

# Constitutionalism in Pakistan: The Changing Patterns of Dyarchy

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This paper deals with the nature and direction of constitutional thinking and practice in Pakistan. It is argued that the country reflects a general malaise of post-colonial societies, characterized by tension between the locus of power in the politico-administrative machinery and the source of legitimacy in the constitution. Under the classical formulation, the constitution represents the way a nation wants to live its collective life in terms of various laws and institutions, as well as the powers and duties of public office-holders. In other words, the institutional-constitutional edifice of the state functions as the vehicle of a nation's life'.<sup>1</sup> One finds comparable theories in the tradition of structural Marxism, for example in Poulantzas,<sup>2</sup> which consider the state as a condensate of the power structure of the society. It is argued that there is a conceptual tension in the formulation of such theories. In the context of postcolonial societies, transplantation of institutions and constitutions from a different era and a different continent played a formative, almost deterministic, role in the way the state's authority was conceived and operationalized. For more than a hundred years, British India remained a laboratory for the implementation of political, economic, legal and administrative values and norms. On the one hand, this shaped the way people came to look at their relations with the state in terms of new implements of power such as non-arbitrary sources of authority, codified law, rational-legal bureaucracy and rule of public representatives. On the other hand, it created the mass public itself which, in due time, rose to stake a claim for societal input into the business of the state.<sup>3</sup> In other words, our discussion needs to go beyond the ahistorical approach to constitutionalism in Pakistan and elsewhere, as embedded in such concepts as the reflection of either the nation's will or the social power structure in a microcosm. The relative autonomy of the state apparatuses of the military, the bureaucracy and the judiciary, as well as constitutional provisions ranging from writ jurisdiction, equality before the law and equality

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of protection from the law to the neatly defined roles of the police and the magistracy and fundamental rights in general, all predate independence.

In the post-independence period, the state increasingly absorbed pressures from the newly enfranchised public, which sought to reshape politics along nationalist goals. The institutional-constitutional framework of the postcolonial state was ill equipped to accommodate much less to sponsor and pursue these goals in earnest. This led to a general outcry of institutional decay, leading to a crisis of democracy.<sup>4</sup> Research on post-independence India and Pakistan gradually moved into consideration of the bifocal nature of public authority. At one extreme, the bureaucratic core of the state, supported by the armed forces, overtly as in Pakistan and covertly as in India, represented the bedrock of conservatism in terms of continuity of policy, locus of power and ideological framework. In common parlance, this came to be known as the 'establishment'. At the other extreme, the political leadership purported to represent the public, project its grievances and seek reallocation of the state's resources to meet the demands of their constituents. In this process, they vacillated between the two poles of upholding the establishment's commitment to what was often billed as the 'national interest' in terms of internal and external security, and representing society's demand structure as couched in the idiom of 'public interest' and articulated through the channels of decision-making. The 'centralizing' tendencies of the former often overwhelmed the disaggregated nature of the latter in the context of the pluralist framework of vote politics in regional, religious, ethnic, caste and tribal terms. Rajni Kothari's formulation of 'state against democracy' in the context of Indian politics, though considered cynical by some, is even more applicable to Pakistan.<sup>5</sup>

The logic underlying this line of argument often led to the positioning of India and Pakistan along a continuum moving from democracy to authoritarianism. Hamza Alavi analyses the postcolonial state in South Asia and elsewhere as an institutional framework that is relatively autonomous, independent of the dominant classes while at the same time mediating between their rival interests.<sup>6</sup> In this context, he sees differences between countries in a comparative framework such as that between India and Pakistan, though formidable, as less than deterministic. In the same way, differences between the democratic and military phases of rule within Pakistan in a longitudinal framework are less than substantive. In Ayesha Jalal's view, the two countries displayed covert and overt authoritarianism respectively. She gives credit for civilian supremacy over the military in India to the 'pre-existing unitary central apparatus' and similar propitious circumstances, rather than to politicians ruling the country.<sup>7</sup> This perspective sought to challenge the scholarly orthodoxy, which looked at the two countries in the context of a dichotomy between democratic and military rule. The argument is that given the shared British legacy and the similar starting point of independent statehood, the difference between the two countries was more of degree than kind. Both systems displayed an obsessive concern with centralization of power at the cost of provincial autonomy, securitization of the national vision, use of ideology to subvert the process of articulation of regional or class interests and a discouragement of the politics of issues in favour of the politics of identity.

