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Introduction

Pakistan's legal and judicial histories are often written through the lens of constitutional law and read like speculative lines connecting the dots between notable cases and major crises. While these constitutional cases and crises are important, an exclusive focus on this domain of judicial action obscures the more significant and consistent developments that have taken place in the sphere of 'administrative' law. It is through the 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 aggrandised themselves to the status of the regulator of the state. This deeper history of the judicialisation of governance and politics in Pakistan can be aptly encapsulated in a tale of two contempt of court cases, decided by the Supreme Court five decades apart. These cases provide useful snapshots of the shifting sands of constitutional politics. They also provide invaluable geological cross-sections of the bedrock of judicial review of administrative action in which the superior courts have laid the foundations of their expanding constitutional role and powers.

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At the peak of the country's first extended nationwide Martial Law (1958–62), Sir Edward Snelson, Secretary of the Law Ministry and one of two remaining British officers in the civil services of Pakistan, was charged with and convicted of contempt by a bench of the High Court of West Pakistan.[1] In a speech given to a gathering of senior bureaucrats, the law secretary had commented that from 1956–58 the High Court had attempted to establish a Writ jurisdiction under Pakistan's first

[1] *State* v. *Sir Edward Snelson*, PLD 1961 (WP) Lahore 78.

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post-independence constitution 'without reference to the strictly defined frontiers of the prerogative writs', thereby interfering with and even usurping executive functions.[2] Although the speech was ostensibly privileged under the Official Secrets Act 1923, print copies were widely distributed amongst the officialdom. There was ample basis for the law secretary's assertions as the Supreme Court had overruled the High Court's expansive approach to this jurisdiction on at least twelve different occasions.[3] At the heart of the issue was the text of the 1956 Constitution empowering the High Court to issue 'directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* ... for the enforcement of any of the rights conferred ... or for any other purpose'. The High Court had made several attempts to liberalise standing and procedural requirements, as well as extend the reach of the constitutional writs to a range of administrative actions beyond what the prerogative writs encompassed in English Common Law. Although the Supreme Court had strenuously resisted the High Court's overtures, it nonetheless also maintained Sir Edward Snelson's conviction, thereby marking the contours of the Writ jurisdiction as the sole preserve of the superior judiciary.[4]

The *Snelson* case marked a visible moment in the divergent institutional trajectories of, and symbolised the contrasting public perceptions of, an 'arrogant bureaucracy dominated by martial law and a sympathetic judiciary'.[5] Barely a year earlier the Supreme Court had validated the imposition of the Martial Law and the abrogation of the 1956 Constitution.[6] Even as the courts had continued to show complete deference to the regime's policies, the superior judiciary nonetheless maintained a core judicial review jurisdiction to scrutinise the administrative actions of subordinate military officials and the civil bureaucracy. The continuity of the Writ jurisdiction provided a bridge of minimum legality across the chasm of Martial Law and emerged as a model for judicial action during subsequent periods of military authoritarianism.

[2] Ralph Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', in La Palombara (ed.), *Bureaucracy and Political Development* (Princeton University Press, 1963), 426; Ralph Braibanti, *Research on the Bureaucracy of Pakistan* (Duke University Press, 1966) 263–4.

[3] Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', 437; Braibanti, *Research on the Bureaucracy of Pakistan*, 266–7.

[4] *Sir Edward Snelson* v. *Judges of the High Court of West Pakistan*, PLD 1961 Supreme Court 237.

[5] Braibanti, 'Public Bureaucracy and Judiciary in Pakistan', 425.

[6] *State* v. *Dosso*, PLD 1958 Supreme Court (Pak) 533.

In notable contrast to the judiciary's continuing relevance, the hitherto-omnipotent apex bureaucracy, modelled on and tracing its lineage directly to the colonial era Indian Civil Service (ICS), experienced a rapid decline in powers and prestige. The Martial Law regime, which even at its peak remained essentially a military–bureaucratic enterprise, needed to simultaneously whittle down and co-opt the bureaucratic structure and therefore saw some utility in the continuing exercise of judicial review so long as the courts did not threaten its larger political interests.

