
Two steps forward one step back: The non-linear expansion of judicial power in Pakistan

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Pakistan's superior courts have evolved from marginal state institutions to key players mediating the balance of powers in a deeply divided and politically fragmented polity during seven decades of the country's postcolonial history. Although the political salience of the Supreme Court's recent actions—including the disqualification of two elected prime ministers—has created the sense of a sudden and ahistorical judicialization of politics, the courts' prominent role in adjudicating issues of governance and statecraft was long in the making. The perception of an historically docile and subservient court which has suddenly become activist has been shaped by an undue focus on the big constitutional moments of regime or governmental change in which the Apex Court has more often than not sided with the military or military-backed presidency. While these constitutional cases and crises are important, an exclusive focus on this domain of judicial action hides the more significant and consistent developments that have taken place in the sphere of "administrative law." It is through the consistent development of the judicial review of administrative action, even under military rule, that Pakistan's superior courts progressively carved an expansive institutional role for themselves. This article highlights the progressive, though non-linear, expansion of judicial power in Pakistan and argues that despite some notable and highly contentious moments of judicial interference in mega politics, the bedrock of judicial review has remained in administrative law—i.e., the judicial review of executive action.

1. Introduction

Pakistan's Supreme Court has recently experienced a prominent transformation in its role, stature, and powers. Most notably, during the tenure of former Chief Justice Iftikhar Muhammad Chaudhry (2009–2013)—a period in Pakistan's legal history appropriately described as that of the "Chaudhry Court"—the Supreme Court

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has undoubtedly engineered remarkable developments in its institutional position through its public law jurisprudence.¹ While the visibility, political significance, and intense controversy surrounding the Court's actions created the sense of an ahistorical assertion of judicial power, this constitutional moment was long in the making. Pakistan's Apex Court has steadily evolved from a marginal state institution to a key player in governance and statecraft over seven decades of the country's independent existence, and especially since the promulgation of the current constitution in 1973.

The perception of a historically docile and subservient court which has suddenly become activist has been shaped by an undue focus on the big constitutional moments of regime or governmental change in which the Apex Court has more often than not sided with the military or military-backed presidency. As such, this historiography exhibits a certain disciplinary bias: Pakistan's legal and judicial histories are mostly written through the lens of "constitutional law" and read like speculative lines connecting the dots of notable cases and major crises. While these constitutional cases and crises are important, an exclusive focus on this domain of judicial action hides the more significant and consistent developments that have taken place in the sphere of administrative law. It is through the consistent development of the judicial review of administrative action, even under military rule, that Pakistan's superior courts progressively carved an expansive institutional role for themselves. It is principally through the judicial review of executive action—or the writ jurisdiction—that the courts acquired the power to mediate intra-state tensions and ultimately aggrandized themselves to the status they have come to acquire since the Chaudhry Court era.

Formally, the Supreme Court's most significant judicial review powers are exercised in the name of constitutional rights. Under its "original jurisdiction" the Court is empowered to deal with any "question of public importance with reference to the enforcement of any of the Fundamental Rights"² enumerated in the 1973 Constitution. As such, there are frequent and exalting references to the fundamental rights provisions. However, beyond the threshold inquiry as to whether any of the constitutional rights are implicated the substance and form of judicial review essentially resembles the writ jurisdiction of the High Courts under article 199. Furthermore, despite the broad and permissive wording of article 184(3) the Supreme Court has largely confined itself to issues of administrative propriety and procedural legality by grounding key principles of its administrative law jurisprudence in the rights provisions of the constitution. As a result, the original jurisdiction of the Supreme Court has progressively emerged as the most important locus of judicial review of executive action, and hence the Court as the supervisor of the administration.

This article highlights the progressive, though non-linear, expansion of judicial power in Pakistan and argues that despite some notable and highly contentious moments

¹ See generally Moeen Cheema, *The "Chaudhry Court": Deconstructing the "Judicialization of Politics" in Pakistan*, 25 WASH. INT'L L.J. 447 (2016) [hereinafter Cheema, *The Chaudhry Court*]; MOEEN CHEEMA, *THE POLITICS & JURISPRUDENCE OF THE CHAUDHRY COURT 2005–2013* (Moeen H. Cheema & Ijaz Shafi Gilani eds., 2015) [hereinafter CHEEMA, *POLITICS & JURISPRUDENCE*].

² See PAK. CONST. art. 184, cl. 3.

of judicial interference in mega-politics, the bedrock of judicial review has remained in administrative law—i.e., the judicial review of executive action. In furtherance of this argument, this article begins with a brief and hence inevitably simplified account of Pakistan's early constitutional history characterized by judicial validations of military takeovers which created the perception of a subservient court. The article then situates two significant waves of judicial action or "judicialization of politics" within this historical narrative—the first in the 1990s and the second more recently under the Chaudhry Court—and describes in some detail the axis along which the superior courts asserted their expanded powers. In conclusion, the article highlights the systemic impact of the constitutional rights jurisprudence of the Pakistani courts and its potential implications for the discussions on the nature of judicial power in the broader South Asian context as well as globally.

2. A history of judicial complicity/resistance (1947–1988)

The history of constitutional politics in Pakistan is hard to characterize within traditional frames of regime types. Pakistan emerged essentially as a one-party dominated state upon independence from colonial rule, and in the aftermath of a bloody partition of British India, in 1947. Within a few years the founding political party, the Muslim League, fragmented and the new state reverted to bureaucratic authoritarianism at the hands of the Civil Services of Pakistan, the uppermost echelon of a bureaucracy that traced its lineage and ethos directly to the colonial era Indian Civil Service. From 1958 to 1971 the country underwent direct military rule which culminated in the first democratic elections held on the basis of adult franchise. The military's failure to transfer power to the elected representatives from East Pakistan, the eastern wing of the country, resulted in political unrest, a military operation, and a civil war in the eastern wing, a war with India, and ultimately the dismemberment of the postcolonial nation state. With the secession of East Pakistan as the new nation state of Bangladesh, the military transferred power to the Pakistan People's Party (PPP) which had won the majority of seats in what remained of Pakistan. Zulfikar Ali Bhutto, the founder and populist leader of the PPP emerged as the country's first and only civilian martial law administrator. In 1973 the Bhutto-led PPP managed to negotiate an agreed constitution with the combined opposition and transitioned the governance system into the parliamentary mode. In 1977, the party failed to effect a peaceful transition to a second period of parliamentary rule as its electoral victory was shrouded in allegations of widespread rigging. Protests by the opposition paved the way for another military takeover in 1977 which resulted in a second protracted period of praetorian rule which lasted until 1988.

Through the first four decades of constitutional and political turmoil, Pakistan's superior courts acquired a reputation of servility to the military as well as to civilian executives. At every moment of constitutional upheaval or military takeovers the courts had been thrust into the spotlight and had essentially validated

extra-constitutional actions. In 1956, when the governor-general dismissed the Constituent Assembly as it was finally on the verge of framing a consensus constitution, the federal Court held that the governor-general enjoyed prerogative powers to undertake such an action in *Maulvi Tamizuddin Khan*.³ In the aftermath of the first military coup in 1958, the Supreme Court declared it to be an instance of “revolutionary legality” in the *Dosso* case.⁴ The Court held that when a party or institution effectively takes over control of the state and there are no public protests, a new legal order is created which cannot be judged against the touchstone of the old constitutional scheme. The Court thus gave the martial law authorities complete power to create an entirely new legal and constitutional framework. In a challenge to the legality of the 1977 coup, the Supreme Court disavowed revolutionary legality and instead relied on a somewhat narrower doctrine of “state necessity” in the *Nusrat Bhutto* case.⁵ While refusing to entertain the petition brought under its original jurisdiction, the Court held that an existential threat to the state and public order had been created by the protests against rigged elections compelling a military intervention. It thus granted the martial law authorities the power to take any actions necessary to deal with the crisis during an undefined period, including the power to permanently amend the 1973 Constitution.⁶

These visible troughs of judicial complicity in constitutional subversions justifiably earned the judiciary a bad reputation, but they also masked the courts' consistent attempts to mediate these naked exercises of power and slowly nudge the dominant institutions and parties back toward formal constitutionalism. More significantly, away from the spotlight of high politics the courts engaged in progressively increasing review of executive action. During the 1960s the courts gradually built a canon of procedural review under the writ jurisdiction granted by the 1962 Constitution of General Ayub Khan. In the aftermath of the promulgation of the 1973 Constitution judicial resistance principally took the form of challenges to detentions under a range of security laws. The Bhutto government, despite its formal democratic credentials, displayed a penchant for suppressing the political opposition through security laws inherited from its military predecessors and extended a state of emergency in the country. The Bhutto-led PPP commanded complete control over the parliament and passed successive constitutional amendments which were designed principally to curtail the judicial review powers of the courts. Nonetheless, in a number of decisions the courts affirmed the position that rights provisions in the constitution providing for deprivation of liberty only in accordance with law and safeguards against arrest and detention remained in

³ *Maulvi Tamizuddin Khan v. Federation of Pakistan*, P.L.D. 1955 Sind 96.

