

2013

## "Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan

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### Recommended Citation

Anil Kalhan, "Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan, 46 *Vanderbilt Law Review* 1 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol46/iss1/1>

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# “Gray Zone” Constitutionalism and the Dilemma of Judicial Independence in Pakistan

*Anil Kalhan\**

*Many countries exist in a “gray zone” between authoritarianism and democracy. For countries in this conceptual space—which is particularly relevant today given the halting path of change in the Arab world—scholars, judges, and rule of law activists conventionally urge an abstract notion of “judicial independence” as a prerequisite for successful*

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*democratic transition. Only recently, for example, Pakistan's judiciary was widely lauded for its "independence" in challenging the military regime. However, judicial independence is neither an all-or-nothing concept nor an end in itself. With the return of civilian rule in Pakistan, a series of clashes between Parliament and the Supreme Court has raised concern that the same judiciary celebrated for challenging the military regime—while invoking exactly the same abstract notion of judicial independence—might now be asserting autonomy from weak civilian institutions in a manner that undermines Pakistan's fragile efforts to consolidate democracy and constitutionalism.*

*In this Article, I challenge the conventional view by examining these recent developments in Pakistan, which are instructive for other countries in this gray zone. Over many decades, as Pakistan has cycled between military and weak civilian rule, the military and its affiliated interests have entrenched their power, and the judiciary has played a central role in facilitating that process. The result has been an enduring institutional imbalance that has undermined Pakistan's weak representative institutions. This process of entrenchment has never gone entirely unchallenged, and Pakistan's current shift to civilian rule offers genuine potential for the long-term consolidation of democracy and constitutionalism. But this persistent institutional imbalance and continued military dominance remains a significant obstacle to fully realizing that potential. Accordingly, I urge an understanding of judicial independence that goes beyond abstract, unqualified notions of judicial autonomy and instead contemplates an appropriate balance between autonomy and constraint—one that not only enables representative institutions to strengthen their governance capacities and power to rein in the military, but also enhances mechanisms of judicial accountability to reinforce the democratic legitimacy of the judiciary's role. Pakistan's experience also has broader significance, suggesting lessons—or at least notes of caution—about the relationship between entrenched status quo interests and an "independent judiciary" in other countries, such as Egypt, that risk languishing in the gray zone between authoritarianism and democracy but seek a more complete shift to democracy.*

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## I. INTRODUCTION

Discussions of constitutional change often assume a model of progression along a straight line, moving from authoritarianism through a standard sequence of steps that, if successful, results in consolidation of democracy, constitutionalism, and the rule of law.<sup>1</sup>

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1. See Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5, 6–7 (2002) (discussing the conventional assumption that “democratization tends to unfold in a set sequence of stages”); Kristen A. Stilt, *Constitutional Authority and Subversion: Egypt’s New Presidential Election System*, 16 IND. INT’L & COMP. L. REV. 335, 336 (2006) (“Most recent scholarship on constitutional

The model also rests on certain premises concerning the processes and institutions these transitions require, with “judicial independence” often understood as especially crucial.<sup>2</sup>

However, the trajectories of constitutional development can be nonlinear, fitful, ambiguous, and protracted.<sup>3</sup> While scholars increasingly have studied the role of courts in authoritarian regimes,<sup>4</sup> many countries exist in a “gray zone” between authoritarianism and democracy, where they may evolve for indefinite periods of time.<sup>5</sup> For these regimes, conventional premises—including assumptions about judicial independence—might either not apply or demand ongoing reassessment. The questions arising from this gray zone are particularly salient today in the Arab world, where in the wake of the 2011 popular mobilizations in Tunisia, Egypt, Morocco, Algeria,

change is grounded in an evolutionary model . . . in which nations proceed from authoritarian forms of government to democracy.”).

2. See Ash Ü. Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT’L L. 235, 237 (2012) (discussing democratization literature’s “standard recommendations regarding the prerequisites for transitions away from authoritarianism,” including judicial independence); Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 443 (2010) (discussing “converge[nce]” of different visions of promoting rule of law “on an institutional program” that includes “courts staffed with ‘independent’ judges”); Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 361 (2009) (“If there is any concept of modern governance that enjoys more widespread admiration even than democracy, it is judicial independence.”).

3. See Stilt, *supra* note 1, at 338 (noting “large category of unexamined constitutions that have undergone change and emendation but in less clear directions”); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2057 (1996) (“In transitional constitutional processes . . . constitutions are not created all at once, but in fits and starts.”); CHARLES TILLY, *CONTENTION AND DEMOCRACY IN EUROPE, 1650–2000*, at 13 (2004) (contesting “the existence of standard sequences of change from undemocratic to democratic regimes”); Noah Feldman, *Review: Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government*, 1 INT’L J. CONST. L. 390, 391 (2003) (urging scholars to “promote conceptual clarity by finding a way to talk about partial rule of law and partial constitutionalism”).

4. See generally *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafo eds., 2008).

5. Carothers, *supra* note 1, at 9–11 (noting that of the nearly one hundred countries considered “transitional,” only a small number are close to “becoming successful, well-functioning democracies”); see also AYESHA JALAL, *DEMOCRACY AND AUTHORITARIANISM IN SOUTH ASIA: A COMPARATIVE AND HISTORICAL PERSPECTIVE* 3 (1995) (“Far from representing a neat and sharp dichotomy, democracy and authoritarianism . . . may frequently overlap irrespective of the formal designation of politics and states as democratic or authoritarian.”); STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 5–13 (2010) (conceptualizing “competitive authoritarian” regimes in which “formal democratic institutions exist . . . but in which incumbents’ abuse of the state places them at a significant advantage”); Larry Diamond, *Thinking About Hybrid Regimes*, 13 J. DEMOCRACY 21, 23 (2002) (discussing the “astonishing frequency with which contemporary authoritarian regimes manifest, at least superficially, a number of democratic features”).

Bahrain, Libya, Yemen, and Syria, the path of change remains halting and its ultimate direction uncertain.<sup>6</sup>

This Article examines the relationship between constitutional change and judicial independence within this gray zone by analyzing recent developments in Pakistan, whose evolving circumstances have foreshadowed events in the Arab world.<sup>7</sup> While in recent years Pakistan has drawn attention in the United States to an extent unparalleled in its history, that discourse has erased much complexity, focusing almost exclusively on war, terrorism, religious extremism, and most fundamentally, the specter of existential state “failure.”<sup>8</sup> This narrow scope of attention is hardly new. Observers have long reduced Pakistan’s history to a static narrative involving crisis, instability, and failure.<sup>9</sup> In the context of more dynamic

6. See Michelle Pace & Francesco Cavatorta, *The Arab Uprisings in Theoretical Perspective—An Introduction*, 17 MEDITERRANEAN POL. 125, 135 (2012) (“[T]he Arab uprisings have shown that there is no linear transition from liberalizing authoritarian rule to a fully fledged democracy of the liberal kind.”); NADIA MARZOUKI, *FOUR KEYS TO UNDERSTAND TUNISIAN POLITICS AFTER THE ELECTIONS* 1 (2011) (“[I]t is much too early to draw any conclusion or to speculate about the future of political debates in Tunisia.”); TAMIR MOUSTAFA, *DRAFTING EGYPT’S CONSTITUTION: CAN A NEW LEGAL FRAMEWORK REVIVE A FLAWED TRANSITION?* 3–6 (2012) (discussing uncertainty arising from Egypt’s post-Mubarak constitutional development); Anthony Billingsley, *Writing Constitutions in the Wake of the Arab Spring: The Challenge of Consolidating Democracy*, FOREIGN AFF. (Nov. 30, 2011), <http://www.foreignaffairs.com/articles/136699/anthony-billingsley/writing-constitutions-in-the-wake-of-the-arab-spring> (discussing the “dynamic and complicated battle[s]” over constitutional change in Tunisia, Egypt, and Libya).

7. See Michele Dunne & Shuja Nawaz, *Can Egypt Avoid Pakistan’s Fate?*, N.Y. TIMES, Feb. 3, 2012, at A21 (discussing the parallels between recent developments in Egypt and Pakistan); Michael C. Dorf, *How Rulings of the Supreme Constitutional Court of Egypt Hold Lessons for Emerging Democracies, and for Our Own*, VERDICT (June 20, 2012), <http://verdict.justia.com/2012/06/20/how-rulings-of-the-supreme-constitutional-court-of-egypt-hold-lessons-for-emerging-democracies-and-for-our-own> (same); Myra MacDonald, *Army, Allah and America: On Pakistani Pitfalls and the Future of Egypt*, REUTERS (Jan. 30, 2011), <http://blogs.reuters.com/pakistan/2011/01/30/army-allah-and-america-on-pakistani-pitfalls-and-the-future-of-egypt/> (same).

8. See SAADIA TOOR, *THE STATE OF ISLAM: CULTURE AND COLD WAR POLITICS IN PAKISTAN* 1 (2011) (“Western media has no space for . . . stories that contradict the dominant narrative of Pakistan as a fountainhead of extremism.”); MANAN AHMED, *WHERE THE WILD FRONTIERS ARE: PAKISTAN AND THE AMERICAN IMAGINATION* 49 (2011) (“Pakistan—as an object of consumption—is marketable only via its violence or its failure.”); Madiha R. Tahir, *Chaos Theory: How Pakistan Was Cast as a Failed State*, COLUM. JOURNALISM REV. (Apr. 24, 2009, 9:48 AM), [http://www.cjr.org/behind\\_the\\_news/chaos\\_theory\\_1.php](http://www.cjr.org/behind_the_news/chaos_theory_1.php) (arguing that U.S. public discourse discusses Pakistan “as though it were a psychiatric patient refusing its happy pills”); Rafia Zakaria, *Hearts, Minds and Floods*, DAWN, Aug. 18, 2010, <http://dawn.com/2010/08/18/arts-minds-and-floods-by-rafia-zakaria/> (positing “inability” in U.S. public discourse “to ever see Pakistan as something other than a militant haven”).

9. See, e.g., Manan Ahmed, *Legends of the Fail*, NATIONAL (U.A.E.), May 7, 2009, at 3 (documenting “decades worth of books” positing Pakistan’s “failure”); ANATOL LIEVEN, *PAKISTAN: A HARD COUNTRY* 3 (2011) (“Tariq Ali wrote *Can Pakistan Survive? The Death of a State* in 1983, a generation ago. That’s quite a long deathbed

discussions addressing the prospects of an emerging “Asian Century,”<sup>10</sup> Pakistan exists at Asia’s margins—not just geographically, but also conceptually.

Without question, as Pakistani observers regularly lament, the trajectory of Pakistan’s constitutional development has been “checkered,” cycling through periods of military and weak civilian rule for decades.<sup>11</sup> However, recent events paint a more complex picture. Indeed, the only recent exception to these standard narratives of Pakistan’s “failure” is revealing. In 2007—four years before the protests in Cairo’s Tahrir Square—Pakistan’s lawyers took to the streets to oppose the attempt by its President and Army Chief, General Pervez Musharraf, to remove the nation’s chief justice, under whom its Supreme Court had asserted unprecedented autonomy from the military regime. This “lawyers’ movement” in support of the judiciary triggered a broader movement for democracy and constitutionalism. Musharraf’s subsequent crackdown failed, and while neither the regime’s legal and institutional edifice nor the military’s entrenched power was entirely dislodged, the movement prompted elections that repudiated Musharraf and ultimately forced him from power.<sup>12</sup>

Since then, Pakistan’s lawyers and judges have been lauded for their commitment to “judicial independence.”<sup>13</sup> But abstract

scene by any standards.”). For recent attempts to complicate these conventional narratives, see generally PAKISTAN: BEYOND THE “CRISIS STATE” (Maleeha Lodhi ed., 2011); Naveeda Khan, *Introduction* to BEYOND CRISIS: RE-EVALUATING PAKISTAN 1–26 (Naveeda Khan ed., 2010).

10. See, e.g., Anupam Chander, *The Asian Century?*, 44 U.C. DAVIS L. REV. 717 (2011); Teemu Ruskola, *Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law*, 44 U.C. DAVIS L. REV. 879 (2011); Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 44 U.C. DAVIS L. REV. 773 (2011).

11. E.g., AHMED, *supra* note 8, at 28–29 (discussing “checkered past” of constitutionalism in Pakistan); FINAL REPORT OF THE PARLIAMENTARY COMMITTEE ON CONSTITUTIONAL REFORMS ¶ 1 (2010) [hereinafter PCCR REPORT] (“Pakistan has a chequered constitutional history.”); HAMID KHAN, *CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN* 732 (2d ed. 2009) (discussing lessons of Pakistan’s “chequered constitutional and political history”); ZULFIKAR KHALID MALUKA, *THE MYTH OF CONSTITUTIONALISM IN PAKISTAN* 3 (1996) (“[T]he history of constitution-making in Pakistan has been long and chequered.”); see also ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 150 (2009) (“Pakistan’s constitutions seem to die with some frequency”).

12. See Anil Kalhan, *Constitution and “Extraconstitution”: Colonial Emergency Regimes in Postcolonial India and Pakistan*, in *EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY* 89, 93–96 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010) (discussing Pakistan’s “lawyers’ movement” and its aftermath).

13. See, e.g., HAROLD BAER, JR., *JUDGES UNDER FIRE: HUMAN RIGHTS, INDEPENDENT JUDGES, AND THE RULE OF LAW* 69–78 (2011) (celebrating Pakistan’s “courageous judges and lawyers” and finding cause for “hope for the rule of law” in judges’ assertions of independence); see also Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217, 226–27 (2011) (celebrating Pakistan’s

invocations of judicial independence offer little guidance on the forms it should take in any given context to advance democracy, constitutionalism, fundamental rights, the rule of law, or other socially desirable ends. And in the wake of Pakistan's return to civilian rule in 2008, a series of clashes among Parliament, the Supreme Court, and the military has raised concerns that the same empowered judiciary that, only a few years ago, was widely celebrated for challenging Musharraf's *military* regime might now—while invoking the same basic conception of judicial independence<sup>14</sup>—be undermining Pakistan's weak, post-Musharraf *civilian* government.<sup>15</sup>

Both descriptively and normatively, an adequate assessment of these concerns demands a more concrete and contextualized understanding of judicial independence than the black-and-white, all-or-nothing conception typically invoked.<sup>16</sup> Judicial independence

judiciary for “delegitimiz[ing Musharraf’s] regime while simultaneously “legitimating themselves”).

14. See, e.g., Iftikhar Muhammad Chaudhry, Chief Justice, Speech Given upon Acceptance of Harvard Law School Association’s Medal of Freedom (Nov. 19, 2008), available at <http://watandost.blogspot.com/2008/11/deposed-chief-justice-iftikhar.html> (“Pakistani lawyers are now struggling to keep their autocrats, *military as well as democratic*, from influencing judges.” (emphasis added)); see also *id.* (“Our autocrats, *whether uniformed or otherwise*, while decreeing a democratic order are, at the same time, postponing the establishment of an independent judiciary to an ever more distant future.” (emphasis added)).

15. See Declan Walsh, *Pakistan Court Widens Role, Stirring Fears*, N.Y. TIMES, Jan. 23, 2012, at A1 (discussing concerns that the court’s “campaign of judicial activism” against the civilian government “could damage [Pakistan’s] fragile democracy and open the door to a fresh military intervention”); Chris Allbritton & Serena Chaudhry, *Pakistan Supreme Court Takes Centre Stage as Political Player*, REUTERS (Feb. 13, 2012), <http://www.reuters.com/article/2012/02/13/us-pakistan-politics-idUSTRE81COMQ20120213> (discussing concerns that the court’s conflict with the civilian government may be “strengthening the hand of the military”); *HARDtalk: Interview with Aitzaz Ahsan* (BBC World News television broadcast Aug. 7, 2012) (asserting that the court has become “too powerful” and at times “overstepped its limits”); Paula Newberg, *The Court Rules in Pakistan*, YALEGLOBAL ONLINE (June 21, 2012), <http://yaleglobal.yale.edu/content/court-rules-pakistan> (arguing that court’s decision to remove Prime Minister Yousaf Raza Gilani from office “amounts to a judicial *coup d’etat*” and jeopardizes Pakistan’s domestic politics, foreign policy, and the fiscal stability). Scholars have raised similar concerns about courts in countries such as Egypt and Turkey. See MOUSTAFA, *supra* note 6, at 9, 13 n.29 (urging safeguards to preserve judicial independence in Egypt, but cautioning that “courts that operate completely independent of majoritarian institutions” can also pose risks to democracy and fundamental rights); Bâli, *supra* note 2, at 243 (noting ways that mechanisms to preserve judicial independence in Turkey at times “have paradoxically served to sustain the power of old-regime decisionmakers and block pathways to future political liberalization”). But see Jill Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts*, 61 AM. J. COMP. L. 1, 5 (2013) (arguing that “courts may be better situated than legislatures to counter executive power in hybrid regimes”).

16. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 340 (1998) (emphasizing importance of context in conceptualizing



entails neither “maximal autonomy” nor an end in itself, but rather, as Stephen Burbank emphasizes, arises from a dynamic web of “relationships and interdependencies.”<sup>17</sup> A more complete understanding of judicial independence, therefore, requires contextualized attention to the overall balance between judicial autonomy and constraint across multiple dimensions and its relationship to the ends it exists to serve.<sup>18</sup> In circumstances involving shifts in constitutional arrangements, a deeper understanding of judicial independence also requires attention to temporal relationships *between* those shifting regimes, including the manner in which laws, institutions, and interests evolve over time.<sup>19</sup>

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judicial independence); *see also* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 10–15 (2009) (discussing importance of context when assessing specific constitutional doctrines and institutions); Bâli, *supra* note 2, at 238–39 (arguing, based on Turkish experience, that conceptualizing judicial independence “under conditions of democratic transition demands greater attention to context than to process or to best practices in institutional design transplanted from elsewhere”); Peter H. Schuck, *Courts in a Democracy*, 1 JINDAL GLOBAL L. REV. 7, 8 (2009) (“[J]udicial independence is not a binary phenomenon; it is manifestly a matter of degree.”); *cf.* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 331 (2005) (arguing that normative theories of judicial review should “build[] upon and incorporate[] positive understandings” of how judges actually behave in real world contexts).

17. Burbank, *supra* note 16, at 317; *see also* Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 10–14 (Stephen B. Burbank & Barry Friedman eds., 2002) (explaining that “judicial independence is a means to an end (or, more probably, to more than one end”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 963–64 (2002) (“[Judicial] independence and accountability . . . are means toward a more fundamental goal: the construction of a well-functioning judiciary.”).

18. *See* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 966–69 (2007) (conceptualizing judicial independence in terms of overall “packages” of rules governing selection, tenure, and removal, along with a range of other legal rules and institutional features); Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL’Y REV. 123, 144–45 (2011) (discussing different axes and dimensions of judicial independence); *see also* Friedman, *supra* note 16, at 331 (noting that the spheres of judicial autonomy and constraint are defined in a contextual manner: “by case, by court, by judge”).

19. *See* Teitel, *supra* note 3, at 209–35 (suggesting that “in periods of political change,” the rule of law “preserves some degree of continuity in legal forms, while it enables normative change,” and assessing the role of the judiciary in these transitional moments); Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 68–76 (1993) (arguing that judicial independence in moments of regime shift or transition should be assessed in a “regime relative” manner); Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand’s Postpolitical Constitution*, 7 INT’L J. CONST. L. 83, 83–86 (2009) (discussing the significant continuing influence of Thailand’s 1997 constitution even after its formal abolition and the establishment of a new constitutional regime); *see also* Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1334–38 (2010) (using the U.S. Supreme Court’s treatment of time in the context of legal transitions as “a lens through which we can understand how the Court thinks about . . . its own institutional role”).

However, scholarship on constitutionalism and the judiciary in Pakistan has not fully addressed these issues. A significant body of work addresses how the military has used the judiciary to facilitate direct seizures of power.<sup>20</sup> Important consideration has also been given to aspects of the judiciary's role during periods of civilian rule.<sup>21</sup> Recent literature on Pakistan, however, largely has not considered the implications of the relationship *between* periods of military and civilian rule for constitutionalism and judicial independence, or the conception of judicial independence best suited to reinforce democracy and constitutionalism. This gap is striking in the wake of the anti-Musharraf movement—which itself is only beginning to draw scholarly attention<sup>22</sup>—and given the relevance of Pakistan's experiences to other countries in this gray zone.

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20. See PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* (1995); Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225, 1244–45; ALLEN MCGRATH, *THE DESTRUCTION OF PAKISTAN'S DEMOCRACY* (1999); Zulfikar Khalid Maluka, *Reconstructing the Constitution for a COAS President: Pakistan, 1999 to 2002*, in *PAKISTAN ON THE BRINK: POLITICS, ECONOMICS, AND SOCIETY* 53, 58–60 (Craig Baxter ed., 2004); Kalhan, *supra* note 12; IMTIAZ OMAR, *EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN* (2002); Upendra Baxi, *Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration*, in *COMPARATIVE CONSTITUTIONAL LAW* 132, 136–40 (Mahendra P. Singh ed., 1989); Aziz Z. Huq, *Uncertain Law in Uncertain Times: Emergency Powers and Lessons from South Asia*, 13 *CONSTELLATIONS* 89, 95–99 (2006); Leslie Wolf-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity*, 1 *THIRD WORLD Q.* 97, 102–04 (1979); T.K.K. Iyer, *Constitutional Law in Pakistan: Kelsen in the Courts*, 21 *AM. J. COMP. L.* 759 (1973).

21. See KHAN, *supra* note 11, at 749–58; WERNER MENSKI ET AL., *PUBLIC INTEREST LITIGATION IN PAKISTAN* (2000); NEWBERG, *supra* note 20, at 200–06; Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power To Dissolve Assemblies Under the Pakistani Constitution and Its Discontents*, 23 *ARIZ. J. INT'L & COMP. L.* 615, 685–86 (2006); Maryam Khan & Osama Siddique, *The 2005 South Asian Earthquake: Natural Calamity or Failure of State? State Liability and Remedies for Victims of Defective Construction in Pakistan*, 9 *ASIAN L.* 187, 215–28 (2007); Mahmud, *supra* note 20, at 1282–94; MARTIN LAU, *THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN* 103–05 (2006); Philip Oldenburg, *Will the Judiciary Save Pakistan?*, in *PAKISTAN: THE MOST DANGEROUS DECADE BEGINS* (Christophe Jaffrelot & Alfred Stepan eds., forthcoming 2013).

22. Work on the anti-Musharraf movement, which has focused almost exclusively on the role of lawyers and judges, and on the Supreme Court under Chief Justice Iftikhar Muhammad Chaudhry, includes *HUMAN RIGHTS WATCH, DESTROYING LEGALITY: PAKISTAN'S CRACKDOWN ON LAWYERS AND JUDGES* (2007); Zahid Shabad Ahmed & Maria J. Stephan, *Fighting for the Rule of Law: Civil Resistance and the Lawyers' Movement in Pakistan*, 17 *DEMOCRATIZATION* 492 (2010); Sadaf Aziz, *Liberal Protagonists? The Lawyers' Movement in Pakistan*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX* 305 (Terence C. Halliday, Lucien Karpik, & Malcolm M. Feeley eds., 2012) [hereinafter *FATES OF POLITICAL LIBERALISM*]; Tasneem Kausar, *Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court*, in *PAKISTAN'S STABILITY PARADOX* 28 (Ashutosh Misra & Michael E. Clarke eds., 2011); Charles H. Kennedy, *The Judicialization of Politics in Pakistan*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 139, 147–58 (Björn Dressel ed., 2012); Shoaib A.

In this Article, I argue that Pakistan's evolution through alternating periods of military and civilian rule has contributed to an enduring imbalance or disequilibrium<sup>23</sup> between the judiciary and other institutions, which in turn has helped to strengthen Pakistan's unelected state institutions at the expense of its comparatively weak representative institutions. This institutional imbalance has hindered Pakistan's constitutional development and long-term prospects for democratic consolidation. In Part II, I explain how Pakistan's military, which has seized power in several coups, has engaged in a recurring, iterative process of *transformative preservation*,<sup>24</sup> by which its own power and that of its affiliated interests have been extended and entrenched into periods of civilian rule. Historically, law and courts have been central to this process. When the military has seized power, the judiciary has validated those interventions, enabling constitutional shifts that preserve the military's dominance. But even when civilian rule has formally returned, the judiciary has played a comparable role in facilitating the military's continued political influence. The result has been a persistent institutional disequilibrium: a politicized judiciary periodically has been empowered to assert its autonomy from weak representative institutions, but simultaneously has remained largely vulnerable to

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Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan Under Musharraf*, 35 LAW & SOC. INQUIRY 985 (2010); Daud Munir, *From Judicial Autonomy to Regime Transformation: The Role of the Lawyers' Movement in Pakistan*, in FATES OF POLITICAL LIBERALISM, *supra*, at 378; Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35 N.C. J. INT'L L. & COM. REG. 485 (2010); Note, *The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power*, 123 HARV. L. REV. 1705 (2010) [hereinafter *Pakistani Lawyers' Movement*].

23. See Asma Jahangir, *Another Aspect of the Judgment*, DAWN, Dec. 19, 2009, <http://archives.dawn.com/archives/31699> (expressing concern that the Supreme Court has "disturbed the equilibrium" between Pakistan's state institutions "by creating an imbalance in favour of the judiciary"); AYESHA JALAL, *THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE* 136–93 (1990) (arguing that Pakistan has been characterized by an enduring imbalance of power between weak elected and strong unelected state institutions, with emphasis on military and bureaucracy); *cf.* Ferejohn & Kramer, *supra* note 17, at 995 (positing a dynamic but stable equilibrium between federal judiciary and other branches of government in the United States).

24. I adapt the term from Anne Pitcher, who conceptualizes "transformative preservation" in the context of Mozambique as a process by which that nation's political and economic restructuring also "incorporate[d] institutional, political, and procedural continuities" that permitted "state institutions and party elites . . . to maintain some of [their preexisting] political and economic control." M. ANNE PITCHER, *TRANSFORMING MOZAMBIQUE: THE POLITICS OF PRIVATIZATION, 1975–2000*, at 6, 237 (2002); *cf.* Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–88 (1996) (conceptualizing "preservation-through-transformation" as a process by which hierarchical status regimes modernize and evolve, but continue to "enforce[] social stratification by means that change over time").

constraints by a dominant military and its affiliated interests, which collectively comprise what I refer to as Pakistan's *deep state*. During the period of civilian rule in the 1990s—which Husain Haqqani aptly describes as “military rule by other means”<sup>25</sup>—that pattern of institutional relationships led to clashes between Parliament and the judiciary that weakened both institutions, facilitating the military's ability to again seize direct control in 1999 and further extend the reach of its power.

As the anti-Musharraf movement and its antecedents illustrate, this entrenchment process has never been total, constant, or free from challenge.<sup>26</sup> In the rest of the Article, I argue that recent developments in Pakistan offer meaningful potential to begin reversing the accumulated legacy of military entrenchment, but that this basic disequilibrium—reinforced by an incomplete understanding of judicial independence—has persisted and inhibits those prospects. In Part III, I recount and analyze shifts beginning in 2005, when the Supreme Court began to assert an unusual degree of autonomy from Musharraf's regime, that have challenged military dominance. The regime's efforts to constrain the court in response found some limited short-term success, but also triggered the anti-Musharraf movement, which ultimately brought regime opponents to power. This mobilization often is characterized exclusively as a lawyers' movement, but that depiction obscures its larger importance as an effective exercise in constitutional politics—waged not only by lawyers, but also by political parties and civil society; advocating not only judicial independence, but also democracy, constitutionalism, and civilian supremacy. This broader mobilization generated a rich set of constitutional norms and practices to guide the transition to civilian rule. But because the anti-Musharraf movement fully displaced neither the regime's governing framework nor the military's entrenched power, the disequilibrium between the judiciary, military, and Parliament has remained.

In Part IV, I analyze and assess Pakistan's uneven regime shift after the 2008 elections, which left its constitutional order muddled but also reconfigured longstanding institutional patterns and planted seeds for potentially far-reaching change. Eventually, that shift yielded unprecedented actions by both Parliament and the judiciary

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25. HUSAIN HAQQANI, *PAKISTAN: BETWEEN MOSQUE AND MILITARY* 199 (2005).

26. My account is broadly consistent with Mona El-Ghobashy's explanation that a country can periodically experience political contention that prompts significant institutional change, but “without any broader redistribution of power that may portend regime change.” Mona El-Ghobashy, *Constitutionalist Contention in Contemporary Egypt*, 51 AM. BEHAV. SCIENTIST 1590, 1594–95 (2008); see also Pace & Cavatorta, *supra* note 6, at 126–35 (urging reconsideration, but not dismissal, of both “democratization/transition” and “authoritarian resilience” paradigms as means of explaining politics in the Arab world).

to begin reversing the legacies of military rule, but it also escalated the conflict between them. The court decisively repudiated its longstanding role of validating military rule, but simultaneously asserted its autonomy from Parliament by imposing its own resolution of core political issues arising from the post-Musharraf transition. For its part, Parliament unanimously adopted the Eighteenth Amendment, an unprecedented package of more than a hundred constitutional changes that repudiated military rule, restored parliamentary supremacy, devolved authority to provincial governments, and reformed the judicial appointments process.

In the process, however, the judiciary's conflict over its autonomy from the military evolved into one over its autonomy from Parliament, even as the basic disequilibrium between Pakistan's institutions has persisted. Since then, Parliament and the Supreme Court have struggled to achieve a *modus vivendi* that advances a shared commitment to constitutionalism and democratic consolidation, amidst public suspicions that the military has used these conflicts and institutional imbalances to undermine Pakistan's fragile transition. In Part V, I examine recent conflicts between the Supreme Court and Parliament, in which the court has aggressively asserted itself in a manner cutting deeply into the core of parliamentary authority. The court has edged close to invalidating provisions of the Eighteenth Amendment as inconsistent with the constitution's "basic structure" and, with the encouragement of the military and opposition parties, has privileged national security matters over fundamental rights. The court even has disqualified an elected prime minister from continuing to hold office, echoing the role it has long played in facilitating the military's subversion of democratic politics. I conclude by assessing the judiciary's increasing self-conception as an institution whose legitimacy derives directly from the people of Pakistan and the prospects for an institutional equilibrium more conducive to democratic consolidation, in which more robust mechanisms of judicial accountability might play a more prominent role to enhance the democratic legitimacy of the judiciary's assertions of power and autonomy vis-à-vis representative institutions.

Pakistan's current shift to civilian rule offers genuine potential for the long-term consolidation of democracy, constitutionalism, and civilian rule. However, given its enduring institutional disequilibrium, effectively challenging the entrenched dominance of the military and its affiliated interests requires an understanding of judicial independence that goes beyond abstract, unqualified notions of autonomy. Instead, fully realizing the current moment's potential requires an appropriate rebalancing of judicial autonomy and constraint, along with the introduction of meaningful mechanisms of judicial accountability, that will enable representative institutions to

strengthen their governance capacity and power to rein in the military and its affiliated interests.

## II. TRANSFORMATIVE PRESERVATION AND INSTITUTIONAL DISEQUILIBRIUM

Speaking in December 2011, amidst rumors of an imminent coup, Pakistan's then-Prime Minister, Yousaf Raza Gilani, grabbed headlines when he pointedly warned the military not to consider itself "a state within the state," insisting instead that it must remain answerable to Parliament like any other government agency.<sup>27</sup> Gilani's statement was remarkable given the prevailing tendency of Pakistan's politicians to tread lightly with the military. But it also was curious for purporting to warn against what more often is simply assumed: that Pakistan's military and its network of affiliated interests—including elements in its intelligence agencies and bureaucracy, along with an array of politicians and other private actors—have already functioned as a "state within a state" for a long time and, more ominously, may simply "exist[] beyond any civilian control."<sup>28</sup>

In this Part, I examine the dominant role played by this aggregation of interests—which I term Pakistan's *deep state*,<sup>29</sup> to emphasize its extensive reach beyond the military's formal institutional boundaries—in Pakistan's politics, economy, and society, and the critical role of law and the judiciary in facilitating that dominance. First, I analyze the ways that the military, during periods of its direct rule, has entrenched a hegemonic position that has

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27. Asim Yasin & Muhammad Anis, *PM Fears Ouster, Rejects "State Within State,"* NEWS INT'L, Dec. 23, 2011, <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=11193&Cat=13>.

28. C. Christine Fair, *Pakistan's Democracy: The Army's Quarry?*, 5 ASIAN SECURITY 73, 75 (2009). Similar observations are often made about Turkey, Egypt, and other countries where military interests have remained powerful after formal transitions to civilian rule. See Bâli, *supra* note 2, at 276–79 (discussing the role in Turkey of the military, bureaucracy, police, and judiciary in securing "core commitments of the state . . . against democratic alteration"); Dunne & Nawaz, *supra* note 7 (discussing Pakistan's lessons for Egypt, given presence in both countries of "powerful intelligence and internal security agencies that have acquired extra-legal powers they will not relinquish easily").

29. Although my conceptualization is distinct, I adapt Kamran Shafi's similar usage, which in turn is borrowed from the Turkish context. See Kamran Shafi, *The Deep State and Technocrats*, DAWN, Sep. 28, 2010, <http://dawn.com/2010/09/28/the-deep-state-and-technocrats-by-kamran-shafi/>; see also Merve Kavakci, *Turkey's Test with Its Deep State*, 20 MEDITERRANEAN Q. 83, 90 (2009) (discussing evolution of "deep state" in Turkey); Dexter Filkins, *The Deep State*, NEW YORKER, Mar. 12, 2012, at 38 (noting that the "deep state," or *derin devlet*, refers in Turkey to "a presumed clandestine network of military officers and their civilian allies" that at times "has functioned as a kind of shadow government").

endured during periods of formally civilian rule. Second, I explain the centrality of law and courts to this process and to the ongoing negotiation of military influence even after civilian rule formally has returned.<sup>30</sup> Finally, I assess the institutional disequilibrium resulting from these processes, in which a politicized judiciary has been empowered to assert its autonomy from already weak representative institutions, but has remained vulnerable to powerful constraints by military and deep state interests.

### A. From Viceregal State to Deep State

Since its independence, Pakistan has oscillated between two constitutional models. The prevailing “viceregal” model, favored by the military and bureaucracy, builds upon the inherited British colonial state and privileges centralization and presidential power.<sup>31</sup> A weaker “parliamentary” model, favored by civilian politicians and initially favored by Pakistan’s Constituent Assembly, emphasizes parliamentary supremacy and federalism.<sup>32</sup> To protect its interests under the viceregal model, the military, which came to predominate over political actors soon after Pakistan’s independence in 1947,<sup>33</sup> has

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30. On the structure of Pakistan’s judiciary, see generally FAQIR HUSSAIN, *THE JUDICIAL SYSTEM OF PAKISTAN* (2011), available at <http://www.supremecourt.gov.pk/web/page.asp?id=594>; Mohammad Yasin & Sardar Shah, *Administration of Justice in Pakistan*, in *THE DISPENSATION OF JUSTICE IN PAKISTAN* 75, 79–84 (Mohammad Yasin & Tariq Banuri eds., 2004). My emphasis in this Article is principally on Pakistan’s “higher” or “superior” judiciary, and in particular its Supreme Court.

