutional necessity. Thus, for the first time, a procedure for premature dissolution was enshrined in the constitution itself.

Since political governments were struggling to complete their tenure in parliament because of the use of presidential emergency powers, in 1997 PM Sharif, through the thirteenth amendment, therefore removed the discretionary power of the president.

This development still did not address the issue of equal representation or reform the division of powers and consequently it fails to demonstrate the key factors on those grounds. This amendment almost reset the constitution to its original draft. And, just as the first draft could not deter the military from imposing a period of martial law, neither could this amendment. The government was still overthrown by General Musharraf in 1999.

Unsurprisingly the judiciary ratified General Musharraf's coup d'état in the case of *Syed Zafar Ali Shah and others vs Gen Musharraf, Chief Executive of Pakistan and others* on the basis of the doctrine of state necessity.<sup>256</sup>

On 12 October 1999 General Musharraf suspended the Constitution and dissolved the Assemblies. Several petitions challenging the takeover were admitted by the Court. Syed Zafar Ali Shah, a member of the ousted National Assembly filed a writ petition challenging the validity of the dissolution. The petition was heard by a full bench. The Court held that the step taken by General Musharraf was valid as the same was motivated by the doctrine of state necessity.

The court examined the circumstances that preceded the military takeover. The court was informed by the Attorney General that the ousted Prime Minister issued an illegal order to retire General Musharraf and nominating General Butt as his

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<sup>255</sup> *ibid.*

<sup>256</sup> [2000] PLD [2000] SC 869.



successor, thereby attempting to create dissension among the armed forces and threaten the integrity and sovereignty of the country.

Khalid Anwar, the Law Minister in the ousted cabinet, argued that the doctrine of state necessity had been buried by the British legal system long ago<sup>257</sup> and could not be resurrected. The Chief Justice did not accept that contention on the premise that precedents from foreign jurisprudence, although entitled to reverence and respect, were not applicable to the facts and circumstances prevailing on 12 October 1999.<sup>258</sup>

As evident from the discussion of the case law set out above, these decisions have served only to encourage the overthrow of governments as they have been used as justification. Following the *Maulvi Tamizuddin* case, every decision save for the *Asma Jilani* case has considered the previous decision and set new precedents justifying overthrow in the name of necessity. All of those decisions collectively form a collage of justification for acts of premature dissolution in the name of the doctrine of state necessity

The instigator of the practice of premature dissolution of the legislature, Ghulam Muhammad, might not himself have been in a position to articulate a justification for premature dissolution. Nevertheless, a justification, protecting what would otherwise have been an unconstitutional act, was provided for him by the judiciary in the shape of the doctrine of necessity.<sup>259</sup> In the *Maulvi Tammizuddin* case, CJ Munir not only set a precedent by invoking the doctrine of necessity but also, it is argued, introduced, albeit unintentionally, a practice of judicial encouragement of such acts of dissolution. Regardless of the allocated duties given to the judicature under the constitution,<sup>260</sup> it is argued that the supreme judiciary went beyond their constitutional powers and remit and encouraged the acts of premature dissolution by ratifying those acts under legal principles. It is worth noting that dissolutions of legislatures also involved abrogation of constitutions (if one was in place), and under

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<sup>257</sup> There is however no historic evidence of the validity of his assertion.

<sup>258</sup> Fayyaz Hussain and Abdul Khan, 'Role of the Supreme Court in the Constitutional and Political Development of Pakistan: History and Prospects: Comparative Study of Begum Nusrat Bhutto (1977) and Syed Zafar Ali Shah Case (2000)' (2012) 5(2) Journal of Politics and Law 82

<sup>259</sup> *Federation of Pakistan and Others vs Maulvi Tamizuddin Khan* [1955] PLD 1955, FC 240.

<sup>260</sup> The Constitution of Islamic Republic of Pakistan, 1973, Part VII.

the current constitution, the same is regarded as high treason, punishable by death.<sup>261</sup> However, no one has ever been punished for those acts to date.

Through the seventeenth amendment in 2003, General Musharraf reinvigorated the eighth amendment and the discretionary powers were reincarnated for the then president.

In the case of *Sindh High Court Bar Association v Federation of Pakistan*,<sup>262</sup> CJ Chaudhry passed a landmark ruling in July 2009 where an emergency declared by Musharraf was declared illegal and the court emphasised that the doctrine of necessity had, as Khalid Anwar had unsuccessfully argued in 1999, been buried forever:

[N]o such judge shall, hereinafter, offer any support in whatever manner to any unconstitutional functionary who acquires power otherwise than through the modes envisaged by the constitution.<sup>263</sup>

Although the application of a doctrine of necessity was categorically rejected in the July 2009 ruling by the Supreme Court, it had in fact already been rejected in April 1972 in the *Asma Jilani* case, but it did not stop Musharraf from overthrowing Nawaz Sharif's government in 1999.

### **The Eighteenth Amendment 2010:**

Once again, the president's discretionary powers were repealed by an amendment to the constitution.<sup>264</sup> The 18th Amendment was made with the intention to develop the relationship between the provincial and federal government as well as relations among provinces.<sup>265</sup> It is argued that the 18th Amendment may not be as productive an innovation as it may have been intended, as it does not provide anything new. This amendment removes the presidential discretionary power of dissolving the legislature, nevertheless, it does not prevent military takeovers. For example, the

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<sup>261</sup> *ibid* Art 6.

<sup>262</sup> PLD (2009) SC 879.

<sup>263</sup> *ibid*.

<sup>264</sup> The Constitution of Pakistan (of 1973), 18<sup>th</sup> Amendment.

<sup>265</sup> Constitution (Eighteenth Amendment) Act, 2010, see also Katharine Adeney, 'A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment' (2012) 42(4) *Publius: The Journal of Federalism* 539.

1999 overthrow of the legislature was a result of a coup d'état, not an exercise of presidential discretionary powers.

This constitutional development still does not address the issue of disparity of representation.<sup>266</sup> As suggested in Chapter 3, federation can only be strong if the units forming it are strong, which is only possible by recognising the federal rights of all units,<sup>267</sup> not only one province. The most important federal right is two-dimensional equal representation. The supremacy of Punjab is a great hurdle which must be overcome to achieve equal representation. The constitutional reforms of 2009 might have been a viable reform towards improving representation and intra federating unit tensions had Punjab's supremacy been revised by, for example, creation of new provinces.<sup>268</sup>

Adeney, in her analysis of the recent constitutional development, the 18th Amendment.<sup>269</sup> covers some of the aspects which are relevant to equal representation in Pakistan, and her analysis covers economic grievances and secessionist movements. She supports the idea that there is a problem of disparity of representation, albeit by reference to groups rather than to provinces. She notes that:

[T]he issues of delivery and responsive government are important to the inclusion of all groups, many of who have been alienated from the state by the current political system, of which the federal design is an important part.<sup>270</sup>

Although Adeney does not herself propose any solution to the problem of disparity, she believes that stronger federation is established by stronger federal units (provinces) by recognising their federal rights.<sup>271</sup> Adeney claims that recognition of diversity can be a source of strength and she gives the example of India where diversity may have played an important role in federal strength. Adeney's conclusion is significant, however, in the context of this project, India is not a useful example. India may not have problems of premature dissolutions of legislature arising from

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<sup>266</sup> *ibid.*

<sup>267</sup> *ibid.*

<sup>268</sup> Katharine Adeney, 'A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment' (2012) 42(4) *Publius: The Journal of Federalism* 539.

<sup>269</sup> *ibid.*

<sup>270</sup> *ibid* 558.

<sup>271</sup> *ibid.*

disparity of representation, but there is evidence of other diversity related problems leading to secession movements and riots, for example separatist actions in Kashmir, the Khalistan movement in Punjab in the 1980s and 1990s and another insurgency in Tripura, Meghalaya, Mizoram, Manipur and Nagaland.<sup>272</sup>

Pakistan is a centralized majoritarian federation comprising a core ethnic region and a small number of units. Adeney is, it is suggested, correct in concluding that the design of this federation has caused increased disaffection with the centre and the core group—Punjabis.<sup>273</sup> The dominance of the Punjab after the secession of East Pakistan in 1971 has caused many tensions and the Special Parliamentary Commission on Constitutional Reforms 2009 was a productive initiative designed to settle those tensions but was not utilized properly as the supremacy of Punjab was maintained.<sup>274</sup> The issue of unequal representation, amongst other repercussions, also led to the continuous struggle of creating new provinces.<sup>275</sup> There is nothing inherently objectionable in the creation of new provinces. However, it is likely that, without other structural changes, such developments will be opposed by the one province that has an effective majority.<sup>276</sup>

Creation of new provinces may improve to some extent the problem of seat allocation so that ultimately Punjab's supremacy can be ended. Creation of new provinces will require parliamentary assent and it is highly unlikely that such assent can be obtained when Punjab has the majority representation in parliament.<sup>277</sup>

Adeney has also observed that politicians have realised that deals with the military to overthrow governments 'backfire in the long term'.<sup>278</sup> She is referring to military intervention in overthrowing the government by way of for example military coups. Adeney recognizes the existence of secessionist movements but suggests that Pakistan is not in danger of disintegration because of the strong military.<sup>279</sup> There

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<sup>272</sup> George C. Thomas, 'Solving India's Diversity Dilemma - Culture, Constitution, & Nehru' (2005) 6(2) Georgetown Journal of International Affairs 21.

<sup>273</sup> Katharine Adeney, 'A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment' (2012) 42(4) Publius: The Journal of Federalism 539.

<sup>274</sup> *ibid.*

<sup>275</sup> Lately there has been a demand for the creation of new provinces such as dividing Punjab in two, Hazara province, a province for Mahajirs etc, see for example Dawn. 'Pakistan will wipe out if new provinces not created: Altaf' (2014) <<http://www.dawn.com/news/1132482>> accessed on 28 November 2018.

<sup>276</sup> Katharine Adeney, 'A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment' (2012) 42(4) Publius: The Journal of Federalism 539.

<sup>277</sup> *ibid.*

<sup>278</sup> *ibid.* 558.

<sup>279</sup> *ibid.*

is, however, it is argued, nevertheless a continued danger of disintegration in some respect, despite Adeney's justified rationale that a stronger military presence substantially reduces the likelihood of that risk occurring, because a stronger military prevents secessions, by overthrowing the government (in the name of state necessity).