⁴ *State v. Dosso*, P.L.D. 1958 S.C. (Pak.) 533.

⁵ *Begum Nusrat Bhutto v. Chief of the Army Staff*, P.L.D. 1977 S.C. 657.

⁶ The courts' reputation for complicity in the undermining of democratic aspirations hit an unprecedented low when in 1979 the Supreme Court upheld the conviction and death sentence of Zulfikar Ali Bhutto, the first popularly elected prime minister of the country, on dubious charges of conspiracy to commit murder. *Zulfikar Ali Bhutto v. State*, P.L.D. 1979 S.C. 53. The court subsequently unanimously dismissed a review petition on the basis that the sentence could not be altered upon review. See *Zulfikar Ali Bhutto v. State*, P.L.D. 1979 S.C. 741. See HAMID KHAN, *CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN* 336–340 (2009).

operation even during a state of emergency.⁷ As such, the courts consolidated a minimal rule of law and procedural review jurisdiction even when substantive fundamental rights provisions were under suspension.

The blatant abuse of martial law regulations by the Zia regime to suppress political dissent caused dismay among the courts that had sanctioned the military takeover on the grounds of state necessity. The courts' legitimacy had suffered a serious setback as a result of the *Nusrat Bhutto* case, and perhaps it was also in an effort to salvage some of their independence and authority that the superior courts gradually began to challenge the actions of martial law courts and tribunals.⁸ The regime responded by issuing a provisional constitution order (PCO) in 1981, which retroactively invalidated all the adverse decisions of the high courts, restricted the judicial review jurisdictions of the courts and empowered the Chief Martial Law Administrator (CMLA) to dismiss any judge.⁹ The regime also required the judges to take a new oath under the PCO. Several judges of the superior courts either declined to take the oath or were not invited to do so. This was the first purge of the superior judiciary in Pakistan's history. Concurrently with the suppression of a tentative judicial resistance, the military regime adopted the strategy of Islamization of the law that opened up avenues of abuse and harassment at an unprecedented level,¹⁰ and created new appellate courts—a Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB)—to adjudicate Islamic law questions. As the regime's control over the state and the polity began to falter during the transitional period to limited democracy (1985–1988) the superior courts increasingly used Islamic legality to expand their powers of judicial review. This was particularly the case in the domain of administrative law. The Shariat Courts adopted the established doctrines of the judicial review of bureaucratic action including the principles of natural justice and reclassified them as fundamental Islamic law principles. Furthermore, the courts found enough evidence in classical or pre-modern Islamic history to declare the independence of the judiciary and the accountability of the executive to be pillars of Islamic constitutionalism.¹¹

⁷ See, e.g., *Manzoor Elahi v. Federation of Pakistan*, P.L.D. 1975 S.C. 66. A review petition filed by the government was dismissed and reported as *Federation of Pakistan v. Manzoor Elahi*, P.L.D. 1976 S.C. 430. See also *Ghulam Jilani v. Federal Government*, P.L.D. 1975 Lahore 65; *Zahoor Illahi v. State*, 1975 P. Cr.L.J. 1413; *Nek Amal v. Political Agent, Malakand*, P.L.D. 1975 Peshawar 67; *Fazal Elahee v. Province of Sindh*, 1975 P.Cr.L.J. 634; *Ghulam Ahmad v. Punjab Police*, P.L.D. 1976 Lahore 773; *Ghulam Jilani v. Federal Government*, P.L.D. 1976 Lahore 38.

⁸ See PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 175–179 (1995); KHAN, *supra* note 6, at 343.

⁹ *Provisional Constitution Order, 1981 (President's Order 5 of 1981)*. See KHAN, *supra* note 6, at 358–359; NEWBERG, *supra* note 8, at 180.

¹⁰ See Moeen Cheema & Abdul Rahman Mustafa, *From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan*, 8 UCL A J. ISLAMIC & NEAR E. L. 1, 14–18 (2009).

¹¹ *Pakistan v. People at Large*, P.L.D. 1987 S.C. 304. The SAB extended such protection to officials and employees of semi-autonomous public corporations and other statutory bodies. *Pakistan v. Public at Large*, 1989 S.C.M.R. 1690; *Federation of Pakistan v. General Public*, 1995 S.C.M.R. 1593. Due process safeguards were soon helped applicable to all governmental action which adversely affected any citizen. *Province of Sind v. Public at Large*, P.L.D. 1988 S.C. 138; *Federal Government of Pakistan v. Government of Punjab*, P.L.D. 1991 S.C. 505.

Such was the historical backdrop to the first significant expansion of judicial power that unfolded in the 1990s. While the courts found themselves repeatedly under pressure at moments of extra-constitutional regime change and were compelled to validate such naked exercises of power through creative constitutional law, they also managed to consistently advance their jurisdiction and jurisprudence in certain other domains. Except during periods of martial law, the courts learned to mediate between the dominant executive and political opposition to push for a minimalist form of constitutionalism. The courts' efforts in this domain were ultimately feeble and fruitless as successive military and civilian governments commanded the power to amend the constitutional and legislative frameworks at will. Nonetheless, the courts managed to win occasional concessions for political opposition, creating expectations of more robust forms of constitutionalism in favorable climes. More significantly, the courts progressively expanded their writ jurisdiction for judicial review of bureaucratic action. In this domain they enjoyed the tacit support of military and civil governments, as both were equally vested in cutting a powerful bureaucracy down to size and the courts' administrative law jurisdiction aligned with this interest. Furthermore, the courts were also able to preserve procedural review of security and preventive detention laws even in the face of executive defiance through the first few decades of postcolonial existence. Finally, General Zia's Islamization had provided them with normative bedrock within which to ground these strands of formal constitutionalism and rule of law.

3. The first wave of “judicial activism” and “public interest litigation”

3.1. The genesis of public interest litigation

With General Zia's sudden death in a plane crash in 1988, Pakistan's political forces found unexpected space to push for a return to democracy. A few months earlier, General Zia had dismissed the parliament elected through non-party-based elections in 1985 and with it the weak civilian government that had increasingly pushed at the contradictions of the transitional democratic façade of military rule. This was the first use of article 58(2)(b) powers—a provision inserted in the constitution through the Eighth Amendment in 1985 which gave the president the power to dissolve parliament in case of a breakdown of constitutional machinery. A seasoned bureaucrat who played a pivotal role in the economic management of the Zia regime became acting president and announced elections to be held in November 1988. The decision not to restore the dismissed assembly was challenged before the courts, casting the superior judiciary into a central role in mediating issues of pure politics—governmental change, transfer of power, and electoral processes—which became a hallmark of the constitutional politics of the following decade. In *Muhammad Saifullah* the Supreme Court found no objective basis for a finding of constitutional breakdown or deadlock.¹²

¹² Federation of Pakistan v. Muhammad Saifullah, P.L.D. 1989 S.C. 166.

The Court also questioned the constitutional and democratic credentials of the dissolved assembly and appeared to view the impending elections as a positive step.