For the purposes of the present study of constitutionalism in Pakistan, we propose

to look at the structural transformation of politics in the country inasmuch as the ruling elite sought to change the juridical framework of exercise of state's authority. This process took place in a direction which was fundamentally different from the one pursued in the neighbouring country. As opposed to the classical approach to the constitution being a reflection of the nation's will and the power structure of a society, it has been argued that the constitutional tradition inherited by Pakistan did not necessarily correspond to the reality of the distribution of power on the ground.<sup>8</sup> The inherent institutional imbalance between bureaucracy and politicians in Pakistan made a mockery of such constitutional provisions as parliamentary sovereignty, procedural and substantive aspects of the legislative process at the federal and provincial levels, and the principle of the government's accountability to public representatives. The *India Act, 1935* as amended by the *Independence of India Act, 1947* remained operative for more than a decade after partition. On the way, the state elite faced a tremendous pressure from the 'political class' that was marginalized under the prevalent ruling setup. As the crisis deepened between the parliamentary and extra-parliamentary forces on the constitutionality of certain policy and administrative measures taken by the government, to be discussed later, the judiciary was brought in as a referee and the ultimate source of legitimacy. The 1954 *Tamizuddin Case* started a process whereby the higher courts continually interpreted the constitution throughout the following half-century. The tenacity of the struggle between the two sides has been amply reflected through a lingering crisis of constitutional understanding between the two. On the one hand, various attempts at constitutional engineering were taken up by extra-parliamentary forces, led by civil bureaucracy during the first quarter and the military during the second quarter of the century after independence. On the other hand, parliamentarians struggled to keep the constitutional framework as inherited from British India intact and thwart attempts from outside the parliament to change its character.

The most contentious issue, which has been at the core of the constitutional crisis of Pakistan, is parliamentary sovereignty. The founding fathers heralded the independent statehood of Pakistan from a starting-point that was, contrary to general understanding, fundamentally different from that of India. It was considered almost mandatory by the ruling elite to discount with the parliament even as power was formally transferred to the Constituent Assembly. Apparently, cross-migration of Muslims from India and Hindus and Sikhs in the reverse direction after partition was an experience shared by the two countries. In reality, the phenomenon of migration had an entirely different impact on their political development. In (West) Pakistan refugees accounted for 20 percent of the population as opposed to only 1 percent of the population in India. Refugees in India came from peripheral areas of British India in the northwest and northeast. Refugees in Pakistan came from what had long been the imperial centre of India, along with the presidencies of Bombay and Calcutta, to the periphery of the erstwhile empires. These people had led the movement for Pakistan, which was established in what became their land of migration. The migratory elite provided the new state with its governor general and prime minister, leadership of the ruling party Muslim League, two-thirds of higher bureaucracy as well as three-fourths of the emergent bourgeoisie. As opposed to structural continuity in India as a successor state of British India, it was structural

discontinuity that characterized Pakistan as a seceding state par excellence. From the beginning, the migrant-led executive of the new state grappled with the issue of dealing with the Constituent Assembly, which had been elected by the legislative assemblies of Muslim majority provinces now constituting Pakistan and which was, therefore, dominated by 'locals'. Migrants from the Muslim minority provinces who had been converted to the Pakistan cause at the time of the 1936–7 elections enjoyed a sense of state legitimacy higher than the late converts from the Muslim majority provinces. Pakistan became a migrant state par excellence.

The new state was characterized by disdain for the legislature. The executive, along with bureaucracy, assumed the sub-legislatory activity in various important fields. Recourse to a mass mandate, which would have meant an exit from power for the migrant-cum-bureaucratic elite, was considered dysfunctional for the system. Elections were postponed ad nauseum. Constitutional formulas that promised to restore parliament to its rightful place at the centre of the state as the custodian of state legitimacy were brushed aside. One such attempt led to the first coup in Pakistan's history led by the civil bureaucracy in 1954. Governor General Ghulam Mohammad dissolved the parliament and dismissed Prime Minister Nazimuddin, who enjoyed the support of the majority in the Constituent Assembly. The Federal Court upheld the decision on the technical ground that the relevant provisions under Article 223-A to issue writs of *mandamus* and *quo warranto* to annul the dissolution and restore the government had not been given assent by the governor general. The fact that the governor general could give or withhold assent as per the Court's verdict indirectly made him a constituent part of the legislature.<sup>9</sup> Subsequently, in response to the governor general's reference to the Federal Court in the midst of the prevalent constitutional crisis, whereby the supreme law-making body had been dissolved and no other law-making institution was in existence, the Court validated the dissolution of the Constituent Assembly following the doctrine of state necessity. By now, extra-parliamentary forces had got fully entrenched in the state system. The doctrine of state necessity became an essential part of the judicial lexicon of Pakistan, whereby maintaining public order was defined as the paramount function of any ruling setup even if it involved an extra-constitutional step. An orthodoxy was born whereby the judiciary developed a 'statist' perspective on constitutional issues in line with the ruling elite on top of what was fast becoming an administrative state.