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At the height of the Chaudhry Court's power and influence in 2012,[7] a five-member bench of the Supreme Court charged and convicted an elected prime minister for contempt and sentenced him to symbolic imprisonment until the rising of the court.[8] Since the restoration of Chief Justice Chaudhry after a successful 'Lawyers' Movement' in 2009, the court had been embroiled in a prolonged tussle with the political executive and had relentlessly pursued a range of corruption charges against key members of the ruling party. Prime Minister Gilani was personally in the dock for refusing to re-initiate long-standing corruption and money-laundering cases against President Zardari, who, while occupying the rather more ceremonial office in a system characterised formally as a parliamentary democracy, wielded real power as the head of the governing coalition. The cases in question had been under investigation in Geneva, Switzerland and were close to being time-barred. Notably, Zardari could not be prosecuted in Pakistan until he relinquished the presidency as he enjoyed absolute immunity while occupying that office. Barely two months later, a separate bench of the apex court headed by Chief Justice Chaudhry disqualified Gilani from being a member of parliament, and hence the prime minister, on account of his conviction for contempt of court.[9]

The disqualification of the prime minister appeared to be a matter of reified constitutional law involving the interpretation of the disqualification provision in the 1973 Constitution, which had been recently amended with cross-party support. However, the underlying basis for

[7] On the Chaudhry Court, see generally, Moeen Cheema and Ijaz Gilani (eds.), *Politics & Jurisprudence of the 'Chaudhry Court' (2005–2013)* (Oxford University Press, 2015).

[8] *Criminal Original Petition No. 06 of 2012 in Suo Motu Case No. 04 of 2010*, PLD 2012 Supreme Court 553.

[9] *Siddique* v. *Federation of Pakistan*, PLD 2012 Supreme Court 660.

the contempt proceedings and the disqualification of an elected prime minister appeared to be much broader. The Supreme Court had been frustrated by the government's use of dilatory and diversionary tactics—including frequent transfers, demotions, promotions, and threats of disciplinary proceedings against key officials – to subvert independent investigations in a range of high-profile corruption scandals. The organisation and workings of the National Accountability Bureau (NAB), legally an independent corruption watchdog, had come under intense scrutiny by the court. As the court looked beyond the NAB to other investigative and policing agencies, it encountered a range of techniques through which the government shielded itself and its appointees in bureaucracy, public banks, and regulatory bodies from efficient prosecution. In case after case, the court sought to wrest control of the NAB and the other agencies from the civilian government, weaken the political executive's hold over the state apparatus, and restore to the bureaucratic apparatus some autonomy. The disqualification case was thus arguably the quintessential manifestation of the Supreme Court's administrative law jurisprudence, at the heart of which now glowed a nostalgia for the independence and integrity of the colonial civil service.

1.1 Judicial Politics in Pakistan

Pakistan has a fascinating, rich, complex and, in some respects, unique legal history in which the superior courts have progressively carved a prominent role in statecraft and constitutional politics for themselves. In the seven decades of the country's independent existence, the judiciary has evolved from a subsidiary state institution with limited functions to a central player in the state structure. The judiciary has incrementally accumulated unprecedented judicial review powers, and now claims to be the ultimate arbiter of the constitutional ambits of other state institutions. How have Pakistan's superior courts moved from the periphery to the core, and fashioned such an expansive role for themselves? Why have other state institutions ceded such space to the judiciary? How have the courts shaped public law doctrines and constitutional jurisprudence to bolster and legitimise their place in the state structure?

This book aims to answer these questions by situating the development of public law and judicial review in the context of constitutional politics, evolution of state structure, developments in political economy, and the changing social dynamics in and around the state. The Lawyers' Movement, the Chaudhry Court, and the emergence of its particular

brand of activism were indeed seminal moments in Pakistan's political history. However, these moments were long in the making and it is only when we situate these relatively more recent developments within their historical contexts that we can develop a more nuanced, descriptively accurate, and analytically coherent account of the nature of the constitutional system and the role of the judiciary therein. When analysed in this mode, public law also becomes a useful lens to understand the political system it seeks to codify, the state structure whose operational rationalities it tries to mould, the political economy that dictates which interests have a voice, and the social dynamics which reinforce and challenge its legitimacy.