The Supreme Court decision in *Muhammad Saifullah* cannot be seen in isolation. The case was adjudicated during a brief period of activism by the Supreme Court. In a series of decisions the Court appeared to be paving the way for the impending transition to electoral democracy. In a landmark decision, only the second notable exercise of the original jurisdiction by the Supreme Court under article 184(3) since the framing of the 1973 Constitution, the Court allowed unregistered political parties to contest the forthcoming elections and held that elections on a non-party basis violated the fundamental rights provisions of the constitution.¹³ The petition brought by Benazir Bhutto gave substance to the freedom of association provided in article 17 and paved the way for the PPP's return to electoral politics. An elaborate judgment by Chief Justice Haleem in the *Benazir Bhutto* case is seen as the genesis of public interest litigation (PIL) in Pakistan. The Court loosened the requirement of *locus standi* and held that any individual with a bona fide interest in challenging a law or executive fiat could bring a petition. In another petition brought by Benazir Bhutto the Supreme Court further paved the way for party-based elections and held that electoral symbols had to be allotted to political parties and not to individual candidates by lot as General Zia's amendments to the Representation of the People Act, 1976 required.¹⁴

In the following decade the courts encountered for the first time in Pakistan's tortuous history a highly contentious and fragmented political landscape and hence the space to expand judicial power. Fierce electoral competition between two of the country's resurgent political parties—a rightist Pakistan Muslim League (N) faction led by Nawaz Sharif and an avowedly left-leaning PPP under Benazir Bhutto—ensured that the incumbent government would face violent opposition both in the legislatures as well as on the streets. Furthermore, a constitutionally empowered presidency backed by a still powerful military, which in moments of crises could also count on tacit support from the political opposition, resulted in a revolving door to the corridors of political power. Four civilian governments, alternatively formed by the PPP and the PML (N), were elected and dismissed from power—the first three by the use of article 58(2)(b) powers by the presidency and the fourth through a military coup. All three dissolutions under article 58(2)(b) were challenged before the courts, and in only one instance was the dissolution not upheld.¹⁵ By the middle of the decade, no consistent logic or doctrine rationalizing the dissolution cases was discernible as the Supreme Court appeared to be relying on changing interpretations of article 58(2)(b). The only consistent progression during this extended saga of political instability was in the power of the superior judiciary which became a key player in the constitutional politics it was mediating.

The original jurisdiction of the Supreme Court emerged as the site of notable judicial action.

¹³ See *Miss Benazir Bhutto v. Federation of Pakistan & Another*, P.L.D. 1988 S.C. 416.

¹⁴ See *Benazir Bhutto v. Federation of Pakistan*, P.L.D. 1989 S.C. 66.

¹⁵ See *Khawaja Ahmad Tariq Rahim v. Federation of Pakistan*, P.L.D. 1992 S.C. 642; *Muhammad Nawaz Sharif v. Federation of Pakistan*, P.L.D. 1993 S.C. 473; *Benazir Bhutto v. President of Pakistan*, P.L.D. 1998 S.C. 388.

Article 184(3) empowered the Supreme Court to directly take up any matter of “public importance with reference to the enforcement of any of the Fundamental Rights” and grant any remedy in the nature of those provided for in article 199 which governed the High Courts’ writ jurisdiction.¹⁶ During the early 1990s the Supreme Court began to dramatically expand the scope of PIL, waived procedural requirements,¹⁷ and whittled down the criteria of standing to the point that any bona fide representative could bring a petition on behalf of an affected group or class.¹⁸ The Court also adopted the practice of initiating PIL cases *suo motu* and the methodology of “rolling review”—that is supervising executive action on a periodic basis through interim orders in successive hearings rather than issuing one decisive judgment—from the Indian Supreme Court.¹⁹ Furthermore, the Court acted as or appointed judicial commissions investigating various facets of governance and began to grant expansive remedies. Most notably, the Court expanded the ambit of right to life to include the Directive Principles of State Policy thereby converting them into socio-economic rights such that the Court gained the capacity to scrutinize government action, regulation and increasingly even policy-making in areas that were hitherto considered non-justiciable.²⁰

3.2. Judicial review and judicial independence

Given the text of article 184(3), for any case to be brought under the original jurisdiction it must raise an issue of enforcement of fundamental rights provisions in the constitution. However, a review of the Supreme Court’s jurisprudence in the 1990s reveals little emphasis on the enhancement of the protections offered by the enumerated fundamental rights in the relevant chapter of the constitution. Apart from the freedom of association decisions which paved the way for electoral politics, some notable pronouncements against gender discrimination formed the only other strand of substantive rights-advancing jurisprudence by the Supreme Court.²¹ Beyond that,

¹⁶ See PAK. CONST. art. 184 cl. 3.

¹⁷ See, e.g., Ghulam Ali v. Ghulam Sarwar Naqvi, P.L.D. 1990 S.C. 1; Fazal Jan v. Roshan Din, P.L.D. 1990 S.C. 661.

¹⁸ See, e.g., Shrin Munir v. Government of Punjab, P.L.D. 1990 S.C. 295; I. A. Sherwani v. Government of West Pakistan, 1991 S.C.M.R. 1041.

¹⁹ See Darshan Masih alias Rehmatay & Others v. State, P.L.D. 1990 S.C. 513. *Darshan Masih*, decided in 1989, was a *suo motu* case based on a telegram sent to the Court by a bonded brick kiln laborer which was converted into a petition. See also *In re Human Rights Case (Environmental Pollution in Balochistan)*, P.L.D. 1994 S.C. 102.

²⁰ See, e.g., Ms. Shehla Zia and Others v. WAPDA, P.L.D. 1994 S.C. 693.

²¹ In *Fazal Jan v. Roshua Din* the Court noted difficulties that women faced in accessing their inheritance under Islamic law particularly in the rural setting and created a right to representation before the courts in such cases. See *Fazal Jan v. Roshua Din*, P.L.D. 1990 S.C. 661. In other decisions handed out around the same time, the Court expanded the rights of access to inheritance and property rights of Muslim, Christian, and Hindu women. See *Ghulam Ali v. Ghulam Sarwar Naqvi*, P.L.D. 1990 S.C. 1; *Shirin Munir v. Government of Punjab*, P.L.D. 1990 S.C. 295; *Moolchand v. Mohammad Yousaf (Udhamdas)*, P.L.D. 1994 S.C. 462; *Inayat Bibi v. Isaac Nazir Ullah*, P.L.D. 1992 S.C. 385. In a couple of cases the courts also tackled gender discrimination in employment. See *Chairman, Pakistan International Airline Corporation v. Sherin Dokht*, 1996 S.C.M.R. 1520; *Muhammad Iqbal Khan v. Chancellor, Gomal University*, 1995 C.L.C. 510; *Naseem Firdous v. Punjab Small Industries Corporation*, P.L.D. 1995 Lahore 584.

the operative parts of the cases invoking fundamental rights essentially addressed grievances against the administration, and scrutinized the propriety and procedural fairness of bureaucratic action. The record on minority rights was particularly weak and was distinctly tarnished by *Zaheeruddin*.²² In that case the Supreme Court upheld the constitutionality of discriminatory Zia-era amendments to the penal code which criminalized certain religious practices of the minority Ahmadi community and forbade them from proselytizing publicly. Given the weak record on the protection of individual and civil rights, it appears that the courts were utilizing the notion of constitutional rights principally to extend their judicial review jurisdictions to adjudicate matters of formal constitutionalism, administrative law, and security laws rather than advancing a coherent movement on fundamental rights.

By the early 1990s, when successive PPP and PML-N governments had begun to dismantle the independence and the integrity of the bureaucracy and police to develop their own patronage networks in the cadres, the High Courts and the Supreme Court picked up the mantle of administrative law from the Shariat Courts. The High Courts considerably expanded the judicial review of executive action leading to a public law explosion in Pakistan. While the writ jurisdiction of the High Courts remained the principal site of administrative law throughout the 1990s, the text of article 199 and historical practice imposed notable constraints. Writs could be brought only if there was no suitable alternate remedy and, except in cases of *habeas corpus* and *quo warranto* type writs, on the application of an “aggrieved person.” With the backing of the Supreme Court and in line with the development of PIL the High Courts also loosened both the requirements of a lack of alternate remedy and *locus standi* particularly in cases falling under their fundamental rights jurisdiction. Collectively, the High Courts’ writ jurisdiction and the Supreme Court’s original jurisdiction emerged as an effective avenue for challenging adverse government action. One key factor in the expansion of the courts’ jurisdiction was the increasing reliance by Pakistan’s expanding urban middle, professional, and industrial classes on the judiciary to challenge the full gamut of executive operations and decisions. The courts also enhanced the standards of transparency and procedural fairness required of the bureaucracy.²³ In matters related to criminal process, the courts asserted wide powers of directing the registration, quashment, and conduct of criminal cases short of active control or supervision of trials. The courts also scrutinized preventive and illegal detentions, torture, and abuse of police powers, and granted remedies such as orders for the discipline, suspension, and dismissal of officers or award of compensation for the victims.

One core issue of formal constitutionalism that the Court took up vigorously, initially through its appellate jurisdiction and ultimately under PIL, was that of judicial independence. In the first step, the High Courts sought to bolster their own supervisory jurisdiction over the lower judiciary as well as to push for its belated separation of from the bureaucracy. Nearly two decades had passed since the promulgation of the

²² *Zaheeruddin v. State*, P.L.D. 1994 S.C. 1.

²³ *See, e.g., Nawab Khan v. Government of Pakistan*, P.L.D. 1994 S.C. 222.