On the other hand, the Federal Court also refused to empower the governor general to validate laws in the absence of the Constituent Assembly. As opposed to the governor general's efforts to organize a Constituent Convention on 10 May 1954 to make a constitution, the Court ordered the summoning of a new Constituent Assembly for that purpose. It duly recognized the continuation in force of the *Independence of India Act* as the supreme law of the land, according to which an elected Constituent Assembly could itself draw up a constitution. The Court clearly displayed a 'constitutional' outlook. In its view, the executive must refer to a super-ordinate body of laws for submitting itself to the principle of the legality of its actions. However, in this respect two opposite consequences arose from these court cases. Constitutionalism became the final point of reference for the courts sitting in judgment on the legitimacy of all presidential measures to bring about a change of government through extraordinary means, such as dissolution of the Constituent/

National Assembly, e.g. in 1954, 1988, 1990, 1993 and 1996. More significantly, the courts took recourse to constitutionalism even when the army directly took over power through extra-constitutional means. The 1958 and 1969 military coups abrogated the 1956 and 1962 Constitutions respectively, while the 1977 and 1999 coups suspended the 1973 Constitution. Each time, the courts sat on the judgment of the act of dissolution of parliament by the army notwithstanding the fact of abrogation or suspension of the relevant constitutions. They conducted elaborate hearings about the constitutional *vires* of the act of dissolution and gave their verdict on the basis of contemporary or classical approaches to constitutional law in the UK and the Commonwealth in general. Critics of the judiciary's role in Pakistan have accused it of following the word rather than the meaning and the letter rather than the spirit of the constitution, and thus turning a blind eye to the actual issue of uses and abuses of constitutional provisions by the supra-parliamentary office of governor general/ later president. Constitutionalism remained a consistent, latent, all-pervasive and morally superior source of legitimacy under both civil and, paradoxically, military dispensations. General Iskandar Mirza declared soon after launching a military coup on 7 October 1958 that Pakistan would be governed under the new setup as much as possible in accordance with the late constitution.<sup>10</sup> Subsequently, after each successful military takeover, the coup maker promised constitutional continuity without those articles which provided for the elective principle and rule of public representatives.

The obvious casualty in the process of successive acts of dismissal of elected assemblies was parliamentary sovereignty. Even apart from the issue of dissolution of the Constituent Assembly, the latter's legislative potential was seriously circumscribed during the first decade after partition. In 1950, the Sindh Chief Court had observed that there was no limit on the legislative powers of the Constituent Assembly.<sup>11</sup> However, the reality was different. The first Constituent Assembly sessions were few as well as brief. For seven years, it met for only 51 days per annum on average. Government bills consumed the whole session time, leaving little space for private members' bills. Successive governments resorted to steamrolling the bills through various stages without eliciting public opinion or allowing full debate on the floor, or sometimes without even informing members about the oncoming legislation. Very few bills were referred to select committees. The National Assembly under the first Constitution (1956–8) passed 72 bills, which included 50 presidential ordinances already entered on the statute book.<sup>12</sup>

Within a decade of independence two power centres had emerged. One comprised the political executive, civil bureaucracy, the business community and intelligentsia, all dominated by the Urdu-speaking migrants from UP, Bombay and to a lesser extent Hyderabad Deccan, later called '*mohajirs*', as well as migrants from East Punjab. These groups were socially embedded in the middle class, which gradually expanded from its *mohajir* core to include Punjabis and to some extent Pathans. It was essentially the *mohajir*-Punjabi middle class that laid the institutional foundations of the state, defined its ideological profile and shaped its cultural, economic, diplomatic and financial policies. With no electoral constituency of its own, it distrusted the process of elections because these were destined to bring the tribal and landed elites into power. The middle class in Pakistan has been socially progressive but politically conservative. It looked at electoral democracy in an illiterate society

such as Pakistan as disruptive of social order and destabilizing in its political impact. In Hamza Alavi's formulation, this was the 'salarial' that heralded the movement for Pakistan essentially to get out of its potentially underprivileged position vis-a-vis its better-educated Hindu counterpart.<sup>13</sup> In Pakistan after partition, middle-class thinking was reflected through a bureaucratic abhorrence of mass politics, commitment to unitary forms of government and hostility against the political class in general that was condemned for nepotism, corruption, factionalism and parochialism. The way out was establishment of control over politicians from outside the elected assemblies. Not surprisingly, it was exactly at a moment in history when the Constituent Assembly was considering a move to transfer some of the overarching powers of governor general away from him when the latter dissolved it in 1954.