While many observers have reacted to the visible 'judicialisation of politics' over the last decade as if the judiciary departed from a tradition of apolitical adjudication to suddenly enter the realm of politics, the fact is that Pakistan's courts have always been a political institution. The perception of a sudden and ahistorical transformation of docile courts into prominent political actors has partly been shaped by the judicial validations of coups d'état and the subsequent constitutional machinations of military regimes from 1958–71, 1977–88 and 1999–2007. However, it is this history of perceived judicial passivity as much as their recent activism which has long defined Pakistan's superior courts as political institutions. A better way to frame the politics of judicial review is in terms of the simultaneous existence of, and a historic dialectic between, 'authoritarian legalism' and 'democratic instrumentalism', both of which represent a 'constantly evolving complex of legitimating ideas through which legal and political actors make their respective claims to authority':[10]

> Authoritarian legalism denotes a situation in which a commitment to the autonomy of law from politics has become distorted in the sense that it functions to separate social life into spheres where law rules and spheres where politics rules. The stability of this kind of (judicial review) regime comes from the residual legitimating role that law continues to play in those circumstances coupled with a political authority claim that justifies the repression of democratic rights by reference to some or other overarching goal that the power holder claims to be pursuing . . . [D]emocratic instrumentalism describes a situation in which law's claim to authority is premised, not on the alleged impartiality of judicial reasoning techniques,

[10] Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018), 2.

> but on judicial review's capacity to serve as a vehicle for competing, ideologically motivated conceptions of constitutional justice. In [judicial review] regimes that approximate this ideal type, the political system has either for some reason adjusted to tolerate this more politicized kind of legal authority claim or is unable to resist it.[11]

Therefore, drawing a hard and fast distinction between judicial complicity/passivity and judicial independence/activism is highly problematic, especially in the Pakistani context. As this history unveils, even during the early postcolonial episodes of Martial Law, wherein the courts accepted the claims of 'state necessity' in validating subversion of the constitutional framework, the judiciary continued to exercise judicial review of executive action through the Writ jurisdiction in a manifestation of authoritarian legalism. Authoritarian regimes, both military and quasi-civil, used the courts to achieve a range of ends, including the regulation of the bureaucracy and provision of residual legal legitimacy. In return, the judiciary was allowed to develop its administrative law jurisdiction so long as it reciprocated by granting legal validation to the regime's primary interests. However, for the courts to provide any legitimacy or administrative efficiency gains they must be capable of some independent action as well as offering the possibility of interstitial resistance to an authoritarian regime.[12] It is thus one of the main aims of this book to elaborate precisely how and why administrative review was used by Pakistan's courts to manage political pressures during periods of authoritarian rule and consolidate the core of their Writ jurisdiction.

During times of transition from Martial Law to quasi-military or hybrid-civil regimes, the courts built upon this bedrock of authoritarian legalism to expand their judicial review function, at times even challenging the continued operation of state security, preventive detention and other laws aimed at suppressing political dissent. For instance, in the mid-1980s to early 1990s, during an era of a quasi-military presidential regime, the Shariat courts engaged in unprecedented judicial review of legislation and executive action, especially in the domain of administrative law.[13] Notably, these courts had been appended to the superior court hierarchy by the military ruler as part of a proclaimed agenda of the

[11] Ibid., 3–4.

[12] This mirrors E. P. Thompson's argument about the nature of the rule of law. See Edward Palmer Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books, 1975).

[13] See Moeen Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law' (2012) 60(4) *American Journal of Constitutional Law* 875.