1973 Constitution and its initial stipulation of a five-year deadline for the separation of the judiciary from the executive.²⁴ In *Sharaf Faridi* the Supreme Court upheld the Sindh High Court’s directions to the provincial government to separate judicial magistracy from executive magistracy and place judicial magistrates under the authority of the High Court.²⁵ In *Azizullah Memon* the Court declared unconstitutional the vesting of criminal trial jurisdictions in the bureaucracy.²⁶ Ultimately, in *Al-Jehad Trust* (known as the *Judges’ case*) the Supreme Court examined a range of questions related to appointments, promotions, and transfers in the superior judiciary directly under its original jurisdiction. The key issue was whether the president had unfettered discretion in appointing judges to the superior courts. The relevant constitutional provisions—articles 177 and 193—required the president to make appointments to the Supreme Court “after consultation with” the chief justice of Pakistan, and with the concerned chief justice in case of appointments to a High Court. Relying upon the principle of judicial independence in Islam and Indian precedents, the Supreme Court held that the consultation required for appointments to the superior judiciary had to be effective, meaningful, purposive, and consensus oriented.²⁷

The Court also held that the president could not reject a chief justice’s nomination without giving cogent objective reasons, or appoint someone whose nomination had been rejected by the chief justice of Pakistan or the chief justice of the High Court, effectively giving them the final say in judicial appointments. Thus, several recent appointees to the High Court were effectively dismissed or forced to resign. The Supreme Court further reduced the role of the president by holding that in making judicial appointments the president was also bound by the advice of the prime minister. The Court also shut the door on a number of ways the executive had historically used to pressurize superior judiciary. Even in the absence of express constitutional text the Court mandated fixed time frames within which a vacancy on the bench had to be filled. The Court also held that the senior-most judge of a High Court had the legitimate expectation of being appointed as the chief justice unless sound reasons for a contrary decision were recorded. An acting chief justice of the Supreme Court or a High Court could not be consulted for judicial appointments. Finally, a sitting judge of the High Court could not be transferred to the FSC without his consent. The decision, however, left one important issue unaddressed: whether the seniority principle was also applicable to the appointment of the chief justice of the Supreme Court.²⁸

3.3. Elective dictatorship and constitutional states of emergency

When Nawaz Sharif’s PML-N won the 1997 elections after the dismissal of Benazir Bhutto’s second government and won a supra-majority in parliament, Pakistan

²⁴ See PAK. CONST. art. 175 cl. 3.

²⁵ See *Government of Sindh v. Sharaf Faridi*, P.L.D. 1994 S.C. 105; *Sharaf Faridi v. Federation of Islamic Republic of Pakistan*, P.L.D. 1989 Karachi 404.

²⁶ See *Government of Balochistan v. Azizullah Memon*, P.L.D. 1993 S.C. 341.

²⁷ *Al-Jehad Trust v. Federation of Pakistan*, P.L.D. 1996 S.C. 324.

²⁸ KHAN, *supra* note 6, at 335–336.

appeared to be headed toward elective dictatorship once again. Within two months of the elections, the parliament passed the Thirteenth Amendment to the constitution which repealed article 58(2)(b) and transferred the power of appointing provincial governors and services chiefs to the prime minister. Pakistan's constitutional scheme thus reverted to a parliamentary system of government as opposed to the quasi-presidential system that had been in place since the Eighth Amendment. The Fourteenth Amendment passed shortly thereafter provided for the disqualification of members of parliament who defected or "committed a breach of party discipline." This ended the practice of floor-crossing, derogatively referred to as horse-trading, which had dogged parliamentary politics since 1985. It also insulated Nawaz Sharif from a vote of no confidence during the five-year term of the parliament. While these developments were good in form, the highly personalized style of party leadership and patronage-based control of the bureaucracy that the PML-N had managed to develop did not augur well for the prospects of democracy and constitutionalism in Pakistan. As the Nawaz Sharif government managed to assert its authority even over the military, the superior courts were the only state institution capable of opposing the elected executive within the confines of the constitution.

The first significant contention arose over the Fourteenth Amendment. Even though in an earlier case it was the Supreme Court that had recommended such measures to curb floor-crossing, the Court entertained a petition challenging the constitutionality of the amendment.²⁹ A Supreme Court bench headed by Chief Justice Shah took the unprecedented step of issuing an interim order suspending the operation of the amendment.³⁰ The prime minister criticized the Court for suspending the amendment and was served with a contempt notice. While the contempt proceedings were under way, a group of PML-N supporters protesting in front of the Supreme Court building broke the police cordon and entered the premises chanting slogans against the chief justice. Two days before the attack on the Court a split had emerged in the Supreme Court, when a two-member bench of the Court admitted a petition under article 184(3) challenging Chief Justice Shah's ascension as the chief justice and issued an order for his suspension on the basis that his appointment as chief justice in 1994 violated the seniority principle articulated in the *Judges'* case. The chief justice immediately issued an administrative order overriding the suspension, but it was vacated by two separate benches of the Court a day before the attack on the Supreme Court premises by PML-N protesters. The matter was taken up by a larger bench of Supreme Court comprising ten judges in *Malik Asad Ali*.³¹ In its final decision, the larger bench unanimously held Chief Justice Shah's appointment as unconstitutional, extending the seniority principle laid down in the *Judges'* case to the appointment of the chief justice of Pakistan as well.

Despite this notable setback to the Court's integrity and credibility, the Supreme Court nonetheless found itself in confrontation with the elected government. At the

²⁹ Pir Sabir Shah v. Shah Muhammad Khan, P.L.D. 1995 S.C. 66.

³⁰ Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan, P.L.D. 1998 S.C. 1263.

³¹ Malik Asad Ali v. Federation of Pakistan, P.L.D. 1998 S.C. 161.

core of contention was the government's continuing attempts to undermine the superior courts by creating special courts and alternatives to regular judicial proceedings. In Nawaz Sharif's second term in office his government displayed a penchant for ad hoc measures and special tribunals that had not been witnessed since Zia's martial law. As sectarian and political violence reached an unparalleled level, the government sought the remedy in the creation of a broad range of terrorism offenses and new anti-terrorism courts.³² Among other dilutions of due process, the act made confession before police admissible in anti-terrorism trials and provided for entry into premises and searches without warrant. Judges of the anti-terrorism courts were appointed by the federal government and lacked tenure. In *Mehram Ali* the Supreme Court invalidated several provisions of the Anti-Terrorism Act for being in violation of the constitution.³³ The Court held that the anti-terrorism and other special courts were subordinate courts and hence subject to the High Courts' supervision. The Supreme Court reiterated that the separation and independence of judiciary from the executive were cardinal principles of Islamic law and decried the tendency to create parallel court systems that were not subject to review. It directed the government to amend the Act in order to place the anti-terrorism courts under the High Courts' supervision and provide their judges with security of tenure.

The use of emergency powers by the Nawaz Sharif government caused further tensions with the Supreme Court. In the aftermath of nuclear tests by India and Pakistan in 1998, the government declared a state of emergency which entailed the suspension of all fundamental rights. The government also issued an order under article 233(2) for the suspension of the judicial review jurisdictions of the superior courts. In *Farooq Ahmed Khan Leghari*, the Supreme Court upheld the imposition of emergency but invalidated the suspension of fundamental rights and the courts' judicial review jurisdictions.³⁴ The Court's position represented a radical departure from precedent as it held that the suspension of fundamental rights under article 233(2) was subject to a proportionality test, must have a direct nexus with the aims of the promulgation of emergency, and should lead to minimal interference with the citizens' rights. Furthermore, as several of the fundamental rights provisions allow for reasonable restrictions, an order for the blanket suspension of rights and judicial review under article 233(2) must be based on an exceptional justification, effectively reading the provision into a nullity. When in 1999, the federal government imposed the governor's rule in the Sindh province under article 232 it dismissed the provincial government, called in the military in aid of civil powers, and set up military courts for the trial of civilians. In *Liaquat Hussain*, the Supreme Court declared the setting up of military courts through this device to be unconstitutional.³⁵ The Court noted that the "creation of courts outside the control and supervision of Supreme Court or High

³² Anti-Terrorism Act, 1997 (XXVII of 1997).

³³ *Mehram Ali v. Federation of Pakistan*, P.L.D. 1998 S.C. 1445.

³⁴ *See Farooq Ahmed Khan Leghari v. Federation of Pakistan*, P.L.D. 1999 S.C. 57.

³⁵ *Liaquat Hussain v. Federation of Pakistan*, P.L.D. 1999 S.C. 504. The Court held that when the military is called in aid of civil power under article 245(1) it cannot set up military courts.