The second power centre was the parliament itself. It represented politicians from all the provinces, East Bengal, Punjab, Sindh, NWFP and Baluchistan. Having been elected before partition, the parliament did not correspond to the new realities of power and privilege as well as ethnicity and demography. Under the prevalent constitutional framework, especially after the 1954 *Tamizuddin Case* followed by the 1955 governor general's reference to the Supreme Court, a dyarchy whereby the legislators were required to adjust to the idea of a non-sovereign parliament. The 1956 Constitution formalized the strong role of president vis-a-vis a weak prime minister. This model was patterned on the 1919 Montagu-Chelmsford Reforms which provided for dyarchy at the provincial level. Under dyarchy the provincial administration was divided between 'reserved subjects' administered by the official councillors belonging to the civil bureaucracy, who were essentially accountable to the executive, and the 'transferred subjects' handled by political councillors responsible to the legislative council. The 1935 India Act provided responsible government at the provincial level but reserved veto power for the governor. It also provided for the principle of dyarchy for the ruling dispensation at the centre, a principle that was operationalized rather late in the form of 'interim government' (1946-7). In the immediate post-independence years, the extra-parliamentary office of Governor General Jinnah made it a matter of routine to initiate information, guide policy as well as take political and administrative decisions largely bypassing the parliament. This pattern of authority has been described as the 'viceregal system'.<sup>14</sup> The moral authority of Jinnah was manipulated by a coterie of bureaucrats around him led by Secretary General Chaudhary Mohammad Ali. They kept the initiative in their own hands in matters ranging from administrative reorganization, revenue and police administration, allocation of resources, posting and transfer of civil bureaucracy, and appointment of service chiefs, judges of higher courts and diplomats abroad. In fact, an informal 'parallel cabinet' of bureaucrats ran the administration.<sup>15</sup> Meanwhile, the Constituent Assembly constantly debated legal formulas and constitutional frameworks to bring about a consensus on the floor between parties, communities and provinces, often at the bidding of the increasingly powerful president operating from outside, in this case President Iskandar Mirza. He openly took the credit for putting in place coalition after coalition to form the government in the Centre for several years.<sup>16</sup> Between them, the two ex-bureaucrats Governor General Ghulam Mohammad and President Iskandar Mirza were responsible for dismissing six prime ministers from 1953 to 1958.



Parliament remained a patchwork of political stalwarts belonging to various provinces, who were elected before independence. Karachi exercised firm control over the provinces through the central bureaucracy. The *Independence of India Act* empowered the governor general to declare an emergency in any part of the country *vide* Article 93. He could also dismantle the administration of a province and put it under governor's rule *vide* a new Section 92-A. This amounted to constitutional terrorism. The Centre dismissed nine provincial governments in 11 years after independence. The migrant-dominated Centre was inspired with an all-Pakistan institutional and constitutional outlook. Faced with security threats from India and laced with disdain for the outlandish morals and manners of the periphery of yesterday's empires which formed today's Pakistan, it showed complete antipathy to sub-national identities. The shifting coalitional arrangements on the floor of the parliament leading to a persistent crisis of government formation reflected a pattern of manipulation of factional groupings inside the house by the president. Whenever provinces asserted their demands, for example East Bengal after the 1954 elections, which brought new firebrand politicians into the second Constituent Assembly in 1955 demanding maximum provincial autonomy, the Centre sought to play off parliamentary parties and party factions against each other. Various ideas started to take shape in official circles: that the provinces were a hotbed of controversy; that a unitary rather than a federal system was the guarantee against political instability; that the parliamentary system turned the chief executive into a hostage in the hands of public representatives since he needed to keep the support of a majority in the house to save the government from falling; and that the presidential system provided the requisite level of stability because a president would be elected for a fixed term and would be shielded from the obligation of being accountable to the parliament. This was considered a solution to the perceived failures of several dyarchic arrangements for distribution of power. Although the president led a constellation of powers operating from outside the parliament, which firmly controlled political and administrative initiatives, he was nevertheless inherently constrained to seek legitimacy from the parliament as enjoined by the Federal Court in the two constitutional cases of 1954 and 1955. In the establishment's view, parliamentarianism was a curse on the country's destiny, which held back its development and security. Therefore, it had to go. But the 1954 civilian coup had failed to deliver in this regard because the ultimate source of legitimacy remained with the *India Act, 1935* and the *Independence of India Act, 1947* which together provided for parliamentary rule with the prime minister as chief executive. Bureaucracy could not rule in its own name.