31. See KHALID BIN SAYEED, *PAKISTAN: THE FORMATIVE PHASE 1857–1948*, at 233–78 (1968). At independence, this “viceregal system” consisted of “a powerful Viceroy, otherwise known as the Governor-General, an Executive Council chosen by the Governor-General, a Central Assembly with limited powers, subordinate Provincial Governments, and, above all, a powerful bureaucracy placed in strategic positions in the Centre, in the Provinces, and in the districts.” *Id.* at 299.

32. See PHILIP E. JONES, *THE PAKISTAN PEOPLE’S PARTY: RISE TO POWER 2–6* (2003); see also Mahmud, *supra* note 20, at 1231–33 (discussing early constitutional conflicts between “authoritarian centralism” and “representative federalism”).

33. See JALAL, *supra* note 23, at 3 (discussing “domestic, regional, and international factors [that] weakened the position of parties and politicians” in Pakistan and “tipp[ed] the institutional balance in favour of the civil bureaucracy and the military”). A significant literature analyzes how Pakistan’s army and bureaucracy became dominant during this period. See *id.*; MAZHAR AZIZ, *MILITARY CONTROL IN PAKISTAN: THE PARALLEL STATE* 55–68 (2008); AYESHA SIDDIQA, *MILITARY INC.: INSIDE PAKISTAN’S MILITARY ECONOMY* 62–72 (2007); IAN TALBOT, *PAKISTAN: A MODERN HISTORY* 126–34 (rev. ed. 2005); Hamza Alavi, *The State in Post-Colonial Societies: Pakistan and Bangladesh*, *NEW LEFT REV.* 59, 65 (1972); D.A. Low, *Pakistan and India: Political Legacies from the Colonial Past*, 25 *J. S. ASIAN STUD.* 257, 266 (2002). Some of this work addresses these questions by way of explaining a contrast with India’s greater success in establishing parliamentary democracy. See PHILIP OLDENBURG, *INDIA, PAKISTAN, AND DEMOCRACY: SOLVING THE PUZZLE OF DIVERGENT PATHS* (2010); Christophe Jaffrelot, *India and Pakistan: Interpreting the Divergence of Two Political Trajectories*, 15 *CAMBRIDGE REV. INT’L AFF.* 251 (2002); MAYA CHADDA, *BUILDING DEMOCRACY IN SOUTH ASIA: INDIA, NEPAL, PAKISTAN* 23–65 (2000);

seized power in several coups, directly ruling Pakistan for over half of its history. At no point, however, has the military possessed sufficient “coercive capacity”<sup>34</sup> to exercise control entirely on its own. While it has utilized force, coercion, and intimidation to attain and preserve power, the military always has cultivated support from other quarters—bureaucrats, politicians, judges, and other elites—to augment its power and lend its rule a veneer of legitimacy.<sup>35</sup>

During these recurring periods of direct rule, the military has undertaken legal, political, and institutional transformations with the effect of preserving and extending its dominance into periods of civilian rule, a process I refer to as *transformative preservation*. The basic approach to effecting these transformations has followed a now-established pattern.<sup>36</sup> Constitutionally, as I explain in Part II.B, military regimes have instituted sweeping changes to the governing framework to strengthen its viceregal aspects. Most visibly, the military has preserved its primacy over defense and foreign policy, but its efforts have never been limited to these areas.<sup>37</sup> Rather, the military has extended its reach much further into Pakistan’s political, social, and economic structure—a position of supremacy that has become deeply rooted over time.<sup>38</sup>

MEGHNAD DESAI & AITZAZ AHSAN, *DIVIDED BY DEMOCRACY* 75–142 (David Page ed., 2005); see also JALAL, *supra* note 5 (discussing both contrasts and continuities in the experiences of India and Pakistan with democracy and authoritarianism).

34. LEVITSKY & WAY, *supra* note 5, at 56–61.

35. See C. Christine Fair, *Why the Pakistan Army Is Here To Stay: Prospects for Civilian Governance*, 87 INT’L AFF. 571, 572 (2011) (noting that because “authoritarianism has never garnered widespread legitimacy,” Pakistan’s military has relied upon the “connivance and acquiescence of [a] broad array of civilian institutions and personalities”); LIEVEN, *supra* note 9, at 23–24 (arguing that given the strength of Pakistan’s “negotiated state,” military regimes find themselves “ingested by the elites they had hoped to displace, and engaged in the same patronage politics as the regimes they had overthrown”); SIDDIQA, *supra* note 33, at 13 (“In military-dominated polities, other dominant groups often turn into cronies of the armed forces to establish a mutually beneficial relationship . . .”). In this respect, Pakistan’s experience is consistent with the experiences of other countries with politically dominant militaries. See GUILLERMO A. O’DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 31 (1986) (concluding, based on a study of authoritarianism in southern Europe and Latin America, that “in no case has the military intervened without important and active civilian support”).

36. See Charles H. Kennedy, *Constitutional and Political Change in Pakistan: The Military-Governance Paradigm*, in *PROSPECTS FOR PEACE IN SOUTH ASIA* 37, 47–71 (Rafiq Dossani & Henry S. Rowen eds., 2005); Kalhan, *supra* note 12.

37. See FRÉDÉRIC GRARE, *REFORMING THE INTELLIGENCE AGENCIES IN PAKISTAN’S TRANSITIONAL DEMOCRACY* 36–46 (2009); SHUJA NAWAZ, *CROSSED SWORDS: PAKISTAN, ITS ARMY, AND THE WARS WITHIN* 413–16 (2008); HOWARD B. SCHAFFER & TERESITA C. SCHAFFER, *HOW PAKISTAN NEGOTIATES WITH THE UNITED STATES: RIDING THE ROLLER COASTER* 81–88, 117–18, 144–46, 171–74 (2011).

38. See Fair, *supra* note 35, at 572 (“With each successive coup, Pakistan’s civilian structures become ever more dysfunctional and the army, with its ever-



First, the military and its allies have aggressively manipulated the political process. During periods of direct rule, military regimes have systematically undermined and delegitimized Pakistan's weak political parties, while simultaneously co-opting politicians into giving their support.<sup>39</sup> In some instances, these objectives have been achieved by banning parties outright and holding elections on a nonparty basis. More recently, military regimes have restricted other associational freedoms and politicians' eligibility to hold office. To establish a civilian façade for the regime, the military has bypassed existing parties by inducing or intimidating politicians to join military-sponsored parties or coalitions, which function as proxies and, if the regime's performance flags, potential scapegoats.<sup>40</sup> When civilian rule has returned, the military has continued to exercise considerable political influence—formalizing its own governing role under the constitution and manipulating not only the political parties themselves, but also media coverage and the electoral process.<sup>41</sup> For their part, however, civilian politicians and political parties have done neither themselves nor democratic governance many favors, often facilitating their own manipulation by seeking the military's support in short-term conflicts with each other.<sup>42</sup>

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expanding network of corporate financial and political interests and beneficiaries, ever more entrenched.”).

39. For discussion of factors contributing to the ineffectiveness of Pakistan's political parties, see INT'L CRISIS GRP., *AUTHORITARIANISM AND POLITICAL PARTY REFORM IN PAKISTAN* 1, 5–6 (2005); YOGENDRA K. MALIK ET AL., *GOVERNMENT AND POLITICS IN SOUTH ASIA* 176–78 (6th ed. 2009); Hasan Askari Rizvi, *Democracy in Pakistan*, in *A FUTURE FOR DEMOCRACY* 117, 130–31 (Wilhelm Hofmeister ed., 2011).

40. See Aqil Shah, *The Transition to “Guided” Democracy in Pakistan*, in *THE ASIA-PACIFIC: A REGION IN TRANSITION* 207, 216–18 (Jim Rolfe ed., 2004) (discussing Musharraf's “legal measures to stack the [electoral] process against his political opposition” and other activities to “engineer[ ]” political processes); INT'L CRISIS GRP., *PAKISTAN: TRANSITION TO DEMOCRACY?* 7–10, 15 (2002) (describing the military's tactics to obtain support from civilian politicians and political parties and to manipulate the political process); S. AKBAR ZAIDI, *MILITARY, CIVIL SOCIETY AND DEMOCRATIZATION IN PAKISTAN* 27 (2011) (“When things go awry, [the military] blames the politicians it itself helped create.”); Seyyed Vali Reza Nasr, *Democracy and the Crisis of Governability in Pakistan*, 32 *ASIAN SURVEY* 521, 523, 533 (1992) (discussing military's creation of an anti-PPP political coalition to maintain its influence).

41. See, e.g., INT'L CRISIS GRP., *supra* note 39, at 23, 25–27 (discussing creation of National Security Council and military's use of pre-election rigging to manipulate electoral results); S. Akbar Zaidi, *Criticising Democracy or Criticising Governance?*, *ECON. & POL. WKLY.*, Feb. 28, 2009, at 8–9 (discussing “severe constraints” that elected civilian governments in Pakistan face, “such as having to clean up the huge mess created by each military decade and with the secret arm of the military breathing down [their] neck[s]”); Maleeha Lodhi & Zahid Hussain, *The Invisible Government*, *NEWSLINE*, Oct. 1992 (investigating and documenting role played by intelligence agencies in manipulating the political process).

42. See Fair, *supra* note 28, at 76 (noting that civilian elites and political parties often “aid and abet the erosion of democracy” by using the military to undermine their political opponents); SHEILA FRUMAN, *WILL THE LONG MARCH TO DEMOCRACY IN PAKISTAN FINALLY SUCCEED?* 8–9 (2011) (noting that party leaders

Second, the military has effectively “colonized” the state’s administrative apparatus.<sup>43</sup> While military personnel long had been inducted into the bureaucracy, under General Zia-ul-Haq’s regime in the 1980s, active and retired officers were placed in civilian positions in larger numbers, at higher ranks, and via more formal quota programs.<sup>44</sup> In the 2000s, Musharraf’s regime made deeper encroachments, deploying thousands of active and retired personnel to serve on “monitoring teams” overseeing civil administration at every level.<sup>45</sup> Under Musharraf, “[v]irtually every aspect of the civil bureaucracy’s functioning . . . was placed in the hands of military personnel.”<sup>46</sup> While the military later announced it would withdraw many of these officers, civilian regimes have not easily reversed these incursions into the bureaucracy.<sup>47</sup>

Third, the military and its affiliates have amassed an economic empire estimated in the billions of dollars. While the military has long cultivated ties with elites,<sup>48</sup> over time the officer corps has evolved into an elite class of its own, commanding a growing share of the nation’s wealth, status, and privilege. The military’s “welfare foundations,” initially formed to provide benefits to military retirees, now employ thousands of individuals in hundreds of commercial ventures across many sectors. These ventures—often hidden from scrutiny, but benefiting from large, off-budget subsidies—range from small businesses to some of Pakistan’s largest enterprises. The

“have not implemented basic democratic standards within their parties” and that “members of a small elite tend to dominate party leadership, using their positions to accrue personal wealth”); HASAN ASKARI RIZVI, *THE MILITARY AND POLITICS IN PAKISTAN 1947–1997*, at 236–39 (2000) (discussing Prime Minister Zulfikar Ali Bhutto’s use of the military to maintain law and order and manage political crisis in 1977 in a manner that undermined civilian authority).

43. JALAL, *supra* note 23, at 323; *see also* AMINULLAH CHAUDRY, *POLITICAL ADMINISTRATORS: THE STORY OF THE CIVIL SERVICE OF PAKISTAN* 138–58 (2011) (discussing the “army ingress into civil bureaucracy” since the 1980s).

44. *See* CHARLES H. KENNEDY, *BUREAUCRACY IN PAKISTAN* 122–25 (1987); HASAN ASKARI RIZVI, *MILITARY, STATE AND SOCIETY IN PAKISTAN* 234–35 (2000).

45. INT’L CRISIS GRP., *REFORMING PAKISTAN’S CIVIL SERVICE* 9 (2010).

46. *Id.* at 10; *see also* CHAUDRY, *supra* note 43, at 154–57 (discussing Musharraf’s aggressive efforts to deepen military control over civilian bureaucracy).

47. *See* Salman Masood, *Pakistan Army Chief Ousts Military from Government*, N.Y. TIMES, Feb. 13, 2008, at A8 (discussing order by Musharraf’s successor as Army Chief to withdraw military officers appointed to civilian bureaucracy). *But see* Ayesha Siddiq, *Pakistan’s Modernity: Between the Military and Militancy*, ECON. & POL. WKLY., Dec. 17, 2011, at 66 (“Contrary to his commitment to the people, Kayani did not withdraw all military personnel from civilian departments.”); CHAUDRY, *supra* note 43, at 156–57 (discussing constraints on ability of civilian governments to remove military officers appointed to civilian positions).

48. *See* STEPHEN P. COHEN, *THE IDEA OF PAKISTAN* 68–70, 269–73 (2004) (discussing the cultivation in 1960s by General Ayub Khan’s regime of an oligarchic elite referred to as the “Establishment”); SIDDIQA, *supra* note 33, at 74–75, 87–88 (discussing policies by Zia regime in 1980s to cultivate support among business interests).

foundations also provide opportunities for private gain by individuals associated with them, owing to patronage networks and other advantages arising from military connections.<sup>49</sup>

Military officers also benefit from favorable access to land.<sup>50</sup> The military is Pakistan's largest landowner, using its power, influence, and sometimes force to acquire millions of acres at well below market value and then allocating or selling those lands to affiliated entities and officers on favorable terms.<sup>51</sup> In rural areas, these schemes have strengthened ties to feudal elites, reinforcing severe inequalities arising from inadequate land access.<sup>52</sup> In cities, the military has become one of Pakistan's largest developers, engaged in billions of dollars' worth of residential and commercial development schemes and enabling officers to make large profits in often-speculative transactions.<sup>53</sup> Beyond their economic significance, these highly visible, large-scale land grabs, which escalated sharply under Musharraf, have greatly enhanced the military's prestige and power, given the importance of land in Pakistani society.<sup>54</sup>

Fourth, the military and its affiliated interests exercise considerable influence over the media. At times, that influence entails outright coercion and intimidation. Pakistan has long ranked among the world's most dangerous countries for journalists, in part due to violence against journalists deemed critical of the military.<sup>55</sup> But

49. See SIDDQA, *supra* note 33, at 18, 112–28 (discussing structure of welfare foundations and other military-affiliated economic enterprises).

50. See *id.* at 174–205 (detailing extent of land ownership and control by the military and affiliated interests); Haris Gazdar, *The Fourth Round, and Why They Fight On: The History of Land Reform in Pakistan*, in *LEVELING THE PLAYING FIELD: A SURVEY OF PAKISTAN'S LAND REFORMS* 8, 44–48 (Rakesh Kalshian ed., 2011) (noting “the privileged access to agricultural, commercial, and residential land enjoyed by military organizations and personnel”).

51. See SIDDQA, *supra* note 33, at 174–75.

52. See SIDDQA, *supra* note 33, at 184 (“[T]he military became an instrument of feudalism and part of the feudal class.”); Talat Anwar et al., *Landlessness and Rural Poverty in Pakistan*, 43 *PAKISTAN DEV. REV.* 855, 869 (2004) (identifying inadequate access to land as an “important contributor[ ] to rural poverty in Pakistan”); see also BINA AGARWAL, *A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA*, at xv (1994) (discussing land ownership and control as “critical determinant[s] of economic well-being, social status, and political power” in rural South Asia); Elisabeth Wickeri & Anil Kalhan, *Land Rights Issues in International Human Rights Law*, 4 *MALAYSIAN J. HUM. RTS.* 16, 18–23 (2010) (discussing the constellation of rights implicated under international law by inadequate access to land).

53. SIDDQA, *supra* note 33, at 185–99.

54. See HUMAN RIGHTS WATCH, *SOILED HANDS: THE PAKISTAN ARMY'S REPRESSION OF THE PUNJAB FARMERS' MOVEMENT* 6 (2004) (“For the Pakistani military establishment, control of land is essential for maintaining its position within the Pakistani political structure . . .”); SIDDQA, *supra* note 33, at 174 (“Land is acquired not just for capital accumulation, but also to exhibit the military's authority and power . . .”).

55. See INT'L FED'N OF JOURNALISTS, *NEW FRONTIERS, NEW STRUGGLES: PRESS FREEDOM IN SOUTH ASIA* 2011–12, at 34–39 (2012); INT'L FED'N OF JOURNALISTS & PAK.

even short of this extreme, the military utilizes a host of more subtle means of influence, such as paying off journalists, planting and disseminating stories (and rumors), and restricting publication or broadcast.<sup>56</sup> While liberalization of Pakistan's electronic media in recent years has enabled more open public discourse—and greater public criticism of state institutions, including the military, than ever before—military interests nevertheless have continued to wield significant influence over the media under both military and civilian rule.<sup>57</sup> Indeed, while other factors contributed to its onset, Musharraf's media liberalization program itself was initiated in part with the purpose of enhancing the ability of the military and its allies to shape public discourse.<sup>58</sup>

The result has been not simply the enhancement of the military's own institutional power, but the emergence of a sprawling aggregate of affiliated interests—Pakistan's deep state—that both benefit from and reinforce military hegemony, even during periods of formally civilian democratic rule. As Ayesha Siddiqi emphasizes, “The military's political clout is not just based on its own strength but also on the financial and political power of its collaborators or clients.”<sup>59</sup>

FED. UNION OF JOURNALISTS, *A STATE OF DENIAL: THE CRISIS OF PRESS FREEDOM AND JOURNALIST SAFETY IN PAKISTAN* (2007). One prominent television journalist asserts that “[t]hose who dare to criticize the military are living dangerously.” Hasnain Kazim, *Living in Fear of Intelligence Agents*, DER SPIEGEL ONLINE (Dec. 23, 2011), <http://www.spiegel.de/international/world/the-perils-of-journalism-in-pakistan-living-in-fear-of-intelligence-agents-a-805639.html> (quoting Hamid Mir); see also Elisabeth Bumiller, *U.S. Admiral Ties Pakistan to Killing of Journalist*, N.Y. TIMES, July 8, 2011, at A4; Huma Imtiaz, *The Perils of Reporting in Pakistan*, FOREIGN POLY (Sept. 24, 2010, 9:31 AM), [http://afpak.foreignpolicy.com/posts/2010/09/24/the\\_perils\\_of\\_reporting\\_in\\_pakistan](http://afpak.foreignpolicy.com/posts/2010/09/24/the_perils_of_reporting_in_pakistan).

56. See SIDDIQI, *supra* note 33, at 98–99, 250 (discussing “tactful” and “subtle” mechanisms used by military to intimidate media “based on a system of rewards and selective punishment”); Lodhi & Hussain, *supra* note 41 (documenting tactics used by intelligence agencies to manipulate and intimidate journalists); Sonya Fatah, *The Geography of GEO*, HIMAL SOUTHASIAN, Sep. 2005, at 7 (stating that after airing sensitive or controversial material, television stations “anticipate[] a coded phone call or a veiled threat”); Kalsoom Lakhani, *Ah, the Rumor Mill. It's a Churnin'!*, CHUP!—CHANGING UP PAK. (Dec. 7, 2011), <http://changingupakistan.wordpress.com/2011/12/07/ah-the-rumor-mill-its-a-churnin/> (discussing dissemination of rumors as means of manipulating public discourse); Declan Walsh, *Pakistani Media Publish Fake WikiLeaks Cables Attacking India*, GUARDIAN, Dec. 9, 2010, <http://www.guardian.co.uk/world/2010/dec/09/pakistani-newspaper-fake-leaks-india> (noting the “strong influence of Pakistan's army over an otherwise vigorous free press”).

57. See MARCO MEZZERA & SAFDAR SIAL, *MEDIA AND GOVERNANCE IN PAKISTAN: A CONTROVERSIAL YET ESSENTIAL RELATIONSHIP* 30–34 (2010); SHERRY RICCHIARDI, *CHALLENGES FOR INDEPENDENT NEWS MEDIA IN PAKISTAN* 5–6, 10, 15, 20 (2012).

58. INT'L MEDIA SUPPORT, *MEDIA IN PAKISTAN: BETWEEN RADICALISATION AND DEMOCRATISATION IN AN UNFOLDING CONFLICT* 16–17 (2009); MEZZERA & SIAL, *supra* note 57, at 27–28.

59. SIDDIQI, *supra* note 33, at 15–16; see also Hasan-Askari Rizvi, *The Military*, in *POWER AND CIVIL SOCIETY IN PAKISTAN* 186, 210 (Anita M. Weiss & S.

Extensive financial and political assistance by the United States has long reinforced this dominance.<sup>60</sup> Originally driven by Cold War imperatives and given renewed emphasis following the 2001 terrorist attacks, U.S. assistance has often strengthened the military at the expense of representative institutions.<sup>61</sup> While U.S. aid recently has been restructured to provide greater civilian assistance and strengthen conditions on military support, U.S. assistance, both financial and political, continues to reinforce the military's power.<sup>62</sup>

The dominance of Pakistan's military and deep state interests has been justified and reinforced by an antidemocratic *legitimizing discourse*<sup>63</sup> comprised of two basic precepts, which the military and its allies actively propagate through government publications, school textbooks, cultural and scholarly production, and the media.<sup>64</sup> First, early in Pakistan's history, the emergence of security-related

Zulfiqar Gilani eds., 2001) (asserting that military strength "no longer depends on controlling the levers of power" but derives from "its organizational strength and its significant presence in the economy and society").

60. See NAWAZ, *supra* note 37, at 92–118 (discussing the effects of U.S. aid to Pakistan); TOOR, *supra* note 8, at 153–54 (discussing role of U.S. financial assistance in "rehabilitat[ing]" Zia's military regime). Large-scale assistance from China and Saudi Arabia plays a similar role. See STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001*, 71–74, 81–82, 180, 296 (2005) (Saudi Arabia); Julian Schofield, *Pakistan–China Strategic Relations, Energy Security and Pakistani Counter-Terror Operations*, in *PAKISTAN: THE US, GEOPOLITICS AND GRAND STRATEGIES* 151, 161–62 (Usama Butt & Julian Schofield eds., 2012) [hereinafter *GEOPOLITICS AND GRAND STRATEGIES*] (China).

61. INT'L CRISIS GRP., *AID AND CONFLICT IN PAKISTAN 2–3* (2012); see also Mariam Mufti, *The Influence of Domestic Politics on the Making of US–Pakistan Foreign Policy*, in *GEOPOLITICS AND GRAND STRATEGIES*, *supra* note 60, at 64, 72–75 (criticizing United States for neglecting "to take account of Pakistan's domestic politics" in its assistance programs). At times, U.S. officials have all but openly signaled their preference for the military to remain in power, or at minimum their equivocal interest in a transition to civilian democratic rule. See COLL, *supra* note 60, at 42–46, 50–52, 62–63, 66–67; INT'L CRISIS GRP., *supra* note 40, at 32; AHMED RASHID, *DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA* 148–49 (2d ed. 2009).

62. Enhanced Partnership with Pakistan Act of 2009, Pub. L. No. 111-73, 123 Stat. 2060 (2009); see also SCHAFFER & SCHAFFER, *supra* note 37, at 172 (discussing the ongoing "challenge" for U.S. officials of "develop[ing] rapport with the army leadership without inadvertently reinforcing the army's role in the country's politics and government at the expense of civilian leadership").

63. See PITCHER, *supra* note 24, at 239–43 (discussing the articulation by political elites, in the context of "transformative preservation" in Mozambique, of diffuse "legitimizing discourse," which "legitimate[s] the transition that Mozambique has undergone, justifi[es] its own role in it, and gain[s] supporters for its project," and which is complemented and reinforced by messages disseminated by other elite actors).

64. Fair, *supra* note 35, at 573; see also A.H. NAYYAR & AHMED SALIM, *THE SUBTLE SUBVERSION: THE STATE OF CURRICULA AND TEXTBOOKS IN PAKISTAN URDU, ENGLISH, SOCIAL STUDIES AND CIVICS*, at i–vii (2005); PAK. ARMY GEN. HEADQUARTERS, *PAKISTAN ARMY GREEN BOOK 2000: ROLE OF PAKISTAN ARMY IN NATION BUILDING* 245–78 (2000); SIDDIQA, *supra* note 33, at 98; TOOR, *supra* note 8, at 86–89; *supra* notes 55–58 and accompanying text.

concerns as defining features of the state's identity—or more to the point, an enduring sense of insecurity—prompted the military to understand and project itself as the state's guardian.<sup>65</sup> Accordingly, the military claims the mantle of protector of not only the state's security, but its very existence, projecting mistrust of politicians' abilities to bear those responsibilities and in essence, to borrow from Jonathan Simon, governing through insecurity.<sup>66</sup> This claimed guardianship converges with the military's assertion of responsibility to protect the state's identity and ideology, including its Islamic character.<sup>67</sup> One consequence has been the blurring of internal and external threats, with the military and its allies often deeming "all internal political opposition as somehow instigated by outside forces."<sup>68</sup>

Second, the military understands and projects itself as Pakistan's most competent institution—not just in security matters, but in governance and development more generally.<sup>69</sup> This self-conception of military professionalism ("selfless, disciplined, obedient, and competent"<sup>70</sup>) is defined in self-conscious contrast to Pakistan's civilian politicians ("incompetent, insincere, corrupt, and driven by

65. Fair, *supra* note 28, at 79 ("[T]he army sees itself, and is seen by many Pakistanis, as the guarantor of an inherently insecure state."). This sense of insecurity emerged soon after independence, and has been reinforced by several wars with India, a civil war leading to independence of Bangladesh, an ongoing border dispute with Afghanistan, and domestic unrest in which the army has been deployed to preserve order.

66. See SIDDIQI, *supra* note 33, at 62–64 (discussing centrality of security to military and policymaking elites); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4–5 (2007) (conceptualizing "governing through crime" as set of practices in which "institutions . . . us[e] crime to promote governance by legitimizing and/or providing content for the exercise of power").

67. See HAQQANI, *supra* note 25, at 2–3, 51–86 (discussing military's self-conception as "guardian of Pakistan's ideological frontier"); FARZANA SHAIKH, MAKING SENSE OF PAKISTAN 147–79 (2009) (discussing role of the military "as a major force attempting not only to determine the national interest but to define the very meaning of Pakistan," including its religious identity).

68. JALAL, *supra* note 23, at 49–50; see also COHEN, *supra* note 48, at 124 (arguing that because the military "demands a united front at home on security issues," it has "supported restraints . . . on the press, political parties, and even academia").

69. See LIEVEN, *supra* note 9, at 163 ("The Pakistani military, more even than most militaries, sees itself as a breed apart, and . . . different from (and vastly superior to) Pakistani civilian society."); see also AZIZ, *supra* note 33, at 93–96 (analyzing the military's self-conception as playing an indispensable role in "nation-building"); Husain Haqqani, *History Repeats Itself in Pakistan*, 17 J. DEMOCRACY 110, 111 (2006) (noting military's "perception of itself as the country's only viable institution"); STEPHEN P. COHEN, THE PAKISTAN ARMY 37, 107–110, 120–21 (2d ed. 1998) (discussing military's rationales for its interventions in politics and governance). This understanding is evident, for example, in the essays published by the Pakistan Army in 2000 on the military's role in nation building. PAK. ARMY GEN. HEADQUARTERS, *supra* note 64.

70. COHEN, *supra* note 48, at 71.

greed”<sup>71</sup>)—and in part can be further traced to a more fundamental, longstanding suspicion of the capacity of ordinary Pakistani citizens to engage in democratic self-governance.<sup>72</sup> On this basis, the military justifies routine involvement in activities far afield of its mandate, which constitutionally is limited to “defend[ing] Pakistan against external aggression or threat of war, and . . . act[ing] in aid of civil power when called upon” by civilian authorities.<sup>73</sup> For example, despite evidence that military-run enterprises are frequently mismanaged and inefficient—often only appearing viable due to hidden subsidies—the military repeatedly asserts that its economic activities benefit Pakistan’s development.<sup>74</sup> Military regimes have also invoked this understanding to engage in high-profile (and highly selective) efforts to combat corruption. While these initiatives have targeted interests opposed to the deep state, they invariably have shielded those aligned with it, including interests within the military itself, whose institutionalized self-dealing activities are often deemed outside the realm of “corruption” altogether.<sup>75</sup> This rationale also has

71. SIDDQA, *supra* note 33, at 61–65, 249. Musharraf, for example, refers to the period of civilian rule preceding his coup as the “dreadful decade of democracy,” during which Pakistan endured “the worst kind of governance” and “corruption and the plunder of national wealth.” PERVEZ MUSHARRAF, *IN THE LINE OF FIRE* 71, 78 (2006); *see also* SCHAFFER & SCHAFFER, *supra* note 37, at 61 (“Thinly veiled contempt for civilians, and in particular for Pakistan’s politicians, is characteristic of Pakistan army officers.”); Adam Gabbatt, *Pervez Musharraf Vows Return to “Suffering” Pakistan During Visit to US*, *GUARDIAN*, July 1, 2012, <http://www.guardian.co.uk/world/2012/jul/01/pervez-musharraf-pakistan-return-aspn> (quoting Musharraf’s opinion that “the state is being run to the ground” by civilians “and people are again running to the military to save the country”).

72. For example, in his autobiography, Pakistan’s first military ruler, General Ayub Khan, questioned the ability of ordinary citizens to think “in terms of national policies.” MOHAMMAD AYUB KHAN, *FRIENDS NOT MASTERS: A POLITICAL AUTOBIOGRAPHY* 207–15 (1967). Similarly, opposition political figure Imran Khan recounts more recent conversations with senior military officials who lamented to him, with an air of resignation, that unfortunately “the people of Pakistan voted for crooks.” IMRAN KHAN, *PAKISTAN: A PERSONAL HISTORY* 222–23 (2011) [hereinafter *KHAN, PAKISTAN: A PERSONAL HISTORY*].

73. PAKISTAN CONST. art. 245, § 1; *see also* SIDDQA, *supra* note 33, at 59 (noting similar provisions in the constitutions of 1956 and 1962).

74. *See* SIDDQA, *supra* note 33, at 219–42 (analyzing financial data from military-affiliated foundations and enterprises). As Musharraf protested in 2004, “[W]hat is the problem if these organizations . . . are doing a good job contributing to the economy . . . ?” *Id.* at 15; *see also* LIEVEN, *supra* note 9, at 168–73 (defending role played by military-affiliated enterprises in Pakistan’s economy).

75. *See* SIDDQA, *supra* note 33, at 95 (describing military’s anticorruption efforts “as a security valve to be turned on and off as a means to regulate the political system”); *KHAN, supra* note 11, at 671–72 (criticizing selective, arbitrary, and nontransparent nature of Musharraf’s anticorruption campaign against civilian politicians and bureaucrats); RIZVI, *supra* note 42, at 98–102 (discussing anticorruption campaign under General Ayub Khan’s military regime against civilian politicians and civil bureaucrats); Shah, *supra* note 40, at 215 (discussing Musharraf’s “selective and arbitrary anti-corruption campaign” against civilian politicians, “which explicitly leaves out military officers and judges.”); *see also* Akhil Gupta, *Blurred Boundaries:*

justified other efforts to control civilian politicians, such as the rules extraconstitutionally imposed by Musharraf in 2002 that limited eligibility for legislative office to individuals with university degrees.<sup>76</sup>

The strength of Pakistan's deep state transcends and eclipses its periodic transitions from military to civilian rule and therefore inhibits the nation's prospects for democratic consolidation and constitutionalism. The military's accumulation of power and status over an extended period of time has not only strengthened it as an institution, in a path dependent manner, but also has given it vested interests in undermining representative institutions to preserve that accumulated power and status.<sup>77</sup> Outside the military's formal institutional boundaries, the strength of Pakistan's deep state ensures that other elites and institutions—often including its judges and courts—*independently* share the military's interests in that dominance, frequently without any need for formal collaboration, coordination, or coercion. These shared interests are reinforced by a shared legitimating discourse that justifies military supremacy and delegitimizes democratic governance and which, over time, has become deeply embedded within Pakistan's day-to-day discourse—including its legal discourse.

As in other countries where military interests are dominant, such as Egypt<sup>78</sup> and Turkey,<sup>79</sup> rolling back deep state power in

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*The Discourse of Corruption, the Culture of Politics, and the Imagined State*, 22 AM. ETHNOLOGIST 375, 388–89 (1995) (arguing, given how conceptions of “corruption” and “accountability” are socially produced, that “there are always divergent and conflicting assessments of whether a particular course of action is ‘corrupt’”).

76. Conduct of General Elections Order, 2002, § 8A, Chief Executive's Order No. 7 of 2002 (Pak.) (requiring federal and provincial legislators to possess at least a “bachelor degree in any discipline or any degree recognized as equivalent by the University Grants Commission”). That requirement not only advanced and reinforced the regime's legitimating discourse, but also helped it manipulate politics, since it “accredited Musharraf's allies in the religious parties—many of whose madrasah experiences were somehow certified as being equivalent to a master's or even a Ph.D.—while disqualifying local politicians with years of experience earning the trust of their constituents.” Omar Waraich, *Pakistan's Fake-Degree Scandal*, TIME, July 21, 2010, <http://www.time.com/time/world/article/0,8599,2005254,00.html>.

77. See SIDDIQA, *supra* note 33, at 17 (noting that “[m]ilitaries that develop deep economic interests or have a pervasive presence in the economy shrink from giving up political control”); Aqil Shah, *Security, Soldiers, and the State*, in THE FUTURE OF PAKISTAN 199, 199 (Stephen P. Cohen ed., 2011) (“Over time, the military has developed both an institutional culture legitimizing its intervention in, influence on, and control of the state and a vested corporate interest in maintaining its dominance.”).

78. See YEZID SAYIGH, ABOVE THE STATE: THE OFFICERS' REPUBLIC IN EGYPT (2012), available at [http://carnegieendowment.org/files/officers\\_republic1.pdf](http://carnegieendowment.org/files/officers_republic1.pdf) (explaining the dominant political, economic, and social role played by the Egyptian military and its affiliated interests); Shana Marshall & Joshua Stacher, *Egypt's Generals and Transnational Capital*, 262 MIDDLE E. REP. (2012), available at <http://www.merip.org/mer/mer262/egypts-generals-transnational-capital> (documenting



Pakistan may not lend itself to standard prescriptions arising from conventional accounts of constitutional and political change. Christine Fair warns that even if the military withdrew from an active political role, that shift would be fleeting absent a “simultaneous increase in the civilians’ political will and capacity to govern”; Ayesha Siddiqa argues that successful democratic consolidation would require a “strong domestic movement backed by external pressure” from international actors.<sup>80</sup> Over the long term, Pakistan’s evolution out of the gray zone will require, among other things, the development of stronger representative institutions, with improved capacity for governance and the power to rein in these entrenched deep state interests.