Courts . . . not only militates against the independence of judiciary but it also negates the principle of trichotomy of power which is the basic feature of the Constitution.”³⁶

Despite such high-profile cases, by the end of the decade judicial activism, PIL, and judicial review had lost much of their sheen. In the domain of constitutional law, the courts’ efforts at instilling the basics of formal constitutionalism had achieved little in terms of fostering political stability. The courts were seen as political an institution as any other, prone to rapidly changing and at times visibly self-serving positions. In administrative law, the courts’ aggressive attempts to instill rule-boundedness and meritocracy in bureaucratic appointments, transfers, discipline, and conduct had no impact in terms of impeding the progressive politicization of the bureaucracy and the police at all levels. The visible pronouncements challenging misuse of anti-terrorism laws and military courts masked the norm of police brutality, impunity of the paramilitary forces during extended security operations, and the frequent use of staged “encounters” or extra-judicial killings by the police and security forces. PIL, which was on the decline by the end of the decade as a Supreme Court overburdened with pending cases deliberately scaled back its interventions, thus appeared to be mere symbolic assertions of judicial review jurisdiction wrapped in glorious language of fundamental rights but which delivered in terms of concrete changes in state practices. Both the original and writ jurisdictions also appeared to be suffering from elite capture as their speedier processes became useful avenues of vindicating private rights under the banner of public law by urban upper- and middle-class litigants who could afford the better and more expensive champions of access to justice.³⁷ Thus in October 1999 when General Musharraf took over power in yet another military coup Pakistan’s political and legal systems seemed to be reverting to the patterns of old.

4. Chaudhry Court and the second wave of judicial proactivism

4.1. From judicial complicity in military rule to a judicial challenge

With General Musharraf’s coup, Pakistan entered its third consecutive cycle of military rule to be followed inevitably by yet another transition to civilian-democratic governance. Upon taking power, the military regime began to unveil a refined version of the constitutional blueprint of military rule developed by Pakistan’s earlier military dictators. A Proclamation of Emergency was declared, the constitution was put in abeyance, and a PCO was issued to provide a temporary governing framework.³⁸ However, this time around martial law was not formally declared and General

³⁶ *Id.* at 656. Notably, there is no explicit provision of separation of powers in the Constitution. However, in *Mehram Ali*, P.L.D. 1998 S.C. at 1466, the court stated that the Constitution was founded on a “trichotomy of powers.”

³⁷ See Werner Menski, *Public Interest Litigation: A Strategy for the Future*, in PUBLIC INTEREST LITIGATION IN PAKISTAN 122–124 (W. Menski, R. Alam, & M. Raza eds., 2000).

³⁸ Provisional Constitution Order, P.L.D. 1999 Central Statutes 448.

Musharraf assumed the self-styled office of the “Chief Executive” of Pakistan. In 2000 when the Supreme Court entertained a challenge to the validity of the military coup and the interim governance framework, concerted and unoriginal efforts to undermine the independence of the judiciary began in earnest. The judges of the superior courts were compelled to take a new oath of office pledging to serve under the PCO.³⁹ Six of a total of thirteen judges of the Supreme Court refused to take the oath and resigned from the bench, including the chief justice. A reconstituted Supreme Court decided the case of *Zafar Ali Shah* and validated the coup on the basis of the doctrine of state necessity.⁴⁰ The Court granted virtually unlimited powers to the military regime, including the power to amend the constitution as long as its salient features—parliamentary form of government, federalism, and the independence of the judiciary—were left intact. The Court, however, imposed one potentially meaningful restriction: the military regime had to hold general elections no later than three years from the date of the coup.

In 2002, just prior to holding the general elections mandated by the Court, The Musharraf regime issued a legal framework order (LFO) which consolidated a number of constitutional changes and revived the notorious article 58(2)(b) to the constitution empowering the president to dismiss the incoming parliament at will.⁴¹ The LFO also barred the leaders of PML-N and the PPP from contesting the elections held in October 2002. A “King’s party” consisting of regime loyalists cobbled together mainly through defections from Nawaz Sharif’s Muslim League, formed a stable minority government. Questions regarding the legal validity of the LFO and other actions taken during the three-year-long period of direct military rule continued to hound the regime until the end of 2003 when the regime reached agreement with an alliance of religious parties to pass the Seventeenth Amendment to the constitution which retroactively validated almost all the actions taken during the state necessity phase.⁴² In *Pakistan Lawyers Forum* the Supreme Court was called upon to judge the validity of the Seventeenth Amendment as well as General Musharraf’s continuing occupation of “dual office”—president and chief of military.⁴³ The Court validated both the amendment and the dual office on the basis of arguments which were essentially an extension of the doctrine of state necessity.

In the first half decade of direct and indirect military rule, the superior courts fundamentally adhered to the blueprint of judicial review devised under the earlier periods of martial law. In addition to the constitutional validation of the regime, the Court refused to brook any challenge to its key policies and interests. For example, the Court upheld the regime’s accountability law, the National Accountability Bureau Ordinance, which had been manifestly used for political ends.⁴⁴ At the same time the courts continued to conduct judicial review of executive action in cases involving

³⁹ Oath of Office (Judges) Order, 2000, P.L.D. 2000 Central Statutes 38.

⁴⁰ *Zafar Ali Shah v. General Pervez Musharraf*, P.L.D. 2000 S.C. 869.

⁴¹ Legal Framework Order 2002, P.L.D. 2002 Central Statutes (Suppl.) 1604.

⁴² Constitution (Seventeenth Amendment) Act, 2003 (Act No. 2 of 2003).

⁴³ See *Pakistan Lawyers Forum v. Federation of Pakistan*, P.L.D. 2005 S.C. 719.

⁴⁴ *Khan Asfandyar Wali v. Federation of Pakistan*, P.L.D. 2001 S.C. 607.

the junior rungs of bureaucracy, police, and other state institutions. Such exercise of judicial review powers was tolerated by the regime, as in earlier periods of military rule. Thus when Justice Iftikhar Chaudhry assumed the office of the Chief Justice of Pakistan in 2005, a tenure expected to last for more than eight years, the Supreme Court looked set for an extended period of business as usual. Justice Chaudhry had taken an oath of office under the PCO and had been a member of several benches which had facilitated the regime. As such, there were no indications of a marked shift in the Court's position. However, within the first week of his ascension as chief justice, the Chaudhry-led Court initiated a more aggressive brand of judicial review, calling into question actions or inactions of the highest levels of bureaucracy.⁴⁵

These high-profile cases began to provide important evidence of the nexus of power and corruption between the bureaucracy, large commercial interests, and the federal and provincial governments elected under the umbrella of the military regime. In the *Steel Mills* case the Supreme Court pushed the envelope further and voided the privatization of the Pakistan Steel Mills to the embarrassment of the prime minister and several members of the cabinet.⁴⁶ A finding of impropriety in the undervalued sale of this strategic national asset significantly undermined the government's claims concerning the objectives and implementation of the privatization program as well as its economic policymaking in general. Most subtly, the Court pushed the boundaries of judicial review such that executive action was not only required to meet the criteria laid down in the governing laws and regulations but had also to be tested on the touchstone of transparency. A number of other cases, reported with considerable excitement in the domestic press, weaved a narrative of endemic corruption and crony capitalism belying the claims of good governance and accountability in economic development under the stewardship of the Musharraf regime.

Thus 2006 was regarded by many as the year of relative "judicial activism." Nonetheless, while the Supreme Court and the High Courts, which also began to engage in limited judicial activism upon the Apex Court's cue, fractured the façade of elected governments that the Musharraf regime had erected, the courts had not directly challenged the military's core interests. That, however, appeared to change when the Supreme Court admitted a petition filed by the Human Rights Commission of Pakistan (HRCP) challenging the forced disappearance and illegal detention of hundreds of people by the country's national security and intelligence agencies either in the context of the "War on Terror" or the separatist insurgency in the province of Balochistan.⁴⁷ While the Supreme Court could not compel the military authorities to account for the missing persons, regular hearings in which high-ranking military officers were called before the Court and press coverage of these brought attention to the

⁴⁵ See Tahir Wasti, *A New Supreme Court: The Contribution of Chief Justice, Iftikhar Muhammad Chaudhry*, in CHEEMA, POLITICS & JURISPRUDENCE, *supra* note 1, at 6. See, e.g., Iqbal Haider v. Capital Development Authority, P.L.D. 2006 S.C. 394; Defence of Human Rights Organization v. Federation of Pakistan, Constitution Petition No. 29 of 2007.

⁴⁶ See *Watan Party v. Federation of Pakistan*, P.L.D. 2006 S.C. 697.