Islamisation of laws, but with the specific purpose of undermining judicial integrity and autonomy. Nonetheless, these very courts co-opted the rhetoric and principles of Islamic public law to resist the continued subversion of the constitutional scheme by the military regime itself. Furthermore, the courts used their position and enhanced role to push for greater space for democratic process and ultimately a transition to civilian-electoral rule as the contradictions between the military and civilian parts of the governing coalition became less manageable.

It is during the periods of formal-democratic governance post-military/hybrid regimes that Pakistan's superior courts have embarked on the enterprise of building more elaborate structures of constitutional jurisprudence and Public Interest Litigation (PIL). In the process, the courts were repeatedly embroiled in challenges to elections and governmental change, which to many epitomise the judicialisation of politics.[14] In response, the judiciary partly pushed back at civilian governments' claims of formally democratic representation by citing the need for deeper, substantive, sustainable democratisation free from political corruption and electoral malpractices. More significantly, however, in a manifestation of democratic instrumentalism, the judiciary expounded independent claims of rule of law, rights, and constitutionalism that may serve to legitimate more robust judicial review despite its seemingly anti-democratic consequences. As a result, while the development of judicial review in Pakistan has not been linear, it has nonetheless been seemingly inexorable. In each period of military rule, the courts stepped back or were forced to accept the curtailment of their jurisdiction to its core, but vigorously re-asserted themselves and pushed the boundaries in subsequent periods of transitional and civilian rule. In the process the courts laid stronger foundations for their judicial review powers, which were harder both for military regimes and elected governments to clip in the later cycles of martial-hybrid-democratic governance.

1.2 A Contextualised History of Judicial Review

Despite the rich and nuanced history of judicial review there is surprisingly little structural analysis of the politics of Pakistan's courts. The

[14] See, e.g., Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93; Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75(2) *Fordham Law Review* 721.

limited body of work on Pakistan's judiciary is largely descriptive, focuses on a handful of notable constitutional cases and seeks to explain the cases and controversies in terms of subservience to regime dictates, political leanings of judges or vagaries of individual personalities.[15] Often this is over-laid with an implicit or explicit prescription rooted in liberal constitutionalism which seeks to draw a sharp distinction between law and politics. In notable contrast with the extant literature on Pakistan's courts, this book seeks to understand and explain the institutional role of the courts, the development of public law doctrines and judicial review practices in the context of historical shifts in constitutional politics, the evolution of state, and broader social transformations.[16] Such a structural and institutional analysis enables us to chart the trajectory of public law in ways that not only account for notable constitutional moments, cases and crises, but also the relatively subtle and long-term evolution of judicial review of executive action which has progressively emerged as the most significant domain of action in Pakistan's public law.

The methodological approach of this book, therefore, fits broadly within the framework of historical institutionalism in public law and political science.[17] The core premise of historical institutionalism is that

[15] See, e.g., Hamid Khan, *Constitutional and Political History of Pakistan*, 2nd ed. (Oxford University Press, 2009); Hamid Khan, *A History of the Judiciary in Pakistan* (Oxford University Press, 2016); and Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and Its Discontents* (Pakistan Law House, 2008). For notable exceptions, see Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge University Press, 1995); and Sadaf Aziz, *The Pakistani Constitution; A Contextual Analysis* (Hart, 2018).

[16] As such, this project is one of 'constitutional ethnography': 'Constitutional ethnography ... looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements. The goal of constitutional ethnography is to better understand how constitutional systems operate by identifying the *mechanisms* through which governance is accomplished and the *strategies* through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context'. Kim Lane Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38(3) *Law & Society Review* 389, 390–1.