### B. *Constitution, Extraconstitution, and Transformative Preservation*

Pakistan’s history makes one fact perfectly clear: far from consistently fostering development of those stronger and more capable representative institutions, its judiciary historically has played precisely the opposite role, joining other actors to actively enable the military’s subversion and control of democratic politics. First, when the military has seized direct political control, the Supreme Court has validated those interventions on *extraconstitutional* grounds of “state necessity,” facilitating a legal dimension to the process of transformative preservation. Second, when civilian rule formally has been restored, the court has continued to play an analogous role—under *constitutional* auspices—in validating dismissal of civilian governments, either at the behest or with tacit approval of the military. In both instances, the judiciary and its legal discourse have reinforced the broader, antidemocratic legitimating discourse justifying military dominance. As a result, by routinely adjudicating the validity of changes in government, Pakistan’s judiciary—in both its constitutional and extraconstitutional avatars—has become deeply enmeshed in what Ran Hirschl calls “pure politics” or “mega-politics”: “watershed

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the extensive reach of the economic enterprises controlled or influenced by the Egyptian military); Jeannie Sowers, *Egypt in Transformation, in THE JOURNEY TO TAHRIR: REVOLUTION, PROTEST AND SOCIAL CHANGE IN EGYPT, 1999–2011*, at 1, 16 (Jeannie Sowers & Chris Toensing eds., 2012) (discussing challenges faced by “newly elected civilian leaders to gain oversight over the military’s opaque budget, extensive land ownership, economic activities, and other privileges”).

79. See Bâli, *supra* note 2, at 246–47 (noting that the “persistent legacy of . . . repressive strategies” by the military and its affiliated interests is “embedded in Turkish constitutional culture”); Hootan Shambayati, *Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics*, in *RULE BY LAW*, *supra* note 4, at 283 (discussing continued strength of military interests during periods of civilian rule in Turkey).

80. Fair, *supra* note 28, at 79; SIDDIQA, *supra* note 33, at 24.

questions of nation building and collective identity that lie at the heart of a nation's self-definition," including "core regime legitimacy."<sup>81</sup>

### 1. Extraconstitutional "Necessity"

When Pakistan's military has directly seized power, it has engaged in a multistage process of constitutional transformation, relying upon the judiciary in a manner that both draws upon and reinforces the broader rationales used to legitimate its dominance.<sup>82</sup> First, the military formally declares an existential or near-existential threat to the state, which justifies displacement of the constitution in favor of a parallel legal framework, often styled as a Provisional Constitution Order (PCO) that strengthens viceregal governance. Elsewhere, I have termed this parallel order an *extraconstitution*, given its paradoxical status as the constitution's legal doppelgänger: while the extraconstitution self-consciously displaces the constitution, it simultaneously seeks legitimacy by mimicking and fostering the appearance of adherence to regular legal and institutional forms.<sup>83</sup> For example, in more recent iterations of this process, while the extraconstitution has relied upon the existing judiciary, it often has simultaneously reconstituted and constrained the judiciary, typically by requiring judges to take new oaths of office swearing allegiance to the extraconstitution itself to retain their positions.<sup>84</sup>

Second, the military seeks judicial validation of the takeover—from the safely reconstituted judiciary—under the doctrine of "state necessity." This extraconstitutional doctrine was first articulated in the 1950s, amidst a conflict between Pakistan's Constituent Assembly, which was poised to ratify its first constitution, and the

81. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 113 (2008); Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 723 (2006); see also Maryam Khan, *The Politics of Public Interest Litigation in Pakistan in the 1990s*, 2 SOC. SCI. & POL'Y BULL. 2, 2 (2011) (discussing transformation of Supreme Court of Pakistan between 1988 and 1999 "from a device for regime legitimation into a self-preserving and autonomous (albeit highly politicized) power broker between a military-backed executive and a highly fragile and fragmented parliament.").

82. See Kalhan, *supra* note 12, at 100–05 (identifying and conceptualizing patterns of extraconstitutional change in Pakistan); Mohammad Waseem, *Constitutionalism in Pakistan: The Changing Patterns of Dyarchy*, 53 DIOGENES 102, 109 (2006) (arguing that military regimes in Pakistan understand themselves to act "in transitional terms," to facilitate "change[s] in the constitutional edifice according to [their] own preferences and priorities").

83. See Kalhan, *supra* note 12, at 101; Tamir Moustafa & Tom Ginsburg, *The Functions of Courts in Authoritarian Politics*, in RULE BY LAW, *supra* note 4, at 1, 5–7 (discussing authoritarian regimes' use of courts to "make up for their questionable legitimacy by . . . giv[ing] the image, if not the full effect, of constraints on arbitrary rule").

84. See Kalhan, *supra* note 12, at 103.

Governor-General, who disagreed with the vision of parliamentary supremacy and federalism animating that document.<sup>85</sup> Declaring that Pakistan's "constitutional machinery has broken down," the Governor-General proclaimed an emergency and dissolved the Assembly before it could ratify the proposed constitution.<sup>86</sup> Subsequent executive and judicial responses deepened the crisis by effectively creating a legal and constitutional vacuum.<sup>87</sup> Pakistan's Federal Court then validated the Governor-General's extralegal measures to address the crisis as justified not by the nation's interim constitutional framework, but rather by an extraconstitutional principle of "state necessity."<sup>88</sup> Since then, through several military interventions, Pakistan's Supreme Court has developed—and even exported to other countries as persuasive authority<sup>89</sup>—a body of extraconstitutional jurisprudence elaborating this doctrine, which has proven remarkably durable.<sup>90</sup> While again fostering the appearance of regularity, the doctrine functions in a self-justifying manner, akin to what David Dyzenhaus, following Johan Steyn, calls a "legal black hole": a "zone in which officials can act unconstrained" by the

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85. Governor-General's Reference, (1955) 7 PLD (FC) 435, 435–36 (Pak.); see also MCGRATH, *supra* note 20, at 102–33 (discussing the constitutional conflict between the Governor-General and Constituent Assembly); Mahmud, *supra* note 20, at 1233–34 (same).

86. Tamizuddin Khan v. Fed'n of Pak., (1955) 7 PLD (FC) 240, 251 (Pak.) (quoting Proclamation of Emergency).

87. *Id.* (invalidating several dozen statutes adopted by the Constituent Assembly prior to its dissolution for lack of assent to those laws by the Governor-General); Usif Patel v. Crown, (1955) 7 PLD (FC) 387, 388 (Pak.) (rejecting the Governor-General's attempt to fill the legal vacuum using his executive power to issue an emergency ordinance).

88. *Governor-General's Reference*, (1955) PLD (FC) at 478 (upholding Governor-General's extraconstitutional order to validate and enforce previously invalidated laws "with a view toward preventing the State from dissolution" before a new Constituent Assembly has been convened); see also NEWBERG, *supra* note 20, at 54–60 (discussing constitutional crisis arising from Governor-General's dissolution of the Constituent Assembly).

89. See Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat and Common Law*, 27 CORNELL INT'L L.J. 49, 51–93 (1994) (discussing reliance on Pakistan's extraconstitutional jurisprudence in Uganda, Rhodesia, Seychelles, Grenada, and Lesotho).

90. For subsequent cases applying versions of the doctrine of state necessity, see Zafar Ali Shah v. Musharraf, (2000) 52 PLD (SC) 869, 881 (Pak.); Nusrat Bhutto v. Chief of Army Staff, (1977) 29 PLD (SC) 657, 733–763 (Pak.); see also State v. Dosso, (1958) 10 PLD (SC) 533, 538–39 (Pak.) (applying extraconstitutional doctrine of "revolutionary legality"). As one Supreme Court justice noted in 2007, "We keep on burying the . . . doctrine of necessity but it keeps haunting us." Nasir Iqbal, *SC Urged To Bury Doctrine of Necessity*, DAWN, Oct. 23, 2007, <http://archives.dawn.com/2007/10/23/top3.htm>; see also sources cited *supra* note 20.

constitution and which “in advance declares what they do to be legal” and “by definition both necessitous and made in good faith.”<sup>91</sup>

Importantly, if unsurprisingly, the Supreme Court’s articulation of state necessity, along with other extraconstitutional principles flowing from that assertion of necessity, both echoes and contributes to the legitimating discourse advanced by the military to delegitimize democratic politics in favor of its own supremacy. For example, in validating Zia’s 1977 coup, the court credited the military with “sav[ing] the country at a time of grave national crisis.”<sup>92</sup> The court quoted approvingly from Zia’s speech announcing the coup, accepting his claim that the civilian government had lost “constitutional and moral authority” on account of alleged electoral corruption and subsequent unrest by opposition parties.<sup>93</sup> When it validated Musharraf’s 1999 coup, the court reinforced this discourse more forcefully, endorsing the military’s claims that corruption, incompetent governance, and even inadequate macroeconomic performance justified the takeover.<sup>94</sup> The court even took notice of the “fact” that the Pakistani people had “welcomed” the coup because of the military’s pledge to hold politicians accountable.<sup>95</sup> Similarly, when it upheld Musharraf’s extraconstitutional order requiring legislators to hold university degrees, the court recounted at length what it called the “sad tale of failures on the part of the public representatives” under civilian rule, concluding that the order “deserves approval [as] the first step aimed at bringing about a change in the political culture” and “rais[ing the Assemblies’] level of competence.”<sup>96</sup> With both coups, the court empowered the regime to take any actions—including promulgation of constitutional amendments—“which tend to advance or promote the good of the people,” in each case expressing faith in the military’s stated intention to only hold power long enough to deliver Pakistan more stable, competent governance.<sup>97</sup> Although the court in each instance

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91. David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2032 (2006); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004).

92. *Nusrat Bhutto*, (1977) PLD (SC) at 723.

93. *Id.* at 716; see also NEWBERG, *supra* note 20, at 163–64 (discussing the Supreme Court’s “agreement with the military that election corruption and political disruptions . . . had so compromised the PPP government that it could no longer represent the electorate”).

94. See *Zafar Ali Shah*, (2000) PLD (SC) at 1129–52.

95. *Id.* at 1219.

96. *Pak. Muslim League (Q) v. Chief Executive*, (2002) 54 PLD (SC) 994, 1026–28 (Pak.), *overruled by* *Muhammad Nasir Mahmood v. Fed’n of Pak.*, (2009) 61 PLD (SC) 109 (Pak.). While the court conceded that “[n]o doubt wisdom is not related with degrees,” it nevertheless concluded that “this is an exception to the rule.” *Id.* at 1028.

97. *Zafar Ali Shah*, (2000) PLD (SC) at 1220; *Nusrat Bhutto*, (1977) 29 PLD (SC) at 716.

posited limits on the legitimate scope of authority justified by necessity, in each case the military disregarded those limits.<sup>98</sup>

Third, the constitution is eventually “revived”—which creates a quandary, as two parallel legal regimes contend for sovereignty: the constitution, supposedly restored, and the extraconstitution, whose very existence, constitutionally speaking, constitutes treason.<sup>99</sup> Formally, Parliament must therefore decide whether the revived constitution, the extraconstitution, or some hybrid will reign supreme. Under both Zia and Musharraf, Parliament responded by adopting amendments incorporating the extraconstitution’s provisions into the constitutional order itself—thereby completing the process of effecting permanent constitutional change upon restoration of civilian rule. In each instance, however, the Parliament that granted its assent lacked meaningful democratic credentials, due to election irregularities and other forms of military interference.<sup>100</sup>

## 2. Constitutionalized “Necessity”

Using this extraconstitutional process, military regimes have periodically transformed Pakistan’s constitutional order, strengthening its viceregal character to extend the military’s power into periods of civilian rule. Upon “revival” of the constitution under Zia’s regime in 1985, for example, Parliament adopted the Eighth Amendment, which vested sweeping authority in the presidency—which remained closely associated with the military—at the expense of the Prime Minister and Parliament.<sup>101</sup> Through these transformations, the military preserved its supremacy notwithstanding the nominal return of civilian rule, effecting a

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98. See *Zafar Ali Shah*, (2000) PLD (SC) at 1219–23 (announcing the expectation that elections would be held within three years and announcing limits on powers justified by extraconstitutional necessity); *Nusrat Bhutto*, (1977) PLD (SC) at 723 (cautioning Zia to ensure that “the period of constitutional deviation shall be of as short a duration as possible”); see also KHAN, *supra* note 11, at 473–74, 495–97, 652–79 (discussing military’s noncompliance with limits set forth by Supreme Court in these cases).

99. PAKISTAN CONST. art. 6, § 1 (proscribing extraconstitutional subversion of the constitution as treason).

100. See KHAN, *supra* note 11, at 509–17, 667–71 (discussing Parliament’s adoption of Eighth Amendment and Seventeenth Amendment). These amendments also have indemnified extraconstitutional actions from being charged as treason. See PAKISTAN CONST. arts. 270A, 270AA (repealed 2010).

101. See Mahmud, *supra* note 20, at 1284–85 (discussing the extensive presidential powers conferred by the Eighth Amendment); Mohammad Waseem, *Pakistan’s Lingering Crisis of Dyarchy*, 32 ASIAN SURV. 617, 620–22 (1992) (discussing Eighth Amendment); Haris Gazdar, *Goodbye General Musharraf, Hello “Troika,”* ECON. & POL. WKLY., Dec. 15, 2007, at 8, 9 (noting that under the system established by the Eighth Amendment, the President’s principal role was “to protect the corporate interests of the military” and to serve as “the constitutional lever through which the military acted”).

transition, as Paula Newberg describes, from “military rule to civilian martial law.”<sup>102</sup> Indeed, Zia himself, who remained both President and Army Chief, candidly described the supposedly revived, but fundamentally transformed constitutional order as “no rival or adversary” of the erstwhile military regime, but rather its “extension.”<sup>103</sup>

The most consequential provision within this system of “civilian martial law” was Article 58(2)(b), which authorized the President to dissolve the National Assembly when, “in his opinion . . . a situation has arisen in which the Government . . . cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.”<sup>104</sup> Between 1988 and 1996, the provision was used to dismiss all four governments that held office.<sup>105</sup> Defenders described it as a “safety valve,” enabling elected governments to be held accountable and thereby preventing crises that might otherwise prompt military intervention.<sup>106</sup> Indeed, in 2000, the Supreme Court went further, directly connecting its extraconstitutional validation of Musharraf’s coup under the doctrine of necessity to Article 58(2)(b)’s repeal in 1997. The court asserted that if the provision still had been available, then the government instead could have been dissolved constitutionally and Musharraf’s extraconstitutional takeover “could have been avoided.”<sup>107</sup>

The Supreme Court’s assertion, however, simply highlights the manner in which Article 58(2)(b) rearticulated and internalized, in

102. NEWBERG, *supra* note 20, at 190–91; *see also* CHADDA, *supra* note 33, at 69 (discussing Eighth Amendment’s “uneasy balance” between “the power of the military-bureaucratic oligarchy, on the one hand, and the demand for civilian rule on the other”). As I have explained elsewhere, the logic of this paradoxical approach to “democratic” transition—which seeks to “liberalize . . . power while still retaining control”—has antecedents in the British colonial state’s responses to the Indian independence movement. Kalhan, *supra* note 12, at 116–18; Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 126–31 (2006) (discussing sweeping emergency powers available to central executive under colonial-era legal framework in India).

103. *See* Hasan-Askari Rizvi, *The Civilianization of Military Rule in Pakistan*, 26 ASIAN SURV. 1067, 1067 (1986) (quoting Zia).

104. PAKISTAN CONST. art. 58, § 2, cl. b. (repealed 2010). An analogous provision conferred discretion upon provincial governors, who are appointed by the President, to dissolve provincial assemblies. PAKISTAN CONST. art. 112, § 2, cl. b. (repealed 2010). Parliament repealed these provisions in 1997, but Musharraf reinstated them following his 1999 coup. They were again repealed when the post-Musharraf Parliament adopted the 18th Amendment in 2010. *See infra* Parts III, IV.

105. *See* Siddique, *supra* note 21, at 634.

106. *Id.* at 638–39, 712 (citing defenders); *see also* Kennedy, *supra* note 36, at 73–74 (arguing that Article 58(2)(b) succeeded at “keeping the military in the barracks” and “provided some degree of accountability to civilian governments”).

107. *See* Zafar Ali Shah v. Musharraf, (2000) 52 PLD (SC) 869, 1218 (Pak.); *see also* Mahmood Khan Achakzai v. Fed’n of Pak., (1997) 49 PLD (SC) 426, 472–80 (Pak.) (asserting, prematurely, that Article 58(2)(b) had “shut the door on Martial Law forever”).

*constitutional* terms, a power to dismiss civilian governments comparable to that which the military already had long exercised on *extraconstitutional* grounds.<sup>108</sup> As a normalized, constitutional mechanism, Article 58(2)(b) has even been considered more destabilizing than extraconstitutional interventions, insofar as it can appear more efficient and benign—and therefore more readily be used.<sup>109</sup> Together with other presidential powers, Article 58(2)(b) had precisely that destabilizing effect, as the military used its availability as an additional means of manipulating civilian politicians.<sup>110</sup> The looming possibility of dissolution also affected political parties' own conduct. When in government, the expectation of a limited, uncertain tenure "condition[ed] party elites to maximize rents" while in office and to curry favor with the military to forestall dismissal.<sup>111</sup> When in opposition, parties enlisted military support for dismissal of their adversaries' governments—hoping to thereby ascend to power themselves through early elections.<sup>112</sup> The military was therefore able to effectively "divide and rule" civilian political leadership, and

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108. See SIDDIQI, *supra* note 33, at 89 (explaining that because of Article 58(2)(b), the military "no longer [needed] to stage a coup" but could "simply prevail upon the president . . . to remove the elected government"); Kalhan, *supra* note 12, at 110–15 (illustrating, using the example of emergency powers, how constitutional authority can functionally approximate extraconstitutionality). Revealingly, the actual dismissals were implemented in a "coup-like manner," with the military deployed to control government buildings, including the Prime Minister's residence. RIZVI, *supra* note 42, at 209, 215, 224–25; see also INT'L CRISIS GRP., *supra* note 71, at 9 (stating that the decision to dismiss Bhutto in 1990 was made at an Army Corps commanders' meeting); Lodhi & Hussain, *supra* note 41 (describing measures to implement Bhutto's dismissal as "tantamount to a coup in civilian disguise").

109. See Siddique, *supra* note 21, at 712 ("Direct martial laws are at least blatantly illegal and easy to identify and condemn."); see also Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 112 YALE L.J. 1011, 1092–94, 1099 (2002) (discussing risks of exceptional powers becoming normalized as "[g]overnment and its agents grow accustomed to the convenience of emergency powers," and urging the virtues of an "extra-legal measures" model of emergency powers that calls upon officials "to act outside the legal order while openly acknowledging their actions"); Mark Neocleous, *From Martial Law to the War on Terror*, 10 NEW CRIM. L. REV. 489, 506 (2007) (arguing that authoritarian regimes increasingly prefer the language of "emergency powers," which "better connotes neutrality and necessity," to that of "martial law").

110. See Siddique, *supra* note 21, at 633 (noting that Bhutto's use of a civilian militia to enforce his policies and keep the military out of politics had the effect of "institutionalizing the use of the state's coercive arm"); Waseem, *supra* note 101, at 630–31 (arguing that the imbalances of power under the Eighth Amendment effected an "enormous expansion of presidential power" and gave rise to "an ad hoc approach to official business").

111. Fair, *supra* note 35, at 576.

112. *Id.*; see also SIDDIQI, *supra* note 33, at 91–95 (discussing parties' attempts during 1990s to "lure the army" to support them in short-term political conflicts with their opponents "by offering the generals greater economic incentives and opportunities").

no elected government in this period was permitted to complete a full term in office.<sup>113</sup>

Because all four dissolution orders were challenged before the Supreme Court, the court continued to play a pivotal role—under constitutional auspices, but functionally comparable to its longstanding extraconstitutional role—in validating the displacement of civilian government.<sup>114</sup> To be sure, unlike the self-justifying, extraconstitutional doctrine of necessity, Article 58(2)(b) did not create a “legal black hole” wholly lacking any limitations upon executive power—or even necessarily what Dyzenhaus terms a “legal grey hole,” in which such limits are “so insubstantial that they pretty well permit government to do as it pleases.”<sup>115</sup> To the contrary, the court, at least theoretically, could have exercised its review in a manner that imposed meaningful limits on the dissolution power—similar, for example, to the role played by the Supreme Court of India’s decision in *S.R. Bommai v. India*,<sup>116</sup> which effectively constrained the Indian central government’s use of its power to dissolve state assemblies by requiring “substantial constitutional reasons” for it to do so.<sup>117</sup> The Pakistan Supreme Court’s Article 58(2)(b) cases even offered glimmers of that possibility, with two of those four judgments invalidating dissolution orders under a stringent legal standard that narrowly defined the circumstances in which dissolution would be permitted.<sup>118</sup>

In practice, however, the Supreme Court did not meaningfully inhibit the dissolution power. The court lurched inconsistently in its jurisprudence, in terms of both the legal standard and the degree of scrutiny over the factual basis for dismissal, and at times exhibited ideological and partisan affinities toward deep state interests.<sup>119</sup> In the two decisions upholding dissolution orders, both involving dismissal of governments led by the Pakistan People’s Party’s (PPP)

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113. See Siddique, *supra* note 21, at 711.

114. One can think of this as akin to deciding a case with political implications similar to those of *Bush v. Gore*, 531 U.S. 98 (2000), every few years.

115. Dyzenhaus, *supra* note 91, at 2018.

116. A.I.R. 1994 S.C. 1918.

117. Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70, 77 (2007); see also S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 150–59 (2003).

118. Fed’n of Pak. v. Muhammad Saifullah Khan, (1989) 41 PLD (SC) 166, 188 (Pak.) (requiring “the machinery of the Government [to have] broken down completely, its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution”); see also Muhammad Nawaz Sharif v. President of Pak., (1993) 45 PLD (SC) 473, 579 (Pak.) (following *Saifullah Khan*, and describing dissolution as “an exceptional power provided for an exceptional situation” which “must receive . . . the narrowest interpretation”).

119. See Siddique, *supra* note 21, at 715 (arguing that “political and personality preferences of the judges . . . come through strongly in” the court’s Article 58(2)(b) opinions).



Benazir Bhutto, the court departed from earlier cases in which it had invalidated dissolution orders, modifying its legal standard and reviewing the factual basis for dissolution more deferentially.<sup>120</sup> But even in the two instances in which the court invalidated dissolution orders—both involving prime ministers and political parties more closely associated than the PPP with Zia and the deep state<sup>121</sup>—the military's behind-the-scenes maneuvering ensured that the governments were dismissed in any event. In the first case, the Army Chief privately prevailed upon the Supreme Court not to restore the ousted government as a remedy for the unlawful dissolution of Muhammad Khan Junejo's government, and the court declined to do so.<sup>122</sup> In the second, although the court did reinstate the dismissed government of Nawaz Sharif, the military soon pressured both the Prime Minister and President to resign, rendering the court's decision inconsequential.<sup>123</sup>

When dissolution orders were upheld, the Supreme Court essentially reprised its traditional, extraconstitutional role. Like the court's extraconstitutional jurisprudence of state necessity, the dissolution orders and the judicial decisions upholding them reinforced the legitimating discourse advanced by the military to justify its supremacy and delegitimize democratic politics. Each dissolution order was justified in part based on charges of corruption and mismanagement—although in fact, dismissal in each instance

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120. See *Ahmad Tariq Rahim v. Fed'n of Pak.*, (1992) 44 PLD (SC) 646, 664 (Pak.) (permitting the dissolution power to be exercised if there is an "actual or imminent breakdown of the constitutional machinery" (emphasis added)); *Benazir Bhutto v. President of Pak.*, (1998) 50 PLD (SC) 388, 430 (Pak.) (rejecting need for a "total breakdown of Constitutional machinery," and instead permitting dissolution "where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution" (emphasis added)).

121. See TALBOT, *supra* note 33, at 261–63, 291–95 (discussing close relationships between the governments of Muhammad Khan Junejo and Nawaz Sharif and the military leadership); Nasr, *supra* note 40, at 523 ("It is an open secret in Pakistan that [the political party coalition led by Nawaz Sharif] was put together by the military's Inter-Services Intelligence . . . to prevent a PPP sweep at the polls."); see also COLL, *supra* note 60, at 438 (characterizing PML-N's Nawaz Sharif as the "civilian face" of the military's "favored [political] alliance" during the 1990s).

122. See *Saifullah Khan*, (1989) PLD (SC) at 192–95 (declining to reinstate dissolved assemblies); HAMID KHAN, EIGHTH AMENDMENT: CONSTITUTIONAL AND POLITICAL CRISIS IN PAKISTAN 56 (1994) (discussing private communications by Army Chief Mirza Aslam Baig to the Supreme Court admonishing it not to reinstate the dissolved National Assembly).

123. See *Nawaz Sharif*, (1993) PLD (SC) at 570 (ordering Nawaz Sharif's dissolved government to be reinstated); see also NEWBERG, *supra* note 20, at 219–20 (discussing military's subsequent "orchestrat[ion]" of the removal of both the President and the Prime Minister, which rendered "[t]he force of the court's restoration order . . . merely heuristic"); RIZVI, *supra* note 42, at 216–19.

only came after other perceived threats to the military's interests.<sup>124</sup> As it had under the doctrine of necessity, the court credited those allegations as valid bases for dismissal, thereby further contributing to the military's legitimating discourse for its supremacy.<sup>125</sup> Politically, the court's decisions had an ideological cast. By invalidating the dissolution of governments led by parties closely affiliated with deep state interests, but then failing to apply the same principles when reviewing dismissal of Bhutto's PPP-led governments, the court enhanced its own role as an institutional "power broker," but at the expense of its own perceived neutrality and autonomy from the deep state.<sup>126</sup>

### C. *The Effect on Judicial Independence and Constitutionalism*

Transformative preservation has shaped the judiciary's role, institutional identity, and independence in important ways, contributing to a disequilibrium that has hindered consolidation of democracy, civilian rule, and constitutionalism. While observers frequently state that Pakistan's judiciary has traditionally lacked "independence,"<sup>127</sup> that characterization, though not altogether inaccurate, paints an incomplete picture. Although often discussed as an abstract, unitary ideal, judicial independence is not a static, all-or-nothing concept, or even a concept that exists along a one-dimensional continuum, akin to the commonplace depiction in Figure 1. Rather, as Stephen Burbank has explained, it arises from the evolving aggregation of "relationships and interdependencies" within which the judiciary is embedded, more akin to the depiction in Figure 2.<sup>128</sup> Judicial independence is also not an absolute end in itself, but exists to serve other normative goals—democracy, constitutionalism,

124. See Shah, *supra* note 40, at 213 (arguing that each government was "ousted only after . . . crossing lines drawn in their powersharing scripts written by the military").

125. See *Ahmad Tariq Rahim*, (1992) PLD (SC) at 653, 666–67 (crediting "corruption and nepotism" as legitimate and permissible grounds for dissolution, even if not "independently sufficient"); *Benazir Bhutto*, (1998) PLD (SC) at 434–38 (crediting corruption, favoritism, and nepotism as legitimate and permissible grounds for dissolution); KHAN, *supra* note 11, at 557–58, 613–16 (discussing the *Ahmad Tariq Rahim* and *Benazir Bhutto* cases).

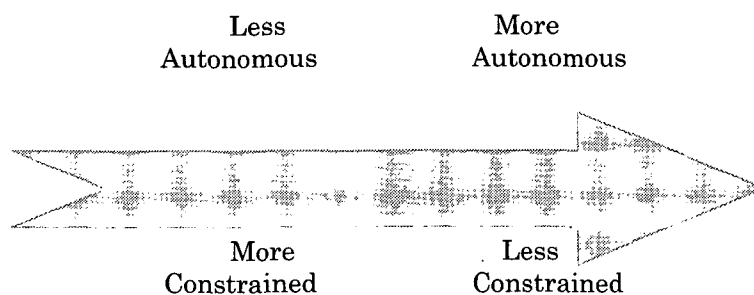
126. MALIK ET AL., *supra* note 39, at 167.

127. See, e.g., INT'L BAR ASS'N, A LONG MARCH TO JUSTICE: A REPORT ON JUDICIAL INDEPENDENCE AND INTEGRITY IN PAKISTAN 33 (2009); KHAN, *supra* note 11, at 758; Kausar, *supra* note 22, at 28; U.S. AGENCY FOR INT'L DEV., PAKISTAN RULE OF LAW ASSESSMENT—FINAL REPORT 11 (2008).

128. Burbank, *supra* note 16, at 317; see also Friedman, *supra* note 16, at 330 ("The decisions of courts are influenced by the institutional structure in which they are embedded."); Goldenziel, *supra* note 15, at 13 (distinguishing between "full" and "constrained" judicial independence); Schuck, *supra* note 16, at 8 ("[J]udicial independence is not a binary phenomenon; it is manifestly a matter of degree.").

fundamental rights, the rule of law, and others.<sup>129</sup> Those ends may vary in importance from one context to another. For gray zone countries such as Pakistan or Egypt, for example, strengthening civilian representative institutions and enhancing mechanisms of judicial accountability may be more important than in other settings—suggesting a conception of judicial independence and the judicial role more oriented toward “representation reinforc[ement]” than may appear necessary in other contexts.<sup>130</sup>

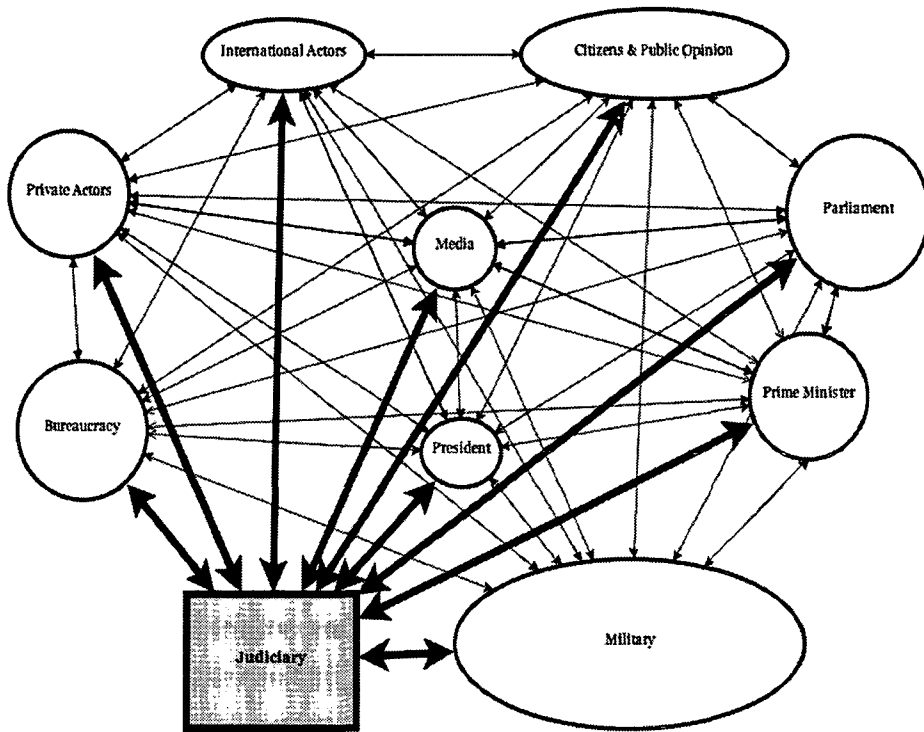
**Figure 1—Judicial Independence: Along a Continuum of Autonomy vs. Constraint**



129. See Burbank & Friedman, *supra* note 17, at 11–22 (emphasizing that judicial independence is a “means to an end,” not an end in itself); Ferejohn and Kramer, *supra* note 17, at 994–95 (“[Judicial] independence and accountability . . . are *means* toward a more fundamental goal: the construction of a well-functioning judiciary.”).

130. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101–02 (1980); Michael C. Dorf, *The Coherencism of Democracy and Distrust*, 114 *YALE L.J.* 1237, 1237 (2005) (assessing and critiquing “representation-reinforcement” theories of constitutional interpretation); Bâli, *supra* note 2, at 238–39 (arguing that democratic transitions “require a different definition of judicial independence, one that incorporates a measure of interdependence . . . between the branches and introduces forms of judicial accountability that underpin the democratic legitimacy of the courts’ powers of review”).

**Figure 2—Judicial Independence: Arising from “Relationships and Interdependencies”**



Both descriptively and normatively, therefore, a more complete understanding of judicial independence demands attention to the evolving balance between judicial autonomy and judicial constraint across an array of dimensions, and the extent to which that balance advances the particular ends it exists to serve in any given context. The relationships from which the judiciary’s independence or lack of independence arises are manifold: for example, between the judiciary and other government actors, private interest groups, lawyers and bar associations, the media, the people at-large, and, for many gray zone countries, the military.<sup>131</sup> Within each of these relationships, the

131. See UPENDRA BAXI, *COURAGE, CRAFT, AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES* 27–36 (1985) (analyzing the relationships between the judiciary and a range of other entities and interests, including the executive, the legal profession, and the public at large, as determinants of “judicial independence”); Remus, *supra* note 18, at 144–45 (discussing relationships between judiciary and

balance between autonomy and constraint may be shaped at many points of potential influence—including the judiciary’s institutional structure, the processes of appointing and removing judges, the regulation of judicial conduct, the administration of judicial business, and the means of responding to substantive judicial decisions. The overall balance also may be affected by other laws, institutions, and norms, including the scope of judicial power, and even (as depicted in Figure 2) by the relationships among nonjudicial actors themselves.<sup>132</sup>

This multidimensional conception of judicial independence complicates some conventional assumptions underlying discussions of the judiciary and is particularly useful in understanding the role of the judiciary for countries within the gray zone.<sup>133</sup> Given the role that status quo interests can play in undermining constitutionalism and representative institutions, the overall balance between judicial autonomy and constraint for gray zone countries must contemplate and serve the long-term objective of reining in and ultimately rolling back the power of those entrenched interests.<sup>134</sup> For Pakistan,

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political branches of government, public at large, and private interest groups as determinants of “judicial independence”).