In 2013, the PML(N) and in 2018, the PTI achieved an absolute majority and formed a government as they won the majority of seats in Punjab. There have been allegations of election rigging at both instances, especially in the 2013 elections which initiated several protests in Pakistan in an attempt to have the government dissolved.<sup>280</sup>

This phase has repeatedly failed to demonstrate the key factors and it is reasonable to deduce that the country has not progressed towards any positive reforms to address the issue of representation or improve the separation of powers. The phase is full of examples of episodes of self-interest:

1. There were no reforms to address the issue of disparity. It lacked the factor of equal representation.
2. There were no instruments creating a separation of powers or a checks and balances system.
3. There were elements of self-interest initially in favour of the Prime Minister, then of presidents.

#### **4.3.5 Summary of the Test Results**

As a legal realist and given the political volatility of the circumstances in which the cases were, by definition, brought, the researcher was alert to the possibility of external influence on the judges that strained their reasoning. Examination of the legal reasoning in the cases does not of itself betray any such influences. Nevertheless, the possibility that members of the judiciary were concerned for their futures can perhaps be inferred. The difficult relationship between the judiciary and

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<sup>280</sup> For example M Khan, 'Pakistan protests: Nawaz Sharif cornered' *BBC News* (Islamabad, 24 September 2014) <<http://www.bbc.co.uk/news/world-asia-29018054>> accessed 28 November 2018. Imran Khan demanded that the PM should resign and hold a re-election, in other words dissolve the newly formed government before its expiry; Dawn. 'Imran claims 2013 polls 'biggest fraud' in Pakistan's history' (2014) <<http://www.dawn.com/news/1111216>> accessed on 28 November 2018.

the government in Pakistan has not only been demonstrated in the attempt by the president in 2007 to suspend the Chief Justice (and subsequent international outcry) but more recently in the 2017 Supreme Court disqualification of Prime Minister Sharif.

The table below summarises the past events of premature dissolution.

*Table 1- Summary of Acts of Dissolution*

<b>Date</b>	<b>Dissolved by</b>	<b>Ratified/Overtaken by</b>
24 October 1954	Ghulam Muhammad (Governor General)	CJ Munir (relied on necessity) – Ratified
07 October 1958	Iskandar Mirza (President)	CJ Munir (relied on necessity) – Ratified
05 July 1977	Zia Ul Haq (Army Chief)	CJ Anwar-ul-Haq (relied on necessity) – Ratified
06 August 1990	Ghulam Ishaq Khan (President)	Unchallenged
18 April 1993	Ghulam Ishaq Khan (President)	CJ Nasim Hassan Shah – Overtaken
05 November 1996	Farooq Ahmad Khan Laghari (President)	Unchallenged
12 October 1999	Pervez Musharraf (Army Chief)	CJ Ahmed (relied on necessity) – Ratified

Pakistan has, as indicated above, been suffering from political instability whereby its political growth and democratic progression have been diminished by intervention by military chiefs or presidents – warranted or unwarranted – in parliament achieving its full term.

There have been adjustments to the constitution which both provide for, and remove, the president's discretionary powers to dissolve assemblies (even before their term). Those discretionary powers are under Article 58 of the current constitution.<sup>281</sup> Although presidents have used the plea of necessity to justify their actions, the doctrine of state necessity has also been routinely invoked in the case of military takeover.

Premature dissolutions are also ratified by the judiciary in the name of the application of the doctrine of necessity. There are several landmark cases in the history of Pakistan that have supported acts of premature dissolution even to the extent of justifying martial law and abrogation of the constitution.

The analysis in this chapter has identified that the key factors selected are not incorporated not only in Pakistan's present political system but also all in all those of the past. The pattern shown in the preceding analysis answers the first subsidiary research question in the affirmative. In answering the second sub-question, this analysis has also established that despite being branded as a democratic federation, Pakistan does not incorporate the selected key factors that are present, specifically, in the US model.

*Table 2 - Summary of Results*

	1935-1954	1956-1962	1962-1973	1973-2018
<i>Compliant with equal representation?</i>	X	X	X	X
<i>Provide for separation of powers and checks and balances?</i>	X	X	X	X
<i>Are there elements of self-interest?</i>	✓	✓	✓	✓

<sup>281</sup> The Constitution of Pakistan 1973, art 58 (2)(b).

An important and unprecedented event occurred in the year 2008, when none of the parties had an absolute majority and, consequently, a coalition government had to be formed.<sup>282</sup> Pakistan Muslim League Nawaz (PML(N)) was an influential party in Punjab and the Pakistan People Party (PPP) has a large vote bank in the Sindh province, consequently the parliament of 2008-13 was formed by way of coalition of the PPP and PML(N) and other smaller parties. It is worth noting that it was also unprecedented that the parliament was not dissolved prematurely during this time. This unprecedented completion of the parliamentary term sheds light on the research question *"Is there any connection between premature dissolution of government and one party having an absolute majority?"* Of course, there may be many more reasons for the parliament completing its full term without premature dissolution, such as the country's democratic maturity, educational awareness and end of the most recent military regime. However, it cannot be ignored that a plausible and logical possibility was the parliamentary arrangements which served as a deterrent to disparity of representation<sup>283</sup> and inadvertently formed a checks and balances system. The parliament of 2008-13 was in fact somewhat compliant with the ideals of the model democratic federal political arrangement, and this essentially prevented any further instances of premature dissolution to date.<sup>284</sup>

The coalition government inadvertently manifested the factor of equal representation alongside a checks and balances system which also hinted at the separation of powers to let the parliament complete its full term for the first time.

The hypothesis that Pakistan is not operating a suitable political system cannot be conclusive without comparing it with a suitable political system. As indicated in Chapter 1, a suitable political system for a democratic federal state is a Democratic Federal Political System, which strictly incorporates the factors used in the preceding analysis.

Potential causes of premature dissolution in Pakistan have been narrowed down for the purposes of this thesis to key driving factors, i.e. the absence of a range of key

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<sup>282</sup> Election Commission of Pakistan, 'National assembly. Party Position including reserved seats' <<http://ecp.gov.pk/Misc/PartyPosition/NAPosition.pdf>> accessed 28 November 2018.

<sup>283</sup> This apparent equal representation was not de-jure but de-facto by compromise and arrangements by parties to form a government. So, the parties without a majority (i.e. PML(N) for Punjab and ANP for NWFP and Baluchistan) also exercised equal powers with the majority party (PPP for Sindh and Punjab), thus all provinces exercised almost equal representation.

<sup>284</sup> Such arrangements are already the salient features of the US presidential system, i.e. the use of a Senate to represent all states equally.



democratic or federal factors in the political system. These factors lead to risk to the country's integrity as a union, and in any case, cases in which necessity is invoked, rightly or wrongly, arise and these consequently justify the premature dissolution. In the next chapter, these factors are explored in more detail as part of the comparative analysis.

## 5. A Comparative law inquiry into the USA and Pakistan Constitutional Systems

This chapter uses comparative law techniques to compare Pakistan and the USA in terms of their state structures and political systems.

As indicated in 2.6, a structural approach is initially used in section 5.1, to explore the similarity between the two states' structure. This is a pre-requisite for any further comparative analysis. A functional-institutional approach is used thereafter to highlight the issues arising due to dissimilarity and through a problem solving approach to propose a solution and implementation in Chapter 6.

A functional-institutional approach is used in the remaining sections of this chapter to conduct a like by like comparison.

### 5.1 The State Structure Analysis

The purpose of this structural comparison is to ascertain whether the state structure of Pakistan is compatible with a US style presidential system. According to the researcher's hypothesis of constitutional suitability, a Democratic Federal Political System is appropriate for a democratic federal state. The working assumption is that both the USA and Pakistan are democratic federal states, therefore, similarities between their state structure should be prominent. This section ascertains these similarities. The parameters of comparison are mainly in the two states' historical origin and their political arrangements.

It is logical to suggest that the way in which the political system functions for the USA should function for Pakistan if their state structures have some similarity.

#### 5.1.1 The USA

As indicated in Chapter 3, the ideals of the Enlightenment were the basis for the Declaration of Independence and the Constitution.<sup>285</sup> The framers of the US constitution were, for example, inspired by the theories of government of Locke, Montesquieu and Rousseau.<sup>286</sup>

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<sup>285</sup> Robert A Ferguson, *The American Enlightenment, 1750-1820* (Harvard University Press 1994) 150.

<sup>286</sup> Ediberto Román, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique* (New York University Press 2010) 59.

The US constitution is over two centuries old, which is a reasonable age from which to infer its reliability. The institutions in the USA have developed through the acumen of its founding fathers influenced by Enlightenment philosophers. The US political system has evolved by addressing several issues discussed later in this Chapter. The US political system is a 'constantly dynamic system of unrelenting process of trial and error'.<sup>287</sup>

There are two aspects to be considered in order to fully ascertain the similarity between both the state structures of both countries, i.e., their historic origin and their political composition. The comparison in this section will therefore take into account the composition of the original union (comprising 13 colonies) of the USA and the five provinces of Pakistan.

The original colonies of America were Crown Colonies (ruled by a Governor, who was assisted by a Council), Proprietary Colonies (which were under individuals given the powers of government) and the Charter colonies (in which the government powers were conferred directly upon the common people).

In colonial times, the American colonies had already implemented self-government, and, through elected assemblies, had the right to legislate. The powers of the colonies in America included trade, policing and taxation.<sup>288</sup> The British Empire had control over other powers such as the military and foreign affairs. There was a perpetual struggle of self-governance between the colonists and the representatives of the empire, which eventually led to a war between the American colonies and the Empire.<sup>289</sup> The Declaration of Independence on 4 July 1776 declared that the colonies were free and independent states.

The colonies were not only independent of the Crown but also independent of one another.<sup>290</sup> In June 1776 a committee was commissioned to draft the articles for confederation, which were ratified by the then Congress on 15 November 1777.<sup>291</sup>

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<sup>287</sup> Vishnool Bhagwan & Vidya Bhushan, *World Constitution - A Comparative Study* (Sterling Publishers 1998) 2.

<sup>288</sup> Roger Hilsman, *To Govern America* (New York: Harry & Row 1979) 11.

<sup>289</sup> *ibid* 13.

<sup>290</sup> *ibid* see also US Department of State. 'Office of the Historian' (2015) <<https://history.state.gov/>> accessed on 28 November 2018.

<sup>291</sup> Richard B. Morris, 'We the People of the United States: The Bicentennial of a People's Revolution' (1977) 82 *American Historical Review* 1.