⁴⁷ See *Human Rights Commission of Pakistan v. Federation of Pakistan*, Constitution Petition No. 5 of 2007.

military's counter-insurgency and anti-terrorism actions in the western parts of the country caused unease among the military hierarchy. As 2007 was scheduled to be the year of presidential and general elections vital for the continuation of the military regime, such judicial activism was most unwelcome. The attention to the corruption and mal-governance brought on by widely reported cases of judicial review did not augur well for the re-election prospects of political parties allied with the Musharraf regime. In March 2007, in a somewhat unexpected move General Musharraf filed a reference before the Supreme Judicial Council, the body mandated by the Constitution of Pakistan to conduct the accountability of the judges of superior courts, and suspended Chief Justice Chaudhry on charges of misconduct.⁴⁸

4.2. Lawyers' Movement and the politics of the Chaudhry Court

The dismissal of the chief justice, an action designed to curb the activist tendencies of the Court, unleashed a wave of political dissent—frequently labeled the “Lawyers’ Movement”—that quickly spun out of the military regime’s control. Justice Chaudhry was finally reinstated as the chief justice after a protracted and fairly populist mobilization in March 2009. In the process, General Musharraf was forced to relinquish power to an elected government. However, it was the elected PPP government that resisted the restoration of Justice Chaudhry to office for more than a year until a “long march” on Islamabad by the Lawyers’ Movement and behind the scenes pressure from the military compelled it. This was the second time in Pakistan’s history that the superior judiciary found the political space to expand and exert judicial power. The PPP government was based on a stable coalition that lasted a full five-year parliamentary term but was not strong enough to suppress a resurgent judiciary that saw itself as having a populist, proto-democratic mandate. A tussle between the PPP government and the Chaudhry Court appeared imminent as the Court looked to assert its perceived mandate.

Unlike what happened in the 1990s, this shaped up to be a jostling for power directly between the elected and judicial institutions rather than a scenario where the Court would be called upon to mediate the tensions between other political players. However, contrary to the fears of an immediate confrontation, the Supreme Court proceeded cautiously in the first few months after its restoration and restored a measure of political equilibrium. The Court began the task of dismantling the legal legacy of the emergency in a measured fashion. First, in *Tikka Iqbal Muhammad Khan* the Court declared the imposition of emergency by General Musharraf to be unconstitutional.⁴⁹ The Court did not, however, automatically invalidate all the actions taken pursuant to the emergency and in a show of respect for the democratic process accepted the validity of the 2008 elections, the formation of federal and provincial governments thereafter, and the presidential election of Asif Zardari. The inevitable confrontation between the Court and the PPP government arose at the end of 2009

⁴⁸ See Moeen Cheema, *Justice Derailed in Pakistan: The Sacking of the CJ*, JURIST (Mar. 13, 2007).

⁴⁹ *Tikka Iqbal Muhammad Khan v. General Pervez Musharraf Chief of Army Staff*, P.L.D. 2008 S.C. 6.

over the National Reconciliation Ordinance, popularly known by its acronym as the NRO. The NRO had ended long-standing corruption charges against President Zardari and other prominent PPP members. In the *NRO case* the Chaudhry Court declared the ordinance to be unconstitutional on the basis that it violated the equality guarantee in article 25 by providing a preferential treatment to certain classes of politicians and bureaucrats.⁵⁰ Other constitutional basis for nullifying the NRO appeared to be a contravention of the separation of powers and judicial independence principles of the constitution. The NRO had essentially operated as a “legislative judgment” dispositive of cases pending before the courts.

One aspect of the judgment ensured that political volatility and wrangling between the elected executive and the judiciary would continue. This related to the withdrawal of corruption and money-laundering charges against the president in Switzerland, UK, and other European jurisdictions (the so-called Swiss case) pursuant to the NRO. While invalidating the NRO the Supreme Court took exception to the manner in which the Swiss case had been closed and directed the government to take immediate steps to reverse this action. This direction would require the federal government to play a role in re-initiating cases against the president and the leader of the ruling party in a foreign jurisdiction. Not unexpectedly the federal government resisted resulting in a protracted battle with the Supreme Court during which the government fruitlessly attempted to take on the Court on the issue of judicial appointments.⁵¹ In addition to resisting the enforcement of Court directives, it appeared that the government’s strategy was to politicize the actions of the superior courts and to create an impression of victimization at the hands of the judiciary, and indirectly the military establishment. Such was the backdrop to the Eighteenth Amendment to the constitution which repealed several problematic aspects of Musharraf era constitutional changes.⁵²

The Eighteenth Amendment transferred important powers back to the parliament and the elected executive, and abolished the “concurrent list,” thereby significantly expanding provincial legislative capacity. It also created new rights to fair trial and due process,⁵³ as well as rights to information and compulsory education.⁵⁴ In addition, the Amendment brought fundamental changes to the judicial appointment process through the creation of a judicial commission and a parliamentary committee, which were challenged before the Supreme Court.⁵⁵ The petitioner argued that the amendment was designed to undermine the independence of the judiciary and thus violated the basic structure of the constitution. In *Nadeem Ahmad*, the Supreme Court issued an interim order identifying aspects of the amendment which undermined the role of the chief justice, gave the executive an equal say in

⁵⁰ See *Dr. Mobashir Hassan v. Federation of Pakistan*, P.L.D. 2010 S.C. 1.

⁵¹ See Moeen Cheema, *Pakistan: New “Judges’ Case” in the Making?*, JURIST (Feb. 14, 2010).

⁵² Constitution (Eighteenth Amendment) Act, 2010.

⁵³ PAK. CONST. art. 10A, added by § 5 of Constitution (Eighteenth Amendment) Act, 2010.

⁵⁴ PAK. CONST. arts. 19A and 25A, amended by §§ 7 and 9 of Constitution (Eighteenth Amendment) Act, 2010, respectively.

⁵⁵ PAK. CONST. art. 175A, amended by § 67 of Constitution (Eighteenth Amendment) Act, 2010.

judicial nominations, and a parliamentary committee virtual veto powers over the recommendations of the judicial commission as problematic.⁵⁶ Under pressure, the parliament adopted most of the Court's recommendations through the Nineteenth Amendment by granting the judges a larger say in the judicial commission.⁵⁷ In a follow-up decision the Court whittled down the role of the parliamentary committee holding that its reasons for refusing a nomination made by the judicial commission were reviewable. This effectively brought the judicial appointment process in line with that of India with a collegium of senior judges deciding on appointments, subject to a requirement of some consultation with the executive. Just as in the 1990s the courts had asserted judicial power to enhance their institutional independence in a patently self-serving manner.

By 2012 as the government approached a difficult election year, the Supreme Court charged, convicted, and disqualified the incumbent prime minister with contempt of court for defying the Court's directions in the NRO case.⁵⁸ This was a remarkable assertion of judicial power and gave rise to immense controversy. While the Court retained considerable support, several cases decided around that time furthered a perception among large segments of the public as well as lawyers that the Court was acting in a politically partisan way.⁵⁹ The more prominent High Court and Supreme Court bar associations became increasingly critical and charged the Court of having overreached. With the retirement of the Justice Chaudhry in December 2013, and the election of Nawaz Sharif for a third term as prime minister commanding a clear majority in parliament, the Supreme Court progressively slipped back into a more traditional role. Nonetheless, the Chaudhry Court had left Pakistan's superior judiciary with a legacy of considerable power and an enhanced institutional role such that it has been impossible for it to disappear completely from the political scene. Continuing controversies over the legitimacy of the Nawaz Sharif government, based on opposition claims of election rigging and corruption, as well as fierce political competition which has threatened to spill over in street agitation, have forced the Court to reluctantly get involved in issues of high politics on several occasions. The superior judiciary remains the only constitutional institution capable of mediating such tensions and ensuring that political conflict does not provide the setting or impetus for another military intervention.

⁵⁶ *Nadeem Ahmad and Others v. Federation of Pakistan*, P.L.D. 2010 S.C. 1165.

⁵⁷ In particular, judicial representation on the Commission was increased from two to four, the Parliamentary Committee was required to give reasons in case of a rejection of the Judicial Commission's nomination, and the Committee's hearings were mandated to be held in camera. See Constitution (Nineteenth Amendment) Act, 2010 § 4.

⁵⁸ Criminal Original Petition No. 06 of 2012 in *Suo Motu Case No. 04 of 2010*, P.L.D. 2012 S.C. 553; *Siddique v. Federation of Pakistan*, P.L.D. 2012 S.C. 660.