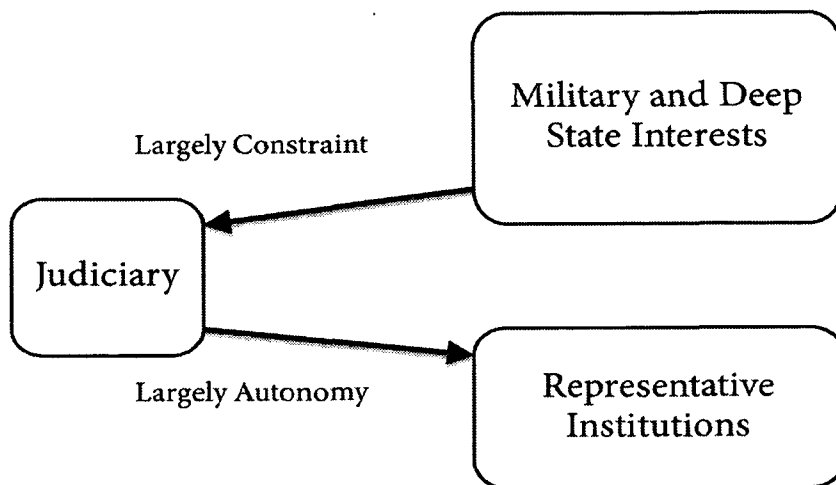
132. See Peter H. Russell, *Toward a General Theory of Judicial Independence, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND 1*, 13–22 (Peter H. Russell & David M. O’Brien eds., 2001) (identifying and discussing various categories of potential influence and control over the judiciary); Jackson, *supra* note 18, at 966–69 (identifying and discussing a range of legal rules and structural factors that affect individual judges’ decisional independence and the judiciary’s institutional independence); Jose J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 *LAW & SOC’Y REV.* 475, 486–95 (1974) (explaining paradox of the judiciary’s relative independence in Spain under the authoritarian Franco regime in terms of the limited scope of its power); see also SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA’S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS* 177 (2009) (arguing that in India, “fragmented political configurations [have] allow[ed] the Supreme Court to appropriate more autonomy”); Faisal Siddiqi, *Legal Empire*, *DAWN*, Jan. 13, 2012, <http://dawn.com/2012/01/13/legal-empire/> (“[F]ragmentation among the power elites breeds greater judicial independence. Greater judicial independence breeds greater judico-political power.”).

133. Cf. Bruce Peabody, *Introduction to THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 1, 17 (Bruce Peabody & Thomas H. Wells, Jr. eds., 2010) (urging analysis of judicial independence that “mov[es] beyond the presumptions that courts work best in political isolation, that they necessarily operate from a position of institutional weakness, and that their independence is primarily justified by strictly legal objectives”).

134. Moreover, while legal scholars sometimes assert that courts are “less subject to cooptation” than legislatures in authoritarian or nondemocratic contexts, such claims not only underestimate the ways in which courts may be constrained or coopted by nondemocratic regimes, but also mask the enabling role that courts themselves can play in the process of coopting and undermining representative institutions. Compare, e.g., Goldenziel, *supra* note 15, at 45 (asserting that courts are “tougher nuts than legislatures for authoritarians to crack”), with Bâli, *supra* note 2, at 243 (discussing ways in which “constitutions and courts both enable and undermine fundamental democratic reforms during periods of transition”), and Nick Robinson,

understanding judicial independence within this disaggregated conceptual context shows that the process of transformative preservation, along with the resulting power of the military and deep state interests, has been crucial in shaping the overall balance between judicial autonomy and judicial constraint. When these components are foregrounded, a picture emerges of institutional imbalance or disequilibrium among the judiciary, Parliament, and the military, as depicted in simplified form in Figure 3: the judiciary has been subject to enduring, long-term *constraints* by military and deep state interests, but nevertheless has been periodically empowered and encouraged (in part by those very constraints) to assert its *autonomy* from representative institutions.

**Figure 3—Pakistan’s Institutional Disequilibrium**



On the one hand, at times the military’s constraints upon the judiciary have fully risen to the level of political capture, effectively enlisting judges as deep state actors.<sup>135</sup> During periods of direct rule, the military often has ensured the judiciary’s allegiance to the

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*Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 64–66 (2009) (arguing, in context of Iran and Thailand, that the “broad role judiciaries now play can be used by elites to maintain power, or at least to ensure that representative institutions do not run too far afield of their interests”).

135. Aziz Z. Huq, *Mechanisms of Political Capture in Pakistan’s Superior Courts*, 10 Y.B. ISLAMIC & MIDDLE E. L. 21 (2003); see also Bâli, *supra* note 2, at 313 (positing “elite capture” of the judiciary in Turkey).

extraconstitution and alignment with its interests—sometimes formally, by manipulating and reshaping judicial composition or placing limits on its jurisdiction, but in other instances more informally.<sup>136</sup> Not surprisingly, the military's ability to constrain the judiciary has not been terribly difficult under its direct rule.<sup>137</sup> But even well short of these extreme moments, the judiciary has still remained vulnerable to military and deep state constraints—even when civilian rule has formally returned, and even in the absence of direct, ongoing control or collaboration. At a basic level, the judges in office under military rule, whose general alignment with the military regime's interests often has already been assured, have remained in office once civilian rule has returned.<sup>138</sup> Given the powerful role of the chief justices of the Supreme Court and High Courts with respect to new appointments, the administration of judicial business, and case assignment, these matters also have been subject to significant influence by military and deep state interests via executive influence over the chief justices.<sup>139</sup> And as with civilian politicians, the specter of possible extraconstitutional intervention has loomed over judicial decision making.

To be sure, the extent of the judiciary's vulnerability to constraints imposed by the military has never been total, but rather has varied in strength over time. Both individual judges and the judiciary as an institution have always attempted to assert some measure of autonomy from the military—and even when validating military rule, the scope of that legitimation has tended to become narrower over time.<sup>140</sup> Until recently, however, the judiciary's most

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136. See *supra* Part II.B.1. At other moments, the alignment of interests between the military and judiciary has occurred without any need for formal collaboration or coercion.

137. As a former Supreme Court justice once asked, “[H]ow do you expect five men alone, unsupported by anyone, to declare martial law illegal?” NEWBERG, *supra* note 20, at 7. But see Mahmud, *supra* note 20, at 1295–98 (criticizing Pakistan's judges for not utilizing prudential devices, such as the “political question” doctrine, to avoid extraconstitutional adjudication altogether).

138. See David Dyzenhaus, *Judicial Independence, Transitional Justice and the Rule of Law*, 10 OTAGO L. REV. 345, 347 (2001) (describing how in transitions, “judges who served the old regime” may be “thought to be deeply compromised from the start”).

139. See INT'L CRISIS GRP., BUILDING JUDICIAL INDEPENDENCE IN PAKISTAN 14–17 (2004); Khan, *supra* note 81, at 7.

140. Compare Zafar Ali Shah v. Musharraf, (2000) 52 PLD (SC) 869, 1219–23 (Pak.) (validating Musharraf's military takeover under the doctrine of state necessity, but purporting to limit the scope of the military regime's authority and to require elections within three years), with Nusrat Bhutto v. Chief of Army Staff, (1977) 29 PLD (SC) 657, 710 (Pak.) (validating Zia's military takeover under the doctrine of necessity, but purporting to require the military regime's measures to be “proportionate to the necessity” and “of a temporary character limited to the duration of the exceptional circumstances”), and State v. Dosso, (1958) 10 PLD (SC) 533, 539–41 (Pak.) (deeming a successful revolution or coup d'état as a “basic law-creating fact,” without any limitations on the scope of the new regime's lawmaking authority). See also NEWBERG,

significant assertions of autonomy from the military have tended to come either after the particular regimes being challenged were safely out of power or when they appeared to be soon on their way out the door.<sup>141</sup> Given the nature and extent of entrenched military and deep state power, even the strongest assertions of judicial autonomy have never been strong enough to withstand military and deep state interests capable of backing up constraints upon the judiciary with extraconstitutional action and, ultimately, force—as both Zia’s and Musharraf’s coups demonstrate at one end of that spectrum, but as even more limited forms of coercion, such as influence by intelligence agencies over appointments, demonstrate well short of that.<sup>142</sup> And in any event, as the court’s Article 58(2)(b) jurisprudence illustrates, the overall patterns shaping judicial composition have yielded a judiciary that has regularly exhibited ideological affinities toward deep state interests—and against political parties and interests less closely associated with the military—even in the absence of direct military efforts to influence or control judges.<sup>143</sup>

On the other hand, although often submerged beneath undifferentiated descriptions of its “lack of independence,” the judiciary in fact has exhibited significant autonomy from civilian political actors—not just under military rule, where the very purpose of military constraints on the judiciary has obviously been to displace representative institutions, but even under civilian rule, as the experience between 1988 and 1999 illustrates.<sup>144</sup> For example,

*supra* note 20, at 191–95 (discussing higher judiciary’s willingness, during later years of Zia’s military regime, to exercise jurisdiction to review petitions by regime opponents challenging their military court convictions); Mahmud, *supra* note 20, at 1280–81 (recognizing that “[e]ven in the posture of general retreat, [Pakistan’s] superior courts occasionally asserted their right to determine the scope of the doctrine of necessity”).

141. *E.g.*, *Asma Jilani v. Punjab*, (1972) 24 PLD (SC) 139 (Pak.) (holding that military takeover of General Yahya Khan was invalid, but only after his military regime had fallen); *Fed’n of Pak. v. Muhammad Saifullah Khan*, (1989) 41 PLD (SC) 166 (Pak.) (holding that Zia’s dissolution of Muhammad Khan Junejo’s government was unlawful, but only after Zia’s death); *Benazir Bhutto v. Fed’n of Pak.*, (1988) 40 PLD (SC) 416 (Pak.) (invalidating provisions of the Political Parties Act imposed by Zia as unconstitutional while he was still in power, but in the later years of his regime as his power began to diminish); *see also* Faisal Siddiqi, *Judicial Sovereigns*, DAWN, June 26, 2012, <http://dawn.com/2012/06/26/judicial-sovereigns/> (arguing that “there is always a rise in severe judicial dissent against the government in the last year of any government in a transitional democratic state”).

142. *See* Haris Gazdar, *Judicial Activism vs Democratic Consolidation in Pakistan*, ECON. & POL. WKLY., Aug. 8, 2009, at 10 (“The judicial denunciation of General Yahya Khan in 1972 [in *Asma Jilani v. Punjab*] did not prevent General Zia-ul-Haq from pouncing in 1977.”); Yasser Latif Hamdani, *Where Is Justice?*, FRIDAY TIMES, Mar. 23, 2012 (suggesting that, even after restoration of civilian government in 2008, nominees for Pakistan’s higher judiciary still must be “vetted by the intelligence agencies for their personal views” before they can be appointed).

143. *See supra* Part II.B.2.

144. *See* DESAI & AHSAN, *supra* note 33, at 120 (discussing “sparks of judicial activism” during the 1990s); MUNIR A. MALIK, *THE PAKISTAN LAWYERS’ MOVEMENT: AN*



following clashes with the governments of both Bhutto and Sharif over judicial composition, the judiciary seized control over the judicial appointments process. Under the constitutional provisions then in place, the President (on advice of the Prime Minister) appointed judges to the Supreme Court after “consultation” with the chief justice of Pakistan, and to the High Courts under a similar process.<sup>145</sup> Bhutto aggressively sought to pack the courts with judges regarded as loyal to her party’s interests—ignoring basic rules concerning qualifications for appointment and seniority-based conventions for elevating judges, and further manipulating judicial composition by appointing ad hoc judges and transferring judges between courts.<sup>146</sup> Sharif proved no less aggressive, clashing with the Supreme Court over appointments and other issues and later engaging in an ugly effort to remove the chief justice, which culminated in a physical attack on the Supreme Court building by a mob of Sharif’s supporters.<sup>147</sup>

Although the judiciary had never effectively resisted the military’s manipulation of its composition, it fared better vis-à-vis these civilian governments. In the so-called *Judges’ Case*, the Supreme Court invalidated many of Bhutto’s judicial appointments and announced detailed rules governing the appointments process.<sup>148</sup> Guided by analogous developments in India, the court held that recommendations for appointment by the chief justice of Pakistan and High Court chief justices would ordinarily be binding, absent “very sound” reasons recorded by the President, which would then be justiciable.<sup>149</sup> The court also required the most senior High Court judge to be appointed chief justice of that High Court in the absence

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UNFINISHED AGENDA 7 (2008) (discussing higher judiciary’s “attempt to assert [its] position as an independent organ of the state” during 1990s). In addition, as Maryam Khan observes, the judiciary’s empowerment during the 1990s was “edified by an enduring substratum” of jurisprudence arising from the emergence of “public interest litigation”—which intersected with the court’s role in purely political questions but also independently enhanced judicial power vis-à-vis civilian institutions in the enforcement of fundamental rights. Khan, *supra* note 81, at 2; *see also* MENSKI ET AL., *supra* note 21, at 1–21 (discussing onset and development of public interest litigation in Pakistan during 1990s).

145. High Court judges were appointed by the President (on advice of the Prime Minister) after “consultation” with the chief justice of Pakistan, the chief justice of the High Court, and the governor of the province for that High Court. PAKISTAN CONST. arts. 177, 193 (amended 2010).

146. KHAN, *supra* note 11, at 594–96.

147. *Id.* at 622–29.

148. *See Al-Jehad Trust v. Fed’n of Pak.*, (1996) 48 PLD (SC) 324, 363–67 (Pak.).

149. *Al-Jehad Trust*, (1996) PLD (SC) at 363–67; *see also* Supreme Court Advocates-on-Record Ass’n v. India, A.I.R. 1994 S.C. 268 (India) (holding that the judiciary itself has primacy vis-à-vis the executive in appointments to India’s higher judiciary and transfer of judges between courts); M.P. Singh, *Securing the Independence of the Judiciary—The Indian Experience*, 10 IND. INT’L & COMP. L. REV. 245 (1999) (discussing controversies over the judicial appointments process in India).

of “concrete and valid reasons”<sup>150</sup>—a seniority principle it later extended to ordinarily require appointment of the most senior Supreme Court justice as the chief justice of Pakistan.<sup>151</sup> A few years later, when Sharif resisted nominations made by the chief justice under the *Judges’ Case* framework, the court successfully insisted upon the appointments.<sup>152</sup>

These episodes could certainly be understood as simple matters of patronage and kleptocracy. However, they also have an institutional dimension, given the judiciary’s powerful, longstanding role in determining the fates of civilian governments and the weakness of Parliament vis-à-vis the President and military.<sup>153</sup> With political survival hanging in the balance, politicians—albeit much less effectively—mirrored the military’s own strategies by seeking to manipulate the judiciary’s composition to their advantage. For example, when Bhutto superseded more senior justices to elevate Justice Sajjad Ali Shah as chief justice, observers widely assumed that the supercession was in part based on his dissenting opinions in Article 58(2)(b) cases that appeared favorable to her.<sup>154</sup> Similarly, when Sharif opposed the recommended nominees, it was based on concerns that those justices would be hostile to his government.<sup>155</sup> Notably, when the two Prime Ministers resisted the Supreme Court’s directives on appointments, the President and military sided with the judiciary each time. Indeed, Bhutto’s resistance to implementing the *Judges’ Case* was explicitly cited in the Article 58(2)(b) order dismissing her government as part of a claimed attempt to “destroy the independence of the judiciary.”<sup>156</sup>

Given the disequilibrium among Pakistan’s institutions, the efficacy of the judiciary’s assertions of autonomy from civilian institutions was uneven. After Parliament adopted two constitutional amendments in 1997, one of which repealed Article 58(2)(b), the conflicts among the judiciary, Parliament, and military intensified. Presented with constitutional challenges to the validity of these amendments, the Supreme Court attempted to enjoin their

150. *Al-Jehad Trust*, (1996) PLD (SC) at 363–67.

151. *Asad Ali v. Fed’n of Pak.*, (1998) 50 PLD (SC) 161, 354–55 (Pak.).

152. KHAN, *supra* note 11, at 623–25.

153. See Hirschl, *Pure Politics*, *supra* note 81, at 749 (arguing that the “crucial political significance of the judiciary” prompts politicians “to seek tighter control over appointments process”).

154. KHAN, *supra* note 11, at 595.

155. *Id.* at 623.

156. *Id.* at 604; see also RIZVI, *supra* note 42, at 229. The presidential order dissolving Bhutto’s first government also cited its “attempts . . . to impair [judicial] independence.” KHAN, *supra* note 11, at 553. Similarly, after Musharraf’s 1999 coup overthrowing Sharif’s second government, the reconstituted Supreme Court explicitly cited the conflicts between Sharif’s government and the judiciary among its reasons for validating the coup on extraconstitutional grounds of necessity. See *Zafar Ali Shah v. Musharraf*, (2000) 52 PLD (SC) 869, 1218–19 (Pak.).

enforcement. Sharif mounted a campaign against the court, leading to contempt of court proceedings against him, the mob attack on the court building by his political allies, and an effort to exploit a deep divide on the court, which ultimately led to the chief justice's ouster by other Supreme Court judges.<sup>157</sup> To resolve the chaos caused by this conflict between Parliament and the Supreme Court, the military played the role of arbiter between the two institutions—just as it frequently did between the political parties—and thereby strengthened its own position at the expense of both. When Musharraf's coup came less than two years later, neither the judiciary nor civilian politicians effectively stood in its way.

### III. RESISTING THE MILITARY: THE ANTI-MUSHARRAF MOVEMENT

Like his predecessors, when Musharraf seized power in 1999, he engaged in processes of transformative preservation that further entrenched military and deep state power. However, by the mid-2000s, the landscape had shifted dramatically, enabling an empowered judiciary and an active movement to effectively challenge the regime in a manner that anticipated the “Arab Spring” by several years. In this Part, I assess the significance of this anti-Musharraf movement—and its internal tensions—for Pakistan's subsequent shift away from military rule. First, I recount the judiciary's assertions of autonomy from the military and the mobilization of Pakistan's lawyers to support that empowered judiciary. Second, I highlight the often-neglected role of political actors in this movement. While justifiably maligned, Pakistan's politicians nevertheless developed an ambitious constitutional vision to strengthen representative institutions and unwind the legacy of military entrenchment—a vision that has effectively, if unsteadily, guided the process and substance of constitutional change since then. Third, I discuss Musharraf's extraconstitutional “emergency” in November 2007, which, even as it eventually led to Musharraf's downfall, successfully constrained the judiciary and reshaped the constitutional order to preserve the regime's interests. The convergence of the movement's legal and political strands to resist the crackdown, with their distinct but complementary visions of constitutional change, ultimately culminated in elections that repudiated the regime. However, the regime's reconfigured legal and institutional order also remained in place, and the tensions between the movement's legal

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157. See *Asad Ali v. Fed'n of Pak.*, (1998) 50 PLD (SC) 161, 354–55 (Pak.) (invalidating the elevation of Justice Sajjad Ali Shah to be chief justice as unconstitutional); see also KHAN, *supra* note 11, at 622–37 (discussing the conflict between Nawaz Sharif and the Supreme Court and its consequences).

and political strands laid the foundation for an extended series of conflicts between the judiciary and representative institutions.

### A. The “Lawyers’ Movement”

Musharraf’s 1999 coup followed Pakistan’s extraconstitutional script of military interventions to the letter, suspending the constitution and issuing a PCO, to which all judges were required to take new oaths of office.<sup>158</sup> Most judges acquiesced, and the reconstituted Supreme Court validated the takeover under the doctrine of necessity.<sup>159</sup> The regime promulgated constitutional amendments, including the reimposition of Article 58(2)(b), that strengthened the governing framework’s viceregal elements.<sup>160</sup> Finally, the regime cobbled together a political party to serve as its civilian façade in Parliament, which—after rigged elections and extended maneuvering by the regime to cajole political support—formally adopted these amendments, thereby completing the process of constitutional transformation.<sup>161</sup> The judiciary, staffed with judges who had taken extraconstitutional oaths of office, reprised its long-running role by validating these and other actions.<sup>162</sup>

However, by 2005, when Iftikhar Muhammad Chaudhry ascended to become chief justice of Pakistan, Musharraf’s standing had eroded.<sup>163</sup> Under Chaudhry, the Supreme Court began to break from its historical role by exhibiting an unusual degree of

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158. See generally Kalhan, *supra* note 12.

159. See *Zafar Ali Shah*, (2000) PLD (SC) at 1218–19. While the court purported to limit the scope of authority justified by necessity—including, curiously, by admonishing Musharraf’s regime to respect “independence of the judiciary”—the regime did not heed those limits. *Id.*

160. See KHAN, *supra* note 11, at 660–670 (discussing Musharraf’s constitutional amendments).

161. See *Shah*, *supra* note 40, at 216–18 (discussing the regime’s manipulation of elections following the Supreme Court’s decision upholding Musharraf’s coup).

162. See *Pak. Lawyers Forum v. Fed’n of Pak.*, (2005) 57 PLD (SC) 719 (Pak.) (upholding Seventeenth Amendment); *Watan Party v. Chief Executive of Pak.*, (2003) 55 PLD (SC) 74, 81–82 (Pak.) (dismissing challenges to extraconstitutional changes to the constitution imposed by Musharraf’s Legal Framework Order, 2002); *Hussain Ahmed v. Musharraf*, (2002) 54 PLD (SC) 853, 867 (Pak.) (rejecting challenges to Musharraf’s presidential referendum). The court also declined to extend the seniority principles from its 1990s *Judges’ Case* to elevations of judges from the High Courts to serve on the Supreme Court—thereby facilitating the ability of the military and President to strengthen their constraints upon judicial composition and administration of justice. See *Supreme Court Bar Ass’n v. Fed’n of Pak.*, (2002) 54 PLD (SC) 939 (Pak.); *INT’L CRISIS GRP.*, *supra* note 139, at 14–17 (discussing mechanisms of executive influence over the higher judiciary).

163. See KIM BARKER, *THE TALIBAN SHUFFLE: STRANGE DAYS IN AFGHANISTAN AND PAKISTAN* 148–49 (2011) (discussing Musharraf’s decline in support “because of his professed support for America, his refusal to step down as army chief, and his aggressive megalomania”); Fair, *supra* note 35, at 578 (discussing decline in Musharraf’s public and political standing after 2004).

assertiveness vis-à-vis Musharraf's military regime. That assertiveness came as a surprise. Chaudhry had taken an extraconstitutional oath of office after Musharraf's coup and had subsequently signed on to the judgment validating the coup and other decisions in the regime's favor.<sup>164</sup> But under his tenure, the court increasingly challenged the regime—for example, expanding its use of public interest litigation and *suo moto* powers, invalidating the regime's privatization of state-owned enterprises, and investigating disappearances arising from the U.S.-led counterterrorism campaign.<sup>165</sup> Functionally, the court's actions were not unprecedented, since its use of public interest litigation and *suo moto* powers built upon mechanisms that had initially been used to enhance its power and autonomy under civilian rule during the 1990s.<sup>166</sup> What *was* an innovation, given the court's institutional history, was its use of these mechanisms to challenge Pakistan's military and deep state interests, as opposed to civilian institutions.

Facing an increasingly assertive judiciary, the regime tried to constrain it more tightly.<sup>167</sup> In March 2007, Musharraf confronted Chaudhry with a raft of pretextual misconduct allegations and pressured him to resign. When Chaudhry refused, Musharraf suspended him and referred him for disciplinary proceedings. Chaudhry was detained and, later, physically mistreated by police while television cameras rolled. Outraged lawyers and bar associations responded by mobilizing in support of Chaudhry's reinstatement and judicial independence, which soon triggered a broader anti-Musharraf movement advocating civilian democratic rule.<sup>168</sup> As the movement gained momentum—with Chaudhry as its leading symbol, attracting throngs of supporters as he traveled to speak to lawyers nationwide—the regime cracked down on protestors and the media, whose unprecedented coverage fueled the antiregime sentiment.<sup>169</sup>

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164. See MALIK, *supra* note 144, at 40.

165. See, e.g., Ghias, *supra* note 22, at 991–95.

166. See Khan & Siddique, *supra* note 21, at 216–22 (analyzing Supreme Court's use of public interest litigation and its expansive interpretation of the constitutional right to life during the 1990s); Khan, *supra* note 81 (discussing Supreme Court's expansion of public interest litigation in the 1990s); *supra* note 144.

167. By 2007, the stakes had become particularly high for Musharraf, whose opponents were challenging his eligibility under the constitution to be reelected President.

168. See Kalhan, *supra* note 12, at 93–96.

169. See Somini Sengupta, *A Lawyer Who Turned a Judge into a National Cause*, N.Y. TIMES, July 28, 2007, at A3 (discussing Chaudhry and his supporters); S. Akbar Zaidi, *Is Pakistan Collapsing?*, ECON. & POL. WKLY., June 18, 2011, at 16 (describing the movement as Pakistan's "first live television revolution"); see also HUMA YUSUF, *OLD AND NEW MEDIA: CONVERGING DURING THE PAKISTAN EMERGENCY* (2009) (discussing significance of television, radio, and new media platforms in enhancing the effectiveness of social and political movements in Pakistan, and the regime's

In July 2007, the Supreme Court dismissed Musharraf's charges and reinstated Chaudhry, and the regime complied.<sup>170</sup> Following Chaudhry's reinstatement, the lawyers' movement pushed the judiciary to consolidate and further assert its autonomy.<sup>171</sup> The court remained active, proceeding with its existing inquiries into disappearances and the regime's privatization initiatives, and—venturing still closer to core military interests—opening an inquiry into the controversial military operation against militants lodged in Islamabad's "Red Mosque" and the right of Musharraf's exiled opponent, Nawaz Sharif, to return to Pakistan in advance of parliamentary elections.<sup>172</sup> The court also entertained petitions challenging Musharraf's eligibility to be reelected President. Its review of these petitions was, again, not functionally unprecedented, since the court's institutional identity had long since come to encompass resolution of deeply politicized questions.<sup>173</sup> But given the court's assertions of autonomy, the regime could no longer depend upon it as a means of validation, as it traditionally had. Upon reviewing these petitions, the court stayed final certification of the election results, and it was widely expected to ultimately rule against Musharraf.<sup>174</sup>

Like the Supreme Court's assertions of autonomy, the lawyers' movement itself was not entirely without precedent, as it built upon existing traditions in Pakistan in which political and social movements had previously resisted military and deep state power.<sup>175</sup>

crackdowns in response); Zafarullah Khan & Brian Joseph, *The Media Take Center Stage*, 19 J. DEMOCRACY 32, 33–34 (2008) (discussing importance of electronic media in amplifying the lawyers' movement's message).

170. Iftikhar Muhammad Chaudhry v. President of Pak., (2007) 59 PLD (SC) 578, 582 (Pak.) (short order).

171. See Faisal Siddiqi, *The Lawyers Movement—Achievements and Challenges*, TEETH MAESTRO (Sep. 14, 2008), <http://teeth.com.pk/blog/2008/09/14/the-lawyers-movement-%e2%80%93-achievements-and-challenges> (identifying and describing five "phases" of the lawyers' movement).

172. See Pak. Muslim League (N) v. Fed'n of Pak., (2007) 59 PLD (SC) 642, 680 (Pak.) (affirming Nawaz Sharif's "inalienable right" as a Pakistani citizen to enter and remain in Pakistan); Ghias, *supra* note 22, at 1010–14; Nasir Iqbal, *Destruction of Evidence Annoys Apex Court: Lal Masjid-Jamia Hafsa Case*, DAWN, Aug. 18, 2007, <http://archives.dawn.com/2007/08/18/top3.htm> (reporting Supreme Court's *suo moto* decision to order investigation into Lal Masjid raid). When the government blocked Sharif's return, by detaining him upon his arrival and summarily rendering him to Saudi Arabia, the court initiated contempt proceedings against the officials responsible.

173. See generally *supra* Part II.B.

174. See KHAN, *supra* note 11, at 700, 711 n.55 (quoting unpublished Supreme Court order that the presidential election process may proceed as scheduled, but that "final notification of the election [results] . . . shall not be issued till the final decision of these petitions"); HUMAN RIGHTS WATCH, *supra* note 22, at 17–18.

175. See JONES, *supra* note 32, at 138–39 (discussing the social movement in 1968 and 1969 against Ayub Khan's regime); TOOR, *supra* note 8, at 4 (highlighting

The particular forms of contention, however, were distinct from those antecedents and triggered a process of institutional change that began to shift the nature of the judiciary's role, institutional identity, and independence.<sup>176</sup> The expansion of public interest litigation enhanced the judiciary's apparent standing among Pakistan's people,<sup>177</sup> and the lawyers' mobilization contributed to that enhanced public standing while simultaneously tightening the relationship between the judiciary and the legal profession.<sup>178</sup> In both instances, these potential avenues for the judiciary's empowerment became closely linked to the rapidly growing power of Pakistan's newly liberalized electronic media—and contributed to a self-understanding among many judges of being *directly* legitimated by and accountable to the Pakistani people.<sup>179</sup> As a result, these events began to reconfigure the overall balance between autonomy and constraint across the judiciary's relationships with a range of actors, and that balance has remained in flux ever since.

### B. *The Charter of Democracy*

To date, scholarship on the anti-Musharraf movement has focused almost exclusively on the roles played by Pakistan's lawyers, judges, and bar associations.<sup>180</sup> However, this interest in the anti-Musharraf movement as a lawyers' movement—waged by and on behalf of what Terrence Halliday, Lucien Karpik, and Malcolm Feeley term the “legal complex,” and primarily in support of judicial

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and foregrounding role of progressive social movements from Pakistan's “very inception . . . in challenging both the establishment and the religious Right”).

176. See El-Ghobashy, *supra* note 26, at 1594–95 (analyzing “institutional change”—paradoxically, during a prolonged period of deepening deliberalization by the Mubarak regime—prompted by new forms of political contention by Egypt's courts, human rights organizations, and professional associations).

177. See Ghias, *supra* note 22, at 997–99; cf. BAXI, *supra* note 131, at 33 (discussing role of public interest litigation in enhancing the popular legitimacy of India's higher judiciary by enabling “the Supreme Court of India [to] transform[] itself dramatically into a Supreme Court for Indians”).

178. See Ghias, *supra* note 22, at 1003–10 (recounting the evolution of the relationship between the judiciary and the legal profession in Pakistan); MALIK, *supra* note 144 at 133–41 (explaining how the lawyers' movement helped mobilize public support for the judiciary); Siddiqi, *supra* note 171 (discussing role of lawyers' movement in 2007 in “enhanc[ing] and preserv[ing] . . . the independence of the judiciary by keeping a vigilant watch on the performance of the superior judiciary as well as by testing the limits of judicial independence through public interest litigation”).

179. See *Pakistani Lawyers' Movement*, *supra* note 22, at 1722–23 (“Protests on the streets inspired many deposed judges to continue resisting military rule . . .”); Faisal Siddiqi, *Supreme Contempt*, DAWN, February 27, 2012, <http://dawn.com/2012/02/27/supreme-contempt/> (arguing that in the wake of the lawyers' movement, “judicial power has become dependent on public legitimacy and as a consequence, judicial power has become linked with media power”).

180. See generally sources cited *supra* note 22.

autonomy and empowerment—has obscured the movement's significance as a broader campaign for democracy and constitutionalism, waged in a variety of settings by politicians and other actors.<sup>181</sup> Certainly, the lawyers' movement played the leading role in sparking anti-Musharraf sentiment, and Pakistan's opposition parties struggled to effectively resist the military regime, which self-consciously exploited their weaknesses.<sup>182</sup> However, civilian politicians—though weak and divided—were not entirely missing in action in opposing Musharraf, and ultimately played a crucial, underappreciated role in advancing a far-reaching vision of constitutional change and forcing Musharraf from power.<sup>183</sup>

In 2006, Bhutto and Sharif, acting on behalf of their respective parties while in exile in London, signed the Charter of Democracy, which set forth a comprehensive blueprint of constitutional principles and practices to guide the restoration of democratic rule and to challenge the accumulated entrenchment of military power.<sup>184</sup> Observers often neglect such preconstitutional documents, and the Charter, though quickly endorsed by almost all political parties, drew little attention outside of Pakistan. However, as Kirsten Matoy Carlson has shown, such documents can illuminate key aspirational

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181. See Ayaz Amir, *Conscience of the Constitution*, NEWS INT'L, Jan. 22, 2010 (emphasizing role played by civilian politicians and political parties in transition away from Musharraf's regime); Terence C. Halliday et al., *The Legal Complex in Struggles for Political Liberalism*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 1, 6–9 (Terence C. Halliday et al. eds., 2007) (conceptualizing “legal complex” as consisting of lawyers, judges, and all other “legally-trained personnel in a society who undertake legal work, including prosecutors and civil servants involved in the administration of justice”).

182. See Ian Talbot, *Pakistan in 2003: Political Deadlock and Continuing Uncertainties*, 44 ASIAN SURV. 36, 37 (2004) (discussing weaknesses in the early stages of the anti-Musharraf movement). The leaders of Pakistan's two leading political parties, former Prime Ministers Benazir Bhutto and Nawaz Sharif, were both in exile outside of Pakistan throughout most of Musharraf's rule, including the period in 2007 during which the lawyers' movement initially gained momentum. Bhutto did not return to Pakistan until October 2007, and Sharif did not return until November 2007. Adeel Khan, *Pakistan in 2007: More Violent, More Unstable*, 48 ASIAN SURV. 144, 149–50 (2008).

183. See Kennedy, *supra* note 36, at 67 (discussing opposition parties' disruption of Parliament with “protests, walkouts, planned disturbances, and other unpleasantness” for thirteen months in 2002 and 2003); Gazdar, *supra* note 101, at 8 (“Opposition political parties, much battered and maligned, must be given credit for maintaining their constituencies and keeping their nerves, through eight-long years of suppression, vilification and exile.”); Amir Zia, *Pakistani Opposition Parties Form New Alliance for Democracy*, ASSOCIATED PRESS, December 4, 2000 (discussing the formation of a broad coalition of Pakistan's opposition political parties to develop a unified strategy to fully restore civilian democratic rule).

184. Charter of Democracy, May 14, 2006, available at <http://archives.dawn.com/2006/05/16/local23.htm>; see also Arif Azad, *General in His Labyrinth*, ECON. & POL. WKLY., Sep. 16, 2006, at 3941 (discussing Charter's substantive provisions and assessing its political significance).



values that guide constitutional development and “tensions that were present at constitution-making and that remain unresolved.”<sup>185</sup>

Carlson’s observation holds true for the Charter, which laid the foundation for both the process and substance of the constitutional shifts that I discuss in Part IV. Indeed, at the time, Pakistani observers described the Charter in grand terms, comparing its significance to the Lahore Declaration, Declaration of Independence, and Magna Carta.<sup>186</sup> At the level of constitutional custom and practice,<sup>187</sup> the declaration pledged its signatories to break with past practices by adhering to norms of political conduct more consistent with civilian democratic rule. The Charter’s signatories pledged not to “join a military regime or any military sponsored government” or “solicit the support of military to come into power or to dislodge a democratic government,” but instead to embrace a “bipartisan” ethos that accepts “the due role of the opposition” and—whether in opposition or in government—not to “undermine each other through extraconstitutional ways.”<sup>188</sup> Given the extent to which contrary practices during the 1990s had eroded representative institutions and reinforced deep state power, this commitment was at least as significant as the declaration’s substantive provisions.<sup>189</sup>

Those substantive proposals themselves were ambitious, squarely addressing Pakistan’s most intractable constitutional dilemmas—parliamentary versus viceregal constitutionalism, civilian versus military primacy, federal versus provincial authority, judicial autonomy versus constraint. The declaration expressly repudiated Musharraf’s extraconstitutional changes—including the reinstatement of Article 58(2)(b), the prohibition on serving more than two terms as Prime Minister, and the university degree requirement for legislative office—and pledged to restore

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185. Kirsten Matoy Carlson, *Is Hindsight 20-20? Reconsidering the Importance of Pre-Constitutional Documents*, 30 AM. INDIAN L. REV. 1, 7–13 (2005).