That paved the way for military takeover within a few years. Army units had been involved in the refugee evacuation effort during partition, in the war in Kashmir 1947–9 and in support of the civilian authority for keeping law and order on several occasions. First Pakistani Commander-in-Chief General Ayub had already emerged as one of the principal players on the chessboard of politics in the Centre. In the following decades, the army emerged as an ally and gradually the leader of extra-parliamentary groups and institutions. It became the shaper and maker of governments and constitutions. It became the bedrock of political conservatism represented by the dominant groups, communities and institutions in the society. Approaches to the phenomenon of praetorianism in Pakistan generally highlight a dichotomy

between constitutional politics and military politics.<sup>17</sup> But, one can argue that a military government in Pakistan looks at its own role in transitional terms, as a facilitator to bring about change in the constitutional edifice according to its own preferences and priorities. The 1958 coup in Pakistan took place at a time when the prospects of general elections under the 1956 elections loomed large on the horizon, threatening to take the initiative away from where it had been for a decade. Elections would have shifted the source of legitimacy from the constitution as interpreted by the judiciary and implemented by the executive back to parliament, which would then become the repository of the national will and state sovereignty. That would have been the undoing of the military-bureaucratic establishment's cherished goals defined in terms of establishing a presidential form of government, a unitarian model of rule, a strong executive opposite a weak legislature and a strong Centre against weak provinces.

The 1958 military coup clearly identified the new locus of power in Pakistan. Punjab as the major catchment area for the army provided a much needed power base for the migratory elite. This eventually led to Punjabization of the state in Pakistan over the following decades leading to alienation of other ethnic communities.<sup>18</sup> The military high command's exposure to the US administration after Pakistan entered the military alliances of CENTO and SEATO in the mid-1950s brought a new awareness about the unity of command and territorial security enjoyed by an American president. Military input in terms of political and constitutional engineering served the function of transition from a parliamentary to presidential system through promulgation of the 1962 Constitution. Meanwhile, the famous 1958 Dosso Case which deliberated over and finally validated the military coup provided a new perspective on the phenomenon of military politics in Pakistan. The 1955 Governor General's Reference had dwelled on the doctrine of state necessity. The Dosso Case instead deliberated on the effect of a successful revolution as a law creating fact. This interpretation heavily relied on Kelsen's theory couched in the principles of legal positivism. Joseph Conrad compared the two extra-constitutional acts of 1954 and 1958 as examples of commissarial and constituent dictatorship respectively.<sup>19</sup> The subsequent history of dissolution of parliaments in Pakistan moved along these two poles of jurisprudence. The 'necessity cases' such as the 1955 Reference, the 1972 Asma Jilani Case and the 1977 Begum Nusrat Bhutto Case where the higher courts focused on the argument of safeguarding the prevalent social and political order from total collapse through extra-constitutional action relied on the implied mandate of the state. The Kelsen cases, for which the Dosso Case remains the prime example, by default bring in the question of acknowledgement of the *fait accompli*. Together, the two types of judicial cases provided 'legal' ways of resolving constitutional crises emerging out of dissolution of elected assemblies.

All along, the judiciary's role as referee in the struggle between parliamentary and extra-parliamentary forces transformed it into a symbol of ultimate legitimacy. The higher judiciary found space between the two power centres, and thereby arrogated to itself the function of judicial review. By upholding the principle of constitutionalism over and above the principle of parliamentary sovereignty, the courts generally supported the executive. Also, by consistently referring to the doctrine of necessity for legitimizing extra-constitutional actions, it followed a 'statist' approach to matters of governance. All along, the judiciary safeguarded and vigorously defended



its own right to overview official actions of a controversial nature. Institutionalism, constitutionalism and statism became the leading characteristics of the judiciary's perspective in the context of a persistent constitutional crisis. The instinctive response of the judiciary to the executive's overbearing attitude, which often amounted to emasculation of lawful opposition in the country, was to keep the latter's authority bound by the word of law and thus to maintain its own role as interpreter of law. Subsequently, the two military takeovers of 1977 and 1999 and dissolution of elected assemblies in 1988, 1990, 1993 and 1996 within an ongoing constitutional setup even further consolidated the role of the judiciary in the making and breaking of governments.