These articles of confederation were merely conventions with no binding authority.<sup>292</sup>

The early Congress consisted of the delegates of the states and each state had one vote.<sup>293</sup> The Congress was designed to control the states' affairs but essentially lacked any real authority or force.<sup>294</sup>

After the War of Independence was over, there were some inter-state disputes.<sup>295</sup> These gave rise to the Annapolis convention in September 1786 which met to consider the extension of the power of the then union known as Confederation.<sup>296</sup> Only five states responded to the conference.<sup>297</sup> Alexander Hamilton from New York moved to summon a convention of delegates of all the States to consider the question of amending the Articles, which resulted in the famous Convention at Philadelphia in 1787.<sup>298</sup>

The convention delegates approached the issue by determining that they had two objectives before them, i.e. to establish a stable central government and to preserve the independence of the States.<sup>299</sup> This resulted in a document incorporating the constitution of the new government of the United States in force on 4th March 1789.<sup>300</sup>

This constitution substantially changed the fate of the then 13 states, because it created a government that was designed to establish stronger federating units and a weak central government,<sup>301</sup> which suggests quite a satisfactory arrangement for union or confederation since their individual identity and autonomy was preserved. Perhaps it was this federal character that allowed the number of states to rise from the original 13 to 50, thus making the USA a union of 50 states.

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<sup>292</sup> *ibid.*

<sup>293</sup> *ibid.*

<sup>294</sup> *ibid.*

<sup>295</sup> For example the issue of navigation of the river Potomac between Maryland and Virginia, see generally *Mount Vernon Conference: James Charleton et al, 'Framers of the Constitution' (1986) Washington, National Archives and Records Administration 19.*

<sup>296</sup> *ibid.*

<sup>297</sup> New York, New Jersey, Pennsylvania, Delaware and Virginia.

<sup>298</sup> James Charleton et al, 'Framers of the Constitution' (1986) Washington, National Archives and Records Administration.

<sup>299</sup> *ibid.*

<sup>300</sup> *ibid.*

<sup>301</sup> Francis Newton Thorpe, 'History of the American People' (1901) World Constitutions Illustrated 56.

This section only focuses on the initial 13 colonies or states for a comparative analysis with Pakistan's initial five provinces. From the point of practicality, it is wise first to explore how the initial 13 states formed a union and surrendered their sovereignty and to consider such issues as whether they were actually similar in certain respects or had common goals. The initial 13 colonies were situated on the Atlantic coast of North America. In early US history there were disputes between these states and those that had joined the union later.<sup>302</sup>

These colonies were classified into three groups i.e. the New England colonies, the Middle colonies and the Southern colonies.<sup>303</sup> Each group had a different socio-economic, political and religious character.<sup>304</sup>

The economic activities of these colonies were primarily reliant on their location, for example; the northern colonies of New England were mainly involved in manufacture and industries such as ship building, the southern colonies focused on agriculture and livestock and the middle colonies alongside agriculture also concentrated on manufacturing metallurgic products such as tools, blocks of iron etc.<sup>305</sup>

In summary, the 13 colonies, which were essentially different in important aspects, (i.e. socio-economic, political and religious) managed to compromise and surrendered their sovereignty to form a union. Despite certain longstanding political issues, such as civil war, and secession attempts for reasons other than representation or anarchy, their history over the past two centuries has witnessed that the arrangement has proved itself and the union has survived.

It is argued that had similar arrangements been considered for the initial five provinces in newly formed Pakistan, Pakistan would have been stable since those five provinces at least shared some common values.<sup>306</sup> In the next section, the inception of Pakistan is explored; compared to that of the USA and its deviation from the US model is tracked in subsequent sections.

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<sup>302</sup> Carl Lotus Becker, *'Our Great Experiment in Democracy; a History of the United States'* (1927) (New York, Harper 1927) 5.

<sup>303</sup> *ibid.*

<sup>304</sup> *ibid.*

<sup>305</sup> *ibid.* 6.

<sup>306</sup> Such as religion, for example the two-nation theory which states that Muslims and Hindus are two separate nations, therefore, Muslims should have their own homeland, in which they can practise Islam.

### 5.1.2 Pakistan

Chapter 4 set out the constitutional, historical and political background of Pakistan's history in detail. This section, however, focuses on those aspects of that background that are particularly relevant for the structural comparison with the USA.

Pakistan (the then subcontinent), was part of a British Colony somewhat similar to the USA save that in this arrangement the British introduced a system of devolution of powers where the interest of the Empire was pre-eminent.<sup>307</sup> The British colonised India and three independent presidencies were set up subordinated to the Governor General.<sup>308</sup> The Governor General was assisted by a council called the executive council.<sup>309</sup> The presidencies were later given the status of provinces or dominions and given certain administrative and legislative powers.<sup>310</sup> A judiciary was also constituted to interpret law.<sup>311</sup> The central government had overriding powers and therefore the polity was not of a democratic federal nature as it compromised on the point of equal representation of people (first dimensional representation) and dominions (second dimensional representation).<sup>312</sup>

The three presidencies model set up by the Empire has its similarity with the earlier colonies of America, i.e., Crown Colonies, Proprietary Colonies and the Charter colonies.<sup>313</sup>

At the time of the creation of Pakistan in 1947, Pakistan could be classified into three groups; i.e. one group comprised of 13 princely states along with parts of Kashmir; the second group consisted of East Bengal and the third group comprised of North-West Frontier Province (NWFP present day KP), West Punjab Sindh and Baluchistan.

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<sup>307</sup> Asok Chanda, *Federalism in India* (London: George Allen & Unwin 1965).

<sup>308</sup> Lucy Sutherland, *The East India Company in Eighteenth Century Politics* (The Clarendon Press 1952).

<sup>309</sup> For example Regulatory Act 1784, 1793, 1833, 1853.

<sup>310</sup> Asok Chanda, *Federalism in India* (London: George Allen & Unwin 1965).

<sup>311</sup> *ibid.*

<sup>312</sup> Lucy Sutherland, *The East India Company in Eighteenth Century Politics* (The Clarendon Press 1952).

<sup>313</sup> Vishnoo Bhagwan & Vidya Bhushan, *World Constitution - A Comparative Study* (Sterling Publishers 1998) 2.

Apart from sharing the same religion, the federating units of Pakistan did not and still do not share culture, language or traditions.<sup>314</sup> Besides independence from the British Empire, these three groups of India wanted a separate Muslim country free from India. These three groups comprised the majority Muslim population. Pakistan is at an advantage here since religion plays an important role in people's daily life. The involvement of religion will be explored further in the functional comparison in the subsequent sections 5.2 and 5.3.

A federal arrangement would have provided greater autonomy to all units. Even in the current arrangement where four provinces now exist, these still have indigenous differences of culture, language, traditions and values. Under such circumstances, allowing one province to decide the fate of others is problematic.

It is not suggested in the case of the USA, that the heterogeneity of religion or possibly the consciousness of the heterogeneity, created a stronger unit. In fact, the argument is more in favour of a federal arrangement which could drive a group of heterogeneous states to form a strong union. In the case of Pakistan, federalism would have made an even stronger union due to the component states' connection through a common belief, i.e., religion.

In conclusion, there are some similarities in the initial situation of the two countries. Both had been British colonies and both experienced turbulence at the time of independence. Both consisted of groups of subsidiary states without significant consistency in culture or tradition. Nevertheless, the US model with its emphasis on equal representation has continued without change or challenge in a relatively peaceful political situation in a way that Pakistan's model, with the addition of the potentially unifying power of a shared religion, but without the security of equal representation, has not. Although other factors may be at play, the next section goes on to consider the extent to which the key political structures relating to the key factors might contribute to this difference.

## **5.2 Government Structure – Legislative & Executive**

In this section a functional-institutional comparison is carried out to determine how the three branches of government are linked, constituted and operate.

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<sup>314</sup> *ibid.*

According to Locke, consent plays a central role and is the mechanism by which political societies are created.<sup>315</sup> The case of Pakistan may be considered as a practical implementation of the effect when a federal government fails to perform its basic duty i.e. absence of key factors, which then raises the issue of consent or will of the people and ultimately causes governments to be overthrown.<sup>316</sup>

Locke may well be construed as a reluctant democrat as his theory of consent focuses on the issue that a few people actually consent to their governments, so no governments are actually legitimate.<sup>317</sup> The government formed by Pakistan if only involves majority from one province is not actually a legitimate government in Locke's sense.

Montesquieu goes further in his three classifications of governments: republican governments, monarchies and despotisms.<sup>318</sup> The form that is relevant for this thesis is republican which is further classified into democratic and aristocratic.<sup>319</sup> As discussed above in Chapter 4, although Pakistan espouses a democratic model, in fact, because of the prevalence of military coups, and the readiness of the judiciary to retrospectively validate those coups, the model is at least at times, despotic. Pakistan is a republican democratic state at least in theory, and in practice it does adopt the shape of despotism at times of military rule. This clash between the ostensibly democratic but in fact despotic, as shown through the examples in Chapter 4, is at the very heart of the problem in this thesis.

Montesquieu, being a medium democrat, believes that the people are sovereign and govern through chosen representatives.<sup>320</sup> In the case of Pakistani politics, self-interests is also one of the issues indicated in Chapter 4, where representatives influence the law to suit their agenda. The researcher argues that the democracy of Pakistan is corrupted due to what Montesquieu calls the spirit of inequality,<sup>321</sup> where politicians put their self-interests before the interests of the state.<sup>322</sup> The

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<sup>315</sup> John Locke, *Second Treatise of Government* (Peter Laslett ed, 2nd edn, Cambridge University Press 1967) 71.

<sup>316</sup> No government since its inception until that of 2008-13 and 2013-18 have completed its full term.

<sup>317</sup> John Locke, *Second Treatise of Government* (Peter Laslett ed, 2nd edn, Cambridge University Press 1967).

<sup>318</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989).

<sup>319</sup> *ibid* 17.

<sup>320</sup> *ibid*.

<sup>321</sup> *ibid* 113, 157

<sup>322</sup> For example, the 8<sup>th</sup>, 13<sup>th</sup> and 17<sup>th</sup> amendments to the Constitution.



researcher claims that the will of the people also encourages the overthrow of governments due to disparity of representation, for example all three martial law regimes had the support of the majority of the people at least in the beginning. The practice of premature dissolution is nurtured because these acts are not only supported by the judiciary in the name of necessity but also welcomed by the people.<sup>323</sup>

Unlike Montesquieu, Rousseau takes a more extreme stance towards government, which is inline with the two dimensional representation. Rousseau advocates that individuals should be assumed to have entered into a social contract where they would give up all their rights to the whole community which, like Hobbes, he refers to as a sovereign.<sup>324</sup> They then exercise their general will to legislate for the public good.