186. Anil Kalhan, *Whither Pakistan’s Charter of Democracy?*, ASIAMEDIA, Sep. 8, 2007, <http://www.asiamedia.ucla.edu/article.asp?parentid=77611>; see also Ayaz Amir, *Nervousness in High Places*, DAWN, May 19, 2006, <http://archives.dawn.com/weekly/ayaz/20060519.htm> (“[T]he Charter of Democracy . . . is one of the most important and . . . most stirring thing[s] to come out of Pakistan’s confused political milieu in a long time.”).

187. See Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183, 1187–90 (1999) (discussing “forming practices” that “constitute the idea . . . of a constitution”); Pratap Bhanu Mehta, *What Is Constitutional Morality?*, 615 SEMINAR 17, 20 (2010) (discussing B.R. Ambedkar’s view that the “core of the constitutional revolution” in India was “a form of political organization sustained by certain ways of doing things”); Adam Tomkins, *The Republican Monarchy Revisited*, 19 CONST. COMMENT. 737, 742–47 (2002) (discussing complementary roles of law and convention in British constitutionalism).

188. Charter of Democracy, *supra* note 184, pmb. ¶ 6, §§ 21–22.

189. See *supra* Part II.

parliamentary supremacy.<sup>190</sup> The Charter also pledged to reassert civilian authority over all military and security agencies, establishing full parliamentary oversight over their budgets and restricting their domestic political activities.<sup>191</sup> Directly tackling longstanding impasses over federalism, the Charter proposed to devolve authority to provincial governments and to distribute financial resources to them more equitably.<sup>192</sup>

The Charter also squarely addressed the institutional imbalances between the judiciary and Parliament, proposing an overhauled judicial appointments process that would vest responsibility for appointments in a judicial commission, which would include judges, bar association representatives, and executive officials, and a joint parliamentary committee.<sup>193</sup> Notably, the Charter also stated expressly that judges would not be permitted to take extraconstitutional oaths of office, and judges who had previously done so could not serve on the commission.<sup>194</sup> For each vacancy, the commission would forward three names to the Prime Minister, who would select one individual to be nominated for confirmation in a public hearing before the parliamentary committee.<sup>195</sup> In the spirit of the Charter's code of political conduct, the committee would be evenly divided between government and opposition members.<sup>196</sup>

The Charter played a key role in guiding the parties' opposition to Musharraf's regime and has continued to guide Pakistan's process of constitutional development since then. To be sure, the politicians' commitment to these principles has not been ironclad. The ink was barely dry on the document when Bhutto—actively encouraged by the Bush administration—began unilaterally negotiating a power sharing deal with Musharraf, including an amnesty for thousands of individuals charged with corruption and other criminal offenses prior to Musharraf's coup.<sup>197</sup> This National Reconciliation Ordinance (NRO) was designed to shield Bhutto, her husband Asif Ali Zardari,

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190. Charter of Democracy, *supra* note 184, §§ 1–2, 12, 28.

191. *Id.* §§ 32, 34; *see also id.* § 35. The declaration also pledged to overhaul military land allotment policies and to review all land allocations to military officers under Musharraf.

192. *Id.* § 5.

193. *Id.* § 3. The commission also would oversee a newly overhauled administrative mechanism to regulate judicial conduct. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. ZAIDI, *supra* note 40, at 185–87 (discussing power sharing deal between Bhutto and Musharraf); *see also* BENAZIR BHUTTO, RECONCILIATION: ISLAM, DEMOCRACY, AND THE WEST 225–32 (2008) (recounting negotiations with Musharraf between August 2006 and November 2007); *Former Premier Discusses Power-Sharing Plan* (PBS television broadcast Aug. 21, 2007), available at [http://www.pbs.org/newshour/bb/asia/july-dec07/pakistan\\_08-21.html](http://www.pbs.org/newshour/bb/asia/july-dec07/pakistan_08-21.html) (interviewing Benazir Bhutto).

and other senior PPP members from criminal charges—but excluded the criminal charges against Sharif by Musharraf's own regime.<sup>198</sup> Musharraf also agreed to resign as Army Chief before seeking another term as President.<sup>199</sup> According to the account given by Bhutto and her supporters, the negotiations with Musharraf were designed not to pursue her own narrow interests, but rather to facilitate a genuine, “orderly democratic transition.”<sup>200</sup> As described by a pro-Musharraf politician, however, the deal constituted “a deliberate strategy to prevent the opposition uniting and [Bhutto] fell for it. . . . [I]t broke up her alliance with Nawaz Sharif and also stopped Bhutto's MPs' boycotting [Musharraf's] re-election as president.”<sup>201</sup>

Protected by the NRO, Bhutto returned to Pakistan in October 2007 to lead the PPP in the upcoming elections, which she and Musharraf presumed her party would win.<sup>202</sup> Bhutto's maneuvering—arguably resembling the very political practices that had undermined democratic rule during the 1990s and that the Charter had pledged to avoid—certainly undermined trust between the civilian political parties and thereby threatened to weaken their effectiveness in challenging Musharraf's regime. Nevertheless, the Charter still exerted considerable normative force and gravitational pull in guiding the parties' challenges to the regime. In terms of practices and norms, the document served as a “yardstick” against which the parties' conduct could be assessed. Bhutto's deal-making effort was short-lived, as her public standing declined when her negotiations with Musharraf became public.<sup>203</sup> But while the NRO itself remained in place, Bhutto distanced herself from Musharraf after his November 2007 crackdown and was effective in renewing her efforts to work with other parties' leaders on the basis of the

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198. National Reconciliation Ordinance, No. LX of 2007, Oct. 5, 2007.

199. See ZAIDI, *supra* note 40, at 186–87.

200. BHUTTO, *supra* note 197, at 230. Bhutto also sought repeal of Article 58(2)(b) and removal of the prohibition instituted by Musharraf against serving more than two terms as prime minister, both of which were also sought by the Charter and would have equally benefitted her rival Nawaz Sharif.

201. Christina Lamb, *Threat To Strip Benazir Bhutto of Amnesty*, SUNDAY TIMES (U.K.), Nov. 18, 2007 (quoting PML-Q leader Chaudhry Shujaat Hussain); see also RASHID, *supra* note 61, at 376–78 (noting that agreement between Musharraf and Bhutto was “immensely unpopular in the PPP and among the opposition leaders”).

202. See Khan, *supra* note 182, at 149.

203. See Nasim Zehra, *Charter of Democracy and the 2007 Elections*, NEWS INT'L, May 22, 2006; Carlson, *supra* note 185, at 8 (discussing the role of preconstitutional documents in “[outlining] the more aspirational goals of the political community”). Sharif and others repeatedly invoked the Charter when criticizing Bhutto's negotiations with Musharraf and again in the aftermath of the February 2008 elections, when the PPP (now led by Zardari) stalled in its pledge to restore the judges ousted by Musharraf during his “emergency.”

Charter's principles.<sup>204</sup> In terms of substance, the Charter squarely confronted central dilemmas in Pakistan's constitutional history and provided a roadmap for the reforms ultimately adopted by Parliament in 2010. When the election campaign arrived, almost all parties expressly included the Charter's substantive proposals in their manifestos.<sup>205</sup>

Foregrounding the Charter complicates an increasingly conventional narrative contrasting Pakistan's activist lawyers with its more incrementalist politicians.<sup>206</sup> While this account has much to commend itself, given the lawyers' leading role in resisting Musharraf—and the politicians' less-than-inspiring record—it also masks an important irony. While the lawyers' movement staked out revolutionary ground in its methods and strategies, as a “movement” its scale was limited and its core substantive vision narrow, aimed almost exclusively at enhancing judicial autonomy and power.<sup>207</sup> By contrast, Pakistan's politicians—by turns tepid and even craven in their actions—actually elaborated, against any reasonable

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204. See Khan, *supra* note 182, at 150; Griff Witte, *Bhutto, Sharif Joining Forces To Press Musharraf for Fair Elections*, WASH. POST, Dec. 4, 2007, at A14.

205. See PAK. INST. OF LEGISLATIVE DEV. AND TRANSPARENCY, ELECTIONS 2008: A COMPARATIVE ANALYSIS OF ELECTION 2008 MANIFESTOES OF MAJOR POLITICAL PARTIES (2007).

206. See *Pakistani Lawyers' Movement*, *supra* note 22, at 1723–25 (crediting the lawyers' movement with causing the “emergence of a new issue-based democratic politics” in Pakistan); Babar Sattar, *Transitionists Again*, NEWS INT'L, Feb. 7, 2009 (contrasting Pakistan's “transitionist” mainstream politicians with its “transformationist” lawyers and judges in the lawyers' movement). This narrative arises from and is situated within a broader debate in Pakistan—which was particularly prominent and charged immediately following Chaudhry's reinstatement as chief justice in 2007—between so-called “transitionists” and “transformationists” over the appropriate means of effecting political and institutional change. See, e.g., Ejaz Haider, *Playing Solitaire*, DAILY TIMES, Nov. 6, 2007; Ejaz Haider, *Transitionists vs Transformationists*, DAILY TIMES, Aug. 31, 2007; Ayesha Siddiqi, *No Transition Without Transformation*, DAILY TIMES, Sep. 3, 2007; Afiya Shehribano Zia, *Civil-ising Democracy*, DAILY TIMES, Sep. 11, 2007.

207. See LIEVEN, *supra* note 9, at 116 (arguing that “[t]he lawyers' only collective programme has been the independence, power and prestige of the judiciary”); Fair, *supra* note 28, at 74 (arguing that the mobilization triggered by the lawyers' movement was “effective,” but “limited”); Munir, *supra* note 22, at 378 (arguing that the lawyers' movement primarily focused on the narrow goal of “advancing judicial autonomy through the restoration of deposed judges,” not on the broader goal of effecting a transition to democracy); Ayesha Siddiqi, *Looking Back at the Lawyers' Movement*, FRIDAY TIMES, Mar. 23, 2012 (arguing that the “core purpose” of the lawyers' movement was not “strengthening the system of justice for the benefit of the common man,” but rather “empowerment of the legal community”); Osama Siddique, *The Lawyers' Movement and Its Fragments*, NEWS ON SUNDAY, Feb. 19, 2012 (arguing that while the lawyers' movement was a “genuine movement” that was “commendable and inspiring,” it ultimately failed to distinguish “between popularity sustained through meaningful performance and the pursuit of popularity beneath the veneer of populism”). See generally Siddiqi, *supra* note 171 (detailing the specific goals and objectives of the lawyers' movement at various stages of the movement).

expectations, a vision of change with genuinely far-reaching potential, intended not only to strengthen representative institutions and challenge military and deep state power, but also to reconfigure the balance between judicial autonomy and constraint. Even as their relationships remained fraught and their collaboration tenuous, Pakistan's politicians exhibited greater agreement than in previous challenges to military rule, finding ways to work cooperatively, if erratically, based on the Charter's principles.<sup>208</sup>

### C. *Emergency and Elections*

These two strands of the anti-Musharraf movement converged—and conflicted—in response to Musharraf's imposition of an extraconstitutional state of “emergency” in November 2007.<sup>209</sup> Oddly, Musharraf's emergency was tantamount to a coup against his own regime. As U.S. diplomatic cables confirm, the crackdown principally sought to preempt any threat to Musharraf's reelection by reshaping and subordinating the judiciary.<sup>210</sup> As he had with his 1999 coup, Musharraf suspended the constitution in favor of a PCO, which arrogated sweeping presidential authority, including the power to issue constitutional amendments. Musharraf exercised these powers extensively, most notably by issuing constitutional amendments insulating his reelection from further legal challenge and converting several temporary executive ordinances, including the NRO, into permanent laws. Musharraf required judges to take new extraconstitutional oaths of office and designated Justice Abdul Hameed Dogar as chief justice. A reconstituted Supreme Court composed of these “PCO judges” validated both the emergency, under the doctrine of necessity, and Musharraf's reelection as President.<sup>211</sup> Musharraf intended these changes to be permanent, thereby completing another iteration in the recurrent process of transformative preservation.

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208. See FRUMAN, *supra* note 42, at 13–14 (highlighting the “sustained unity of the main political parties over a lengthy period during the Musharraf era” as a significant change from earlier movements against military rule in Pakistan).

209. See Kalhan, *supra* note 12, at 96–99 (discussing Musharraf's “emergency” and opposition responses); S. Akbar Zaidi, *Musharraf and His Collaborators*, ECON. & POL. WKLY., Nov. 10, 2007, at 8 (same).

210. See, e.g., U.S. Embassy Cable, Musharraf Convoles Dip Corps (Nov. 5, 2007), available at <http://www.cablegatesearch.net/cable.php?id=07ISLAMABAD4728> (recounting Musharraf's comments to diplomatic corps rejecting the Supreme Court's authority to review his eligibility to be reelected as President).

211. Tika Iqbal Muhammad Khan v. Fed'n of Pak., (2008) 60 PLD (SC) 178 (Pak.) (validating Musharraf's Proclamation of Emergency), *declared void ab initio*, Sindh High Court Bar Ass'n v. Fed'n of Pak., (2009) 61 PLD (SC) 879 (Pak.); Wajihuddin Ahmed v. Chief Election Comm'r, Islamabad, (2007) 59 PLD (SC) 13, 22 (Pak.) (vacating pre-emergency stay of final certification of presidential election results), *declared void ab initio*, Sindh High Court Bar Ass'n, (2009) PLD (SC) 879.

However, the short-lived emergency faced significant resistance. Soon after its announcement, a seven-judge Supreme Court bench enjoined civilian and military officials from acting under the PCO or administering new oaths of office to judges.<sup>212</sup> Ultimately, dozens of judges, including Chaudhry, either refused or were not asked to take new oaths and were ousted.<sup>213</sup> While the regime arrested and detained thousands of lawyers, judges, politicians, and ordinary citizens, including the lawyers' movement's senior leaders, lawyers continued to demonstrate in large numbers and to boycott proceedings before the PCO judges.<sup>214</sup> Once again, none of this political contention was entirely unprecedented, since judges, lawyers, politicians, and ordinary citizens also had resisted and mobilized against Pakistan's previous extraconstitutional interventions. However, its scale, visibility, and effectiveness were greater in 2007 than at most previous moments in Pakistan's history.

By now, the anti-Musharraf mobilization had broadened well beyond Pakistan's lawyers, who were joined in their resistance by politicians and civil society actors.<sup>215</sup> Television networks actively opposed the emergency, and while accessible to relatively few citizens, new media outlets became potent avenues of organizing and protest.<sup>216</sup> The emergency also heightened political mobilization by Pakistan's university students.<sup>217</sup> While the scale of the anti-emergency movement was limited, owing to its composition and barriers imposed by the crackdown itself, it nevertheless proved effective with Pakistani citizens and, crucially, international audiences. When Musharraf ultimately agreed to relinquish his position as Army Chief and terminate the emergency—in anticipation of parliamentary elections, which were postponed to February 2008

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212. *Sindh High Court Bar Ass'n*, (2009) PLD (SC) at 1055 (quoting full text of order).

213. See HUMAN RIGHTS WATCH, *supra* note 22, at 19.

214. See Siddiqi, *supra* note 171; Jane Perlez & David Rohde, *Lawyers Resist Emergency Rule by Musharraf*, N.Y. TIMES, Nov. 6, 2007, at A1. Retired judges also were outspoken in criticizing the emergency. See MALIK, *supra* note 144, at 252–53.

215. See *Pakistani Lawyers' Movement*, *supra* note 22, at 1713–15.

216. See Pamela Constable, *Political Talk Defies Ban in Pakistan*, WASH. POST, Nov. 25, 2007, at A14 (discussing protests and resistance to the emergency by journalists following the regime's censorship of television news networks); Marta Bolognani, *Virtual Protest with Tangible Effects? Some Observations on the Media Strategies of the 2007 Pakistani Anti-Emergency Movement*, 18 CONTEMP. S. ASIA 401, 405–08 (2010) (assessing the significance of blogs, online petitions, video clips, text messaging, and other forms of new media in the anti-emergency movement).

217. See Marta Bolognani, *Rang de Basanti in Pakistan? Elite Student Activism, the Emergence of a Virtual Globalized Public Sphere, and the 2007 Emergency*, in PAKISTAN AND ITS DIASPORA: MULTIDISCIPLINARY APPROACHES 19, 19 (Marta Bolognani & Stephen M. Lyon eds., 2011); Shahan Mufti, *Student Protests Build in Pakistan*, CHRISTIAN SCI. MONITOR, Nov. 15, 2007, at 1.

following Bhutto's assassination—pressure from the United States played a significant role.<sup>218</sup>

Although the lawyers' movement and political parties had cooperated to oppose Musharraf, the elections campaign revealed a divide that would reverberate in the elections' aftermath. Many within the lawyers' movement, along with some opposition politicians, advocated a boycott of elections unless the judiciary and constitution were restored to their pre-emergency state.<sup>219</sup> This position was not universally held within the movement. However, the main parties' decision to participate in the elections reinforced many lawyers' suspicions that politicians inclined only to seek incremental change would, ultimately, prove reluctant to restore the pre-emergency constitution and judiciary and instead, like their 1990s predecessors, would seek to impose their own judicial constraints.<sup>220</sup>

Nevertheless, with the elections, both strands of the anti-Musharraf movement contributed to a clear repudiation of the military regime. Despite evidence of irregularities, anti-Musharraf parties won a decisive victory. Though falling short of a majority, the PPP (now led by Bhutto's widower, Zardari) gained the most National Assembly seats of any party, and Sharif's Pakistan Muslim League-Nawaz (PML-N) the second most. The parties that comprised the regime's civilian façade were roundly defeated.<sup>221</sup> And while the lawyers' movement largely boycotted the elections, it had successfully placed judicial independence and opposition to the emergency at the forefront of the campaign, cultivating a popular mandate for the incoming government to roll back the regime's extraconstitution and restore the ousted judges.

While the judiciary had attempted to assert unprecedented autonomy from the military regime—and even had begun to enjoy

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218. See MALIK, *supra* note 144, at 250–52 (discussing importance of protests and other expressions of solidarity with the lawyers' movement by lawyers and bar associations in the United States, Canada, and other countries); Bolognani, *supra* note 216, at 405–06 (highlighting efforts by anti-emergency activists to use new media in a manner that self-consciously targeted U.S. and other international audiences).

219. These lawyers argued that since the regime could not be trusted to hold fair elections, participation risked lending credence to a fraudulent victory by regime loyalists, who could then validate and indemnify the actions taken under the emergency—including subordination of the judiciary. Muneer A. Malik, *First Things First*, DAWN, Dec. 6, 2007, <http://teeth.com.pk/blog/2007/12/06/first-things-first-muneer-malik-op-ed-in-dawn>.

220. Gazdar, *supra* note 101, at 9. Other lawyers opposed a boycott, since engaging the political process was inherently necessary to restore the ousted judges. See Siddiqi, *supra* note 171; see also James Traub, *The Lawyers' Crusade*, N.Y. TIMES, June 1, 2008, at MM46; KHAN, PAKISTAN: A PERSONAL HISTORY, *supra* note 72 (discussing his disagreement with the lawyers' movement on election boycott); Raza Rumi, *The Flawed Boycott Mantra?*, NEWS INT'L, Feb. 21, 2008 (noting risks in boycott of "de-legitimising the main political parties that have had the roughest time during the Musharraf years").

221. OLDENBURG, *supra* note 33, at 204.

some success in doing so—the emergency demonstrated its ultimate vulnerability to military constraints, given Pakistan’s institutional disequilibrium and the extent of entrenched military and deep state power, which always could be backed up with force, coercion, and manipulation. This lesson was, of course, one that Pakistan had learned before—and is instructive for other countries, such as Egypt, whose constitutional regime shifts also confront powerful status quo and military interests.<sup>222</sup> Even as he conceded ground to the antiregime movement and ultimately was repudiated by the election results, Musharraf remained President, and his constitutional and institutional transformation, including his reshaping of judicial composition and authority, remained in place for the new government to wrestle with.

#### IV. NAVIGATING PARTIAL REGIME SHIFT AND ROLLING BACK EXTRACONSTITUTIONALISM

Far from effecting a clear and complete “transition” to a stable constitutional democracy, the legacy of Musharraf’s emergency—as in other countries where status quo interests have remained powerful following regime shifts<sup>223</sup>—left Pakistan languishing between constitutional regimes for a prolonged period. Musharraf’s emergency had secured his position as President and packed the courts with PCO judges. Given the accumulated legacy of transformative preservation, the military and deep state remained dominant. At the same time, Musharraf and the military could hardly count on the incoming Parliament—led by parties that had pledged to reverse not just the emergency, but much of the regime’s broader legacy—to play its traditional role of assimilating Musharraf’s extraconstitution into the constitutional order. In this Part, I examine the contentious process by which this impasse between constitution and extraconstitution was navigated and ultimately broken. While this process eventually rolled back Musharraf’s extraconstitution—a landmark achievement—and further empowered both Parliament and the judiciary, it also exacerbated the disequilibrium and

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222. See Sowers, *supra* note 78 (arguing that the process of rolling back the military’s power in Egypt “will likely unfold over decades, punctuated by reversals and periods of conflict over the role of the security forces and the military in the political system”).

223. See, e.g., Bâli, *supra* note 2, at 276–79 (discussing the role of status quo forces in Turkey); Kenneth M. Pollack, *Democratizers? The Pursuit of Pluralism, in THE ARAB AWAKENING: AMERICA AND THE TRANSFORMATION OF THE MIDDLE EAST* 87, 87–88 (Kenneth M. Pollack ed., 2011) (discussing challenges for political transition presented by “contingent of powerful political and military actors who are either ambivalent or outright hostile to democracy” in Iraq, Palestine, Tunisia, Egypt, and Libya).



imbalance between them, as the existing clashes over judicial autonomy from the *military* morphed, almost seamlessly, into conflicts over the judiciary's autonomy from *Parliament*.

#### A. Constitution vs. Extraconstitution

The lawyers' movement pressed hard for the new coalition government, led by the PPP with support from the PML-N and other parties, to roll back the legacy of Musharraf's emergency, calling specifically for removal of Musharraf and reinstatement of Chaudhry and other ousted judges.<sup>224</sup> Initially, the PPP was reluctant to seek Musharraf's removal, but the coalition ultimately agreed on plans to impeach him. While impeachment itself was never likely, the pressure prompted the military to prevail upon Musharraf to resign, leading eventually to Zardari's election as President.<sup>225</sup>

Winding back Musharraf's extraconstitutional legacy, however, proved more intractable. The confused status of Pakistan's constitutional framework produced complex debates about the proper modalities to accomplish that objective. Viewed through the lens of the constitution, the entire legal edifice established under the emergency, including the PCO judges' appointments, could simply be deemed illegal and summarily reversed—for example, by an executive order or, at most, a parliamentary resolution.<sup>226</sup> However, through the lens of the extraconstitution, those actions and laws, having been validated by a reconstituted judiciary and implemented as formal constitutional amendments, could only be modified, as Musharraf and his allies insisted, through subsequent amendments.<sup>227</sup>

With both constitutional and extraconstitutional institutions coexisting side by side, this quandary—essentially political in nature, not strictly legal—evaded easy resolution. Initially, the PPP-led coalition came down strongly in favor of constitutionalism, pledging to restore all ousted judges within thirty days by a simple parliamentary resolution. Indeed, by invoking the Charter of Democracy as the basis of their coalition, Zardari and Sharif suggested an even more far-reaching and radical repudiation of

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224. See Siddiqi, *supra* note 171.

225. See Fair, *supra* note 28, at 73–74; *Cables Reveal How Musharraf Was Eased Out*, DAWN, Dec. 8, 2010, <http://dawn.com/2010/12/08/cables-reveal-how-musharraf-was-eased-out-2/>.

226. As Chaudhry stated, "I was deposed by an Executive Order and I can be restored by an Executive Order." Anil Kalhan, *The Math of Rollback*, DORF ON LAW (Feb. 23, 2008), <http://www.michaeldorf.org/2008/02/math-of-rollback.html>.

227. See Kalhan, *supra* note 12, at 109–10, 114 (discussing "muddled" state of Pakistan's constitutional order after the 2008 elections); Faisal Siddiqi, *Constitutionalism of a Political Problem*, NEWS ON SUNDAY, Mar. 30, 2008 (discussing conflict over the legal and constitutional modalities by which the judges ousted by Musharraf could properly be restored to office); *supra* Part II.B.1.

Musharraf's legacy.<sup>228</sup> However, the new government proved grudging in its efforts to take these steps. Zardari and the PPP repeatedly failed to honor their commitment to restore the judges, and as U.S. diplomatic cables confirm, that pledge was never particularly sincere on anyone's part in the first place.<sup>229</sup>

Zardari's misgivings about restoring the judges were based principally on anxiety that a Chaudhry-led Supreme Court would invalidate the NRO, thereby reopening corruption charges against him and other PPP politicians.<sup>230</sup> More generally, the PPP and its leaders had long harbored more suspicions concerning the judiciary, given its role in validating General Zia's coup (and affirming Zulfikar Ali Bhutto's execution) and its politicized role during the 1990s. Sharif had his own personal motivations for the opposite position.<sup>231</sup> Ultimately, the PPP's unwillingness to act led Sharif's PML-N to withdraw from the coalition and sit in opposition in Parliament.

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228. Amir Wasim & Abid Abbasi, *Zardari, Sharif in Historic Accord: PML-N To Join Gout at Centre, Judges' Restoration in 30 Days*, DAWN, Mar. 10, 2008, <http://archives.dawn.com/2008/03/10/top1.htm>. However, as Faisal Siddiqi observes, while pledging to restore the ousted *judges*, the coalition's platform was silent as to the *judiciary* as an institution and the status of incumbent PCO judges. Faisal Siddiqi, *Politics of Constitutionalism*, NEWS ON SUNDAY, June 29, 2008, <http://jang.com.pk/thenews/jun2008-weekly/nos-29-06-2008/enc.htm#1>.

229. U.S. Embassy Cable, *Zardari's Views on Agreement with Nawaz* (Mar. 10, 2008), available at <http://dawn.com/2011/05/24/2008-zardari-nawaz-agreed-not-to-restore-chief-justice-iftikhar-chaudhry/> (reporting Zardari's comments that he and Sharif "had agreed (very privately)" not to restore Chaudhry); see also U.S. Embassy Cable, *Immunity for Musharraf Likely After Zardari's Election as President* (Aug. 23, 2008), available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/167125> [hereinafter U.S. Embassy Cable, *Immunity for Musharraf*] (reporting that "Zardari plans to continue to slow roll action on the judges' restoration but remains confident that Nawaz Sharif will not walk out of the coalition"); U.S. Embassy Cable, *Zardari Examining a Coalition with Nawaz Sharif* (Feb. 20, 2008), available at <http://dawn.com/2011/05/24/2008-zardari-says-govt-without-nawaz-would-be-weak/> [hereinafter U.S. Embassy Cable, *Examining a Coalition*] (reporting that "Zardari planned to meet Nawaz's demands on the judiciary by burying them in committee, which he thought might satisfy Nawaz"); Anil Kalhan, *Pakistan's "Oddfather"?*, DORF ON LAW (Aug. 27, 2008), <http://www.dorfonlaw.org/2008/08/pakistans-oddfather.html> (noting that Zardari had openly acknowledged breaking "one promise after another about [restoring] the judges" during the months following the elections).

230. See U.S. Embassy Cable, *Helping Resolve the Deadlock over the Judges* (May 4, 2008), available at <http://dawn.com/2011/05/27/2008-zardari-upset-at-isi-head-lt-gen-nadeem-taj/>.

231. Under Chaudhry, the court had ordered Musharraf to permit Sharif's return to Pakistan from exile. *Pak. Muslim League (N) v. Fed'n of Pak.*, (2007) 59 PLD (SC) 642, 680 (Pak.). After the elections, both his and his brother Shahbaz Sharif's eligibility to hold office had been challenged in pending court cases, in which he was loath to trust the PCO judges. See U.S. Embassy Cable, *Immunity for Musharraf*, *supra* note 229 (inferring that Sharif's position "probably is based on Nawaz's expectation that Chaudhry would rule in both Nawaz's and Shahbaz's favor"). Despite the erstwhile cooperation between Sharif and Zardari, the prospect of a Chaudhry-led court striking down the NRO was likely also a factor in Sharif's support for Chaudhry's reinstatement. Fair, *supra* note 35, at 580–81.

Sharif and the PML-N thereby became firmly aligned with the lawyers' movement, boosting the likelihood of the judges' eventual restoration, but also giving the movement, and by extension the judiciary, a more political cast.<sup>232</sup>

While this conflict may be understood in these personality-driven terms, it also reflected a more fundamental tension between two opposed sets of political practices in a moment of regime shift.<sup>233</sup> The coalition's pledge to restore the ousted judges reflected the Charter of Democracy's commitment for parties to work cooperatively to establish a stronger foundation for constitutionalism and civilian supremacy. By contrast, as the product of Bhutto's parley with Musharraf, the NRO had emerged from a very different approach. Viewed charitably, that approach sought reconciliation with Musharraf's regime in aid of a negotiated and structured transition to civilian democracy, redounding to the benefit of all parties.<sup>234</sup> Less charitably, the deal enlisted military support for Bhutto and her party to achieve short-term political gains, but at the cost of reinforcing the military's dominance and political centrality, as the PPP and PML-N both had done during the 1990s.

The government's inaction also may be understood in terms of the disequilibrium among Pakistan's state institutions. As the experience under civilian rule in the 1990s demonstrates, Pakistan's weak representative institutions—facing powerful military and deep state interests, and a judiciary empowered to assert its autonomy from civilian actors—have readily found reasons to prefer and seek a constrained, subordinated judiciary. Moreover, hedging on reinstatement of the judges avoided a potential confrontation at a vulnerable moment for the new government with Musharraf and the military. As U.S. diplomatic cables reveal, Zardari and other politicians remained wary of the military's continued power during the months after the elections.<sup>235</sup> Before his resignation, Musharraf—

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232. U.S. Embassy Cable, *supra* note 230 (noting the embassy's view that "Nawaz has succeeded in changing the debate to how, not if, the former Chief Justice returns . . . [and] is reaping the popular glory as principled protector of the judiciary").

233. See *supra* text accompanying notes 187–89, 200–201; cf. Siddiqi, *supra* note 228 (analyzing the issue of restoring ousted judges as a "political, and not a personal, problem").

234. See Amir, *supra* note 181 (crediting Bhutto's role in successfully negotiating with Musharraf to relinquish his position as Army Chief); Faisal Siddiqi, Op-Ed., *The NRO Mystery*, DAWN, Jan. 1, 2012, <http://dawn.com/2012/01/01/the-nro-mystery/> (discussing "competing visions of democratic constitutionalism" reflected in conflicts over NRO).

235. U.S. Embassy Cable, *supra* note 230 (noting that Zardari's "relations with Musharraf and ISI are fraying badly"); U.S. Embassy Cable, Examining a Coalition, *supra* note 229 (noting Zardari's concern that "his own reputation within the Army was not good"). These fears persisted even after Musharraf's resignation. See Declan Walsh, *Pakistan's President Asif Ali Zardari "Prepared for Assassination,"* GUARDIAN, Dec. 1, 2010, at 8 (discussing Zardari's fear in 2009 that military might "take [him] out").

armed with not only military support, but also power to dissolve Parliament under Article 58(2)(b)—actively sought to shape the new government and its agenda.<sup>236</sup> Indeed, when his political standing later slumped, Musharraf even considered dissolving Parliament simply to preempt his impeachment.<sup>237</sup>

With its interests in alignment with those of Musharraf and the military, the PPP-led government engaged in “crude pragmatism,” committing to restore individual *judges* while simultaneously seeking to preserve the constrained *judiciary* inherited from Musharraf’s regime.<sup>238</sup> Parliament first enacted a law—notably, with the PML-N’s support—expanding the Supreme Court from sixteen to twenty-nine judges, enabling the government to place its own stamp on the court’s composition.<sup>239</sup> The government then gradually began to return most ousted judges to the bench. These judges were not truly “reinstated” to their previous positions, but in effect “reappointed” to new vacancies, upon taking new oaths of office. While the government eventually restored nearly all ousted judges, this mechanism enabled it to do so selectively—and in particular, to avoid reinstating Chaudhry—while simultaneously making no challenge to the status of Musharraf’s PCO judges, most notably Dogar’s status as chief justice.<sup>240</sup> Finally, although never presented in Parliament, the government proposed an extensive package of constitutional amendments that would have restored all ousted judges and rejected many of Musharraf’s extraconstitutional changes, but also aggressively constrained judicial authority, limited judges’ terms of office, and established executive primacy in judicial appointments and removal.<sup>241</sup>

This strategy eventually narrowed the conflict to one mostly involving Chaudhry and a few other judges, but left Pakistan’s constitutional order as murky as when the coalition came to power. While the proposed amendment package signaled the PPP’s

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236. U.S. Embassy Cable, *Examining a Coalition*, *supra* note 229 (“Musharraf’s advisors have tried to convince Zardari to exclude Nawaz Sharif in any PPP-led government.”).

237. U.S. Embassy Cable, *Scenesetter for PM Gilani’s Visit to Washington* (July 25, 2008), *available at* <http://dawn.com/2011/05/29/2008-musharraf-debated-dissolving-parliament-to-save-himself/>.

238. Faisal Siddiqi, *Politics of Legal Absurdities*, *NEWS ON SUNDAY* (Sep. 28, 2008), <http://jang.com.pk/thenews/sep2008-weekly/nos-28-09-2008/dia.htm#4>; *see also* U.S. Embassy Cable, *supra* note 230 (noting Zardari’s proposals to restore ousted judges, but for more limited terms or with more limited powers).

239. Raja Asghar, *Assembly Passes First Budget, Expands SC*, *DAWN* (June 23, 2008), <http://archives.dawn.com/2008/06/23/top1.htm>.

240. Siddiqi, *supra* note 238; U.S. Embassy Cable, *Insights on Zardari’s Plans for the Party, Coalition, and Judges* (Aug. 27, 2008), *available at* <http://dawn.com/2011/06/11/2008-political-scheming-to-get-zardari-elected/> (discussing the PPP strategy of “gradual reinstatement” of judges).