[17] For a brief overview of historical institutionalism, see Rogers M. Smith, 'Historical Institutionalism and the Study of Law', in Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington (eds.), *Oxford Handbook of Law and Politics* (Oxford University Press, 2008), 47–60; Roux, *Politico-Legal Dynamics of Judicial Review*, 37–41; and Mara Malagodi, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics, and Democracy in Nepal (1990–2007)* (Oxford University Press, 2012), 14–18. For other recent accounts of constitutional law that fit within the historical institutionalism

institutions matter in that they play a significant role in shaping political structures, behaviours and decisions. In turn, institutions are shaped by historical developments in political and social structures. A key concept at the heart of historical institutionalism is that of path-dependence. At 'critical junctures' or historical moments, there are several paths of development that become open to legal institutions. These critical junctures can be defined as '*relatively* short periods of time during which there is a *heightened* probability that agents' choices will affect' institutional change.[18] A critical juncture is often caused by an external shock – constitutional crisis, regime change, military *coup* or war – which causes enough disruption such that choices are 'relatively underdetermined by existing institutional traditions'.[19] Once such choices are made and a path is taken, however, and prior to another destabilising critical juncture, these paths are surprisingly difficult to alter. As such, historical institutionalism addresses the enduring challenge of explaining the interplay of structures and agency in affecting/resisting institutional change as well as the dialectic of continuity and change.[20]

In the domain of public law, 'historical institutionalists are interested in the development of judicial review as an institution, the path-dependent effects of contingent doctrinal choices and the factors that trigger major periods of constitutional development and change'.[21] Historical institutionalism is of particular relevance to explaining the paradox of continuity and change in postcolonial contexts. Seven decades after independence from British rule, Pakistan retains a postcolonial legal system – most of the codes and the structural features of the colonial legal system remain intact. While it is customary to describe the legal systems

tradition, see Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press, 2007); Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (Cambridge University Press, 2008); and Terence C. Halliday, Lucien Karpik and Malcolm Feeley (eds.), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge University Press, 2012).

[18] Giovanni Capoccia and R. Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59(3) *World Politics* 341, 348.

[19] Roux, *Politico-Legal Dynamics of Judicial Review*, 37–8.

[20] Malagodi, *Constitutional Nationalism and Legal Exclusion*, 17.

[21] Roux, *Politico-Legal Dynamics of Judicial Review*, 35. Doctrines have to be understood 'as expressions of broader political ideologies, institutionalized in ways that constrained judges but also empowered them to give specific meaning to more general political outlooks': Smith, 'Historical Institutionalism and the Study of Law', 48.

of former colonies as postcolonial, often the usage of this descriptor lacks critical value. For the assertion of postcoloniality to be analytically meaningful, one must go beyond a mere declaration of the fact of an operative colonial legacy and provide a deeper description of how and why colonial laws and legal structures persist despite the passage of time, and intervening political and social disruptions. Equally significantly, one must describe the extent to which that legacy has been jettisoned and explain how and why such change occurred. It is the dialectic of continuity (*-colonial*) and change (*post-*) which makes the lens of postcolonial legality a useful framework for an historical account of a legal system such as Pakistan's. A historical institutionalist approach enables one to identify the reasons for path-dependence and resistance to change while also identifying the critical junctures at which structural change occurs.

Given that Pakistan's contemporary legal system traces its lineage directly to the legal structures established in the century of direct crown rule in British India, any historical account of law in Pakistan must begin with the colonial era. Chapter 2 provides an account of the state structure and legal system, including an inchoate judicial review jurisdiction in the late colonial period in British India. It is the limited availability and partial success of a procedural form of rule of law in moderating the authoritarianism of the colonial state, despite its larger failures, that account for its lasting resonance amongst segments of the colonised elites. In the first decade of postcolonial existence, as the Constituent Assembly of Pakistan failed to draft a constitution until 1956, the colonial era framework remained its interim constitution. The causes of this failure of constitutional politics, the role of the superior courts during this period, and in particular their alleged complicity in the uprooting of constitutionalism and democracy in the first decade are also investigated in Chapter 2. However, despite their seeming subservience to the executive, the courts continued to push the political elites that came to dominate the new state towards framing a republican constitution. Most notably, the dislocations in the state structure caused by the partition of British India also gave the courts the space to extend their administrative law jurisdiction through the newly-established 'Writ jurisdiction' over a bureaucracy that was in the process of reconstruction.