Rousseau's central doctrine in politics is that a state can be legitimate only if it is guided by the general will of its members.<sup>325</sup> Unlike other Enlightenment philosophers such as Locke and Montesquieu who developed theories of government that had a deep effect on the American revolution,<sup>326</sup> Rousseau's political philosophy has extreme democratic views, especially those of the doctrine of sovereignty and representation, with his apparent rejection of representative government.<sup>327</sup> He believed that the legislature would need to legislate only on the areas or issues upon which citizens had not specifically agreed.<sup>328</sup> His hostility to the representation of sovereignty extends to the election of representatives to sovereign assemblies even where those representatives are subject to periodic re-election.<sup>329</sup>

All three philosophers advocated the concept of representation albeit using different terminologies but conveying the same essence of equal representation. According to Locke, governments exist by the consent of the people and when they fail to perform their basic duty should be resisted and overthrown. This assertion is reflected in

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<sup>323</sup> The researcher has personal knowledge that the people of Pakistan have supported martial law at least in the beginning.

<sup>324</sup> Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts tr, Oxford University Press 1994).

<sup>325</sup> *ibid.*

<sup>326</sup> Armando Navarro, *The Cristal Experiment: A Chicano Struggle for Community Control* (University of Wisconsin Press 1998).

<sup>327</sup> *ibid.*

<sup>328</sup> *ibid.*

<sup>329</sup> *ibid.*

the US Bill of Rights.<sup>330</sup> According to Montesquieu, people are sovereign and govern through chosen representatives. In relation to Rousseau, the state can be legitimate if it is guided by the general will of its members. In the next two subsections, the two countries are explored under the philosophical lens as discussed in this section.

### 5.2.1 The USA

The US government is composed of three branches. Each of these is given powers over the others to guarantee that there are checks and balances.<sup>331</sup> The legislative branch i.e. Congress has two houses, and the composition of these houses ensures equal representation at both federal and states' level. These three branches function independently of each other.

People invested with power are highly likely to abuse it and therefore those powers must be limited.<sup>332</sup> As discussed in 3.3, separation of the executive, legislative and judicial powers of government improves the issue of the abuse of powers by individual branches and checks and balances operate effectively. In practice, the concept of separation of powers can also be noticed within the legislative branch where both houses are balanced in sense of their exclusive and overlapping roles.

The current model of the USA provides for a bicameral legislature.<sup>333</sup> Its lower house is called the House of Representatives (with 435 members) and the upper house the Senate (with 100 members). Unlike many other democracies such as the UK, India or Pakistan, the upper House of the USA is more powerful than the lower house, for example, the US Senate can also operate as executive and judiciary.<sup>334</sup> These additional powers are not indicative that the separation of powers is compromised because these powers can only be used in special circumstances, for example, impeachment which is a judicial process but can only be conducted by the Senate sitting as jury.

The tenure of the lower house is two years, and that of the Senate is six years. To the researcher, the two year tenure is a more democratic and productive

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<sup>330</sup> The first ten amendments to the US Constitution.

<sup>331</sup> William E. Nelson, 'Constitutional History' 1966 Annual Survey of American Law 687.

<sup>332</sup> Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989) 162.

<sup>333</sup> Judson S. Landon, 'Constitutional History and Government of the United States' (1900) World Constitutions Illustrated 21.

<sup>334</sup> *ibid.* It exercises this judicial role when conducting hearings, for example impeachment proceedings.

arrangement, for many reasons, for example: it improves awareness in voters of the need to choose the right candidate and accountability and performance of the congressmen improve if they want to be re-elected in two years' time. A five year tenure on the other hand is a long time to revisit voters' choice of candidate. If a similar tenure of the national assembly were to be adopted by Pakistan, it might temporarily address the issue of premature dissolution since the historic premature dissolutions had been of parliaments that had completed at least two years of their tenure. Nevertheless, such an interim measure may not address the actual problem of disparity.

The current model of the US political system incorporates equal representation in the two-dimensional paradigm described in 3.2. The arrangement ensures that the member states regardless of their size and population have an equal representation in the federation.

The framers of the constitution have appropriated an important place to the upper house. It is even mentioned earlier than the House of Representatives in the constitution.<sup>335</sup> The US Senate has an inviolable role in the federalism and democracy of the USA, it is the assurance of the autonomy of the states before forming a union. Allocation of equal number of senators from each state has ensured the states' right of equal representation in the second dimension. Although there have nevertheless been secession attempts in the US in the past, none of those have, to date, succeeded.<sup>336</sup> It is important to note, that these secession attempts were not due to an issue of representation.

The reasoning behind the use of bicameralism is straightforward. The initial unicameral legislature of the Congress under the Articles of the Confederation between 1781 and 1787 was weak and smaller states were struggling to ensure their equality since their sovereignty would have been threatened if representation was merely based on population.<sup>337</sup>

It is very important to note that the upper house under the original US Constitution is not a directly elected house, but rather chosen by the states' legislatures.<sup>338</sup> This

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<sup>335</sup> US Constitution Art 1.

<sup>336</sup> Erin Ryan, 'Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society' (2016) FSU College of Law, Public Law Research Paper No 806 1.

<sup>337</sup> Judson S. Landon, 'Constitutional History and Government of the United States' (1900) World Constitutions Illustrated 318.

<sup>338</sup> *ibid.*

arrangement has great similarity with Pakistan's current procedure for the election of senators, who are chosen by the provincial assemblies.

In the case of the USA, there are two possible reasons why the framers of the US constitution made this early arrangement for indirect election of the Senate,<sup>339</sup> that is, their conclusion that the advantages of indirect election outweighed the disadvantages of direct election. They were concerned about the candidates being able to manipulate the voters and win the polls, whereas letting a group of people with much more experience in states' affairs choose the senators would be beneficial.<sup>340</sup> Indirect election was also seen as a mechanism to ensure harmony between the state legislatures and central government.<sup>341</sup>

The USA had similar issues of self-interest with indirect elections of senators to those observed in Pakistan. There were problems such as secret deals, with the result that financial power could potentially place senators in the Senate.<sup>342</sup> There were even times that the states' legislatures failed to elect a senator, for example until 1912 on several occasions several states were represented by only one member in the Senate.<sup>343</sup> Between 1901 and 1903, there was no representation for the state of Delaware in the Senate.<sup>344</sup> Wealthy people at the time could literally buy the votes required to get them in the Senate.<sup>345</sup> Due to the increasing unpopularity of the practice of indirect election, the 17th Amendment in 1912 abolished the indirect election and provided for direct popular election.

Pakistan faces similar issues of corruption in the election of the upper house. The USA's solution to this problem is to elect its members directly.

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<sup>339</sup> *ibid.*

<sup>340</sup> VD Amar, 'Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment' (1996) 49(6) *Vanderbilt Law Review* xiv.

<sup>341</sup> *ibid.*

<sup>342</sup> VD Amar, 'Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment' (1996) 49(6) *Vanderbilt Law Review* xiv. See also: JW Garner, 'Government in the United States: National, State, and Local' (1911) *World Constitutions Illustrated* 184.

<sup>343</sup> Judson S. Landon, 'Constitutional History and Government of the United States' (1900) *World Constitutions Illustrated* 318.

<sup>344</sup> WE Guitteau, 'Government and Politics in the United States: Problems in American Democracy.' (1918) *World Constitutions Illustrated* 248, 252.

<sup>345</sup> JW Garner JW, 'Government in the United States: National, State, and Local' (1911) *World Constitutions Illustrated* 174, 184.

As much as bicameralism is efficiently implanted in the US political system, which guarantees equal representation of states and its people, nonetheless, this concept is not fully observed in the process for a presidential election.

Under the US constitution, the head of state and head of government are the same person, the president. In other parliamentary democracies, the head of state, for instance the president in Pakistan and India or the monarch in the UK, has very limited operational power. By contrast, the US president is powerful as he is at the same time head of government. His office can be compared with those of prime ministers of other parliamentary democracies such as the UK or Pakistan. However, it is argued, even when he is compared with prime ministers, he still enjoys enormous powers.<sup>346</sup> It would not be exaggerating to state that the US president's office has had the most power among its equivalents in other democratic nations.<sup>347</sup>

It is under the US political system that the constitution has made the president an executive head. It is difficult to compare the US president's position and/or his office with any other foreign institution.<sup>348</sup> As Laski puts it, '[he] is both more and less than a king, he is also both more and less than a Prime Minister'.<sup>349</sup>

Theoretically the US president is elected through an indirect election.<sup>350</sup> The 'indirect' factor is due to the selection process by the Electoral College, which is directly elected by the people.<sup>351</sup> The Electoral College is constituted of 538 members.<sup>352</sup> Each state has its presidential electors, and the allocation is based on the similar principle as that of Congress.<sup>353</sup> This researcher does not agree with the method of using an Electoral College as this thesis strongly advocates direct representation of the people as discussed in 3.2. The Electoral College appears to be an extra and unnecessary layer of formality in the presidential election process, since the people elect presidential electors and then they cast their vote for president and vice president, the people should be able to elect the president directly instead.

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<sup>346</sup> For example, he is not obliged to employ his cabinet, he selects his cabinet albeit with the approval of the Senate.

<sup>347</sup> John Yoo, 'President Obama and the Framers' Presidency' (2013) 36(1) Harvard Journal of Law & Public Policy 73.

<sup>348</sup> Harold Laski, *The American Presidency: An Interpretation* (New Brunswick: 1980) 11.

<sup>349</sup> *ibid.*, 11.

<sup>350</sup> Albert J. Rosenthal, 'Constitution, Congress, and Presidential Elections' (1968) 67(1) The Michigan Law Review 1.

<sup>351</sup> *ibid.*

<sup>352</sup> *ibid.*

<sup>353</sup> *ibid.*

The researcher's Democratic Federal Political System does not have any room for indirect election and it is on this point that even the US political system deviates (albeit slightly) from it. It is not only the researcher's contention that there is a flaw in the use of the Electoral College, but there have been in the past proposals to abolish the Electoral College.