241. KHAN, *supra* note 11, at 718–19; Siddiqi, *supra* note 238.

unwillingness to fully embrace Musharraf's extraconstitution, the PPP simultaneously (and inconsistently) was prepared to accept Musharraf's reconstituted and subordinated judiciary as legitimate, including its extraconstitutional jurisprudence validating the emergency, and to impose its own, even stronger constraints upon the judiciary. This approach produced a sharpened divide between the PPP and PML-N—stalling cooperation on the Charter of Democracy's broader aims—and deepened mistrust of the government's commitment to judicial independence within the lawyers' movement. What had been a conflict over judicial autonomy from the military was rapidly, and seamlessly, transmuted into a conflict over judicial autonomy from an elected Parliament, with lasting consequences for Pakistan's larger processes of constitutional change and democratic consolidation.

The conflict over Chaudhry and the other ousted judges was not resolved until it became entangled with a major political crisis. In February 2009, the PCO-reconstituted Supreme Court held Sharif and his brother Shahbaz Sharif, the Chief Minister of Punjab, ineligible to hold elective office. Nominally on that basis, but overreaching for political advantage, Zardari dismissed Punjab's PML-N-led provincial assembly and imposed direct federal rule. Sharif and the PML-N responded by planning massive demonstrations in conjunction with the lawyers' movement but largely backed by its own street power, demanding Chaudhry's reinstatement.<sup>242</sup> Faced with thousands of opponents embarking on a "long march" from Lahore to Islamabad—and intense pressure from his own party, the United States, and most crucially and forcefully, the Army Chief<sup>243</sup>—Zardari backed down, agreeing not only to restore the Punjab government, but also to restore Chaudhry as chief justice upon Dogar's retirement later that month.<sup>244</sup>

Chaudhry's reinstatement is often characterized as the lawyers' movement's "greatest victory," the result of having pushed politicians

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242. See Matthew J. Nelson, *Pakistan in 2009: Tackling the Taliban?*, 50 *ASIAN SURV.* 112, 115–16 (2010).

243. See Saeed Shah, *Pakistan Increases Power of Army Strongman General Ashfaq Kayani*, *GUARDIAN*, July 24, 2010, at 19 (noting Kayani's "secret interven[ti]on" to restore Chaudhry); U.S. Embassy Cable, *Implications of the Long March* (Mar. 16, 2009), available at <http://dawn.com/2011/05/20/fallout-from-the-2009-long-march/> (discussing Kayani's "adroit behind-the-scenes maneuvering"); U.S. Embassy Cable, *Little Movement on Reconciliation* (Mar. 12, 2009), available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/196412> ("In four conversations with Ambassador this week . . . Kayani hinted that . . . he might have to urge Zardari to resign."); U.S. Embassy Cable, *Long March Round Up as of 1500 Local Time*, March 16 (Mar. 16, 2009), available at <http://dawn.com/2011/06/06/2009-armys-role-in-long-march-conclusion/> (noting Kayani's role as "primary interlocutor" responsible for convincing Zardari to restore ousted judges).

244. The resolution also restored the remaining ousted judges. See Nelson, *supra* note 242, at 116.

to respect the judiciary's emergent autonomy and power.<sup>245</sup> However, without denying the lawyers' crucial role, this depiction pays insufficient heed to the centrality of political elites, the military, and the enduring disequilibrium in Pakistan's institutional relationships, which shaped both the conflict and its resolution. Though distinct in important ways, the structural dynamics surrounding the events restoring Chaudhry to office echoed earlier conflicts in Pakistan's political history. A politicized judgment, rendered by a Supreme Court empowered to assert its autonomy from civilian political actors, brought simmering, politically driven tensions over the balance between judicial autonomy and constraint to the fore. When the crisis escalated—largely outside of Parliament—it was the military that interceded to mediate and ultimately play the decisive role in resolving it. While important, the lawyers' movement was subsidiary to these processes. And while the military had politically weakened in the face of the anti-Musharraf movement, and did not formally dismiss Zardari's government over the crisis, its continued primacy remained plain to see.<sup>246</sup>

Even as Chaudhry and other ousted judges were restored, the larger impasse between constitution and extraconstitution remained unsettled. But as I explain in the rest of this Part, resolution of this conflict enabled both the judiciary and Parliament to take other major steps advancing constitutionalism over extraconstitutionalism—further empowering both institutions, but also setting the stage for a reconfigured and intensified conflict between them.

### B. *The Judiciary's Great Leap Forward*

Almost immediately after Chaudhry's reinstatement, the Supreme Court began to reassert itself, making clear its intention to resume a forceful role as both a guardian of constitutionalism and an arbiter of core questions of "pure politics."<sup>247</sup> However, in a series of major decisions, the court elided any distinction between the autonomy and power it claimed vis-à-vis the erstwhile military regime and the autonomy it now began to assert, even more forcefully, vis-à-vis the post-Musharraf civilian government. In the

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245. Ahmed, *supra* note 22, at 501–02; see also Kausar, *supra* note 22, at 32 (asserting that "the movement ended successfully" by achieving the judiciary's reinstatement in March 2009); *Pakistani Lawyers' Movement*, *supra* note 22, at 1726 (asserting that the movement "forced nearly every major political party in Pakistan to endorse the ideas of judicial independence and the restoration of the judiciary").

246. See Fair, *supra* note 35, at 580–85 (detailing the military's continuing centrality as "part of Pakistan's political machinery" and asserting that "it is far from clear that the army has departed from its historical [political] role").

247. Hirschl, *Pure Politics*, *supra* note 81.

process, the court's jurisprudence—though resting on different premises from its earlier jurisprudence, which openly and self-consciously justified military supremacy—both contributed to and reinforced the antidemocratic logic of the military's legitimating discourse.<sup>248</sup>

First, in two decisions normalizing the Sharifs' political status, the court indirectly chipped away at the quasi-legal basis for Musharraf's extraconstitution. In May 2009, the court reversed its previous judgment disqualifying the Sharifs from elective office.<sup>249</sup> In July 2009, the court went further, vacating Nawaz Sharif's 2000 conviction for "hijacking" altogether.<sup>250</sup> This latter decision unmistakably, if obliquely, turned the court's extraconstitutional jurisprudence of necessity on its head—gesturing instead at a principle of necessity in defense of *constitutionalism* by concluding that under applicable civil aviation law, Sharif was justified by the need to protect "public safety and tranquility" in trying to prevent Musharraf from returning to Pakistan to carry out his coup.<sup>251</sup>

Second, in July 2009, a fourteen-judge bench led by Chaudhry issued a landmark judgment holding the entire legal edifice of Musharraf's emergency—including the initial proclamation of emergency; the PCO; and all orders, laws, constitutional amendments, and other actions by Musharraf during the emergency—unconstitutional and void *ab initio*.<sup>252</sup> The court reiterated its order enjoining the emergency when it was declared and held that the subsequent validation of the emergency under the doctrine of necessity by PCO judges unlawfully appointed in the face of that order was a nullity.<sup>253</sup> Since Parliament had not acted to endorse and indemnify Musharraf's extraconstitutional laws and actions, the court stated, they could be afforded no legal effect.<sup>254</sup>

248. See also Kennedy, *supra* note 22, at 151–58.

249. Fed'n of Pak. v. Muhammad Nawaz Sharif, (2009) 61 PLD (SC) 644 (Pak.).

250. Following Musharraf's 1999 coup, Sharif was convicted by an anti-terrorism court of "hijacking" Musharraf's commercial flight, which Sharif—a day after he fired Musharraf as Army Chief, and while the coup was already underway—unsuccessfully ordered to be prevented from landing in Karachi upon Musharraf's return from an international trip. See RASHID, *supra* note 61, at 47.

251. Muhammad Nawaz Sharif v. State, (2009) 61 PLD (SC) 814, 847–48 (Pak.); see also U.S. Embassy Cable, Ice May Have Cracked, but Sharifs Still Distrust in Zardari (July 24, 2009), available at <http://dawn.com/2011/05/20/sharif-confides-in-americans-about-zardari-hafiz-saeed-and-punjab-power-crisis/> (noting Shahbaz Sharif's view that judgment was "constitutionally significant" in discrediting rulings" justifying military intervention and "makes it more difficult for the Army to take over").

252. Sindh High Court Bar Ass'n v. Fed'n of Pak., (2009) 61 PLD (SC) 879 (Pak.).

253. *Id.* at 1200 (declaring *Tika Iqbal Muhammad Khan v. Fed'n of Pak.*, (2008) PLD (SC) 178, void *ab initio*).

254. *Id.* at 956–57.

The court's judgment amounted to a complete unwinding of the judiciary's composition to its pre-emergency state. For the judges ousted by Musharraf, the court swept away the PPP-led government's strategy of selective "reappointment," since it deemed those judges never to have been terminated in the first place.<sup>255</sup> Since the position of chief justice had never become vacant, the court invalidated Musharraf's appointment of Dogar as chief justice. And on that basis, the court invalidated *all* judicial appointments from November 2007 to March 2009—whether by Musharraf *or* the PPP-led civilian government, over 100 positions in all—since they were never made "in consultation with" a lawful "Chief Justice," as constitutionally required.<sup>256</sup> The court also invalidated the civilian government's law expanding the size of the Supreme Court, principally on technical legislative process grounds, but also because Parliament's increasing the size of the court had "militate[d] against the independence of the judiciary."<sup>257</sup> Those PCO judges who already were judges when they took extraconstitutional oaths of office were restored to their previous positions, but also were referred for judicial misconduct proceedings and, in some cases, charged with contempt of court.<sup>258</sup>

At one level, these cases may simply be understood as the judiciary getting its own constitutional house in order, decisively repudiating its longstanding extraconstitutional jurisprudence of state necessity and sanctioning individual judges whose conduct had enabled Musharraf's intervention. However, the Supreme Court simultaneously asserted its autonomy from *civilian* political actors—implicitly, but unmistakably rebuking the PPP-led government for not fully (or more quickly) reinstating the ousted judges and forcefully reasserting its equally longstanding role as arbiter of Pakistan's core questions of pure politics.<sup>259</sup> The court's decision in the *PCO Judges Case* displaced a political settlement—which, after protracted contestation and negotiation, had finally, if imperfectly, resolved the conflict over the judiciary—in favor of its own resolution. While framed in legal terms, the necessarily political nature of the

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255. Indeed, the court voided all notifications by the Law Ministry reappointing those judges. *Id.* at 1057–58.

256. *See generally id.*

257. *Id.* at 1111–13, 1142–44.

258. *Id.* at 960. Most of these judges eventually resigned. The court also revised its code of judicial conduct to add a new misconduct ground prohibiting judges from "support[ing] in whatever manner . . . any unconstitutional functionary who acquires power" via extraconstitutional means. *Id.* at 962.

259. *See* Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Reform*, 31 *YALE L. & POL'Y REV.* (forthcoming 2012) (manuscript at 2), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2154194](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154194) (discussing the role of federal judicial conduct regulation in not only addressing misconduct of individual judges, but also "facilitat[ing] the centralization of judicial authority, the development of a cohesive judicial identity, and the emergency of the Judiciary's 'corporate persona'").



court's own resolution was manifest, especially since it too had stopped short of wiping Musharraf's extraconstitutional slate entirely clean. The court extended recognition to orders, judgments, and administrative matters by PCO judges during their unlawful terms and explicitly protected the validity of the 2008 elections, even though they were held under partially extraconstitutional auspices.<sup>260</sup> Moreover, even though it invalidated an amendment giving permanent legal effect to several temporary ordinances, including the NRO, the court nevertheless also extended their life, ostensibly to give Parliament an opportunity to decide whether to adopt them as ordinary laws.<sup>261</sup> While the government publicly welcomed and adhered to it, the court's decision amounted to an unmistakable assertion of autonomy not just from the previous military regime, but also from the present civilian government, anticipating the prospect of further conflict.<sup>262</sup>

That conflict openly erupted in a third case in December 2009, when a seventeen-judge bench declared the NRO unconstitutional and ordered the government to reinstitute all cases withdrawn or vacated under the ordinance, including those against Zardari and other politicians.<sup>263</sup> As observers have noted, the NRO—which the PPP-led government not only could not successfully get reenacted by Parliament but also did not even defend before the court—was vulnerable to straightforward invalidation on the comparatively narrow ground that it had arbitrarily defined the categories of individuals benefiting from its protections and, therefore, violated the right of equality. However, in a 287-page opinion by Chaudhry, the court also declared the ordinance inconsistent with a slew of other constitutional provisions, leveling it, as I.A. Rehman describes, with a “fusillade from heavy cannons,” even though it was “such an easy target that a single shot . . . was enough to demolish it.”<sup>264</sup> Once

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260. *Sindh High Court Bar Ass'n*, (2009) PLD (SC) at 1200–06 (applying *Asma Jilani v. Punjab*, (1972) PLD (SC) 139); see also Mahmud, *supra* note 20, at 1255–60 (discussing similar dilemmas in *Asma Jilani*). The court also kept quiet about the fact that most of the “non-PCO” judges, including Chaudhry himself, had themselves taken extraconstitutional oaths under Musharraf's first PCO in 2000.

261. *Sindh High Court Bar Ass'n*, (2009) PLD (SC) at 1203–05.

262. Gazdar, *supra* note 142, at 10–11.

263. *Mobashir Hassan v. Fed'n of Pak.*, (2010) 62 PLD (SC) 1 (Pak.) (short order); *Mobashir Hassan v. Fed'n of Pak.*, (2010) 62 PLD (SC) 265 (Pak.) (detailed judgment); see also Jahangir, *supra* note 23 (criticizing the effect of the Supreme Court's decision on separation of powers); Asma Jahangir, *Flaws in the Judgment*, DAWN (Jan. 26, 2010), <http://archives.dawn.com/archives/32568> [hereinafter Jahangir, *Flaws*] (discussing various shortcomings of the decision).

264. I.A. Rehman, *Pause, Sirs, and Ponder*, DAWN (Dec. 24, 2009), <http://archives.dawn.com/archives/19722>; see also Amir, *supra* note 181. Moreover, by convening a seventeen-judge bench—the largest in the court's history for any case—Chaudhry signaled an intent for the case to carry a high profile. See Feisal H. Naqvi,

again, the court displaced a negotiated political settlement (in this instance, between Bhutto and Musharraf) with its own resolution, articulated in legal terms but no less political. Indeed, at points in its decision the court seemed to justify its conclusion almost directly in political terms. For example, the court concluded, based on excerpts from Bhutto's posthumously published memoir, that despite the ordinance's title, the NRO did not genuinely provide "reconciliation" in the "national interest," but rather was "the result of [a] deal between two individuals for their personal objectives."<sup>265</sup> As Ayaz Amir observes, this conclusion rests on a "selective reading" of the various roles played by different actors in the transition away from Musharraf's regime, failing to sufficiently acknowledge that "[d]ifferent chapters were written by different authors"—including actors outside the lawyers' movement and judiciary—in effecting that transition.<sup>266</sup>

While invalidating an order issued under Musharraf's military regime, the court's decision also converged with the military's own legitimating discourse. The court discussed at great length the importance of prosecuting corruption by politicians, devoting specific attention to charges against Zardari in Pakistan and abroad and ordering the government to write Swiss officials to seek their assistance in pursuing corruption cases against him. The court specifically emphasized the NRO's inconsistency with the National Accountability Ordinance, which was adopted by Musharraf's military regime soon after his 1999 coup and is widely understood to have been used by his regime arbitrarily to coerce and manipulate political opponents.<sup>267</sup> The court also drew upon the discussion of corruption in *Zafar Ali Shah*, an extraconstitutional decision that invoked the military's allegations of corruption by civilian politicians as a basis to validate Musharraf's 1999 coup.<sup>268</sup> Finally, the court held that the NRO violated constitutional provisions imposed by Zia that require members of Parliament to be "sagacious, righteous and non-profligate, honest and ameen"—provisions premised upon a presumptive mistrust of the integrity of elected politicians and self-consciously adopted as an instrument of deep state control of civilian politics.<sup>269</sup>

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*The Lonely Death of the NRO*, FRIDAY TIMES, Dec. 24, 2009 (suggesting that "the very size of the bench made it clear . . . that a 'historic' judgment was in the offing").

265. *Mobashir Hassan*, (2010) PLD (SC) at 352–53; Naqvi, *supra* note 264; Amir, *supra* note 181.

266. Amir, *supra* note 181.

267. *Mobashir Hassan*, (2010) PLD (SC) at 400–06. On the military's selective use of anticorruption initiatives, see *supra* note 75 and accompanying text.

268. See *supra* text accompanying note 94.

269. *Mobashir Hassan*, (2010) PLD (SC) at 422–23, 437–40 (citing and discussing PAKISTAN CONST. arts. 62–63); see also Jahangir, *Flaws*, *supra* note 263 (arguing that the Supreme Court's invocation of Articles 62 and 63 amounted to

The NRO was unpopular, and the court—increasingly understanding its legitimacy in the aftermath of the anti-Musharraf movement to derive directly from the public—was applauded by many for striking it down. But what could have been a judgment sounding in more limited principles of equality and nonarbitrariness instead became a wide-ranging decision decrying corruption and a presumptive lack of morality among Pakistan’s civilian politicians. In this manner, the court suggested a role for itself not simply as a referee of central political questions, but as an arbiter of political integrity and morality—a role wholly congruent with the military’s self-conception of its own role and the deep state’s antidemocratic legitimating discourse.<sup>270</sup> Later, when the PPP-led government opted to aggressively resist the court’s judgment, balking in particular at the court’s order to write Swiss officials concerning corruption allegations against Zardari, the court’s projection of that self-conception of its role and identity intensified to a breaking point—ultimately leading to the court’s ouster of the Prime Minister, which I discuss below in Part V.

The court’s inclination to act as ultimate arbiter of political integrity and morality is manifest in a fourth case during this period, which involved the Musharraf-era requirement that legislators hold university degrees. As discussed above, this requirement—in addition to disqualifying the overwhelming majority of Pakistan’s citizens from holding elective office—institutionalized the antidemocratic logic of the military’s legitimating discourse and served as an instrument of political manipulation by Musharraf’s regime. While the court had extraconstitutionally sustained that requirement soon after it was issued, the PCO Supreme Court under Dogar overruled that decision in 2008, invalidating the requirement as inconsistent with the constitution’s fundamental rights to association and equality.<sup>271</sup>

It soon came to light, however, that many politicians, across a broad range of political parties, had falsely claimed to have earned the requisite degree in order to evade the requirement imposed by Musharraf’s regime. Even though that requirement itself had now

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“plead[ing] that that legacy of dictators that suits us will be accepted and the one that hurts us will not”); Rehman, *supra* note 264 (arguing that the Supreme Court’s invocation of Zia’s constitutional amendments, which “have never been debated by a representative assembly and have been consistently denounced by democratic opinion,” was akin to “quoting a PCO judge”).

270. See Walsh, *supra* note 15 (quoting Muneer Malik); cf. Shambayati, *supra* note 79, at 286 (advancing reasons why, in Turkey, “the military and the judiciary might share a number of common values and assumptions about politics and politicians”).

271. Muhammad Nasir Mahmood v. Fed’n of Pak., (2009) 61 PLD (SC) 109, 177 (Pak.) (noting that only 1.6 percent of the population were qualified as graduates, and that the literacy rate in Pakistan is only 35 percent).

been invalidated, the court (now under Chaudhry), reviewing a challenge filed by a losing political candidate, took cognizance of these false degree claims as alleged “corrupt practices” and ordered the Election Commission to investigate all of Pakistan’s sitting legislators and sanction any who had made false claims.<sup>272</sup> The decision triggered a massive spectacle, as media coverage flooded public discourse with allegations against politicians who may have claimed false academic credentials.<sup>273</sup> While the immediate controversy subsided, the court’s actions—which, practically speaking, resurrected from the constitutional dead and gave effect to an extraconstitutional, deep state mechanism to subvert civilian politics—prompted suspicions of a concerted effort by deep state interests to undermine Pakistan’s civilian government.<sup>274</sup> Regardless of whether the court’s actions involved any actual conspiracy (and no documented evidence suggests one), the court nevertheless had, in effect, once again actively propagated and reinforced the deep state’s legitimating discourse and arguably enhanced the military’s power vis-à-vis Pakistan’s representative institutions.

### C. *The Eighteenth Amendment*

In the immediate aftermath of the *NRO Case*, the PPP-led government appeared to be in a state of chaos, amidst rumors of imminent military intervention.<sup>275</sup> However, beneath that volatile surface, Parliament was functioning as a more mature and effective constitutional actor than arguably ever before in Pakistan’s history.<sup>276</sup> Resolution of the crisis between the PPP and PML-N in March 2009 had enabled an unprecedented, year-long parliamentary process that culminated in April 2010 with adoption of the Eighteenth Amendment, an unprecedented package of more than one hundred constitutional changes implementing much of the Charter of Democracy—reasserting civilian supremacy, strengthening Parliament over the presidency, devolving power to provincial governments, and reconfiguring the balance between judicial

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272. Muhammad Rizwan Gill v. Nadia Aziz, (2010) PLD (SC) 828; see also Kennedy, *supra* note 22, at 153–54.

273. See Waraich, *supra* note 76.

274. As Farahnaz Ispahani, a PPP legislator (and Wellesley graduate), intimated, “The unconstitutional degree requirement is being invoked by those who have constantly assaulted our fledgling democracy.” *Id.*

275. Declan Walsh, *Pakistan Denies Coup as Court Ruling Rocks Zardari Government*, GUARDIAN, Dec. 17, 2009, at 26.

276. See generally FRUMAN, *supra* note 42, at 21–22; PAK. INST. OF LEGISLATIVE DEV. & TRANSPARENCY, MID-TERM ASSESSMENT OF THE QUALITY OF DEMOCRACY IN PAKISTAN, MARCH 25, 2008–SEPTEMBER 24, 2010 (2010).

autonomy and constraint with respect to the judicial appointments process.<sup>277</sup>

The amendments were prepared by a twenty-six-member Parliamentary Committee on Constitutional Reforms (PCCR), which included representatives from all parties represented in Parliament and was expressly charged with recommending amendments to implement the Charter.<sup>278</sup> While the military placed informal constraints upon the PCCR's mandate, it largely left the committee to its own devices, apparently owing to skepticism that Pakistan's notoriously contentious politicians would reach agreement.<sup>279</sup> That expectation proved wholly mistaken, for in the Charter's spirit, the PCCR achieved a level of political consensus rarely seen in Pakistan's history.<sup>280</sup> When the PCCR presented the Eighteenth Amendment to Parliament, it did so with unanimous support of its members.<sup>281</sup> Ultimately, the Eighteenth Amendment sailed through Parliament without a single dissenting vote.

At its core, the amendment reasserted civilian supremacy, declaring that the extraconstitutional amendments imposed by Musharraf after his 1999 coup were "without lawful authority and [therefore have] no legal effect" and, on that basis, repealed them.<sup>282</sup> The amendment expanded the grounds for treason to include extraconstitutional attempts to suspend or hold the constitution in abeyance and attempts by courts to validate such actions.<sup>283</sup> Beyond their substantive effect, these provisions therefore functioned as an

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277. Constitution (18th Amend.) Act, No. 10 of 2010, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Apr. 20, 2010; see also Colin Cookman, *The 18th Amendment and Pakistan's Political Transitions*, CENTER FOR AM. PROGRESS (Apr. 19, 2010), <http://www.americanprogress.org/issues/security/news/2010/04/19/7587/the-18th-amendment-and-pakistans-political-transitions/>; Raza Rumi, *An Unlikely Catalyst for Change*, TEHELKA (Apr. 17, 2010), [http://www.tehelka.com/story\\_main44.asp?filename=Ne170410an\\_unlikely.asp](http://www.tehelka.com/story_main44.asp?filename=Ne170410an_unlikely.asp).

278. PCCR REPORT, *supra* note 11, ¶ 8; Katharine Adeney, *A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment*, 42 PUBLIUS 539, 546–47 (2012).

279. Adeney, *supra* note 278, at 547. Other observers credit a conscious effort by the military to step back from active engagement in politics.

280. The committee held 77 meetings, involving 385 hours of deliberation and consideration of 982 amendment proposals from the public. PCCR REPORT, *supra* note 11, ¶¶ 13, 22; see also Haris Gazdar, *Democracy in Pakistan: The Chasm*, ECON. & POL. WKLY., May 29, 2010, at 10 ("While Pakistani public spaces resounded throughout this period with the cacophony of civil strife, terrorism, scandal, institutional clashes, political anger and economic disaffection, the committee laboured quietly until consensus had been reached among representatives of virtually every significant shade of opinion.")

281. While some members included "notes of reiteration" recording opposing views in the Committee's Final Report, in the interest of consensus, all committee members signed and agreed to the final package. See PCCR REPORT, *supra* note 11, ¶ 17.

282. Constitution (18th Amend.) Act, No. 10 of 2010, pmb. §§ 2, 96.

283. *Id.* § 4 (amending PAKISTAN CONST. art. 6).

analogue to the Supreme Court's *PCO Judges* decision: getting Parliament's own constitutional house in order by disavowing its historical role of ratifying and completing the military's process of transformative preservation.

Substantively, the constitutional amendment package restored parliamentary supremacy, placing selection of the Prime Minister with Parliament and transferring most executive authority from the President to the Prime Minister.<sup>284</sup> Most notably, the amendment eliminated the President's discretionary authority under Article 58(2)(b) to dissolve the National Assembly.<sup>285</sup> The amendment also eliminated constraints on Parliament's lawmaking power, limiting the President's legislative role and eliminating two Zia-era schedules of semi-entrenched laws—one list of laws requiring presidential consent before they could be amended or repealed, and one list of laws that could only be amended or repealed using the procedures for constitutional amendments.<sup>286</sup> A handful of provisions recognized fundamental rights not previously guaranteed.<sup>287</sup>

The Eighteenth Amendment also enhanced the status and autonomy of provincial governments, addressing one of Pakistan's most longstanding and vexing sets of concerns.<sup>288</sup> The amendment eliminated the "Concurrent List," which had enumerated forty-seven

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284. *Id.* §§ 14, 15, 27, 28, 29, 31 (amending PAKISTAN CONST. arts. 46, 48, 89, 90, 91, 99). Similar changes modified the relationships between provincial governors and chief ministers. *Id.* §§ 42, 46 (amending PAKISTAN CONST. arts. 129, 139). Power over most appointments was transferred to the Prime Minister, although some appointment powers previously vested in the President, such as judicial appointments, were transferred to other entities. *Id.* §§ 33, 77, 89, 90 (amending PAKISTAN CONST. arts. 101, 213, 242, 243); *id.* § 67 (adding PAKISTAN CONST. art. 175A).

285. *Id.* § 17 (repealing PAKISTAN CONST. art. 58(2)(b)–(c)). The amendment also eliminated the analogous provision conferring discretion upon provincial governors to dismiss provincial assemblies. *Id.* § 37 (repealing PAKISTAN CONST. art. 112(2)(b)). The President now only may dissolve the National Assembly and order elections on advice of the Prime Minister, or if the Prime Minister loses a vote of confidence and no other member of Parliament can form a government. *Id.* § 17. The President may only dismiss the Prime Minister upon losing a vote of confidence. *Id.* § 29 (amending PAKISTAN CONST. art. 91).

286. *Id.* §§ 15(i), 26, 94, 101–02 (amending PAKISTAN CONST. arts. 48(1), 75(1), 268(2), 6th sched., 7th sched.). The amendment also limits the President's power to issue ordinances having the effect of ordinary laws when Parliament is not in session. *Id.* § 27 (amending PAKISTAN CONST. art. 89(1)).

287. *Id.* § 5 (adding PAKISTAN CONST. art. 10A) (right to fair trial); *id.* § 9 (adding PAKISTAN CONST. art. 25A) (right to education); *id.* § 7 (adding PAKISTAN CONST. art. 19A) (right to information). These provisions built upon other efforts by civilian government to improve Pakistan's international human rights compliance, including its ratification of the International Covenant on Economic, Social and Cultural Rights (which the Musharraf regime had signed but had not ratified), the International Covenant on Civil and Political Rights, and the Convention Against Torture.

288. See Adeney, *supra* note 278 (analyzing and assessing the significance of the amendment's provisions altering the distribution of powers between the central and provincial governments).

subject areas in which both the federal and provincial governments could legislate but in which federal law prevailed in the event of any conflict.<sup>289</sup> With this transfer of lawmaking authority, seventeen of the federal government's forty-eight ministries were devolved to provincial governments, requiring an extensive implementation process to enhance provincial capacity to manage these responsibilities. The amendment also modified the formula for distributing national revenues to provincial governments and gave provincial governments greater control over their own natural resources.<sup>290</sup>

Finally, the amendment overhauled the process for judicial appointments.<sup>291</sup> As discussed above, the Supreme Court, following precedent from India, held in 1996 that recommendations for appointment by the chief justice in the constitutionally required process of "consultation" ordinarily would be binding upon the executive. As in India, this process had been criticized for concentrating excessive power in the executive and chief justice, without sufficient transparency, scrutiny, or meaningful engagement by Parliament, the legal profession, or the public at large.<sup>292</sup> With the Supreme Court asserting the chief justice's primacy in the consultation process, the judiciary effectively had seized total autonomy over its composition—indeed, even greater autonomy than in India, for while Indian judges may be removed by Parliament, in Pakistan removal is constitutionally assigned to a judicial body, the Supreme Judicial Council.<sup>293</sup>

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289. Constitution (18th Amend.) Act, No. 10 of 2010, § 49 (amending PAKISTAN CONST. art. 142). Residual powers continue to rest with provincial governments.

290. *Id.* §§ 58–59, 65 (amending PAKISTAN CONST. arts. 157, 160, 172); see also Adeney, *supra* note 278, at 546–50 (noting "[l]ong-standing demands" for abolition of the Concurrent List and "major tensions" over the distribution of resources between the provinces); Asma Jahangir, *Strengths and Pitfalls*, DAWN, Apr. 16, 2010, <http://archives.dawn.com/archives/27059> (characterizing the amendment's federalism provisions as its "most vital" reforms). The amendment also officially changed the colonial-era name of the North West Frontier Province to Khyber Pakhtunkhwa. Constitution (18th Amend.) Act, No. 10 of 2010, § 3 (amending PAKISTAN CONST. art. 1).

291. Constitution (18th Amend.) Act, No. 10 of 2010, § 66 (adding PAKISTAN CONST. art. 175A).

292. *E.g.*, Osama Siddique, *Judicial Apointments and Accountability: A Flawed Debate*, FRIDAY TIMES, Mar. 12, 2010; see also Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty*, in PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN 158, 174–80 (Devesh Kapur & Pratap Bhanu Mehta eds., 2007); Anil Divan, *Judicial Appointments: Agenda for Reform*, HINDU, Dec. 17, 2009.

293. Compare PAKISTAN CONST. art. 209, with INDIA CONST. arts. 124(4), 217(1). See also Osama Siddique, *Across the Border*, 615 SEMINAR 52, 53 (2010) (explaining and analyzing constitutional jurisprudence on judicial appointments in Pakistan and India); I.A. Rehman, *Selection of Judges*, DAWN, Jan. 21, 2010, <http://archives.dawn.com/archives/19929> (discussing concerns since the 1990s over the judicial appointments process). Of course, as discussed above, judicial composition in

Based on these and other criticisms, reformers had long proposed a more inclusive and transparent appointments process that would provide for greater judicial accountability, and the Eighteenth Amendment established a variant on the reforms proposed in the Charter of Democracy.<sup>294</sup> Relatively speaking, the overhauled process in the Eighteenth Amendment placed only modest constraints upon the judiciary's autonomy and power over its own composition. Initial nominations are made by a Judicial Commission, chaired by the chief justice of Pakistan and including representatives from the judiciary, the executive, and bar associations.<sup>295</sup> After reviewing all candidates, the Judicial Commission then nominates one individual for each vacancy to an eight-person Parliamentary Committee equally divided between government and opposition party members. The Parliamentary Committee's authority is limited: it may reject a nominee by a three-fourths vote but must do so within fourteen days, otherwise the nominee is automatically deemed confirmed with or without the Committee's action.<sup>296</sup> Unlike the previous process, with its broad executive discretion in consultation with the chief justice, the executive no longer has any direct formal role beyond effectuating the appointments upon confirmation.

Together with the *PCO Judges Case*, the Eighteenth Amendment—although not without significant flaws, as critics have noted<sup>297</sup>—resolved the impasse that had deadlocked Pakistan's post-Musharraf constitutional order. In the *PCO Judges Case*, the Supreme Court formally invalidated Musharraf's emergency and

Pakistan has periodically been subject to significant *extraconstitutional* constraints by the military. See *supra* Part II.B.1.

294. See Charter of Democracy, § 3 (proposing the creation of a judicial appointments commission); see also, e.g., Hamid Khan, *The Problem of Judicial Appointments in Pakistan's Historical Perspective*, in HAMID KHAN, *THE JUDICIAL ORGAN* 155, 165 (1999) (advocating a "permanent Judicial Commission consisting of representatives from the Judiciary, Parliament and the Bar, which should be invested with the power to scrutinise each and every proposed nominee" to the higher judiciary); Rehman, *supra* note 293 (discussing and assessing proposals by political parties, civil society organizations, and government entities to reform the judicial appointments process).

295. See Constitution (18th Amend.) Act, No. 10 of 2010, § 66 (adding PAKISTAN CONST. art. 175A).

296. *Id.*; see also Siddique, *supra* note 293, at 55 (emphasizing the limited scope of the Parliamentary Committee's authority).

297. See Fair, *supra* note 35, at 583 (discussing concerns that various provisions in the amendment will weaken internal democracy within political parties and further strengthen the power within Parliament of party leaders over rank and file members); Jahangir, *supra* note 290 (praising the amendment on balance, but criticizing some of its provisions for discriminating against religious minorities, reinforcing the power of political party leaders, and failing to go far enough with some of its reforms); Amina Jilani, *The Constitution, the Letter and the Memo*, EXPRESS TRIB., Jan. 27, 2012 (criticizing the amendment for leaving the constitution "riddled with bits and pieces of Zia's Eighth Amendment").



aggressively repudiated the jurisprudential basis used to validate military interventions for generations. With the Eighteenth Amendment, Parliament established that it was prepared to go further by rolling back much of the legal edifice arising from Musharraf's 1999 coup and presenting a strong first step in challenging entrenched military and deep state interests. Taken together, these developments have helped effect significant reconfigurations in Pakistan's political and institutional patterns.<sup>298</sup>

And yet, the very logic of transformative preservation means that reconfigured political and institutional patterns will not automatically lead to broader changes in the structure of underlying power relationships.<sup>299</sup> And despite these significant institutional changes, the basic disequilibrium among Pakistan's institutions, particularly between the Supreme Court and Parliament, and the dominance of Pakistan's military and deep state interests have largely endured. While the military has most certainly shifted the nature of its engagement with politics, it continues to wield considerable political, economic, and social influence and has not by any means sought to relinquish that underlying power.<sup>300</sup> As Parliament and the judiciary have sought to empower themselves—but in a context in which the state's dominant institution remains neither one of them, but rather the military—the structure of the disequilibrium between them has largely persisted.