⁵⁹ A few decisions in 2012 courted extensive controversy in addition to the prime minister's contempt saga. See, e.g., *Watan Party and Others v. Federation of Pakistan*, P.L.D. 2012 S.C. 292. See also *Suo Motu Case No. 5 of 2012*, P.L.D. 2012 S.C. 664, arising out of allegations of financial impropriety against the chief justice's son. Similar allegations had formed the basis of General Musharraf's misconduct charges against the chief justice in 2007.

4.3. Consolidation of judicial power

While the overt political tensions between the judiciary and the elected government garnered the overwhelming share of the journalistic and academic attention, the more significant assertion of judicial power by the Chaudhry Court was predicated on a consolidation of the various strands of legality that the Court had historically built. Many of the constitutional controversies including the NRO saga had issues of administrative law at their core. The issue of the constitutional validity of the NRO was paralleled by the judicial review of the workings of the National Accountability Bureau (NAB), the federal anti-corruption agency which seemed to be laboring under political control. In the interregnum between the NRO case and the prime minister's disqualification, the Court was preoccupied with the failure of NAB chairmen and senior prosecutors to effectively reinstate and pursue the corruption cases that the NRO had sought to end in one legislative swoop. In a succession of cases the Supreme Court sought to wrest control of the NAB from the government, disqualified incumbent chairmen, and attempted to force the appointment of independent officials in their place.⁶⁰ In several other cases the Supreme Court took up the nexus of political power, bureaucracy, regulatory bodies, and crony capitalism.⁶¹ Many of these cases were initiated *suo motu* under the Court's original jurisdiction.⁶² As the Court's attempts to compel independent investigations by NAB through rolling review and active supervision failed, it looked to alternatives such as the Federal Investigation Agency (FIA).⁶³ Frustrated with its inability to leverage existing institutions, the Court began to directly investigate corruption charges against ministers and high officials by appointing ad hoc fact-finding commissions composed of superior court judges or trusted bureaucrats.⁶⁴

The failures of investigative and anti-corruption agencies brought the Supreme Court face to face with the deeply entrenched politicization and patronage-based control over the regulatory agencies and the senior bureaucracy. In a spate of cases the Chaudhry Court took up improper appointments to apex positions in regulatory agencies. The Court invalidated the appointment of the chairman of the Oil and Gas Regulatory Authority (OGRA),⁶⁵ the president of National Bank of Pakistan,⁶⁶ and the chairman of the Securities and Exchange Commission of Pakistan.⁶⁷ The scrutiny of appointments, mostly taken up in *suo motu* proceedings,

⁶⁰ See *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd.*, P.L.D. 2010 S.C. 1109; *Shahid Orakzai and Other v. Pakistan Through Secretary Law, Ministry of Law, Islamabad and Others*, P.L.D. 2011 S.C. 365; *Ch. Nisar Ali Khan v. Federation of Pakistan*, P.L.D. 2013 S.C. 568.

⁶¹ For notable example, see *Bank of Punjab and Others*, P.L.D. 2010 S.C. 1109; *Muhammad Yasin v. Federation of Pakistan*, P.L.D. 2012 S.C. 132; *In the matter of Alleged Corruption in Rental Power Plants etc.*, 2012 S.C.M.R. 773; *Regional Director, Anti-Narcotics Force v. Rizwan Ahmad Khan*, 2012 S.C.M.R. 870; *Suo Motu Case No. 11 of 2011*; *Suo Motu Case No. 18 of 2010*.

⁶² See, e.g., *Alleged Corruption in Rental Power Plants*, 2012 S.C.M.R. 773.

⁶³ See, e.g., *Suo Moto Case No. 18 of 2010*.

⁶⁴ *Alleged Corruption in Rental Power Plants*, 2012 S.C.M.R. 773

⁶⁵ *Muhammad Yasin*, P.L.D. 2012 S.C. 132.

⁶⁶ *Mir Muhammad Idris v. Federation*, P.L.D. 2011 S.C. 213.

⁶⁷ *Muhammad Ashraf Tiwana v. Pakistan*, 2013 S.C.M.R. 1159.

involved the Court indirectly in the political economy of policymaking. This strand of judicial review reached its high point in a remarkable exercise of judicial power in the *Khwaja Muhammad Asif* case.⁶⁸ In a petition brought by an opposition politician, the Supreme Court undermined the prime minister's discretion in this regard by directing the creation of an independent commission to recommend appointments to regulatory bodies and public corporations. The Court pushed this logic in the context of the career bureaucracy as well. In *Tariq Aziz-ud-Din* and *Anita Turab*, for example, the Court attempted to break the shackles of political control over the bureaucracy, instill transparency and merit in appointments to key posts in the bureaucracy, and resist the claims of executive prerogative in postings, promotions, and transfers.⁶⁹

The Court also built up on the groundwork historically laid down by the superior courts and proactively challenged illegal detentions and abuse of police powers. The Court took up such issues en masse and exercised its original jurisdiction much more liberally than at any previous juncture in its history. The Court did that through a creative interpretation of article 184(3) as it subtly defined any violation of an individual's fundamental rights as also a matter of public importance, thereby merging the two threshold requirements for a case to fall under the original jurisdiction. The Court also employed a novel device or rather virtually created a new institution in the form of a Human Rights Cell (HRC) with the Supreme Court tasked with the responsibility of sifting through the daily newspapers, electronic media reports, and hundreds of letters sent to it from potential petitioners in order to identify human rights cases suitable for the Court's cognizance. Many of these grievances concerned blatant abuse and torture by police,⁷⁰ and the Court expanded the ambit to include refusal to address honor crimes and domestic violence against women.⁷¹ The Court also took up grievances against administrative action such as illegal dispossession of land by revenue officials⁷² and causing of death or personal injury through negligence and regulatory failure.⁷³ While the Court converted a relatively small number of these into formal proceedings,⁷⁴ the threat of a *suo motu* hearing, public humiliation by the Court, and possible disciplinary consequences terrorized police and executive officials implicated

⁶⁸ *Khwaja Muhammad Asif v. Federation of Pakistan*, 2013 S.C.M.R. 1205.

⁶⁹ *See, e.g.*, *In re Tariq Aziz-ud-Din*, 2010 S.C.M.R. 1301; *Syed Mahmood Akhtar Naqvi v. Federation of Pakistan*, P.L.D. 2013 S.C. 195.

⁷⁰ *See, e.g.*, Human Rights Case No. 5466-P of 2010; *Suo Moto* Case No. 66 of 2009; Human Rights Case Nos. 44 of 2008 & 14 of 2009; Human Rights Case No. 1109-P/2009; Human Rights Case No. 4095 of 2006; Human Rights Case No. 4860 of 2006; Human Rights Case No. 5443 of 2006; *Suo Moto* Case No. 12 of 2005 and Constitution Petition No. 22 of 2005.

⁷¹ *See, e.g.*, Human Rights Case No. 5466-P of 2010; Human Rights Case No. 57 of 2009; Human Rights Case No. 4181-N of 2009; Human Rights Case No. 12912-P of 2009; *Suo Moto* Case No.1 of 2009; Criminal M. A. No.396 of 2005 and Constitution Petition No. 16 of 2004.

⁷² *See, e.g.*, Human Rights Case No. 29 of 2009; Human Rights Case No. 11108-P of 2009.

⁷³ *See, e.g.*, Human Rights Case No. 2041-P of 2009; Human Rights Case No. 2435 of 2006; Human Rights Case No. 4805 of 2006; Human Rights Case No. 8207 of 2006.

⁷⁴ The Chaudhry Court took up around 200 such cases for hearing. *See generally* Asher A. Qazi, *Suo Motu: Choosing Not to Legislate, Chief Justice Chaudhry's Strategic Agenda*, in *POLITICS & JURISPRUDENCE*, *supra* note 1.

in alleged violations. This gave the HRC tremendous powers, which by its own account disposed more than 180,000 such grievances wielding a threat of conversion into a *suo motu* human rights case.⁷⁵

The Court's human rights activism served to garner a populist legitimacy which the Court leveraged in the accountability and constitutional cases. On one level, the Court's human rights crusade was an unquestionable good, for how could the redress of grievances that no other institution was willing or able to meaningfully address be wrong! However, what is questionable is the long-term effectiveness of the Court's actions in challenging the culture of illegality, impunity, and corruption in the police and the bureaucracy. Instead of pushing for structural reforms in the postcolonial state that might over time develop a culture of rights protection, the Court offered an ad hoc mechanism for individual petition and redress. The failure to institutionalize rights protection was endogenous to the Court itself as the basis on which the human rights cases were not clearly articulated let alone rationalized and the HRC had no constitutional or legal basis. As a result, when and how many *suo motu* actions to initiate and by extension the extent of the role that the HRC was meant to play depended on the discretion of the incumbent chief justice.