The American Bar Association in 1967 recommended that the Electoral College to be substituted by a popular vote. This recommendation was passed by the lower house but failed in the upper house.<sup>354</sup> Later, in 1977, President Jimmy Carter was also unsuccessful in his attempt to propose a direct presidential election.<sup>355</sup> The researcher fully agrees with each charge put by the American Bar Association that '[t]he electoral college method of electing a President of the United States is archaic, undemocratic, complex, ambiguous, indirect, and dangerous'.<sup>356</sup>

It is however conceded that equal representation is implemented in accordance with the Democratic Federal Political System in both houses in the US congress, but at the same time, it is argued, the presidential election system reveals some degree of unbalance. Representation and the will of the people are important principles,<sup>357</sup> and it is illogical to conduct a presidential election indirectly through an Electoral College. It diminishes the will of the people, for example, in the most recent US Presidential Elections (2016), the runner up candidate had 48.2% of the popular vote, whereas the elected president had only 46.2% of the popular vote.<sup>358</sup>

In the next section, the government structure of Pakistan will be described and then compared to that of the USA in terms of legislature and executive.

### **5.2.2 Pakistan**

Unlike the USA where the three branches of government are separated, in the case of Pakistan, the powers are co-ordinated between the three branches, which

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<sup>354</sup> American Bar Association, *Elect the President: A Report of the Commission on Electoral College Reform* (American Bar Association, 1967).

<sup>355</sup> *ibid*, also Office of the Historian. 'Central America, 1977–1980' <<https://history.state.gov/milestones/1977-1980/central-america-carter>> accessed on 28 November 2018

<sup>356</sup> American Bar Association, *Elect the President: A Report of the Commission on Electoral College Reform* (American Bar Association, 1967) 3.

<sup>357</sup> Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts tr, Oxford University Press 1994).

<sup>358</sup> Anon, 'Daily Chart: America's Electoral College and the Popular Vote' [2016] *The Economist* <<http://www.economist.com/blogs/graphicdetail/2016/12/daily-chart-0>> accessed 28 November 2018.

primarily means that these branches are not independent of each other, but interdependent.<sup>359</sup> The executive branch as in the UK is created from the legislative branch. The judiciary on the other hand has some level of theoretical independence.

The Parliament is comprised of two houses like the US Congress and its composition is extremely similar to the earlier US congress where the upper house was elected by the state legislature. There is an office of the President, who is elected by the parliament and is merely a ceremonial figurehead. Parliamentary seats are allocated by way of proportional representation.

Seat allocation on the basis of population proportionality is pragmatic and logical and the arrangement is similar to that of the US House of Representatives. The issue arises when the constitution allows one federating unit to form a government for the rest of the union. Under the US political system, one or some states cannot control the fate of other states, there are safeguards to prevent any such eventuality. For instance, direct elections of state senators, representatives and the separate election of the president are three distinct powers in a triangular relationship. It is theoretically possible under the US political system to have one party in the majority in the lower house, a second party in the majority in the upper house and a president belonging to a third party. This clearly indicates that it is not possible for one state in the USA to monopolise government for the rest of the union.

In theory the Senate of Pakistan, like that of the USA, is composed with the aim of giving equal representation to all the federating units in order to promote national unity and maintain coordination. The tenure of its members is set in a similar way to the USA, that is six years, and half of its members are required to retire every three years. Like the early US Senate, Pakistan's senators are indirectly elected by the legislatures of the federating units. This method of indirect election was abandoned by the USA following the 17th amendment to the constitution. It is argued that the reasons for the USA abandoning the indirect method are equally applicable to Pakistan, in pursuit of more transparent representation of the federating units.

The Constitution established the upper house for a reason, which is to preserve equal representation in the federation primarily because the popularly elected lower

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<sup>359</sup> Constitution of Pakistan, Part III.



house of parliament is dominated by Punjab province which is more than half of Pakistan's population.<sup>360</sup>

The problem of disparity is particularly acute in Pakistan because there is not only a disparity of representation in the lower house, but it which translates into disparity in the upper house that is meant to represent provinces equally. It is argued, indeed, that federating units in Pakistan are unable to obtain two dimensional representation as the selection of senators is by indirect election and senators do not play any role in forming a government which is the prerogative of the lower house only. It is also a common practice to secure a seat by using financial or other political influence. This is also known as 'political-horse trading'.<sup>361</sup>

Comparing this with the US triangle of lower house, upper house and executive head, Pakistan's upper house is ineffective because senators do not reflect the true representation in the second dimension due to their indirect election. The lower house and upper house both can therefore be, and usually are, controlled by one province or the party that wins in that province.

With the upper house ineffective in terms of representing the provinces, it would not be exaggerating to simply conclude that Pakistan's political system is a de facto unitary government.

The USA and Pakistan clearly are, therefore, different in their political systems. The USA is a federation with a presidential form of government, which conforms, to a greater extent, to the factors of democratic federalism selected for use in this thesis. The US Congress is entirely different from its colonial predecessor (the UK) whereas Pakistan has eventually adopted more of a Westminster model where the upper house has a completely different function.

In Pakistan, the parliament controls the executive, which is composed of the leader of the majority party and his cabinet (ministers). The USA, on the other hand, has Congress and the President unconnected to each other. Congress cannot remove the secretaries nor are secretaries present in Congress to answer any questions from either of the houses. The prime minister of Pakistan can get the National

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<sup>360</sup> *ibid.*

<sup>361</sup> This term is widely used in Pakistan by Pakistani officials including party leaders and journalists to refer to Senate elections for example Tariq Butt, 'Political foes on same page to curb horse-trading' *Pakistan Telegraph* (Islamabad, 28 February 2015).



Assembly dissolved by advising the president, but the US President cannot dissolve Congress before the end of its term.

Pakistan has been under the dictatorship of military rulers for more than half of its existence as a country. However, the current political system, albeit branded as democratic, is also dictatorial, as the prime minister and his cabinet can take decisions without any checks from other bodies such as the judiciary. The US Congress has more operative control over the cabinet than the Parliament of Pakistan has over the cabinet. Cabinet is part of the Parliament under Pakistan's political system, but the US cabinet is not part of Congress.

In conclusion, the political system of Pakistan does not fulfil the concept of equal representation in the second dimension and the doctrine of separation of powers is not manifested in its parliamentary arrangement. The US political system on the other hand, has found and implemented a solution to uphold equality of representation in the second dimension i.e. federating units.

The next section goes on to consider the judiciary, which is the third element of government structure and is clearly significant as the custodian of the constitution and guardian of democracy.

### **5.3 Government Structure – The Judiciary**

The judicial system and its functioning in any polity varies with respect to its political system.

#### **5.3.1 The USA**

There was, however, no provision for a judicature under the Articles of Confederation in the USA.<sup>362</sup> At the Philadelphia Convention, the need for a central judiciary was ascertained not only to address the issues of confederation but also to provide rulings regarding conflicting decisions between states.<sup>363</sup> Consequently, the subsequent US constitution provided that 'The judicial power of the United

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<sup>362</sup> Francis Newton Thorpe, 'History of the American People' (1901) World Constitutions Illustrated 56.

<sup>363</sup> *ibid.*

States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish'.<sup>364</sup>

The Supreme Court is created by the constitution, whereas other all other federal courts are created by Congress.<sup>365</sup> The Supreme Court plays a very significant role in the US judicial system. All the judges of the Supreme Court are appointed by the President himself, upon the advice or recommendation of the Senate.<sup>366</sup> The appointment of judges (judiciary) are by the president (executive) with the involvement of Senate (legislature). This process should not be seen as circumventing the separation of powers, for two reasons. First, Supreme Court judges are appointed for life and cannot be removed by either executive or legislature save for impeachment. Second, the President can only appoint judges on the advice and recommendations of the Senate which is likely to be comprised of a mixture of all parties, unlike the parliamentary house in Pakistan.<sup>367</sup> If the Senate wishes to oppose any nomination by the president they can and have done. For example, President Obama nominated Merrick Garland for Associate Justice of Supreme Court, whom the Senate successfully opposed by holding their vote for 293 days until the presidential term had expired.<sup>368</sup>

Whilst the Supreme Court of the USA has several judicial functions, in the context of this thesis, the significant role of the Supreme Court is that of custodian of the constitution and protector of the federation and of democracy.

The Supreme Court is the guardian of the US Constitution because, by way of judicial review, it can nullify any unconstitutional laws passed by the Congress or by executive order by the President. The case of *Marbury v Madison*<sup>369</sup> is a good example that demonstrates the power of judicial review. The facts of this case have some similarity with the previous example of Obama nominating Merrick Garland for Supreme Court near the end of his presidential term except that in this case President John Adams had already appointed William Marbury as Justice of the Peace for the District of Columbia. When President Jefferson succeeded, he ordered

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<sup>364</sup> US Constitution Article III.

<sup>365</sup> *ibid.*

<sup>366</sup> *ibid.*

<sup>367</sup> US Constitution Article II, see also Epstein L and Posner EA, 'Supreme Court Justices' Loyalty to the President' (2016) 45 *The Journal of Legal Studies* 401.

<sup>368</sup> J Fishkin and DE Pozen, 'Asymmetric Constitutional Hardball' (2018) 118(3) *Columbia Law Review* 915.

<sup>369</sup> 5 US 137 (1803).

his secretary of state not to finalize the appointment of Marbury. The Supreme Court nullified the presidential order of Adams and by extension ruled against Marbury.

The judicial review power vested in the US political system has not only guarded the constitution from being abused but also provided a substantial shield against any despotic intention of the executive or the military,<sup>370</sup> unlike in the case of Pakistan, where unconstitutional acts have been ratified by the Supreme Court. The US Supreme Court has played an important role and has delivered landmark judgments to preserve the integrity of the union.

For example, in the case of *McCulloch v Maryland*, two important constitutional law principles were introduced: firstly, the doctrine of implied powers to Congress for implementing the Constitution's express powers and secondly that a state's action may not hinder valid constitutional exercises of power.<sup>371</sup> Whilst the constitution already provided for an elastic clause<sup>372</sup> under Art I of the US Constitution,<sup>373</sup> the Supreme Court in this case held that the word 'necessary' in the elastic clause does not refer to any one way of action, but applies to a wide range of other procedures for the implementation of all constitutionally expressed powers. In the words of CJ Marshall:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>374</sup>

Judicial review is a powerful tool that a Supreme Court has to protect the constitution by determining whether the law passed or being passed is in accordance with the constitution.

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<sup>370</sup> US Constitution Article II and the practical example of *Texas v White*, discussed at 5.3.1.

<sup>371</sup> *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316 (1819) 316

<sup>372</sup> US Constitution Article I (Section 8): "Congress to pass all laws necessary and proper for carrying out the enumerated list of powers".

<sup>373</sup> "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

<sup>374</sup> *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316 (1819) 316.