The 1962 Constitution is the epitome of presidentialism in Pakistan. It has been remembered as such by its protagonists such as the army, the bureaucracy, the business community and conservative elements of the intelligentsia for more than three decades now. They hark back to the halcyon days of Ayub when there was political stability, and politicians were kept under control. Unfortunately, there was no way to enter the Ayub system available to politicians belonging to the major political parties, especially for those from East Pakistan and smaller provinces of West Pakistan. The popular uprising against Ayub in 1968–9 followed by the 1970 elections held on a parliamentary basis represented a setback for presidentialism in thought and practice. The 1973 Constitution revived the parliamentary form of government. It provided for a prime minister as chief executive, a bicameral parliament to assuage the fears of smaller provinces vis-a-vis Punjab, and a titular president. Parliament was *de facto* and *de jure* sovereign from 1973 to 1977. Zia's martial law government (1977–85), while making a departure from the previous practice of abrogating the constitutions, had only suspended the 1973 Constitution. There was a tacit understanding in official circles that the presidential system had led to an accumulation of anger and frustration among Bengalis from East Pakistan, and that even in West Pakistan, Sindh, NWFP and Baluchistan had strong reservations against it.

The 1985 elections were again held under the parliamentary system. The military-led state elite faced the challenge of keeping the political initiative in its own hands while formally transferring power to elected representatives. The withdrawal of the military from politics in 1985 was carefully managed to keep its covert role intact, as opposed to the previous withdrawal in 1971 after the defeat in East Pakistan. The two models correspond to the Brazilian and Argentinian models: in the former case (1980–4), military withdrawal represented a phased process in order to ensure continuity of policy and personnel after what was at best a partial transfer of power. In the latter case, the military regime collapsed after the defeat in the Falklands War in 1982. This led to the emergence of a strong civilian government which was able to take innovative measures in terms of policy, institution-building and accountability of the generals.<sup>20</sup> The Bhutto government (1971–7) approximated the Argentinian model, as he introduced various economic, political and administrative reforms. The Zia–Junejo government (1985–8) represented the Brazilian model. If the Ayub era is the symbol of presidentialism, the Bhutto era is a reified model of populist politics cushioned by parliamentary sovereignty and mass mandate. The military junta under Zia was inimical to the idea of allowing back anything remotely similar to

what were alleged to be the dictatorial powers of a prime minister. The argument was that if the constitution had a provision for dissolution of the National Assembly at the hands of the president, then the conflict between the PPP government and the PNA movement in 1977 would have been resolved within the constitutional framework by dissolving the parliament, and martial law would not have been imposed.

The civilianization process in 1985 led to a new political and constitutional orthodoxy. It is characterized by a two-pronged constitutional approach: carving out a new legal and institutional edifice in order to accommodate the populist sentiments in favour of a parliamentary form of government; and at the same time keeping control over policy and personnel, in both operational and structural terms, in the hands of the president. The new political idiom revolved around the theme of balance of power between president and prime minister. This was a euphemism for lack of parliamentary sovereignty whereby the president could dissolve the National Assembly and dismiss the government of the prime minister and his/her cabinet under the 8th Constitutional Amendment. From 1985 to 1997, the new arrangement for division of powers between president and prime minister as enshrined in the 8th Amendment remained a hotbed of controversy. It promises to remain so in the latest incarnation of 'dyarchy' after the 2002 elections. The April 1997 13th Amendment annulled the relevant clauses of the 8th Amendment, thereby taking the presidential power of dissolution of the National Assembly away from him. During the tussle between President Leghari and Prime Minister Nawaz Sharif in December 1997, Chief Justice Sajjad Ali Shah suspended the amendment, thereby restoring the presidential powers to dissolve the National Assembly, ostensibly to pave the way for the president to do exactly that. However, within minutes of the Court's verdict, the other and larger faction of the divided Supreme Court restored the 13th Amendment. Later, in 2003, the controversial article 58(2) (b) was reinstated in the 17th Amendment, again enabling the president to dissolve the National Assembly.