The postscript to the Chaudhry Court was thus written by a Supreme Court that has from 2014 to 2017 experienced a gradual shift in its direction under the leadership of five different chief justices. Except for a brief period of twenty-three poetic days in which the twenty-third chief justice of Pakistan briefly rekindled the legacy of Chaudhry, the Court has progressively curtailed its original jurisdiction and dramatically reduced the use of *suo motu* powers. Unsurprisingly, when a chief justice has initiated a *suo motu* case, its rarity has magnified rather than redeemed the subjective basis on which this power has been exercised. Nonetheless, the Court remains a powerful institution and the centrality of its role within the governance system of Pakistan appears to be an irreversible development. On multiple occasions the post-Chaudhry Supreme Court has also been dragged into the midst of political crises that threatened the very existence of the democratic system and the constitutional scheme on which the Court claims to found its powers. In the aftermath of the May 2013 general elections, the Court refused to take up charges of large-scale electoral rigging until a march on the capital and a sit-in on its Constitution Avenue by the largest opposition party plunged the country into a protracted crisis. Even then the Court only intervened when it was compelled to form a judicial commission through a negotiated settlement between the parties.⁷⁶ In 2016 the Court again waited patiently on the sidelines as long-standing allegations of corruption and money-laundering against Prime Minister Nawaz Sharif and his family were reignited with a vengeance by the so-called Panama leaks which precipitated yet

⁷⁵ Faisal Siddiqi, *Public Interest Litigation: Predictable Continuity and Radical Departures*, in CHEEMA, POLITICS & JURISPRUDENCE, *supra* note 1.

⁷⁶ See generally Moeen Cheema, "Election Disputes" or Disputed Elections?: Judicial (Non-)Review of Elections in Pakistan, in JUDICIAL REVIEW OF ELECTIONS IN ASIA (P. J. Yap ed., 2016).

another round of street protests by the opposition only to be belatedly dragged in the midst of another existential crisis to the democratic political system.⁷⁷ On both occasions the Court remained the only institution that had the capacity to decisively and credibly resolve such crises and mediate between the key stakeholders of Pakistan's governance system.

5. Conclusion

Over the seven decades of Pakistan's postcolonial history the superior courts have evolved from marginal state institutions to prominent players in governance and statecraft. However, this transformation cannot be described as one from an apolitical role to sudden and dramatic judicialization of politics in the aftermath of the Lawyers' Movement. Pakistan's superior courts have always been political institutions which have been called upon to adjudicate regime change and other issues of pure politics. In between these noticeable moments of constitutional crises the courts have progressively strengthened their administrative law jurisdictions and expended the judicial review of executive action. Even as the courts ceded space to military regimes and civilian governments on their core interests, they consistently built a robust jurisprudential canon on the proper exercise of administrative power. Given that the most significant powers of government have been exercised through the career bureaucracy, and increasingly through public corporations and regulatory bodies, the courts have fought hard to extend the purview of judicial review to the regulators of the economy as well. Ultimately, the courts have extended the purview of judicial review to the elected executive as well in times of democratic rule. The evolution of judicial power in Pakistan may thus be characterized as the judicialization of governance as much as that of politics.

Much of the commentary on judicial developments in Pakistan appears to be driven by an evaluation that judicial involvement in politics is problematic per se, and hence the prescription that courts should eschew getting embroiled in political questions. However, there is little focus on *how* and *why* the judicialization of governance and politics has taken place. Without answering these prior questions, any evaluation or prescription will remain a mere matter of faith in liberal constitutionalism. This article has made an attempt to identify how the judicialization of governance and politics has been shaped by the courts through their public law jurisdictions and jurisprudence, providing the descriptive basis to undertake an in-depth analysis of the *why* question. While that is a significant project in its own right beyond the scope of this article, some preliminary observations may nonetheless be made about how the Pakistan case study may add to the regional and global discussions on the judicialization of governance and politics.

⁷⁷ See generally *Developments in Pakistani Constitutional Law*, in 2016 GLOBAL REVIEW OF CONSTITUTIONAL LAW (Richard Albert et al. eds., 2016).

The increasing judicialization of politics appears to be the norm around the world,⁷⁸ and most recently courts in Asia have become noticeably activist.⁷⁹ The literature on the judicialization of politics generally revolves around three explanatory frameworks which may broadly be relied on to analyze the expansion of judicial power in a given polity.⁸⁰ The first (and arguably dominant) “liberal” set of explanations focuses on the spread of ideals of rights and rule of law across the globe.⁸¹ While the traction of rights discourse may explain aspects of judicialization elsewhere, it provides little insight into the expansion of judicial power in Pakistan. As noted in this article, Pakistan’s courts have failed to develop a coherent rights jurisprudence and have essentially used their fundamental rights jurisdiction to vindicate their administrative and governance directives.

Ran Hirschl, an influential theorist on the subject, challenges the valorization of rights-based constitutionalism as inevitable and inherently valuable and offers a critical class-based analysis of judicialization that may have greater explanatory power in the Pakistan context.⁸² Hirschl considers the judicialization of politics to be a product of strategic interplay and alignment of the interests of otherwise competing elites. Hirschl thus sees judicial review centered on adjudication of constitutional rights not only in terms of unelected courts dominating political decision-making but as part of a broader movement whereby political and policymaking power is shifted to semi-autonomous and professional institutions in general—and as a result to those classes and groups that have access to and influence upon such institutions. Hirschl’s framework may help us understand important aspects of the judicialization process in Pakistan. The courts’ assertiveness during periods of civilian rule can be partly explained by the alignment of the judiciary with the military and its allied classes that have lost their grip on the state but find the courts a useful vehicle to reassert some of their power. In every period of transition from military to civilian rule, the courts exhibited a renewed vigor and a conservative form of judicial activism that imposed limits on the social and economic policymaking by elected governments. However, while Hirschl’s analytical framework enables us to dissect some key aspects of judicialization in Pakistan, it fails to shed light on the developments in administrative law and the courts’ consistent challenges to the securitization of the state even under military rule.⁸³

⁷⁸ See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (N. C. Tate & T. Vallinder eds., 1995); ON LAW, POLITICS AND JUDICIALIZATION (M. Shapiro & S. Sweet eds., 2002); RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (T. Ginsburg & T. Moustafa eds., 2008).

⁷⁹ See generally THE JUDICIALIZATION OF POLITICS IN ASIA (B. Dressel ed., 2012); NEW COURTS IN ASIA (Andrew Harding & Penelope Nicholson eds., 2010); TOM GINSBURG & ALBERT H. Y. CHEN, ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA (2009).

⁸⁰ B. Dressel, *The Judicialization of Politics in Asia: Towards a Framework of Analysis*, in THE JUDICIALIZATION OF POLITICS IN ASIA 4–5 (B. Dressel ed., 2012).

⁸¹ C. R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); Anne Mary Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000).

⁸² RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

⁸³ Hirschl himself identifies Pakistan as an exception to his thesis as Pakistan is a rare case of judicialization that has happened in a society that has not been a democracy for a large part of its history and was under direct military rule when Hirschl expounded his thesis. See *id.* at 31.

A “functionalist” strand of the literature which accords greater weight to the strategic motivations and institutional incentives of judiciaries may have greater relevance than Hirschl’s “departing hegemon” thesis in helping us understand the judicialization of governance in Pakistan.⁸⁴ According to this framework of analysis, courts gain relevance and power in weak or fragmented political systems where no one institution or class is able to exert preeminent hold over the state and political processes. In such a scenario, a number of important and highly contentious issues end up by default before the courts, giving judges the opportunity to strategically expand the role of the courts in resolving critical political and social issues. Such a process of judicialization is thus driven by the courts themselves which seek to align with and hence use the support of various groups, classes, and institutional complexes at different times and around different sets of issues. Ginsburg and Moustafa’s analysis of the politics of courts under authoritarian regimes may help explain the judicialization of administrative governance which has arguably been the most significant if not the most visible plane of judicial action in Pakistan.⁸⁵ Ultimately, however, the progressive expansion of judicial power in Pakistan may help highlight how fluid and dynamic the process of judicialization can be and that any given time a range of factors and players may contribute to the expansion of and/or resistance to a more assertive judicial role.

⁸⁴ See L. BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOUR* (2006); R. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003); J. FREEJOHN, *JUDICIALIZING POLITICS, POLITICIZING LAW* (2002); M. SHAPIRO & A. STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* (2002); M. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

⁸⁵ See *RULE BY LAW*, *supra* note 78.