In determining the constitutionality of the legislation, the court is not concerned with the wisdom, experience or policy of legislation. In the words of CJ Marshall:

Whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in [a] doubtful case. ... But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.<sup>375</sup>

There have been different opinions regarding the Supreme Court's power of judicial review, for example, President Thomas Jefferson was of the view that the strategy of the founding fathers was to create three independent branches of government, but the power of review given to the Supreme Court, according to him, negated the doctrine of the separation of powers. Consequently, he argued that every separate branch should be their own judges of actions.<sup>376</sup> Jefferson's argument is, it is suggested, unsustainable as separation of powers goes side by side with checks and balances and without one the other is unachievable.

In the context of this thesis, the concept of a powerful judiciary that can review the acts of the legislature and the executive is very important for the integrity of the country, at the same time, as indicated above, the US judiciary has also played an active role in maintaining and preserving the integrity of the union where the constitution was silent, for example, preventing secession attempts.

One of the potential issues of disparity is secession movements, which, as described in Chapter 4, have happened in the past not once, but twice in Pakistan. It is therefore very important to analyse the secession paradigm under the US presidential model. Usually in parliamentary democracies, the political system does not necessarily strictly stop secession requests, for example, the referendum for Scottish independence in the UK referred to in Chapter 3.

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<sup>375</sup> *Fletcher v Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) discussed in JM Lynch, 'Fletcher v. Peck: The Nature of the Contract Clause' (1982) 13(1) Seton Hall Law Review 1.

<sup>376</sup> JJ Darby, 'Congress and the Constitution' (1966) 526(6) Cornell Law Review 1027.

The American Civil War involved secession of the southern states.<sup>377</sup> In the early 1860s, the southern states tried to secede, resulting in the bloodiest war ever fought on US soil. The war was a secession struggle of the southern states, over the issue of slavery.<sup>378</sup>

Territorial referendums took place in Texas, Tennessee, Virginia, and Arkansas, each declaring victory for secession.<sup>379</sup> Secession was resisted by the military and questions were brought before the Supreme Court in *Texas v White*.<sup>380</sup> The Supreme Court held that the Confederate states were still states by extension, it held that all the seceding states were still states since the US Constitution did not allow for secession at all.<sup>381</sup> CJ Salmon Chase stated:

The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.<sup>382</sup>

The Supreme Court in this case had created a very strong and useful authority on demand for secession, establishing that secession is not an option under US constitutional law. The opinion of the Chief Justice in *Texas v White* has been 'widely accepted as being the final word on the issue of the legality of secession from the

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<sup>377</sup> Erin Ryan, 'Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society' (2016) FSU College of Law, Public Law Research Paper No 806 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2775377](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775377)> accessed 28 November 2018.

<sup>378</sup> *ibid.*

<sup>379</sup> *ibid.*

<sup>380</sup> 74 US 700 (1869).

<sup>381</sup> *ibid.*

<sup>382</sup> *ibid* 725.

perspective of American constitutional law'.<sup>383</sup> The same principle was applied by the Supreme Court in the most recent Alaskan secession attempt in 2010.<sup>384</sup>

It is argued that the reason the Supreme Court saved the union from disintegration was due to its constitutionally enshrined separation of powers, which created an independent and powerful judiciary. It was therefore less contentious to all parties when the decision was made in *Texas v White* and likewise the Alaskan case. In the next section, the role of the judiciary in Pakistan is explored and compared with the USA.

### 5.3.2 Pakistan

The power of the judiciary is not greatly different from that of the USA, its main role is to interpret the constitution and federal laws.<sup>385</sup> As discussed earlier at 3.4, Virk<sup>386</sup> and de Smith<sup>387</sup> separately argued that Pakistan's federal judiciary played an important role in the country's political instability by interpreting the laws so as to favour usurpers of power such as military chiefs by ratifying their unconstitutional actions ex post facto. As discussed in Chapter, 4, the researcher's finding is to the contrary, that in the majority of the cases,<sup>388</sup> the judges did not in fact have scope to act otherwise than they did. First, they were bound by the parameters of the legislation they were required to interpret. Second, they were bound by precedent in the shape of the initial *Tamizuddin* case.

Pakistan's federal court succeeded its British Indian predecessor, the Federal Court of India and subsequently established the Supreme Court in 1956. It has retained its name ever since.<sup>389</sup>

Pakistan's constitution defines the composition, jurisdiction, powers and functions of the Court.<sup>390</sup> Like the USA, Pakistan's Supreme Court also exercises original,

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<sup>383</sup> Peter Radan, 'An Indestructible Union... of Indestructible States: The Supreme Court of the United States and Secession' (2006) 10 Legal History 187, 188.

<sup>384</sup> LT Mohs, 'Alaska's Initiative Process: The Benefits of Advance Oversight and a Recommendation for Change' (2014) 31(2) Alaska Law Review 295.

<sup>385</sup> The Constitution of the Islamic Republic of Pakistan, 1973, Part VII.

<sup>386</sup> Muhammad Nasrullah Virk, 'Doctrine of Necessity-Application in Pakistan- Cases of Immense Importance- A Critical Review' (2012) 2(2) International J. Soc. Sci. & Education, 82.

<sup>387</sup> Stanley A. De Smith, *Constitutional and Administrative Law* (Penguin 1986) 80.

<sup>388</sup> Such as the *Maulvi Tamizuddin* case, the *Nusrat Bhutto* case and the *Musharraf* case.

<sup>389</sup> Supreme Court of Pakistan. 'History' (2017)

<<http://www.supremecourt.gov.pk/web/page.asp?id=113>> accessed on 28 November 2018

<sup>390</sup> The Constitution of Pakistan 1973, Article 176 - 191

appellate and review jurisdiction.<sup>391</sup> The constitution of Pakistan provides for the independence of the judiciary.<sup>392</sup> Nevertheless, the constitution assigns the Supreme Court the responsibility of maintaining harmony and balance between the legislature, executive and judiciary.<sup>393</sup> In theory, the Supreme Court is required to preserve, protect and defend the constitution.<sup>394</sup>

As described in Chapter 4, Pakistan has undergone several episodes of martial law, where the constitutions were either abrogated or held in abeyance. These extra-constitutional acts were challenged in the courts. The analysis of those cases in 4.3 revealed patterns of how the courts approached those cases by invoking necessity and how they impacted significantly on the development of the political system in Pakistan so that the first occasion on which a parliamentary term was completed was in 2008.<sup>395</sup>

As also described in Chapter 4, the implementation of the doctrine of necessity was innovated by Pakistan's judiciary and has played an important role as several dissolutions of governments have been associated with this doctrine.

By contrast, the US Supreme Court did not need a legal justification to substantiate its action in its decision of *Texas v White*, because it was in its original jurisdiction rather than trying to justify a previous decision by an executive. It is argued, the US Supreme Court has never had to ratify an action taken by the executive or legislature in the name of necessity since it is completely independent of the other branches by virtue of the doctrine of separation of powers.

Due to the application of checks and balances in the US political system, people in power cannot necessarily take decisions motivated by their own self-interest and even if they take, they are highly unlikely to implement. However, it is possible, for the president to make an executive order which can be brought to the Supreme Court to check its constitutionality. For example, most recently the constitutionality

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<sup>391</sup> *ibid.*

<sup>392</sup> *ibid.*

<sup>393</sup> *ibid.*, Articles 175 – 212.

<sup>394</sup> *ibid.*,

<sup>395</sup> Fayyaz Hussain and Abdul Khan, 'Role of the Supreme Court in the Constitutional and Political Development of Pakistan: History and Prospects' (2012) 5(2) *Journal of Politics and Law* 82 85



of President Obama's Affordable Care in 2014 and President Trump's Muslim Travel Ban in 2017,<sup>396</sup> were checked and reviewed by the Supreme Court.

In the constitutional history of Pakistan as discussed in Chapter 4, people in power such as prime ministers, presidents and military chiefs have considered their self-interests. Briefly, as described in 4.3.3, Bhutto in the initial 1973 Constitution assigned all powers to the Prime Minister (i.e. himself) leaving only a ceremonial role for the President. General Zia, through the 8th Amendment, shifted all the powers to the President (i.e. himself). Sharif had to repeal the 8th Amendment through the 13th Amendment to revert all powers to the Prime Minister (i.e. himself) and General Musharraf, through the 18th amendment, restored the 8th amendment so shifting powers back to the president (i.e. himself).

The Supreme Court technically cannot nullify these amendments since they are passed by the legislature following the defined constitutional procedure. There is no issue about who exercises the power: the president or the Prime Minister. The question of why the power keeps shifting from one office to another raises issues of self-interest. On this basis, it would have been appropriate for the Supreme Court to put an end to this practice by nullifying those amendments relating to power shifts. The Supreme Court's invariable silence on the matter has raised issues of impartiality and independence.

Important factors promoting the integrity, impartiality and independence of the US Supreme Court judiciary is that they hold lifetime appointments and their nominations are approved by a popularly elected house. Whereas, in the case of Pakistan, judges are appointed by a bureaucratic promotion system and retire at the age of 65. It is argued that, in the case of Pakistan, without sureties of tenure, the judiciary lacks the security of position required for independent, bold, brave and impartial decisions.

The functioning of the Supreme Court and the tenure of judges may not be directly related to the political system since these can be reformed by any political system, however, it is the separation (of powers) element that is paramount and is one of the key factors selected for the Democratic Federal Political System.

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<sup>396</sup> Jeffrey Crouch, Mark J Rozell, and Mitchel A. Sollenberger 'The Law: The Unitary Executive Theory and President Donald J. Trump' (2017) 47 Presidential Studies Quarterly 561, 561.



## 5.4 The key factors in the US context

The functional comparative analysis seems to suggest adopting US solutions to the problems of Pakistan, for example, abolition of indirect election of upper house, direct election of head of government. So as not to idolise the US system just because it is functioning for that State and has been doing so for a long time, the rationale and objectivity is thus important to propose such a significant change to Pakistan's political system. It is important to apply the test in section 4.3 about the key factors to the US Political System before any further inference is drawn in the Chapter 6. The analysis of this test is not circular. It is accepted that the key factors were initially drawn from the US system, however, these key factors, as indicated in Chapter 1, are also recognised legal concepts, and, as explained in Chapter 3, rooted in philosophical concepts. This test will reveal whether these key factors are fully manifested in the US political system.

As discussed in Section 5.2, the US Congress does provide for two dimensional representation, the lower house represents the people and the upper house represents the federating units and both of these houses are directly elected.