The 1985 8th Amendment formalized a situation that had existed *de facto* during the 1950s. Under this, 'dyarchy' provided the substantive principle of constitutional rule, thereby effecting the replacement of a prime ministerial-dominant form of government with a presidential-dominant system.<sup>21</sup> The 8th Amendment indemnified various legal and constitutional developments under Zia's military rule. Fearing the PPP's potential to return to power in the event of elections, the military ruler along with the anti-Bhutto political grouping Pakistan National Alliance (PNA) representing various major and minor political parties, sought to checkmate the prospect of a PPP victory by tilting the balance of power in favour of the president. First and foremost, President Zia sought to perpetuate his own role over and above a future parliament in order to keep in place the policy structure and a plethora of laws, regulations, amendments and ordinances issued by him during his eight-year-long military rule. He held a referendum for his own election as president outside the framework of the constitution in November 1984, prior to holding general elections in February 1985. The referendum remained at best a fraud, as barely 10–12 percent of voters turned out. However, it demonstrated the fact that the regime was committed to getting legitimacy through a formal exercise in mass mandate. The political forces belonging to the mainstream, ethnic and Islamic parties, the emergent

civil society in general and the lawyers' community in particular continued the struggle for restoration of parliamentary rule, which climaxed in 1983. The regime was convinced that elections needed to be held to avoid another Bangladesh, in this case Sindh, which was the epicentre of the movement, not least because Z. A. Bhutto belonged to that province. However, elections were to be held on a non-party basis. This triggered the boycott of elections by the alliance of political parties MRD (Movement for Restoration of Democracy). After the elections were held, but before the new parliament met, Zia promulgated the Restoration of Constitution Order. This order empowered the president to dissolve the National Assembly when, in his view, an appeal to the electorate was necessary. Later, this provision became part of the 8th Amendment, with some minor changes. As a classic case of deliberate insertion of contradictions within a constitution, the new amendment formally declared parliamentary sovereignty. In a similar case, the president was mentioned as the chief executive with the prime minister responsible for the operational side of the government as leader of the house.

Even as the National Assembly was elected on a non-party basis, parties were restored soon after the lifting of martial law on 30 December 1985. The majority in the house joined Prime Minister Junejo in forming the Pakistan Muslim League (PML). The old phenomenon of the king's party under Ayub, as a loyalist group of legislators operating along with the supra-parliamentary will of the president, re-emerged as a necessary part of the dyarchic arrangement for sharing power between the president and the prime minister. This helped keep the procedural aspects of the legislative process in line and maintain a profile of parliamentarism in operation. Junejo presided over the process of transition from the one-party-dominant model of the 1970s to the two-party model in the late 1980s, as he rebuilt the PML as a classic king's party. After dissolving the National Assembly and dismissing Junejo in May 1988, Zia once again called for non-party elections. But he seemed to have lost touch with reality, as the political community had already got engaged in a thriving political struggle between the PML and the PPP on the right and left of the centre respectively. The more Zia sought to lace himself with legal safeguards against the much-dreaded prospect of Benazir Bhutto's comeback to power through elections, which he was obliged to hold within 90 days of the dissolution of the National Assembly, the more he lost ground in moral and political terms.

This was when the judiciary staged a comeback. Zia had emasculated higher courts under martial law. He had forced judges twice to take a new oath – first in 1977 and again in 1981 – and thus pledge allegiance to his 'constitutional' setup. He amended Article 199 of the Constitution in 1980 to bar the courts from reviewing cases against official orders or challenging military courts' verdicts. However, the Baluchistan High Court declared the amended Article 199 and 212(A) *ultra vires* of the Constitution and thus invalidated restrictions placed on the judicial review. Indeed, civil courts had continued to provide relief to various politicians whom Zia's military government tried to convict of crimes against martial law. The PCO 1981 again sought to restrict the jurisdiction of civil courts and thereby alienated the bar and the bench still further. After dismissal of the Junejo government, Zia sought to contain the party-based political dynamics of the country. He required all parties to be registered with the Election Commission and submit their accounts annually.

When Benazir Bhutto challenged the amendment in Section 3 of the 1962 Political Parties Act to this effect, the Supreme Court declared them null and void. Later, the Lahore High Court declared dissolution of elected assemblies by Zia unconstitutional. However, it stopped short of restoring the dissolved assemblies, as the election process was already under way. Subsequently, the Supreme Court gave its verdict in favour of party-based elections as opposed to the announcement of Zia, who had meanwhile died in an air crash. Through what is often called judicial activism, courts demonstrated a new sensitivity to popular and unfettered mandate as the ultimate source of legitimacy for government formation. However, two years later, the Supreme Court upheld the dismissal of Benazir Bhutto's government via the dissolution of the National Assembly in 1990. But next time, it set aside the dismissal of Nawaz Sharif's government in 1993. The Court observed that the prime minister was answerable for his actions to the National Assembly not to the president, and the latter was bound by the advice of the former and not the other way round. The judiciary demonstrated its commitment to 'populism', i.e. to the institutional expression of the rule of public representatives. However, it remained allegedly selective in its approach. For example, it found the dismissal of the two governments of Junejo and Nawaz Sharif in 1988 and 1993 unconstitutional, but declared the dismissal of Benazir Bhutto's governments in 1990 and 1996 as constitutionally valid. The former headed the king's party in the parliament and thus represented a constitutional tradition from within the establishment's trajectory of policies and profiles. The latter fell outside the circle drawn by the establishment, even as it sometimes played ball with it with the lure of office, if only to keep politics from getting out of hand.