Chapter 3 charts the consolidation of judicial review during the first period of direct and indirect martial rule under the Ayub regime (1958–68). Despite the military–bureaucratic authoritarianism of the Ayub era and the judicial validation of Martial Law, the courts managed to preserve the judicial review of bureaucratic action. In the post-Martial

Law phase, the promulgation of the 1962 Constitution provided the courts with the basis to consolidate the foundations of the Writ jurisdiction along three axes – formal constitutionalism, administrative law, and procedural safeguards against the abuse of public order and state security laws – which have remained at the core of the superior courts' definition of rule of law in the decades since. As Pakistan emerged from the shadows of military rule, dismembered after a civil war and the secession of its eastern wing as Bangladesh, democratic governance and progressive politics promised a better future for the masses. The adoption of Pakistan's first constitution by an elected assembly in 1973 added to the optimism for constitutionalism and rule of law. This optimism was quickly dispelled as the elected government of Zulfiqar Ali Bhutto (1970–76) proved itself to be as authoritarian as its predecessors and very much within the mould of postcolonial governance. Chapter 4 describes this failure of formal democratic constitutionalism in the face of an elective dictatorship. It also charts how the superior courts nonetheless insisted on minimal procedural safeguards against the enforcement of state security and public order laws and resisted the curtailment of judicial review through successive constitutional amendments.

Chapter 5 highlights the emergence of a distinctly praetorian governmentality in the next cycle of military rule in the 1980s. Having displaced an elected government, the military regime of General Zia ul Haq (1977–88) set about the task of refining the blueprint for military rule. What was distinctive, however, about this form of praetorian governmentality as compared to the earlier period of military rule was the hegemonic ideation of an alternate basis of political legitimacy predicated on the 'Islamisation' of the laws. New Shariat courts were given unprecedented powers of judicial review of legislation for conformity with Islamic law, while the fundamental rights provisions of the Constitution remained under suspension, and the superior courts' Writ jurisdiction was incapacitated. Nonetheless, Islamisation also enabled the superior courts to re-orient their public law jurisprudence and to bolster their legitimacy. Pakistan's appellate courts learnt to capitalise on this new rhetoric and restructured a more assertive form of judicial review grounded in the normative bedrock of Islamic legality. As Pakistan emerged from military rule once again upon the death of General Zia in 1988, it underwent a new governmental experience marked by tussles between unsettled elected governments and a constitutionally empowered and military-backed civilian presidency. Chapter 6 underscores how the superior courts utilised this fractious political

environment to engineer a dramatic expansion of public law and judicial review. The Supreme Court utilised its 'Original jurisdiction' for the first time in history to institute PIL. Nonetheless, recurrent involvement in matters of pure politics and governmental change resulted in direct confrontations between the judiciary and elected governments, and ultimately the politicisation of judicial review.

Chapter 7 dissects the subtle shifts in state structure and power relations during the third cycle of military rule in Pakistan which for the first time was characterised by a successful hybridity of a military–civil composite. When General Pervez Musharraf overthrew another elected government in October 1999 the familiar architecture of military rule was resurrected. However, heightened levels of elite consolidation and the prominent role of courts in the state structure constrained the space for overt authoritarianism. Unlike previous military regimes, General Musharraf was successful in holding elections and managing a symbiotic relationship with a civilian government whereby a semblance of transitional democratic governance could be upheld. The Supreme Court once again validated the military takeover and the continuity of judicial review of executive action initially aligned with the regime's proclaimed agenda of the structural reform of the state and anti-corruption drive. However, when Chief Justice Iftikhar Chaudhry assumed office in 2005 this accommodation between the military-dominated regime and the courts began to fracture. With impending elections in 2007, the regime dismissed the Chief Justice, sparking the protest movement by the lawyers that would ultimately pave the way for another transition to civil democratic rule, as well as for the restoration of an assertive 'Chaudhry Court'.