The researcher however does not agree that the equal representation is reflected in the indirect election of the US president through electoral college. As explained in 3.2, the presence of the Electoral College negates transparent representation. Since the legislature is directly elected in both houses, but the executive is not, the US political system only partly complies with the first key factor.

The doctrine of separation of powers has become ingrained within the US political system, which is equipped with a significant system of checks and balances.<sup>397</sup> Although there is no explicit article in the US constitution that indicates the doctrine of separation of powers, nevertheless, the way the US political system is designed is a clear demonstration of the implementation of these doctrines. For example, constitutionally, the three branches of government under the US political system are independent of each other.<sup>398</sup>

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<sup>397</sup> Facts On File Library of American History, 'Montesquieu, Charles-Louis de Secondat, Baron de La Brède et de' in Michael A Genovese (ed), *Encyclopedia of the American Presidency* (Revised edn, Infobase New York 2010) see also Anne M Cohler, Basia C Miller, Harold S Stone (ed), *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone tr, Cambridge University Press 1989).

<sup>398</sup> Harold Laski, *The American Presidency: An Interpretation* (New Brunswick, New Jersey 1980) 15.

The judicature likewise has its own freedom.<sup>399</sup> It has the power of judicial review over the legislature and the executive and can also nullify legislation or executive acts if they are construed to be repugnant to the constitution.<sup>400</sup> As such, the US judiciary acts as the custodian of the constitution.

The third question of self-interest however has several debatable manifestations in the US political system in the form of presidential executive power, also recently referred to as unitary executive theory.<sup>401</sup>

Self-interest was, for example, manifested in the spoils system: a patronage system in use until the 19th century. This was a practice in which a party gave civil service posts to its party supporters, friends or family as opposed to a merit system.<sup>402</sup> Due to such practices, there was a potential for ineffectiveness and corruption. The Pendleton Act was passed in 1887 to abolish such practices. Although the president of the US is invested with so much power that an issue of self-interest may arise in theory, nevertheless, the separation of powers and rule of checks and balances are implemented in such a fashion that his accountability is now much stricter to avoid compromises of constitutional integrity.

The unitary executive theory appeared during the President George W Bush administration in 2001, where exercising broad executive powers was justified by the judiciary, for example his war on terror went far beyond what the founding fathers would have originally foreseen.<sup>403</sup> President Obama also advanced his executive powers in the same way as his successor in both foreign and domestic policy.<sup>404</sup> President Trump took his executive powers to a whole new level, one of a few examples of which is his controversial executive order on immigration.<sup>405</sup>

These examples may appear to be suggesting that the checks and balances system as discussed in 3.2 is not as effective as it should be. Optimistically speaking, constitutionality of the order was challenged in the judiciary. If the order turned out

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<sup>399</sup> Judson S. Landon, 'Constitutional History and Government of the United States' (1900) World Constitutions Illustrated 316.

<sup>400</sup> *ibid.*

<sup>401</sup> Jeffrey Crouch, Mark J Rozell and Mitchel A Sollenberger., 'The Law: The Unitary Executive Theory and President Donald J. Trump' (2017) 47 Presidential Studies Quarterly 561.

<sup>402</sup> Anon, 'A Constitutional Analysis of the Spoils System-The Judiciary Visits Patronage Place' (1972) 57(5) Iowa Law Review 1320, see also HL McBain, 'De Witt Clinton and the Origin of the Spoils System in New York' (1907) World Constitutions Illustrated 58.

<sup>403</sup> Jeffrey Crouch, Mark J Rozell and Mitchel A Sollenberger., 'The Law: The Unitary Executive Theory and President Donald J. Trump' (2017) 47 Presidential Studies Quarterly 561, 561.

<sup>404</sup> *ibid* 567.

<sup>405</sup> *ibid.*

to be constitutional, it may mean that the legislature was trying to halt the presidential orders without justification or they were simply saving themselves from controversial issues such as immigration, education, health or war.

On the other hand, it is possible that indeed the checks and balances system is only strong in theory and in practice, and that it is not as operational as stipulated by the doctrine.

Presidential executive power and the issue of self-interest in Pakistan are not comparable. Historically, in the case of British India and then Pakistan, the issue of self-interest revolved around the executive head seeking to remain in power even if it involved extra-constitutional steps as described in Chapter 4. By comparison, in the case of the USA, as evident from the recent presidents' executive orders, the self-interest element is very slight and is confined to their agenda, either related to their manifesto or foreign policy, rather than their individual interest in staying in power.<sup>406</sup> On that basis, a reasonable inference is that despite the risk of unrestrained executive powers, these powers do not come under the purview of the self-interest issue raised in the test.

This chapter completes the comparative analysis and it is now apparent that both the countries do indeed have similarities in their state structures but have very different constitutional instruments to run them. It has been observed that the political system adopted by the USA is effectively working for it. On the other hand, all the political systems adopted and tested by Pakistan have proved to be either less effective or ineffective at all. Appendix 1 shows the entire constitutional comparison of both countries.

The next chapter takes the findings from both parts of the comparative review and uses them to answer the research questions and respond to the starting hypothesis.

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<sup>406</sup> ibid 570.

## 6. Conclusion

According to the researcher's hypothesis of constitutional suitability, outlined in Chapter 1, Pakistan has had unsuitable political systems ever since its formation in 1947. The analysis in this thesis has been focused on the premature dissolution of government as a symptom of such instability. The hypothesis on which this thesis is based is that this, in turn, is a product of the poor design of the country's constitution.

As established in Chapter 2, Pakistan is, in principle a democratic federal state, so a suitable political system for it would be a Democratic Federal Political System. This concept forms the basis of the underlying hypothesis of the thesis.

The literature review in Chapter 3 explored the theoretical basis of a number of key factors of such a system so as to provide a conceptual framework by which to test that hypothesis. These factors included federalism (at 3.1), disparity of representation (at 3.2); separation of powers (at 3.3); state necessity (at 3.4) and statute structure (at 3.5).

Chapter 4 then evaluated the extent to which Pakistan has or has had a Democratic Federal Political System properly comprising the key factors of equal representation), separation of powers and a system of checks and balances and an absence of the influence of self-interest on the part of those able to take over power or amend the constitution. This chapter also considered the effect of judicial encouragement in terms of interpretation and use of the doctrine of state necessity (discussed in 3.3 and 4.3).

Using the methodologies described in Chapter 2, the hypothesis was then tested by reference to four subsidiary research questions, set out in Chapter 1. These are answered here as follows.

1. *Is political instability in terms of premature dissolution of government an on-going and important issue in Pakistan?*

The analysis in Chapter 4 established the fundamental point that premature dissolution of government has been part of Pakistan's constitutional history since the formation of the country. Furthermore, Chapter 4 demonstrated a pattern in which there is a causative relationship between assertion of state necessity, the premature dissolution of government and ratification by the courts.

2. *Are the present and past political systems Democratic Federal ones?*

The answer to this question is in the negative. In answering this question, the researcher investigated the presence of the key factors explained in Chapter 4 not only in the current situation but in each phase of constitutional development from 1935 to date.

2.1 *Does the political system address issues of equal representation?*

It is concluded in Chapter 4 at 4.3 that Pakistan's past and present political systems do not, because the earlier political systems had a unicameral legislature and the present bicameral legislature does not provide for direct election of the upper house. Therefore, equal representation of provinces, i.e. the second dimension is not preserved.

2.2 *Does the political system provide for separation of powers and checks and balances?*

It is concluded in Chapter 4 at 4.3 that none of Pakistan's past or present political systems provided for separation of powers, mainly due to a parliamentary arrangement where the executive is associated with the legislature and the legislature, as concluded in the discussion in Chapter 4 of seat allocation – is inappropriately constituted. The lack of effective separation of powers and of a functioning system of checks and balances contributes to the problem of political instability in the form of disparity of representation and self-interest that raise claims of necessity and ultimately lead to premature dissolution.

2.3 *Are there elements of self-interest exercised by influential individuals that can override the controls in the system?*

It is concluded in Chapter 4 that there are such elements. The first of these is Article 58 (2) (b) of the constitution that gives the president discretionary powers to dissolve the legislature, a provision that underwent a number of reforms. The presence, or not, of such a constitutional power has not, however, prevented premature dissolution through coup d'état and imposition of martial law.

The second factor is that, when heads of state have dissolved legislatures, the judiciary have almost always, as set out in 4.3, supported their actions in the name of necessity.<sup>407</sup>

Consequently, none of the preceding political systems of Pakistan conformed with the key factors that it is argued are important for a democratic federal state. Nor has it ever adopted a suitable political system which incorporates these factors.

3. *Is there any connection between premature dissolution of government and one party having an absolute majority?*

It was demonstrated in Chapter 4 that the political system does not address questions of equality of representation. It was demonstrated that the problem of disparity causes reliance on the doctrine of state necessity, because it risks disintegration of the federation and such reliance causes the overthrow of government and premature dissolution of government. Chapter 4 therefore concludes that none of the political systems of Pakistan appropriately dealt with the issue of representation in the second dimension. A connection can also be inferred from the fact that, as noted in Chapter 4, on the first anomalous occasion in which the disparity was removed, and the coalition reinforced checks and balances, it resulted in Pakistan's first ever completion of a parliamentary term, which has, fortunately for the stability of the country, been repeated in the 2018 elections.

4. *Is the state structure of Pakistan compatible with a Democratic Federal Political System?*

Having established that the problems in Pakistan can be traced to faults in the constitutional arrangements, the fourth sub-question was answered in Chapter 5. Here it was concluded that Pakistan's political structure is not suitable for its constitutional framework and it significantly fails the test of alignment with a Democratic Federal Political System. It is, as described above, the researcher's hypothesis that a US presidential model might be better aligned. The researcher's choice of comparator in the structural and functional comparative analysis in Chapter 5 was the USA because of its similarity of state structure with Pakistan. To

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<sup>407</sup> Except for the April 1993 act of president Ghulam Ishaq Khan, overturned by CJ Nasim Hassan Shah where the judiciary did not rely on necessity, because the constitution already provided for the power.

ensure that the comparison was rigorous, the key factors, in particular that of the operation of self-interest, were also applied to the US political system (at 5.4).

The points of comparison in Chapter 5 were narrowed down to two main topics; state structures and government structure.

In terms of state structure, Chapter 5 concluded that the USA and Pakistan share the same state structure in many respects such as their colonial history and multiple federating units that opted to form a union. In terms of government structure, Chapter 5 concluded that both the countries however adopted a very different form of political systems. The political system adopted by the USA is effective and suitable with its state structure, whereas Pakistan's present and past political systems have clashed with its state structure, which in turn has put the country in to a state of political instability.