#### V. BALANCING AND REBALANCING JUDICIAL AUTONOMY AND CONSTRAINT

With the Musharraf-era conflict over judicial autonomy from the military thus transformed into one over judicial autonomy from Parliament, the conflicts between Parliament and the Supreme Court have sharply escalated, amidst public suspicions that military and deep state interests have used this conflict, along with other mechanisms, to undermine Pakistan's fragile democratic transition.

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298. See Cyril Almeida, *A More Complicated Script*, DAWN, Dec. 30, 2011, <http://dawn.com/2011/12/30/a-more-complicated-script/> (discussing "subtle reasons" for the survival of civilian government since 2008 "which suggest, unbelievable as it may sound, that democracy may be structurally stronger than it ever has been"); Zaidi, *supra* note 169 (arguing that "[d]espite instability and rumours galore about the collapsing presidency or the fall of the government, a transition to a democratic order seems to have been made").

299. See *supra* note 24 and accompanying text.

300. E.g., SHUJA NAWAZ, WHO CONTROLS PAKISTAN'S SECURITY FORCES? 6 (2011) (predicting that "[i]n the next three to five years, the military's influence over Pakistan's polity will likely increase"); see also Siddiqi, *supra* note 33 (documenting and analyzing the dominant role played by the military and its affiliates in Pakistan's economy).

In this Part, I assess the perils of this continuing institutional disequilibrium and the prospect that the relationships between these institutions might evolve into an equilibrium more conducive to democratic consolidation. First, I examine the Supreme Court's decision to adjudicate the constitutional validity of the Eighteenth Amendment's judicial appointments provisions on the ground that it allegedly violated the constitution's "basic structure." While the substantive dispute over those provisions echoed and reprised conflicts over judicial appointments from the 1990s, the stakes and potential fallout from this iteration were higher, as the court seriously contemplated invalidating a constitutional amendment that had been unanimously adopted by Parliament. Second, I analyze the hazards involved in the court's adjudication of its abstract self-conception of judicial independence, risks that arise even if not framed in basic structure terms. Third, I discuss the controversies arising from the so-called "Memogate" case and the contempt proceedings that led to the court's disqualification of Prime Minister Yousaf Raza Gilani, both of which have involved even more aggressive incursions into parliamentary authority. Finally, I assess the judiciary's increasing self-understanding as an institution whose legitimacy derives directly from the people of Pakistan and the prospect that the relationships between Pakistan's institutions might evolve into an equilibrium more conducive to democratic consolidation.

#### *A. Transplanting Basic Structure?*

Among the many provisions in the Eighteenth Amendment, the judicial appointments provisions in Article 175A were not, by any means, the most consequential or far-reaching in their potential implications.<sup>301</sup> However, soon after the Eighteenth Amendment's adoption, Supreme Court petitions were filed challenging the new appointments process as inconsistent with a "salient feature" of the constitution—namely, "independence of the judiciary"—and, therefore, beyond Parliament's constitutional amendment power altogether. In advancing this claim, the petitioners, who included bar associations and individual lawyers, raised the stakes in the ongoing conflict between Parliament and the judiciary by urging the court to embrace a version of the "basic structure" doctrine, a principle of

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301. See Jahangir, *supra* note 290 (characterizing the amendment's other reforms as more significant). Some observers even speculated that controversies over these provisions had been "engineered by the army in a belated attempt to derail" the broader constitutional reform project. See Adeney, *supra* note 278, at 9, 22 n.14 (citing the author's conversations with Pakistani politicians and civil society activists).

judicial review fashioned by the Supreme Court of India.<sup>302</sup> The doctrine places implied limits on Parliament's power to adopt constitutional amendments if they damage or alter the constitution's "basic structure," and on that basis claims judicial power to invalidate constitutional amendments that trench upon that basic structure.<sup>303</sup>

In India, the doctrine's application has provoked extensive controversy.<sup>304</sup> Critics argue that the doctrine is premised upon "distrust of the democratic process, which itself must surely be part of the basic structure," and has therefore resulted in judicial usurpation of parliamentary sovereignty.<sup>305</sup> Given the "haphazard" and "inconsistent" way in which the Supreme Court of India has defined the elements of the basic structure, critics argue, the doctrine appears to have been invoked "as much to expand the scope of judicial power as it has to delineate the core values of the constitution."<sup>306</sup> On the other hand, the doctrine's defenders argue that—particularly in a context where formal constitutional amendment by Parliament is not overly difficult—it preserves democratic constitutionalism and has contributed to the longevity of India's constitution by inhibiting radical constitutional change.<sup>307</sup> Observers also suggest that while

302. On the basic structure doctrine in India, see generally SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2009); Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure,"* in *INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 179 (Zoya Hasan et al. eds., 2002); Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 107 (B.N. Kirpal et al. eds., 2000); Robinson, *supra* note 134, at 27–40.

303. See *Kesavananda Bharati v. Kerala*, A.I.R. 1973 S.C. 1461 (India) (applying the basic structure doctrine); *Gandhi v. Narain*, A.I.R. 1975 S.C. 2299 (India) (same); *Minerva Mills Ltd. v. India*, A.I.R. 1980 S.C. 1789 (India) (same).

304. See Ramachandran, *supra* note 302. In recent years, a similar controversy over the permissibility of constitutional amendment has arisen in Turkey. See Bâli, *supra* note 2, at 250–55 (discussing the crisis in Turkey arising from the Turkish Constitutional Court's invalidation of amendments challenging the interests of the Kemalist secular establishment); see also Robinson, *supra* note 134, at 64–66 (discussing analogous constitutional dynamics in Pakistan, Iran, Thailand, and Bangladesh).

305. Ramachandran, *supra* note 302, at 130.

306. Mehta, *supra* note 302, at 200.

307. See Sudhir Krishnaswamy, *Constitutional Durability*, 615 *SEMINAR* 48, 51 (2010) (arguing that the basic structure doctrine has helped to "ensure[] [India's] constitutional survival"); Mehta, *supra* note 302, at 191–96 (articulating a defense of the basic structure doctrine as a means of "protect[ing] democratic sovereignty from usurpation by transient majorities"). Both the Indian Constitution and the Pakistan Constitution may be formally amended relatively easily. In India, while amendment of some constitutional provisions also requires ratification by legislatures in half of the states, amendments to most provisions simply requires approval by a majority of the total membership and two-thirds of those members present and voting in each house of Parliament. INDIA CONST. art. 368. In Pakistan, formal constitutional amendment is even easier, in virtually all instances simply requiring approval by a two-thirds majority vote in each house of Parliament. PAKISTAN CONST. art. 239.

the doctrine has contributed to the dramatic expansion of judicial power, in fact the Supreme Court of India has exercised considerable restraint in its exercise of that power.<sup>308</sup>

Despite its readiness to draw upon Indian jurisprudence in other contexts,<sup>309</sup> the Supreme Court of Pakistan has been more equivocal about the basic structure doctrine. On the one hand, although it has been presented with arguments expressly based on the doctrine on many occasions, the court has repeatedly—and expressly—declined to fully and openly embrace it, most recently doing so in 2005.<sup>310</sup> Pakistan's constitution expressly provides—in a provision added by General Zia's Eighth Amendment—that Parliament's power "to amend any of the provisions of the Constitution" is subject to "no limitation whatever," and that amendments "shall not be called in question in any court on any ground whatsoever."<sup>311</sup> While the court has described aspects of the constitution as "salient features" or "essential features"—including "independence of the judiciary"—it has never inferred a *judicial* power to remedy alleged infringements, stating instead that any remedy "lay in the political and not the judicial process."<sup>312</sup> On the other hand, on occasion the court has articulated a rule of constitutional interpretation, in the event of an irreconcilable conflict between two provisions, that contemplates the possibility of holding that the provision containing "lesser rights" must yield to the provision containing "higher rights."<sup>313</sup>

308. See SHANKAR, *supra* note 132, at 177–78.

309. See Maryam Khan, *Selective Borrowings*, 615 SEMINAR 56, 57–58 (2010) (discussing the use of Indian constitutional jurisprudence by courts in Pakistan); Arun K. Thiruvengadam, *In Pursuit of "The Common Illumination of Our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia*, 2 INDIAN J. CONST. L. 67, 95–97 (2008) (discussing the influence of Indian case law on early public interest litigation cases in Pakistan).

310. *Pak. Lawyers Forum v. Fed'n of Pak.*, (2005) 57 PLD (SC) 719 (Pak.); Khan, *supra* note 81, at 5 ("The Constitutional Courts of Pakistan . . . have never quite found grounds for convergence with India on [the basic structure doctrine], thus insulating constitutional amendments from substantive judicial review."); Feisal H. Naqvi, *Not a New Debate*, DAWN, Apr. 23, 2010 (summarizing and analyzing "30 years of uninterrupted case law" in which the Pakistan Supreme Court has "expressly rejected" the basic structure doctrine).

311. PAKISTAN CONST. art. 239(5)–(6). *But cf.* *Minerva Mills Ltd. v. India*, A.I.R. 1980 S.C. 1789 (India) (invalidating, on basic structure grounds, similar provisions added to the Indian Constitution by Indira Gandhi's Forty-Second Amendment).

312. *Pak. Lawyers Forum*, (2005) PLD (SC) at 763.

313. KHAN, *supra* note 11, at 636–37 (discussing "higher rights" principle of constitutional interpretation); see also, e.g., *Wukala Mahaz Barai Tahafaz Dastoor v. Fed'n of Pak.*, (1998) 50 PLD (SC) 1263 (Pak.); *Mahmood Khan Achakzai v. Fed'n of Pak.*, (1997) 49 PLD (SC) 426 (Pak.); *Al-Jehad Trust v. Fed'n of Pak.*, (1996) 48 PLD (SC) 324 (Pak.). *But cf.* LAU, *supra* note 21, at 82–83 (arguing that the Pakistan Supreme Court had "establish[ed]" existence of basic structure doctrine by late 1990s). As an interpretive principle ostensibly limited to conflicts between specific constitutional provisions, this principle is, at least conceptually, narrower than the basic structure doctrine, which not only tests constitutionality against "structural"

Nevertheless, Pakistani lawyers, scholars, and other observers have by and large expressed little enthusiasm for resolving this tension in the court's precedent in favor of openly recognizing the basic structure doctrine—particularly given the historical role of Pakistan's judiciary in facilitating military interventions that have undermined constitutionalism and representative institutions.<sup>314</sup> The inconsistencies found in the doctrine's application in India might well be compounded by Pakistan's shifting and interrupted constitutional development, which could present greater challenges in ascertaining which constitutional elements, over time, should be considered legitimate parts of the basic structure and which should not.<sup>315</sup> As the Eighteenth Amendment itself illustrates, with its sweeping changes, meaningful challenges to the accumulated entrenchment of deep state power and other important constitutional reforms might well, in some instances, require major changes to well-settled constitutional understandings and practices that might or might not be deemed to constitute part of some judicially fashioned "basic structure." Observers also have been wary of the possibility that induction of the basic structure doctrine into the Pakistani constitutional context might result in elevation of the Objectives Resolution, which is rooted in Islamic principles and which Zia incorporated into the text of the constitution as Article 2A to *grundnorm* status—a position with

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principles that transcend any particular constitutional provision, but also, as Sudhir Krishnaswamy emphasizes, is not limited to review of constitutional amendments. KRISHNASWAMY, *supra* note 302.

314. See generally Khan, *supra* note 309; Babar Sattar, *People's Court?*, COUNSEL, Fall/Winter 2010; Siddique, *supra* note 293; Cyril Almeida, *Judicial Appointment Process Under Fire*, DAWN, Sep. 5, 2010, <http://archives.dawn.com/archives/38944> (quoting lawyer Salman Raja); Ejaz Haider, *Judicial Dues Ex Machina?*, FRIDAY TIMES, Sep. 19, 2010; Nasir Iqbal, *Aitzaz, Akram Spar Over Parliament*, DAWN, Apr. 21, 2010, <http://archives.dawn.com/archives/44080> (quoting lawyer Aitzaz Ahsan); Maryam Khan, *Towards a New Hegemony?*, FRIDAY TIMES, Sep. 19, 2010; Naqvi, *supra* note 310; Salman Akram Raja, *Excluding the People?*, DAWN, Oct. 15, 2010, <http://dawn.com/2010/10/15/excluding-the-people-by-salman-akram-rajarepeated/>; Hasan-Askari Rizvi, *Amending the Constitution*, DAILY TIMES, Apr. 11, 2010, [http://www.dailytimes.com.pk/default.asp?page=2010%5C04%5C11%5Cstory\\_11-4-2010\\_pg3\\_2](http://www.dailytimes.com.pk/default.asp?page=2010%5C04%5C11%5Cstory_11-4-2010_pg3_2); Osama Siddique, *Wasteland of Discourse*, FRIDAY TIMES, Sep. 19, 2010.

315. See Khan, *supra* note 309, at 60 ("[T]he constitutional history of Pakistan, with its many constitutional deviations, does not speak of a consistent adoption of any basic structure."); cf. Richard S. Kay, *Changing the United Kingdom Constitution: The Blind Sovereign*, in SOVEREIGNTY IN FOCUS: DOMESTIC, EUROPEAN AND GLOBAL PERSPECTIVES (Richard Rawlings, Peter Leyland & Alison Young eds., forthcoming 2013) (conceptualizing constitutional change, in both the United Kingdom and United States, as entailing an extended series of discrete, "uncoordinated events by different actors," rather than a single, "rule-making event"); LaCroix, *supra* note 19, at 1330–31 (questioning "central assumption[] in American constitutional law" that presumes unitariness and continuity between political, legal, and institutional regimes over time).

which the court flirted during the 1990s, but which it has not seriously pursued since then.<sup>316</sup>

### B. *Interpreting and Adjudicating “Judicial Independence”*

Against this jurisprudential backdrop, the Supreme Court’s decision to hear the petitions challenging the Eighteenth Amendment at all—much less to convene a seventeen-judge bench to hear months’ worth of arguments—got people’s attention. News reports soon described the court and Parliament as being on course for a “collision.”<sup>317</sup> When arguments in the Eighteenth Amendment cases were held, members of the court appeared to respond enthusiastically to the notion of applying some version of the basic structure doctrine to scrutinize the amendment’s consistency with independence of the judiciary.<sup>318</sup> Members of the court directly contested the notion that Parliament’s power to amend the constitution was “unfettered,” even though the constitution’s text expressly states that it is.<sup>319</sup> By one observer’s estimation, a majority of the court was prepared to embrace some version of the basic structure doctrine to strike down the judicial appointments provisions to some extent.<sup>320</sup>

Of course, even accepting independence of the judiciary as part of the constitution’s basic structure offers little guidance by itself as to what that “independence” concretely requires—with respect to the appointments process or anything else.<sup>321</sup> Nevertheless, since

316. See Siddique, *supra* note 293, at 54–55 & n.13 (cautioning that recognition of the basic structure doctrine and *grundnorm* status for the Objectives Resolutions “both carry the risk of creating and entrenching an all-encompassing, over-powerful and unaccountable judiciary”); Ali Dayan Hasan, *Objective Reality*, DAWN, Aug. 6, 2010, <http://archives.dawn.com/archives/28754> (discussing the Objectives Resolution and its “misuse”). See generally Iyer, *supra* note 20 (discussing the much-criticized attempts by Pakistani courts to invoke Hans Kelsen’s concept of *grundnorm*); Mahmud, *supra* note 20, at 1244–47, 1255–57 (same).

317. Mir Jamilur Rahman, *Towards Collision*, NEWS INT’L, Apr. 27, 2010; see also Shafqat Mahmood, *Are the Institutions Ready To Clash?*, NEWS INT’L, Apr. 23, 2010 (anticipating Eighteenth Amendment litigation to be “the mother of all legal and political battles”).

318. See Nasir Iqbal, *Parliament Not Under Trial, Says CJ*, DAWN, July 28, 2010, <http://archives.dawn.com/archives/36559> (noting Justice Ramday’s comments that “courts in Pakistan were going through an evolutionary process and starting to take note of the ‘basic structure theory’”).

319. See *Court Never Summoned Senator Rabbani, Says CJ*, DAWN, Sep. 28, 2010, <http://archives.dawn.com/archives/41578> (noting Chief Justice Chaudhry’s questioning whether Article 239 should be given effect since it was adopted under Zia); Nasir Iqbal, *Parliament Doesn’t Have Unfettered Powers: CJ*, DAWN, Aug. 17, 2010, <http://archives.dawn.com/archives/36562> (noting Chief Justice Chaudhry’s comments that Parliament lacked “unfettered powers” of constitutional amendment).

320. See Almeida, *supra* note 314 (quoting an unnamed senior lawyer).

321. See Ferejohn & Kramer, *supra* note 17, at 962–63 (maintaining that abstract platitudes about judicial independence tend to be “as vapid as they are

Chaudhry's restoration in 2009, the Supreme Court has made increasingly loud noises about the importance of judicial independence, not just as an ideal, but as a justiciable constitutional requirement. As discussed above, in the *PCO Judges Case*, the court invalidated the coalition government's June 2008 law expanding the size of the Supreme Court in part for its inconsistency with "independence of the judiciary."<sup>322</sup> Several months later, the thirteen-judge bench that reinstated Chaudhry after his 2007 suspension by Musharraf finally issued detailed reasons for that judgment. In concluding that the President lacked authority to suspend judges, the court characterized judicial independence as a "basic and salient feature" of the constitution that required "security of office and of its tenure."<sup>323</sup> A month later, in the *NRO Case*, the court concluded that by conferring authority upon a nonjudicial entity to withdraw criminal cases without judicial consent, the NRO had infringed upon "independence of the judiciary"—which the court again termed, in abstract terms, as one of the constitution's "salient features."<sup>324</sup>

Strikingly, the justices' comments during arguments conveyed not only skepticism about the substance of the appointments provisions, but disdain for Parliament itself—a remarkable contrast from the favorable appraisals of Parliament's work, across a broad spectrum of opinion, in adopting the Eighteenth Amendment.<sup>325</sup> Chaudhry criticized Parliament for lack of debate over the

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axiomatic, . . . the sort of thing that men and women on both sides of a discussion will agree upon and serve up with perfect sincerity and conviction").

322. *Sindh High Court Bar Ass'n v. Fed'n of Pak.*, (2009) 61 PLD (SC) 1111–13, 1142–44 (Pak.).

323. *See* *Iftikhar Muhammad Chaudhry v. President of Pak.*, (2010) 62 PLD (SC) 61, 173 (Pak.) (detailed judgment). The court grounded "judicial independence" in the fundamental right to life, reasoning that the access to justice necessary to vindicate that fundamental right would be "a mere farce and a mirage in the absence of an independent judiciary . . . free of executive influence and pressures." *Id.* at 121.

324. *Mobashir Hassan v. Fed'n of Pak.*, (2010) 62 PLD (SC) 265, 359–71 (Pak.). Although the court had only recently repudiated its extraconstitutional jurisprudence of necessity in the *PCO Judges Case*, the court emphasized the discussion of judicial independence in *Zafar Ali Shah v. Musharraf*. That discussion came in an *extraconstitutional* judgment in which the court—apparently "immune to irony," as Paula Newberg observes—validated, among other things, Musharraf's subordination of the judiciary following his 1999 coup. Paula R. Newberg, *Balancing Act: Prudence, Impunity, and Pakistan's Jurisprudence*, in *ROUTLEDGE HANDBOOK OF SOUTH ASIAN POLITICS: INDIA, PAKISTAN, BANGLADESH, SRI LANKA, AND NEPAL* 177, 186 (Paul R. Brass ed., 2010). Taking the logic of the *PCO Judges Case* to its conclusion would deem *Zafar Ali Shah* a nullity as well. *See supra* note 159.

325. *See, e.g.*, FRUMAN, *supra* note 42, at 21–22; PAK. INST. OF LEGISLATIVE DEV. & TRANSPARENCY, *supra* note 276; *see also* Mosharraf Zaidi, *The Silver Lining in "Memogate,"* FOREIGN POL'Y, Nov. 18, 2011 (praising Parliament's work in adopting the Anti-Women Practices Bill of 2011 as embodying "how politics is supposed to work, in a country where for decades it has not").

amendment package.<sup>326</sup> Another justice criticized Parliament for not taking the petitioners “into confidence” when drafting the amendment, since bar associations and lawyers—as “common litigants” before the court—were “the main stakeholders.”<sup>327</sup> Several justices criticized Parliament for not articulating reasons why the existing process required any changes.<sup>328</sup> Justices even directly questioned Parliament’s legitimacy as a representative institution, asserting that the Eighteenth Amendment did not reflect the “will of the people,” and that the Parliamentary Committee created under the new process lacked sufficient democratic credentials because its members—though all members of Parliament—“were not elected by the public but by the leader of the House and the opposition.”<sup>329</sup>

When the court issued its decision, it exhibited more finesse than in these comments, but forcefully asserted its autonomy all the same. In a unanimous interim order, the court emphasized the centrality of judicial independence as a “core value” of the constitution.<sup>330</sup> Crediting Parliament’s good faith in adopting the provisions, the court postponed any final decision on the merits, expressing a preference to defer to Parliament “in the first instance.” However, while affording Parliament these courtesies, the court referred the provisions back to Parliament for “re-consideration” in light of its “concerns/reservations” and “observations/suggestions.”<sup>331</sup> The court then made explicit what it hoped to see upon “reconsideration,” intimating that Article 175A’s “consonance” with judicial independence required increasing the number of Supreme Court judges on the Judicial Commission from two to four, thereby giving the judiciary primacy. The court also “suggested” that if the Parliamentary Committee disagreed with a recommendation by the Judicial Commission, it should be required to “give very sound reasons” and refer the nomination back to the Commission for reconsideration. If the Commission reiterated its recommendation, then its decision would be deemed binding and final. In the

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326. See Sohail Khan, *Parliament Should Have Debated 18th Amendment: CJ*, NEWS INT’L, June 11, 2010; see also *SC Thinks Government Doesn’t Have “Good” Advisers*, DAWN, Sep. 2, 2010, <http://archives.dawn.com/archives/35258> (noting Justice Iqbal’s concern that “no homework had been done” by PCCR when drafting the appointments provisions).

327. See Sohail Khan, *18th Amendment Destroyed CJs Institution: Ramday*, NEWS INT’L, July 29, 2010 (quoting Justice Ramday). Ramday went on to say that the amendment constituted the very “destruction of the institution of the Chief Justice of Pakistan.” *Id.*

328. *Id.*

329. See Sohail Khan, *18th Amendment Eliminates Role of PM, says CJ*, NEWS INT’L, Sep. 1, 2010; Sohail Khan, *Was the 18th Amendment Will of the People?*, NEWS INT’L, July 6, 2010 (quoting Chief Justice Chaudhry); *SC Thinks Government Doesn’t Have “Good” Advisers*, *supra* note 326.

330. *Nadeem Ahmed v. Fed’n of Pak.*, (2010) 62 PLD (SC) 1165, 1180–81 (Pak.).

331. *Id.* at 1180, 1183.



meantime, since Article 175A had already gone into effect, the court ordered its implementation with modifications along similar lines as its “suggestions,” to ensure “consonance . . . with judicial independence.”<sup>332</sup>

Nominally, the court struck a cooperative tone, emphasizing that it did not regard “sovereignty of the Parliament and judicial independence as competing values.”<sup>333</sup> Rather, the court stated, “[b]oth the institutions are vital and indispensable . . . and they do not vie but rather complement each other so that the people could live in peace and prosper in a society which is just and wherein the rule of law reigns supreme.”<sup>334</sup> Publicly, many acclaimed the court’s decision for being rendered in this spirit, avoiding the clash of institutions that many had feared.<sup>335</sup> At least superficially, the decision could be understood as embodying restraint, avoiding direct resolution of the contentious question of whether to recognize the basic structure doctrine,<sup>336</sup> and appearing to contemplate “dialogue” with Parliament in some manner.<sup>337</sup>

However, given its longstanding jurisprudence largely rejecting the basic structure doctrine, the court’s decision to hear the petitions in the first place could scarcely be termed an act of restraint. While framed as affording deference to Parliament, behind this façade the subtext of the court’s order seemed clear, if implicit, that if Parliament did not revise the provisions to the court’s liking, then it would likely invalidate the provisions as beyond Parliament’s amendment power. Moreover, treating judicial independence as an abstract but justiciable constitutional guarantee, as the court has now edged toward doing in several cases, raises concerns whether or not understood as part of the constitution’s basic structure. For one thing, placing responsibility for interpreting and specifying what

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332. *Id.* at 1182, 1184–85.

333. *Id.* at 1183–84.

334. *Id.*

335. Among some observers, however, such praise was more akin to a sigh of relief that the court had not openly embraced the basic structure doctrine. See Babar Sattar, *Judges as Legislators (Part 2)*, NEWS INT’L, Apr. 2, 2011 (arguing that the court’s interim order “was not a marvel of jurisprudential merit”).

336. Cf. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 360–67 (2d ed. 2006) (discussing the statutory interpretation canon of “constitutional avoidance” in the United States).

337. See, e.g., ROBERT A. KATZMANN, COURTS AND CONGRESS (1997) (discussing forms of “dialogue” between Congress and federal judiciary); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997) (analyzing ways that the Canadian Charter of Rights and Freedom structures a form of “dialogue” between judiciary and Parliament); Shylashri Shankar, *The Judiciary, Policy, and Politics in India*, in THE JUDICIALIZATION OF POLITICS IN ASIA 56, 63 (Björn Dressel ed., 2012) (arguing that the Supreme Court of India’s accumulation of power has resulted “not [in] the rise of a ‘juristocracy’ but a continuous dialogue with other actors and organs of the state”).

“independence” requires with the judiciary itself leaves those determinations with an actor institutionally self-interested in the outcome.<sup>338</sup> More fundamentally, as discussed earlier, judicial independence is not an undifferentiated concept—as the court and others often assume—but rather comprises an evolving balance between judicial autonomy and constraint across a range of relationships and dimensions.<sup>339</sup> While courts obviously adjudicate and specify abstract principles all the time, whether this conception of judicial independence, given its nature, lends itself well to that kind of concrete specification, through a process of common law, case-by-case adjudication of discrete issues, remains far from clear.

The court’s piecemeal discussions of judicial independence illustrate the difficulty. In each case, it assessed the particular issue being considered against a static, abstract, and decontextualized conception of judicial independence. Regardless of whether the specific outcomes in any of these cases might have been desirable, the court’s methodology—perhaps unavoidably—neglects the larger, overall balance between judicial autonomy and judicial constraint, across the full range of relationships and dimensions from which judicial independence arises. Such an approach is therefore unlikely to pay sufficient heed to the dynamic, evolving, and context-sensitive manner in which that overall balance should be assessed. These concerns are significant enough when assessing the validity of *subconstitutional* laws or actions. Of course, the stakes are self-evidently higher when evaluating *constitutional amendments*, as the basic structure doctrine demands, since invalidation of an amendment forecloses any response from representative institutions and results in a permanent, entrenched change to the broader institutional balance.<sup>340</sup>

In any event, the “dialogue” between the court and Parliament on the appointments process has been fairly unidirectional. In response to the court’s order, Parliament partially acquiesced by promptly—and again unanimously—adopting the Nineteenth Amendment, which increased the number of senior judges on the Judicial Commission from two to four. Parliament did not, however, follow the court’s guidance regarding the ability of the Judicial Commission to overrule the Parliamentary Committee if it rejected the Commission’s nominees.<sup>341</sup> The court soon ensured the

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338. See Russell, *supra* note 132, at 23 (identifying and discussing concern that in adjudicating alleged violations of judicial independence, “judges, in a sense, are acting as judges in their own case”).

339. See *supra* notes 128–133 and accompanying text.

340. See generally Khan, *New Hegemony*, *supra* note 314 (distinguishing between legitimacy of judicial review of constitutional amendments and other ordinary acts of Parliament).

341. Constitution (19th Amend.) Act, 2010, No. 1 of 2011 (Pak.).

Commission's supremacy over the Parliamentary Committee on its own—and in effect, the court's own continued supremacy in the appointments process. In early 2011, after the Committee rejected the Commission's recommendations to extend the terms of several High Court additional judges, a four-judge Supreme Court bench overruled the Committee and ordered the nominees' terms to be extended.<sup>342</sup> The court limited the Committee's authority, concluding that the Committee lacked institutional expertise to question the Commission's conclusions regarding the "professional caliber, legal acumen, judicial skill and quality and the antecedents" of judicial nominees.<sup>343</sup> A concurring opinion by Justice Khawaja went further, invoking "independence of the judiciary" as a constitutional touchstone and relying upon the two *Judges' Cases* from the 1990s as a means of preserving judicial supremacy over appointments.<sup>344</sup>

The result of the court's two appointments decisions, as Cyril Almeida observes, was essentially to "dictate" implementation of the reformed judicial appointments process in a manner that "will pretty much look like the [pre-Eighteenth Amendment] appointment process."<sup>345</sup> Even as it purported to act with restraint, the court had aggressively asserted its power and autonomy—swatting away even the modest constraints that Parliament had, unanimously, adopted as constitutional amendments.

### C. *The Judiciary and the Deep State*

Since deciding the *Eighteenth Amendment Case*, the Supreme Court's assertions of judicial autonomy have cut ever more deeply into the core of parliamentary authority, most notably in two high profile, deeply politicized cases. First, the court waded into the heart of deep state politics by initiating a judicial investigation into the circumstances surrounding the shadowy "Memogate" affair. That controversy concerned an unsigned memo sent to U.S. military officials in May 2011, days after the U.S. raid on Osama bin Laden's compound, warning of a supposedly imminent military coup and

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342. *Munir Hussain Bhatti v. Fed'n of Pak.*, (2011) 63 PLD (SC) 407; *see also* Feisal H. Naqvi, *Protecting the Independence of the Judiciary-I*, EXPRESS TRIB., Mar. 13, 2011 (discussing Supreme Court's decision to overrule the Parliamentary Committee); *Supreme Court Decision Undermines Legislature, Says Asma Jahangir*, EXPRESS TRIB., Mar. 5, 2011 (reporting Supreme Court Bar Association President Asma Jahangir's criticism of the Supreme Court's decision).

343. *Munir Hussain Bhatti*, (2011) PLD (SC) at 443–45.

344. *Id.* at 465–67 (Khawaja, J., concurring).

345. Cyril Almeida, *Breathing Room*, DAWN, Oct. 22, 2010, <http://dawn.com/2010/10/22/by-cyril-almeida-5/>; *see also* Mohammad Waseem, *Clash of Institutions in Pakistan*, ECON. & POL. WKLY., July 14, 2012, at 16, 17 (arguing that the court "has made it clear, if not in letter but in spirit, that the interpreters of the Constitution are above the makers of the Constitution").

asking U.S. officials to intercede to prevent it.<sup>346</sup> According to a Pakistani American named Manjoor Ijaz, who claimed to have delivered the memo to U.S. officials, the memo was written by then-Ambassador to the United States Husain Haqqani on behalf of Zardari, both of whom long had been at odds with military and security interests. A media firestorm immediately ensued over the mysterious origins of the memo and its possibly “treasonous” nature. Haqqani denied Ijaz’s allegations, but was forced to resign as ambassador. The Prime Minister then announced that a parliamentary committee would investigate the matter. The military also launched its own formal investigation—amidst rumors that the entire affair had been engineered, somewhat clumsily, by deep state elements to undermine the PPP-led government and that a coup even might be imminent.<sup>347</sup>

Meanwhile, the PML-N’s Sharif and other opposition figures filed petitions with the Supreme Court requesting a judicial investigation, and in the course of reviewing those petitions, the court ordered Haqqani not to leave Pakistan, despite concerns for his safety and amidst allegations that the court had denied him due process of law.<sup>348</sup> In response, the military—directly filing responses with the court at its direction, but apparently without the civilian government’s consent—encouraged the court to investigate the matter, while both the government and Haqqani urged it not to do so, especially since Parliament was undertaking its own investigation.<sup>349</sup>

346. See Josh Rogin, *Exclusive: Secret Pakistani-U.S. Memo Offering Overthrow of Military Leadership Revealed*, FOREIGN POLY: CABLE, Nov. 17, 2011, [http://thecable.foreignpolicy.com/posts/2011/11/17/exclusive\\_secret\\_pakistan\\_us\\_memo\\_revealed\\_ijaz\\_calls\\_amb\\_haqqani\\_architect\\_of\\_sche](http://thecable.foreignpolicy.com/posts/2011/11/17/exclusive_secret_pakistan_us_memo_revealed_ijaz_calls_amb_haqqani_architect_of_sche) (discussing memo). The actual memo is available at [http://foreignpolicy.com/files/fp\\_uploaded\\_documents/111117\\_Ijaz%20memo%20Foreign%20Policy.PDF](http://foreignpolicy.com/files/fp_uploaded_documents/111117_Ijaz%20memo%20Foreign%20Policy.PDF).

347. See generally Walsh, *supra* note 15 (discussing Ijaz’s allegations); Simon Denyer, *Pakistan’s Memo Scandal Pits Military Against Zardari Government*, WASH. POST, Dec. 16, 2011, [http://articles.washingtonpost.com/2011-12-16/world/35287553\\_1\\_zardari-government-memo-husain-haqqani](http://articles.washingtonpost.com/2011-12-16/world/35287553_1_zardari-government-memo-husain-haqqani) (discussing the military’s inquiry into Ijaz’s allegations); *Memogate Probe by Parliament Committee*, DAWN, Nov. 29, 2011, [http://epaper.dawn.com/~epaper/DetailImage.php?StoryImage=29\\_11\\_2011\\_001\\_011](http://epaper.dawn.com/~epaper/DetailImage.php?StoryImage=29_11_2011_001_011) (discussing Parliament’s investigation into Ijaz’s allegations).

348. See Salman Masood & Eric Schmitt, *A Diplomat in a Gilded Cage, Feeling Trapped and Not Entirely Safe*, N.Y. TIMES, January 9, 2012, at A7 (discussing restrictions imposed upon Haqqani’s freedom of movement); see also *PML-N Seeks Memogate Probe Commission*, DAWN, Nov. 19, 2011, [http://epaper.dawn.com/~epaper/DetailImage.php?StoryImage=19\\_11\\_2011\\_001\\_003](http://epaper.dawn.com/~epaper/DetailImage.php?StoryImage=19_11_2011_001_003) (discussing PML-N’s demand for a Supreme Court investigation). The court later eased those travel restrictions, enabling Haqqani to depart for Washington. Nasir Iqbal, *Court Lifts Haqqani Travel Restrictions*, DAWN, Jan. 31, 2012, <http://dawn.com/2012/01/31/memo-commission-gets-2-month-extension-court-lifts-haqqani-travel-restrictions/>.