Chapter 8 defines the key features of the 'proactivism' of the Chaudhry Court in the most recent period of corporatist governance. A fluid and somewhat awkward balance of power appeared to have been reached wherein the military was dominant in some spheres but lacked the capacity to dictate its will wholesale to the other institutional complexes. It also appeared that the political elites and the judiciary had learned from the military's historical success in safeguarding its institutional interests and were similarly acting coherently and strategically in the furtherance of their respective corporate concerns. The resulting form of corporatist governance gave the political system the kind of dynamic equilibrium that it had historically lacked. Given this fragmentation and awkward balancing of institutional power, a resurrected Chaudhry Court found the space to engineer the second significant wave of the judicialisation of politics and governance in Pakistan. The judicial review

practices entrenched by the court were largely predicated on the three historical strands of legality: namely, formal constitutionalism, administrative law, and the review of police powers. However, the court used its judicial review powers proactively and at an unprecedented level. The lasting legacy of the Chaudhry Court is a superior judiciary with a seemingly permanent place as a coequal player in the state structure along with the political executive and the military. The concluding Chapter 9 highlights that even as Pakistan's superior courts have emerged as powerful institutions, their judicial review practices have essentially built upon and expanded the logics of postcolonial legality along the axes of minimalist or formal constitutionalism, administrative law, and a procedural rule of law. The conclusion will also situate the history of judicial review in Pakistan within the growing comparative public law literature on judicial power across the globe.

1.3 Comparative Judicialisation of Politics and Governance

Although the ambitions of this book are by and large descriptive and localised – to explain the historical evolution of public law and judicial review in Pakistan – it is hoped that such a grounded description will also provide an insight into the emergent theorisation of the judicialisation of politics worldwide. The increasing judicialisation of politics is a global phenomenon.[22] Over the last few decades, constitutional courts in Asia have reinforced the trend.[23] The literature describing and analysing the judicialisation of politics generally attributes three categories of explanations that are relied upon to analyse the expansion of judicial power in a given polity.[24] The first, a liberal framework, imagines the judicialisation of politics to be a consequence of the global rise in the significance of

[22] See generally C. Neal Tate and Torbjorn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, 1995); Martin Shapiro and Alec Stone Sweet (eds.), *On Law, Politics and Judicialization* (Oxford University Press, 2002); Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

[23] See generally Björn Dressel (ed.), *The Judicialization of Politics in Asia* (Routledge, 2012); Andrew Harding and Penelope Nicholson (eds.), *New Courts in Asia* (Routledge, 2010); Tom Ginsburg and Albert H. Y. Chen (eds.), *Administrative Law and Governance in Asia* (Routledge, 2009).

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

human rights and rule of law in the latter half of the last century.[25] While the prominence of rights discourse and the constitutionalising of rights may explain the empowering of courts elsewhere, it seems to shed little light on the expansion of judicial power in Pakistan. 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.

Unlike liberal proponents, Ran Hirschl's influential account questions the celebration of rights-based constitutionalism and offers a critical class-based analysis of judicialisation that may have greater explanatory power in the Pakistani context.[26] According to Hirschl, the judicialisation of politics results from the strategic alignment of various elites who are on the verge of losing power – 'departing hegemons' – who seek to shield their interests and policies from the vagaries of electoral politics. Such elites find it useful to empower not only courts but also other semi-autonomous and professional institutions with which they share some ideological commitments. As a result, judicialisation and bureaucratisation of policy-making is often conservative and tends to undermine the attempts of elected governments to redistribute resources and power. Hirschl's framework resonates with criticisms of the recent judicialisation of politics in Pakistan and helps explain the assertiveness of courts, especially in the times of post-military elected governments when the judiciary imposed serious constraints on social and economic policy-making. However, whilst Hirschl's analytical framework enables us to unpack aspects of judicialisation in Pakistan at moments of transition from military to civil rule, it does not account for the consolidation of the Writ jurisdiction and the development of administrative law even during military rule.

A 'functionalist' explanatory framework which focuses on the strategic motivations and institutional incentives of judiciaries may provide the missing pieces that help us better understand the judicialisation of politics in Pakistan.[27] In particular, Ginsburg and Moustafa's analysis

[25] Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); Anne Mary Slaughter, 'Judicial Globalization' (2000) 40(4) *Virginia Journal of International Law* 1103.