*Can a Democratic Federal Political System resolve the problem of premature dissolution of government in Pakistan?*

The answers to the subsidiary research questions have, therefore, demonstrated that the answer to the overall research question for the thesis is that it is in the best interests of Pakistan to adopt a Democratic Federal Political System as defined in this thesis. It will counter, and may put an end to, the issue of necessity arising out of disparity of representation which, in turn, leads to premature dissolution of government. The political system Pakistan should adopt should, it is argued, be based on that of the USA with the following adjustments:

- Preserving the religious provision to recognise a critical part of Pakistan's cultural identity and so as to ease adoption of a new constitution.
- Providing for popular election for the head of government/state.

Under such a Democratic Federal Political System, if introduced in Pakistan, there would be no need for a constitutional mechanism to dissolve parliament before its expiry, at the same time, the issues of disparity would be resolved and thus prevent claims in the courts based on the doctrine of necessity from arising.



## 6.1 Researcher's Contribution to Knowledge & Practice

The contribution of this thesis is to both knowledge and practice. This is because the findings highlight new knowledge but because that knowledge is, it is argued, also critical for the effective practice of constitutional lawyers, judges and others in Pakistan.

### 6.1.1 Contribution to knowledge

In terms of knowledge, this thesis has, through use of the key factors analysis, demonstrated that the political system in Pakistan, though envisaged and described as a democratic federal system, does not in fact function as one. This contributes to assertions of a state of necessity, endorsed by the judiciary, which result in premature dissolution of government and can be traced to the underlying disparity in representation between the provinces. In addressing the problems caused by the failures in democratic federalism, the thesis has considered the USA, rather than the UK, with which Pakistan has a historical, colonial connection. Both are; however, former colonial states and this thesis has demonstrated that, with some adjustments and variations, a US-style presidential system could address the problems of Pakistan by emphasising separation of powers in a way that, in practice, has not been the case in Pakistan.

The researcher is not proposing to adopt the US model in its entirety after discovering some flaws in that system,<sup>408</sup> Pakistan can address those flaws before adopting that model. In any case, the system proposed is not entirely untested, the USA has been functioning using the same model for a very long time, of course there have been issues within the USA as well.<sup>409</sup> Pakistan will therefore have an advantage in being able to identify and to remove any flaws that the US model may currently have. These variations also add to the contribution to knowledge provided by this thesis.

### 6.1.2 Contribution to practice

The researcher's contribution to practice in this thesis encompasses two things. First, a wider perspective in the practice of constitutional reform which challenges a pro-British mindset, the legacy of the British administration in legislation and

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<sup>408</sup> These flaws mainly refer to the method of presidential election and the enormous presidential executive powers which can be misused by a primitive democracy such as Pakistan.

<sup>409</sup> Such as indirect election of Senate and the patronage system.



legal culture and animosity to the USA. Second, a response to established and conservative beliefs of key actors in legal practice (the intelligentsia, judges, lawyers) about the adequacy of the current system and the possibility of change. Both can be the foundation for changes in law reform practice.

*A wider perspective in the practice of constitutional reform*

The wider perspective is represented by the use of the USA as a comparator. The researcher has observed a reluctance in the Pakistani intelligentsia, particularly in the right wing parties, towards adopting the ways of the USA. His findings provide an opportunity to challenge this animosity against the USA that is prevalent amongst politicians, members of the judiciary and constitutional lawyers.

The researcher is fully aware of the place of Islam in Pakistan's culture, after all the country was created in the name of Islam, where the Muslims of India could live according to Islamic practices and customs. The constitutional instruments discussed in this thesis, therefore, throughout the history of Pakistan enshrined basic Islamic principles and elevated them to a position of untouchability. Principles of Islam, therefore, transcend, rather than impact on, the stability or otherwise of individual governments.

Further discussion about the state religion is beyond the scope of this thesis since the place of religion is not effected. Nevertheless, none of the reforms proposed through this thesis clash with Islamic virtues. The researcher, therefore, suggests that constitutional reforms are possible, and that using a template taken from the USA does not prejudice Pakistani autonomy or religious culture. This is because it is only a template, which can and should be adapted to Pakistani culture where Islam is given a superior place.

*A response to conservative beliefs of key actors that can be the foundation for changes in law reform practice*

The conservatism is represented first by an allegiance to the British legal system as a post-colonial legacy. Key local legal instruments i.e., Civil Law,<sup>410</sup> Criminal Law<sup>411</sup> and Law of Evidence<sup>412</sup> are those drafted and enacted by the British rulers.

Second, there is an inherent reluctance to be open about the idea of adopting a presidential form of government. It is assumed that any presidential system must be that of General Khan (at 4.3.3). There are fears about despotism. Here too the use of the USA as a comparator demonstrates that key factors of its system such as separation of powers and checks and balances in the context of political system are capable of addressing this concern. There are also fears of change, based on an assumption that since the current constitution was reached by consensus, any proposal for change would be strongly opposed.

The researcher's approach, however, demonstrates that such fears can be addressed. The country does not have to abrogate or subvert the constitution entirely as a small number of constitutional amendments can address these issues.

As an experiment, therefore, this thesis provides an example of the use of a wider and more creative perspective in constitutional reform, which can be adopted by lawyers or politicians as an enduring part of their practice as reformers. This then links with the final recommendations for policy and future research, designed to further the contribution to practice represented by this thesis.

## **6.2 Recommendations for policy and future research.**

In order to implement the recommendations made in this thesis, a detailed implementation study will be required to inform future policy. This will involve feasibility but could also investigate public opinion about the proposed changes. Changing a political system requires substantial changes to the constitutional law, which can be a challenging task. It not only requires an absolute majority, but, in most cases, unanimity, otherwise it may not work. This unanimity will be facilitated by the changes in perspective amongst those involved in implementing change suggested as part of the contribution to practice.

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<sup>410</sup> The Civil Procedure Codes 1908, as the year suggests, Pakistan was not even formed at the time.

<sup>411</sup> The Pakistan Penal Code 1860 and Code of Criminal Procedure 1898, as the years suggest, Pakistan was not even formed at the time.

<sup>412</sup> Evidence Act 1872. However this was amended in 1984 and renamed the Qanoon-e-Shahadat Order. It is, however, almost the same document word for word.

A detailed implementation study will ensure that future policy is robust and evidence-based. Factors that will need to be considered include:

- Which body shall prepare and make recommendations for the new constitution, for example should this be the existing constituent assembly? What should be the membership of such a body?
- Which body should commission and provide the terms of reference for the new constituent assembly, for example, should this be all political parties with the support of the military?
- As a result of the reforms, who should be the chief executive and head of state, since, under a Democratic Federal Political System, both are one, then the question is which office shall be dissolved.
- Whether Pakistan should assume a completely new constitution or introduce a substantial amendment to the existing one?
- What will happen to the existing offices and elected members, will they serve out their time or be removed immediately?
- Should there be transitional provisions and if so, what should those transitional provisions be?
- What is the scope and likelihood of the risk that a ruling party would seek re-election after the new system has been implemented to legitimise their mandate?

Although the implementation stage will require further research and feasibility studies on the points listed above, however, it may be appropriate for the implementation study to use a detailed proposal as a consultation benchmark. The researcher proposes that this benchmark could be as follows.

All parties (ruling and opposition) should agree with the military leadership to form a constituent assembly whose sole task shall be to give the country its new constitution under the Democratic Federal Political System. The timing of this is crucial and a good time to do this will be at the end of the government's term when as a matter of usual practice, a caretaker government is formed for three months. An exception should be made to extend the tenure of the caretaker government to nine months so that the constituent assembly can finish its work under an impartial government. The caretaker government would then introduce the new constitution which would fully incorporate the Democratic Federal Political System.

A date should then be decided when all the elections – for the lower house, the upper house and the president - are announced at the same time to save unnecessary costs and time delay. Obviously subsequent elections cannot be synchronised since the terms will be different: for the lower house two years, for the upper house three years initially and then six years going forward and for the president four years. These dates will be set in a manner for the future so that none of these ever overlap.

Other major changes will include the offices of Chief Ministers, the abolition of the role of the Prime Minister and the number of upper house members being confined to two per federating unit (so as to address the issue of disparity of representation).

Further research into the implementation of the reforms discussed in this thesis will inevitably be required. Such a project will require an in-depth understanding of the function of different machineries within the government so as to be able to recommend transition and complete enactment of the new system. The researcher would like to be in a position to carry this out himself but recognises that others might be commissioned to do so.

The researcher does not underestimate the challenge presented by his proposals. Nevertheless, it is his view, and his hope, that with the knowledge presented by this thesis, and the call to practitioners to take on wider and more creative approaches to law reform, a more stable, and fairer, Pakistan will be the result.

## Appendix 1

Table 3 - Salient Features of the USA and Pakistan

	<b>USA</b>	<b>Pakistan</b>
<i>Federating Units</i>	50 states	4 provinces
<i>Population</i>	326.6 Million	204.9 Million
<i>Origin</i>	Post-Colonial (British)	Post-Colonial (British)
<i>State Structure</i>	Federation	Federation
<i>Political System</i>	Federal	Non-Federal
<i>Head of State</i>	President	President (Ceremonial)
<i>Election of Head of State</i>	Direct	Indirect
<i>Government Structure</i>	Executive, Legislature and Judiciary	Executive, Legislature and Judiciary
<i>Tenure of Head of Government</i>	4 years limited to 2 terms	5 years, unlimited terms
<i>Election of Head of government</i>	Direct	N/A Majority leader
<i>Power Flow between government branches</i>	Separated	Co-ordinated /interdependent
<i>Cabinet Affiliations</i>	Separate to Legislature	Part of legislature
<i>Members of Lower house &amp; Tenure</i>	435 (2 Years)	342 (5 Years)
<i>Election of members</i>	Popular	Popular
<i>Majority required to form government</i>	N/A	172
<i>Maximum Seat allocation</i>	California (53)	Punjab (183)
<i>Members of Upper House &amp; Tenure</i>	100 (6 Years)	104 (6 Years)
<i>Elections of Members</i>	Direct	Indirect
<i>Judicial organ</i>	Supreme Court	Supreme Court
<i>Tenure</i>	Lifetime	Retirement at 65
<i>Secessions</i>	None	1 Bangladesh 1971
<i>Episodes of Martial Law</i>	None	3
<i>No of constitutional instruments</i>	1 since 1787	3 Constitutions since 1947
<i>No of Amendments</i>	27 since 1787	18 since 1973

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