The second phase of parliamentary sovereignty under Nawaz Sharif after the passage of the 13th Amendment in 1997 did not last long. The army was simply not ready to countenance loss of control over what it perceived as selfish, wayward, corrupt and immature politicians operating from the floor of the parliament. The Supreme Court validated the 1999 coup but gave relief by providing for transfer of power back to elected representatives in three years, i.e. by 11 October 2002. Drawing on the precedent of the 1979 Begum Nusrat Bhutto Case, the Court also gave the new chief executive General Musharraf the right to amend the constitution, short of altering its basic character defined by federalism, parliamentarism and judicial independence. In 2002, President Musharraf enacted constitutional amendments by issuing an LFO (Legal Framework Order) prior to elections, which restored dyarchy in letter and spirit. LFO revived the presidential powers to dissolve the National Assembly, appoint services chiefs and judges of higher courts, and establish the National Security Council. Later, an amended version of LFO was passed by the parliament with the help of the new king's party PML (Quaid-I-Azam) and the Islamic alliance MMA (Muttahida Majlis Amal). Despite an uproar of criticism from the political community, lawyers and intelligentsia in general, the new law has stayed the course during 2003–4. Meanwhile, President Musharraf had got himself elected through a controversial referendum prior to parliamentary elections in the footsteps of President Zia, followed by a vote of confidence from the parliament and provincial assemblies in December 2003. The current dyarchic arrangement for sharing power between the parliament and extra-parliamentary forces is heavily

tilted in favour of the latter. While Prime Minister Jamali (2003–4) was at least the nominee of the king's party PML-Q, Prime Minister Shaukat Aziz (2004– ) is the nominee of the president, even though he was not a member of the National Assembly at the time of his nomination.

In the year 2005, the dyarchy remains fully operational in Pakistan. This is the constitutional expression of dichotomy between the state elite and political elite. It reflects the institutional imbalance between the state apparatuses of army and bureaucracy along with the judiciary as a maverick partner on the one hand and parliament and political parties on the other. The initial attempt of the army's project of constitutional engineering in the form of a presidential system (1962–9) collapsed in the face of a nationwide movement, which led to a revival of parliamentarism as enshrined in the 1973 Constitution. The two subsequent military governments had recourse to an establishment of dyarchy as a semi-presidential system without parliamentary sovereignty. It has been argued that Pakistan suffered from incomplete constitution-making which led to constitutional interpretation by institutions such as the bureaucracy, the military and the judiciary thereby reconstituting the state.<sup>22</sup> However, even more significantly, it is the structural discontinuity in Pakistan that precluded the possibility of a smooth constitutional development from the beginning. The migrant-turned-military state sought to grapple with the model of one-province-dominates-all as a product of, first, the partition of India in the case of East Bengal and, then, the break-up of Pakistan in the case of Punjab. The commitment of the wider political community to a parliamentary form of government points to the efficacy of the neo-institutional approach to analysing the prevalent constitutional norms in the country. We can argue that constitutionalism in Pakistan has moved along priorities of the state apparatuses in a substantive sense, to the great dissatisfaction of the political community. This is an inherently tense situation, which continues to engage the bar and the bench, often on opposite sides of the political spectrum, representing the political community and the state elite respectively.

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### Notes

1. Woodrow Wilson's words quoted in Raza (1985: 11).
2. See for discussion Poulantzas (1982: 48–50).
3. See for a detailed discussion Waseem (1989: 66–84, 116–36).
4. See Kholi (1990).
5. Kothari (1988).
6. Alavi (1979: 54–7).
7. Jalal (1995: 43).
8. Alavi (n.d.: 66).
9. Khan (2001: 137).
10. *The Pakistan Times*, 11 October 1958
11. See Khan (2001: 137).

12. Ahmed (1970: 91–8, 120).
13. Alavi (1990: 32).
14. Sayeed (1968: 253–71).
15. Alavi (1990: 42).
16. *The Pakistan Times*, 8 October 1958.
17. See Rizvi (2000: xiv–xix).
18. See Samad (1995: 124–35).
19. Conrad (n.d.: 125).
20. See Viola and Mainwaring (1985: 193–7).
21. Kennedy (1995).
22. Newberg (1995: 47).

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