[26] See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004), 218.

[27] See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006); Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (American Enterprise Institute, 2003); John Ferejohn, 'Judicializing

of courts under authoritarian regimes may help explain the judicialisation of administrative governance which has arguably been the most consistent if not the most visible domain of judicial action in Pakistan.[28] According to this framework of analysis, judicialisation is strategically driven first and foremost by the courts themselves who align with and hence enlist the support of various elite groups and institutional complexes at different times and over different sets of issues. This form of judicialisation happens most noticeably in fragmented and highly contentious polities where no one institution or class is able to dominate the state and the political system. As a result, a range of highly political and deeply contested issues end up before the courts, giving the judiciary the space to strategically expand the role of the courts in mediating issues of high politics as well as socio-economic policy. Furthermore, given the unstable and fragmented distribution of powers, no adversely affected party has the capacity to effectively curtail the expansion of judicial power and there are empowered constituencies that support the courts' decisions.

While acknowledging the strengths of these structural and functionalist accounts in explaining judicial power at key constitutional junctures in Pakistan's history, this book also demonstrates how fluid and dynamic the process of judicialisation can be. At any key moment, a range of factors and players may contribute to the expansion of, and/or resistance to, a more assertive judicial role. More significantly, this analysis of judicialisation in Pakistan highlights the gaps in any explanatory framework that does not take the ideational dimensions of public law and judicial review seriously.[29] The structural, political science analyses of the judicialisation of politics and governance canvassed so far adopt a largely external perspective on legal institutions. To the extent that internal institutional aspects of constitutional courts are taken note of it is mostly in terms of the strategic motivation of the judiciary in expanding its powers and prominence, overlooking fundamental ideational and normative questions that also impact judicial decision-making. Legal ideals, ideas, and culture not only articulate and in turn shape the judges'

Politics, Politicizing Law' (2002) 65(3) *Law and Contemporary Problems* 41; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999); Shapiro and Sweet, *On Law, Politics and Judicialization*.

[28] See Ginsburg and Moustafa, *Rule by Law*.

[29] On the lack of attention to ideational dimensions of judicial review, see Roux, *Politico-Legal Dynamics of Judicial Review*, 15–34.

conception of their role, but also the expectations of important elements in the state and society. The quest for legitimacy by some courts explains why they take on a judicialisation agenda even when it is not strictly in their strategic interest and may incur a backlash. The popular legitimacy of judicial action, or lack thereof, also enables an understanding of why courts succeed or fail, and why certain groups and classes beyond the legal complex support the courts in their attempts to expand their role.

The dominant ideational framework within which Pakistan's courts have operated, cultivated the support of specific groups, garnered an aura of legitimacy, and shaped expectations of their role is that of 'postcolonial legality'. Over the last seven decades, the judiciary has progressively expanded the logics of formal constitutionalism and procedural rule of law encoded in their bequest by colonial legal institutions. With the new demands that crises in constitutional politics, changes in the state structure, reconfigured elite dynamics and global normative pressures imposed, the courts have had to adapt and define their role to meet emergent challenges. Nonetheless, they have defined their progressively expanding and more prominent role with considerable fidelity to the rationales of postcolonial legality. This has been evident in the courts' interventions in constitutional politics that were firmly rooted in a faith in parliamentary democracy and separation of powers that colonial rule promised but never delivered. Likewise, the courts' increasingly assertive role in regulating the bureaucratic administration has largely been bereft of innovative ideas and success, as they have incessantly invested in restoring the mythical independence and structural integrity that the colonial bureaucracy bestowed to the postcolonial state. The courts' commitment to postcolonial ideas of legality has been somewhat matched by the military, political elites, bureaucracy, and the intelligentsia, all of whom have historically internalised related principles of postcolonial statecraft. The acceptance of key ideas of postcolonial legality partially explains why both military and civil governments have grudgingly tolerated, and important social groups have supported, the courts' assertiveness along the axis of postcolonial legality.