349. See *Memogate Case: Kayani, Pasha Replies Were Illegal, Implies PM*, EXPRESS TRIB., Jan. 10, 2012, <http://tribune.com.pk/story/319209/memogate-gilani-terms-kayani-pasha-sc-replies-unconstitutional/> (discussing the Prime Minister’s statements “that Kayani and Pasha’s replies to the Supreme Court were illegal, given

However, the court admitted the petitions and established the commission, concluding that the matter implicated fundamental rights and was of sufficient public importance to warrant the court's review.<sup>350</sup> In an unusual manner, the court's fundamental rights reasoning was imbued with national security considerations. The court concluded that the existence and contents of the memo "have threatened the independence, sovereignty, and security of the country," and accordingly, that the circumstances surrounding the "origin, authenticity, and purpose" of the memo implicated the petitioners' fundamental rights to life, dignity, and information under the constitution.<sup>351</sup>

Second, the PPP-led government's prolonged unwillingness to implement the court's December 2009 judgment in the *NRO Case* prompted the court to convict Prime Minister Gilani of contempt of court and take the remarkable step of directly ordering his disqualification and removal from office.<sup>352</sup> Following the court's December 2009 judgment, the government had deployed an array of tactics to avoid its implementation—and in particular, to avoid writing Swiss authorities to request reinstatement of the charges against Zardari.<sup>353</sup> The delaying tactics were widely understood as calculated not only to protect Zardari from legal exposure, but also to at least try to protect the PPP-led government from the political

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they did not have clearance" from the civilian government); Saeed Shah, *Pakistan Army Steps Up Confrontation with Government*, GUARDIAN, Jan. 11, 2012, <http://www.guardian.co.uk/world/2012/jan/11/pakistan-army-confrontation-government> (discussing the civilian government's position that the court should "drop the case" in deference to Parliament's own pending investigation); Faisal Shakeel, *Rejoinders: Army, ISI Chiefs Stick to Their Guns on Memo*, EXPRESS TRIB., Dec. 22, 2011, <http://tribune.com.pk/story/310328/mod-reply-we-only-handle-administrative-matters-of-isi-not-operational/> (discussing the positions of various actors on whether the court should formally investigate the circumstances surrounding the memo).

350. *Watan Party v. Fed'n of Pak.*, (2011) 63 PLD (SC) 997 (Pak.).

351. *Id.* at 1053, 1068–82. The commission established by the court later concluded that Haqqani was the author of the memo, but that Zardari had no involvement. See Azam Khan, *'Boss' Zardari Had No Involvement in Memogate: Commission Report*, EXPRESS TRIB., June 16, 2012, <http://tribune.com.pk/story/394746/boss-zardari-had-no-involvement-in-memogate-commission-report/>. Haqqani has denied any involvement, and at this writing his challenge to its report is pending before a nine-judge bench of the Supreme Court. Husain Haqqani, *My Real 'Crime' Against Pakistan*, WASH. POST, June 14, 2012, at A19; *SC To Hear Memogate Case on Oct 22*, NEWS INT'L, Oct. 12, 2012.

352. See Azam Khan, *Gone: 'The Office of the Prime Minister Stands Vacant.'* EXPRESS TRIB., June 20, 2012, <http://tribune.com.pk/story/396325/gone/>; Anil Kalhan, *Love in the Time of Contempt*, DORF ON LAW, Feb. 14, 2012, <http://www.dorfonlaw.org/2012/02/love-in-time-of-contempt.html>.

353. See Khawar Ghumman, *Government To Defend Executive's Authority*, DAWN, July 20, 2011, <http://dawn.com/2011/07/20/government-to-defend-executives-authority/>.

fallout it would likely endure by placing itself on record as requesting criminal charges against its own head of state and party co-chair.<sup>354</sup>

After the government had stalled implementation for over two years, the Supreme Court's patience finally reached its limit. In a January 2012 order, the court enumerated six "unpleasant" options it might take to address the government's recalcitrance—ranging from direct, outright disqualification of the President and Prime Minister or the initiation of contempt proceedings against the Prime Minister, at the aggressive end of the spectrum, to leaving the matter in the hands of Parliament or the people of Pakistan, at its more restrained end. In between these two extremes, the court floated the idea of creating a commission to monitor the implementation of its judgment.<sup>355</sup> The less severe options might have exposed the court as incapable of fully enforcing its order. As a practical matter, however, the court faced that prospect anyway, since the likelihood of Swiss proceedings against Zardari ultimately being revived was exceedingly limited.<sup>356</sup>

The court opted to indict Gilani for contempt. In response, the Prime Minister argued, among other things, that he could not constitutionally write the letter because, as President, Zardari had absolute immunity from criminal prosecution during his term of office. A seven-judge bench rejected Gilani's arguments and convicted him in April 2012, but only imposed a symbolic sentence lasting approximately thirty seconds.<sup>357</sup> At the time, some observers interpreted this "token" sentence as an effort by the court to back down from the conflict and instead let Gilani's fate be determined by the political process.<sup>358</sup> However, in May 2012, the Speaker of the National Assembly ruled that the conviction did not require Gilani's referral to the Election Commission for disqualification from holding

354. See Cyril Almeida, *The Swiss Conundrum*, DAWN, Feb. 5, 2012, <http://dawn.com/2012/02/05/the-swiss-conundrum/> (assessing political consequences if the letter to Swiss authorities were written).

355. Adnan Khawaja v. State, Crim. M.A. 486/2010 (Jan. 10, 2012) (Pak.), available at <http://www.thenews.com.pk/article-30345-SC-NRO-Implementation-verdict-text>.

356. See generally Kalhan, *supra* note 352 (discussing the low probability that any proceedings in Switzerland against Zardari would be revived).

357. See *In re Yousaf Raza Gilani*, Crim. O.P. 6/2012 (Apr. 26, 2012) (Pak.) (short order) (on file with author); *In re Yousaf Raza Gilani* (detailed judgment), available at <http://www.scribd.com/doc/92823324/Prime-Minister-Gilani-s-Case-Detailed-Verdict> (sentencing Gilani until the "rising of the court").

358. Jon Boone, *Pakistani PM Serves Token Sentence of Less than a Minute for Contempt*, GUARDIAN, Apr. 26, 2012; see also Declan Walsh, *Pakistani Prime Minister Is Spared Jail but Faces More Battles*, N.Y. TIMES, Apr. 27, 2012, at A8 (characterizing the court's decision as a "victory of sorts" for Gilani and the PPP). The court stated that the likelihood of "serious consequences in terms of Article 63(1)(g) of the Constitution," including the possibility of a five-year ban from serving in Parliament, constituted a "mitigating factor[ ]" when imposing Gilani's sentence, but did not treat those potential consequences as part of the sentence itself. *In re Yousaf Raza Gilani*, ¶ 2 (short order).

office under Article 63(1)(g).<sup>359</sup> Opposition politicians petitioned the Supreme Court to overrule the Speaker's decision.<sup>360</sup> In June 2012, a three-judge bench of the court, including Chaudhry, exercised jurisdiction to review the Speaker's decision, overruled that determination, and directly ordered Gilani's disqualification on its own—with retroactive effect from the date of his conviction in April 2012.<sup>361</sup> The court again invoked judicial independence as a basis for its decision, concluding that the Speaker's ruling had “defied the principles of independence of the judiciary” by disregarding and effectively trying to overrule the court's own conclusion, in convicting Gilani of contempt, that he had brought the Supreme Court and judiciary “into ridicule.”<sup>362</sup>

With these assertions of autonomy since Chaudhry's restoration to office, the Supreme Court has veered remarkably close to reprising its traditional role of facilitating the subversion of representative institutions—relying in the process, once again, on an underlying discourse that coincides with the military's own legitimating discourse. In the *Memogate Case*, the court directly invoked the deep state's interests to privilege its own investigation over that of Parliament, and to privilege national security over fundamental rights. Haqqani's lawyer, Asma Jahangir, went so far as to suggest that the military, unable or unwilling to directly intervene to remove Zardari or the PPP-led government in Parliament, instead sought to use the judiciary and the government's political opponents to subvert the civilian government indirectly.<sup>363</sup> But even in the absence of any conspiracy, the episode illustrates Pakistan's institutional disequilibrium at work and the way in which the judiciary can

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359. Article 63(1)(g) of the Pakistan Constitution provides for disqualification from Parliament for any individual that “has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to . . . the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan.” PAKISTAN CONST. art. 63(1)(g). Article 63(2) confers the Speaker of the National Assembly with authority to refer any question as to potential disqualification to the Election Commission “unless he decides that no such question has arisen.” *Id.* art. 63(2). Under Article 63(3), if the Election Commission then “is of the opinion that the member has become disqualified,” then the individual will cease to be a member of Parliament. *Id.* art. 63(3).

360. See Nasir Iqbal, *Petitions Filed in SC: PML-N, PTI Want Gilani Disqualified*, DAWN, May 29, 2012, <http://dawn.com/2012/05/29/petitions-filed-in-sc-pml-n-pti-want-gilani-disqualified/>.

361. Muhammad Azhar Siddique v. Fed'n of Pak., (2012) 64 PLD (SC) 106 (Pak.).

362. *Id.* ¶¶ 15, 22–23.

363. See Sidrah Moiz Khan, “Darkest Day” for Judiciary: National Security Has Trumped Fundamental Rights: Asma, EXPRESS TRIB., Dec. 30, 2011, <http://tribune.com.pk/story/314153/civilian-authority-has-come-under-the-army-asma-jehangir/> (reporting Jahangir's criticisms); Syed Irfan Raza, *Asma Criticises Memo Commission, Quits as Haqqani Lawyer*, DAWN, Jan. 2, 2012, <http://dawn.com/2012/01/02/asma-criticises-memo-commission-quits-as-haqqani-lawyer/> (same).

weaken representative institutions to the benefit of military and deep state interests. In the case of Gilani's disqualification, the court set itself up as an "arbitrator[] of democratic righteousness," assuming for itself the role of not only determining whether democratically elected legislators are sufficiently honest to remain in office, but also whether Parliament's own internal processes are sufficient to police those qualifications.<sup>364</sup> Although the court recognized, as it had in previous cases, that the constitution confers the Speaker and Election Commission with discretionary and apparently exclusive authority over questions of disqualification from Parliament, the court's decision purported to eliminate the discretion of both the Speaker and the Election Commission altogether in cases involving "conviction of a member of Parliament by a court of competent jurisdiction."<sup>365</sup> Rather, the court essentially concluded, disqualification would flow automatically as a consequence of any such conviction, subject only to appellate judicial review of the conviction itself.

In both cases, the court functioned as an extraparliamentary broker, like the President and military during the 1990s, to whom opposition politicians turn when seeking short-term advantage against the party in government. In both cases, the court also cut closer to the core of Parliament's inner workings. In the *Memogate Case*, the court declined to defer its own investigation in favor of Parliament's own inquiry, while in the Gilani disqualification case, the court took the remarkable step of reviewing and overruling a ruling made by the Speaker of the National Assembly—characterizing it as falling outside the "internal proceedings" of Parliament precluded from review under the constitution.<sup>366</sup> The court also directly ordered the President of Pakistan, following Gilani's retroactive dismissal, "to take necessary steps . . . to ensure continuation of the democratic process through parliamentary system of government."<sup>367</sup> The implication in both of these cases was a paternalistic one: in matters near the core of the democratic process,

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364. Siddiqi, *supra* note 132.

365. *Muhammad Azhar Siddique*, (2012) PLD 106, ¶¶ 28, 48 (distinguishing Articles 63(1)(a), (g), & (h) from other subsections of Article 63(1)).

366. *See id.* ¶¶ 33–35 (characterizing the Speaker's determination as an "administrative task" subject to judicial review). While the court cited case law from the Supreme Court of India in support of this conclusion, at least one leading Indian constitutional lawyer has said that those cases have "nothing to do with the situation in Pakistan." *Experts Divided on Pakistan Court Citing Indian Verdicts*, HINDU, June 20, 2012, <http://www.thehindu.com/news/national/article3551660.ece> (quoting Rajeev Dhavan).

367. *Muhammad Azhar Siddique*, Const. P. No. 40/2012 & CMA No. 2494/12 (June 19, 2012) (short order).



Parliament and the President could not be trusted to handle their own affairs without the judiciary's oversight.<sup>368</sup>

#### D. Judicial Populism and Judicial Accountability

In the United States, scholars have extensively studied the relationships between judicial decision making and public opinion.<sup>369</sup> Recent experiences in Pakistan offer an interesting context in which to examine those relationships, as the judges of Pakistan's higher judiciary rapidly have come to understand their roles and professional identities as being defined and legitimated directly by the Pakistani people. The seeds of this self-conception were sown before the lawyers' movement, when the Supreme Court began to expand its use of public interest litigation and *suo motu* powers.<sup>370</sup> As Upendra Baxi observed thirty years ago, as the Supreme Court of India was embarking on its own innovations with public interest litigation, these mechanisms of adjudication can open "new bases of legitimation of [judicial] power and authority, relatively autonomous from the executive and the legal profession," since they are not mediated by other state institutions or the legal community, but rather purport to engage ordinary litigants directly.<sup>371</sup>

In the wake of the anti-Musharraf movement's popular mobilizations in support of the judiciary, this self-conception has deepened further. As the lawyers' movement's leaders have emphasized, the movement's strategies were self-consciously designed to sensitize judges to issues of concern to the legal community and the

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368. See Saroop Ijaz, *Don't Pity Us, My Lord*, EXPRESS TRIB., May 12, 2012, <http://tribune.com.pk/story/377911/dont-pity-us-my-lord/> (criticizing Justice Khosa's concurring opinion in the Gilani disqualification case as "purely political and polemical writing" and "paternalistic," and interpreting it as having "very strong whiffs of contempt for our weak nation").

369. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court—Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010).

370. See PAK. SUPREME COURT., ANNUAL REPORT, APRIL, 2010–DECEMBER, 2011, at 128, available at <http://www.supremecourt.gov.pk/web/page.asp?id=382> (discussing the court's Human Rights Cell); Kausar, *supra* note 22; Kennedy, *supra* note 22.

371. BAXI, *supra* note 131, at 33; see also Khan, *supra* note 81, at 3 (discussing ways in which public interest litigation can enable the judiciary to "act fairly autonomously in assuming judicial control over issues of public importance"). Until recently, however, as Maryam Khan observes, the jurisprudence of public interest litigation in Pakistan, to a somewhat greater extent than in India, has carried "a more conspicuous flavor of political elite struggle in the larger battle for democratization," emphasizing adjudication of the political claims of those elite interests more prominently than the fundamental rights claims of ordinary litigants. Khan, *supra* note 81, at 5.

public.<sup>372</sup> When the demonstrations against Musharraf and in support of the judiciary widened to include more ordinary citizens, particularly during the emergency, judges increasingly came to understand themselves as both accountable to and legitimated by the members of the public who rallied in their support.<sup>373</sup> For example, Chaudhry's own account of the judiciary's role, as articulated in a speech at Harvard Law School in 2008, self-consciously justifies the court's assertions of autonomy and power—against both “civilian *as well as* uniformed politicians and our intelligence agencies”—as being designed to benefit “the general population at large and the economy.”<sup>374</sup>

Since Chaudhry's restoration to office in March 2009, this institutional self-understanding also has been increasingly manifest in the court's opinions.<sup>375</sup> In his concurring opinion in the Gilani contempt decision, for example, Justice Asif Saeed Khan Khosa traces a straight line from the will of the people not to Gilani's status as member of Parliament and Prime Minister, but to his contempt conviction—owing to the fact that “ultimate ownership of the Constitution” and its institutions “rests with the people of the country who have adopted the Constitution”:

The power to punish a person for committing contempt of court is primarily a power of the people of this country to punish such person for contemptuous conduct or behavior displayed by him towards the courts created by the people . . . . It is, thus, obvious that a person defying a judicial verdict in fact defies the will of the people at large and the punishment meted out to him for such recalcitrant conduct or behavior is in fact inflicted upon him not by the courts but by the people

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372. See MALIK, *supra* note 144, at 76–77 (explaining that the movement sought “to change the mindset of the judges, especially those who manned the superior courts”); Ghias, *supra* note 22, at 1009 (noting comments by leaders of the lawyers' movement that “the responsibility of the bar is to sensitize the Court to political questions—and the Court was sensitized when public opinion was mobilized”).

373. See *Pakistani Lawyer's Movement*, *supra* note 22, at 1722–23 (discussing effect of lawyers' movement and anti-emergency demonstrations on judges' professional identities); Walsh, *supra* note 15, at A1 (“Judges say their expanded mandate comes from the people, dating back to the struggle against the military rule of Gen. Pervez Musharraf.”).

374. Chaudhry, *supra* note 14 (emphasis added); see also Cyril Almeida, *A Transformative Court*, DAWN, Jan. 22, 2012, <http://dawn.com/2012/01/22/a-transformative-court/> (“Having slain a military ruler, the Supreme Court under Chief Justice Chaudhry has embarked on a transformative agenda.”).

375. See Raza Rumi, *The Task Ahead*, NEWS INT'L, Apr. 11, 2010 (discerning a “clear tilt towards the popular as opposed to the technically legal” in the court's decisions after Chaudhry's restoration, including the *NRO Case*); Siddiqi, *supra* note 132, (discussing Supreme Court's self-conception since 2007 that “real power lies in its ability to represent itself as a people's court or as the ‘Supreme Court of the People of Pakistan’”).

of the country themselves acting through the courts created and established by them.<sup>376</sup>

Justice Khawaja made similar observations in his opinion concurring in the judgment disqualifying Gilani from office, claiming for the judiciary a coequal basis, with Parliament, for reflecting the popular will.<sup>377</sup> Justice Khawaja directly contested the notion that “Parliament alone represent[s] the will of the people,” asserting instead that by exercising its contempt power and disqualifying Gilani, the court had “performed its democratic role stated in the Constitution to keep elected representatives in compliance with the will of the people manifested in the Constitution.”<sup>378</sup>

At one level, this depiction of the judicial role might be understood as reflecting a popular sovereignty-based understanding of constitutionalism in which the judiciary—no less than other government institutions—is both legitimized and constrained by a constitution that embodies and reflects the popular will.<sup>379</sup> And to be sure, even as it has challenged civilian politicians, the court simultaneously has tried to continue asserting its autonomy and power vis-à-vis military and deep state interests as well. For example, in recent years the court has moved forward on two sensitive cases involving the intelligence agencies, one investigating the circumstances in which individuals have “disappeared” while in the custody of intelligence officials and one investigating allegations that the agencies had infiltrated and manipulated the political process during the 1990s.<sup>380</sup> However, the court’s aggressiveness with

376. *In re Yousaf Raza Gilani*, Crim. O.P. 6/2012, ¶ 6 (Apr. 26, 2012) (Pak.) (detailed judgment) (Khosa, J., concurring), available at <http://www.scribd.com/doc/92823324/Prime-Minister-Gilani-s-Case-Detailed-Verdict>.

377. *See Siddique v. Fed’n of Pak.*, (2012) PLD (SC) 106, ¶ 7 (Pak.) (Khawaja, J., concurring).

378. *Id.* ¶¶ 2, 7.

379. *See, e.g.*, Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 464–65 (1989) (describing how, under a “dualist” theory of constitutionalism, courts, “[r]ather than threatening democracy by frustrating the statutory demands of the political elite,” instead “serve democracy by protecting the hard-won judgments of a mobilized citizenry against fundamental change by political elites who have failed to establish the requisite kind of mobilized support from the citizenry at large”); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *GEO. L.J.* 723, 730 (2009) (arguing that judicial review “supports popular sovereignty by mitigating the principal-agent problem that lies at the heart of democratic government”).

380. *See Asghar Khan v. Beg*, Hum. Rts. Case No. 19 of 1996 (Oct. 19, 2012) (Pak.) (short order), available at <http://tribune.com.pk/story/453773/asghar-khan-case-short-order-full-text/> (ordering legal action to be taken against retired generals involved in manipulating the 1990 elections, and ordering military and intelligence agencies not to interfere with political process); Declan Walsh, *Court Challenges Put Unusual Spotlight on Pakistani Spy Agency*, *N.Y. TIMES*, Feb. 7, 2012, at A4 (discussing Supreme Court cases against Pakistan’s intelligence agencies); 1990 Election Was Rigged, Rules SC, *Dawn*, Oct. 19, 2012, <http://dawn.com/>

cases involving civilian politicians goes well beyond an understanding of its role rooted in conventional popular sovereignty-based constitutional principles, carrying instead the more directly populist valence of the anti-Musharraf movement.<sup>381</sup> And whether the court will successfully manage to be genuinely evenhanded in its treatment of civilian versus military interests over the longer term, in the face of continued military and deep state dominance, remains highly uncertain.<sup>382</sup>

Fashioning a judicial role more conducive to reinforcing democratic consolidation will require directly confronting and moving beyond at least two ironies that may be seen in the higher judiciary's increasingly populist institutional self-identity, which Faisal Siddiqi characterizes as a self-conception of "judicial sovereignty."<sup>383</sup> The first irony involves a disconnect between the priorities of the higher judiciary and other pressing public needs in reform of the judicial system. After all, a judiciary animated by a sense of accountability to and legitimation by the Pakistani people might, in fact, prioritize its work somewhat differently. As Osama Siddique argues, the court's extensive investment of resources in major political cases—which it increasingly undertakes in the name of the "people"—might, from another perspective, be "tantamount to neglecting an uplift of what is essential from the standpoint of [ordinary citizens] who daily face a deeply eroded court system," over which the Supreme Court and High

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2012/10/19/asghar-khan-case-sc-resumes-hearing-3/ (discussing Asghar Khan); Allbritton & Chaudhry, *supra* note 15 (discussing journalist Ahmed Rashid's view that the court "has also given at least the appearance of being willing to take on the military").

381. See Faisal Siddiqi, *A Defining Judicial Moment*, DAWN, May 21, 2012, <http://dawn.com/2012/05/21/a-defining-judicial-moment/> (identifying and discussing Supreme Court's "new judicial philosophy of basing judicial legitimacy not only on the written words of constitutional legitimacy but also on public legitimacy and potential public mobilisation").

382. Saroop Ijaz, *Setting the Record Straight*, EXPRESS TRIB., Oct. 21, 2012, <http://tribune.com.pk/story/454377/setting-the-record-straight-3/> (contrasting the court's aggressive decisions against Parliament, such as the dismissal of Gilani from office outright in the NRO contempt case, with its more restrained decision to merely "ask[] the federal government to investigate" and prosecute military and intelligence agencies' unconstitutional interference with electoral process in *Asghar Khan*). In recent months, the military has begun to push back against these assertions of autonomy by the court. See Imdad Hussain, *Don't Cross the Limits: Kayani*, DAILY TIMES, Nov. 6, 2012, [http://www.dailytimes.com.pk/default.asp?page=2012%5C11%5C06%5Cstory\\_6-11-2012\\_pg1\\_1](http://www.dailytimes.com.pk/default.asp?page=2012%5C11%5C06%5Cstory_6-11-2012_pg1_1) (discussing a speech by General Kayani defending the military against criticisms in *Asghar Khan* and warning the court and other institutions to act within limits).

383. Siddiqi, *supra* note 141 (arguing that the Supreme Court's removal of Gilani as Prime Minister was enabled by "the perceived unpopularity of his government and the lack of popular resistance to such judicial removal").

Courts have ultimate supervisory responsibility.<sup>384</sup> Notwithstanding tools like public interest litigation and *suo moto* powers, ordinary Pakistani citizens are still much more likely to interact with courts in the lower judiciary, which suffer from huge case backlogs, widespread corruption, uneven quality, and other problems interfering with access to justice.<sup>385</sup> Even within the higher judiciary itself, the intensive focus on these political cases necessarily means that other public interest cases get placed on the back burner.<sup>386</sup>

The second irony concerns the nature of the judiciary's perceived legitimation and accountability. While the judges increasingly understand themselves as directly legitimated by the people, in fact the judiciary has no direct lines of accountability to that source of legitimation. The people have no direct role in the appointment or removal of judges—and indeed, given the manner in which the appointment and removal processes have evolved, the people do not even have a meaningful indirect role through their elected representatives in Parliament. There is no way for public opinion to directly inform judicial decision making in any sort of unmediated way. While judges might hope to infer the will of the people from Pakistan's increasingly lively and open media, the often sensationalist and partisan nature of much media coverage and its susceptibility to deep state influence make the media an imperfect proxy for popular will.<sup>387</sup> Indeed, Pakistan's judiciary has increasingly sought to curtail even these limited lines of judicial

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384. Siddique, *supra* note 314; see also MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 295 (1989) (drawing attention, in the context of India, to the distinction between “higher state” and “local state”); *supra* note 30.

385. See Walsh, *supra* note 15, at A1 (noting that “critics accuse Mr. Chaudhry of failing to reform the chaotic lower courts, which remain plagued by long backlogs”); Nick Jackson, *The Last Word: “Not Judicial Diktat,”* NEWSWEEK PAK., July 6 & July 13, 2012, <http://www.newspakpakistan.com/component/content/article/36-scope/1437-not-judicial-diktat> (interviewing Human Rights Watch's Ali Dayan Hasan and discussing problems with access to justice in Pakistan).

386. See *Judiciary Always Supports Army Rule, Rues Asma*, EXPRESS TRIB., Jan. 12, 2012, <http://tribune.com.pk/story/319949/asma-jahangir-criticises-judiciarys-approval-of-past-military-takeovers/> (recounting lawyer Asma Jahangir's view that instead of pursuing the NRO case, the Supreme Court should instead “take up thousands of other pending cases”); Shyema Sajjad, *Justice, Samosas and the Ostrich*, DAWN, July 27, 2012, <http://dawn.com/2012/07/27/justice-for-ostriches-and-samosas/> (“One hopes that between the madness and monotony of the Swiss letter cases, our judiciary will eventually realize that there are families and institutions and individuals all waiting for justice . . . [The Court] needs to think about what matters more and prioritise its time and rulings accordingly.”); see also Khan, *supra* note 81, at 5 (discussing the emphasis in Pakistan's public interest litigation jurisprudence on contestation among political elites).

387. See Waseem, *supra* note 345, at 17 (discussing skewed nature of discourse in Pakistan's “media echo-chamber,” especially in light of formal legal prohibitions against putting the military and judiciary “in disrepute” in media coverage); *supra* notes 55–58 and accompanying text.

accountability by attempting to restrict criticism of the judiciary in the media.<sup>388</sup>

In this context, a judiciary that sincerely desires its legitimation to rest with the Pakistani people has an interest in stronger representative institutions and stronger lines of accountability to those institutions, and a more robust public conversation on how to implement mechanisms of judicial accountability that could help to better legitimate the role that the Supreme Court has increasingly sought to perform.<sup>389</sup> So far, however, Parliament has not effectively asserted meaningful external constraints upon the judiciary. To be sure, the government has not, by any means, conceded that the Supreme Court has always been acting lawfully and constitutionally. But it also has not been in a position to act forcefully upon that position. For example, in what one might consider a rather feeble variant on departmentalism,<sup>390</sup> the PPP-led government questioned the court's disqualification and dismissal of Gilani and, even after designating a new Prime Minister, Raja Pervez Ashraf, to replace Gilani, continued to resist the court's orders to write the Swiss letter in the *NRO Case*. Given that resistance, the court initiated contempt proceedings against Ashraf, as it had against Gilani, and the cycle began anew.<sup>391</sup> At the same time—apparently owing in large measure to the risk of military intervention in the event of an escalating constitutional showdown—at no point did the government seriously contest the court's remarkable sanction, opting instead to acquiesce to Gilani's judicially ordered dismissal.<sup>392</sup> While senior PPP officials intimated that the government was prepared to continue playing this game of chicken indefinitely—permitting the court to continue ousting sacrificial prime ministers by using its contempt power until the government's full term of office was complete and elections were

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388. See *Pakistan: Judges Muzzling Critics in the Media* HUM. RTS. WATCH (Nov. 27, 2012), <http://www.hrw.org/news/2012/11/27/pakistan-judges-muzzling-critics-media>.

389. Cf. Faisal Siddiqi, *Why Is the SC So Powerful?*, DAWN, Oct. 15, 2012, <http://dawn.com/2012/10/15/why-is-the-sc-so-powerful/> (arguing that “the key challenge [in Pakistan] is not to fear a powerful Supreme Court but to develop mechanisms to ensure the public accountability of judicial power”).

390. See Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1318–25 (2012) (discussing departmentalism and similar theories of shared authority over constitutional interpretation between the judiciary and other state actors).

391. See *Adnan Khawaja v. State*, Crim. Misc. Application No. 486/2010 in Crim. Appeal No. 22/2002 (Aug. 8, 2012) (Pak.) (short order) (ordering Prime Minister Ashraf to show cause as to why he had not written the letter to Swiss authorities).

392. See Siddiqi, *supra* note 389 (“The reason why the PPP-led government is not willing to take on the [Supreme Court] is because of the permanent danger of military intervention in the face of a constitutional deadlock.”).

scheduled—ultimately, the government acquiesced and agreed to draft the letter to Swiss officials.<sup>393</sup>

Ultimately, this pattern of responses—standing, of course, in sharp contrast to the constraints to which the judiciary is vulnerable from military and deep state interests—is one of institutional weakness, not strength. Parliament has not been able to meaningfully constrain the judiciary or, indeed, even tried particularly hard to do so.<sup>394</sup> Most recently, while the government has attempted to shield the Office of the Prime Minister from the Supreme Court’s assertions of power, by adopting a new Contempt of Court Act that limits the court’s contempt power, a five-judge bench invalidated that law as unconstitutional. Notably, the court interpreted its constitutional power to punish contempt of court as effectively plenary, concluding that the constitution did not permit Parliament to “curtail[ ] the [contempt] powers of the Supreme Court” and that any such limitation would infringe upon the “dignity” and independence of the judiciary.<sup>395</sup> The court also has continued to cast more fundamental aspersions on Parliament’s legitimacy as a democratic institution that echo the deep state’s legitimating discourse.<sup>396</sup> Even as the court continues to assert its autonomy in the name of “judicial independence,” a judiciary without an appropriate balance between autonomy and constraint, across the full range of its relationships with other actors, remains elusive.

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393. See Declan Walsh & Salman Masood, *Pakistani Government Relents in Judicial Standoff Over Corruption Case*, N.Y. TIMES, September 18, 2012, at A14 (reporting Ashraf’s agreement to write the “Swiss letter”); Salman Masood, *Battle Eases Between Pakistani Government and High Court*, N.Y. TIMES, Oct. 10, 2012, [http://www.nytimes.com/2012/10/11/world/asia/battle-eases-between-pakistani-government-and-high-court.html?\\_r=0](http://www.nytimes.com/2012/10/11/world/asia/battle-eases-between-pakistani-government-and-high-court.html?_r=0) (reporting Supreme Court’s approval of text of Ashraf’s letter to Swiss authorities).

394. See Cyril Almeida, *Judging the Court*, DAWN, July 15, 2012, <http://dawn.com/2012/07/15/judging-the-court/> (“The chief justice has claimed parliament isn’t supreme, but no one has stood up in parliament to shut down the chief justice.”); cf. Abu El-Haj, *supra* note 390, at 1316–17 (discussing the tendency in the United States to conflate judicial review with judicial supremacy).

395. *Baz Muhammad Kakar v. Fed’n of Pak.*, Const. P. No. 77/2012 & CMA No. 3057/2012, ¶ 14 (Aug. 3, 2012) (short order).

396. Saroop Ijaz, *Ward of the Court*, EXPRESS TRIB., Aug. 12, 2012, <http://tribune.com.pk/story/420805/ward-of-the-court/> (criticizing the Supreme Court for “inquiring into the motivation or the good faith of Parliament” in enacting the Contempt of Court Act and “demean[ing] the manner in which parliamentarians debate or choose not to debate matters in Parliament”); cf. Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 13 (2012) (similarly criticizing the U.S. Supreme Court for “dismissing democratic politics and democratic engagement in the articulation of constitutional values” and expressing concern that “the Court’s decisions convey a broad message about the democratic process itself that may undermine public confidence in the democratic process”).

## VI. CONCLUSION

Pakistan's current shift to civilian rule has involved remarkable institutional and political change, developments that stand in sharp contrast to the standard, longstanding narratives about Pakistan's perpetual crisis and imminent "failure." The current moment can genuinely be understood as one with potential to lay a solid, long-term foundation for democracy and constitutionalism. But the path ahead remains treacherous. As with other countries in the gray zone between authoritarianism and democracy, tackling the complexities of that challenge may not lend itself to prescriptions arising from conventional, evolutionary accounts of constitutional and political change. The ultimate success of this transition process will depend upon a sustained, effective challenge to entrenched military and deep state dominance that is supported by a range of actors, including the judiciary.

In this context, it is crucial to develop an understanding of the judiciary's role and institutional identity that goes beyond unqualified, decontextualized notions of "judicial independence" that uncritically assume that "maximal autonomy" is necessarily preferable. Writing about U.S. debates over judicial review, Barry Friedman has described how normative discussions of the judicial role tend to coalesce around two basic positions—one regarding the judiciary as a "threat" that "diminishes or interferes with democratic governance" and one offering a basis for "hope," in which the judiciary, if conferred with sufficient "independence," can help "ensur[e] that government adheres to constitutional command."<sup>397</sup> As Friedman elaborates, however, the "'hope' stories" often fail to sufficiently account for real world constraints upon the ability of courts to live up to the idealized role that normative theories often contemplate.<sup>398</sup> Insofar as courts are embedded within particular political, institutional, and social contexts—and are both constrained and empowered by those contexts—more complete understandings must account for those contextual realities. As Pakistan's historical experience demonstrates, gray zone countries present contextually distinct versions of this threat–hope dilemma, in which aggressive assertions of judicial autonomy against weak representative institutions can weaken those institutions even further—and, in the process, further reinforce the already well-entrenched power of status quo interests.

Pakistan's long-term trajectory out of the gray zone requires representative institutions with strengthened governance capacities

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397. Friedman, *supra* note 16, at 309.

398. See *id.* at 317, 330–34.



and power to rein in entrenched military and deep state interests.<sup>399</sup> Given the existing weaknesses of Pakistan's representative institutions—and their enduring vulnerability to the deep state and its antidemocratic legitimating discourse—a judiciary without an appropriate balance between judicial autonomy and judicial constraint, across the full range of the judiciary's relationships with other actors, can pose “threats” that might not be present or as severe in other countries. These lessons have broader applicability, since other countries undergoing constitutional regime shifts similarly contend with status quo interests, such as the military, that wield considerable power. Pakistan's experiences are therefore instructive—or at least suggest notes of caution—about the relationship between military and other status quo interests and an “independent judiciary” for other countries that risk languishing in the gray zone, but seek a more complete shift to democracy and constitutionalism.

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399. See Rumi, *supra* note 220 (“In a country of 160 million people with strong traditions of democratic yearning, the process of change cannot be articulated outside the mainstream electoral politics, however faulty the political parties.”).