

The Constitution of Pakistan

A Contextual Analysis

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Preface

The contrast between India's record of fidelity and Pakistan's less steadfast relationship to constitutionalism is oftentimes the basis problematising Pakistan's very existence. By citing the pre-1947 unity of the two, the possibility of seeking explanation from that point onwards seems logical, and Islamic theocracy and military authoritarianism are somehow aligned and presented as existing within the demand for a homeland for the subcontinent's Muslims. In other instances failure is traced to the period of Muslim rule in India as indication of a culture of despotism amongst Muslims. Through invocation of both flimsy historical premises, there is a convergence in arguing that the record of frequent coup d'états and constitutional abrogation in Pakistan reflects an original sin, that of Pakistani statehood.

In line with this inescapable narrative, the little scholarly attention that has been directed at constitutional law in Pakistan deals primarily with the elaboration of an emergency jurisprudence. A number of cases spanning the decades of Pakistan's existence in which the judiciary has conferred legitimacy upon coup d'états and forged novel doctrine, legal bridges, to sustain a broader legality across regime changes are associated with such a jurisprudence. There is no denying that this record is awe inspiring for its inventiveness and the ease by which legal and political domains are collapsed, so that the attention it has received is not altogether surprising. However, these cases around coup d'états and emergencies cannot be the stand-in for understanding a broader legality in Pakistan.

These cases are not read here together as either exceptional or emblematic of judicial complicity or capitulation. Rather, situated in relation to developments in broader institutional fields and struggles, they are simply indicative of the centrifugal tendencies that have long been associated with the Pakistani state. To existing scholarship on Pakistani constitutional legality, then, this book perhaps only adds the limited innovation of reading many strands of jurisprudence together, so that the centrality of executive powers is the pivot for relating emergency jurisprudence and a broader constitutionalism.

Not only by acts of constitutional abrogation but more consequentially because of the constitutional amendments that follow in train, there is no simple line to divide emergency and a broader constitutional jurisprudence. In the landscape of Pakistani constitutionalism, emergencies are not simply time bound and coincident with martial law, but also must refer to the selective application of constitutional protections to diverse populations within Pakistan. At times this is because of the operations of a plural legality and at others, because of territorial exemptions written into the Constitution itself.

Constitutionalism in Pakistan, as elsewhere, must necessarily be understood historically, materially and at the interstices of always competing ideological structures. Thus, a deeper historicity is offered in the first two chapters, to organise the framework for understanding more thoroughly the interpretations and elaboration of the 1973 Constitution, which forms the bulk of what is studied in the remainder of the book. While there is no single relation of determination or causality that can be suggested here between the formal apparatus of law and constitutionalism and the material organisation of power and resources within Pakistan, it is important nonetheless to be more precise about the manner in which diverse domains have been organised in relation to each other.

As a historical starting point, important for understanding contemporary constitutionalism in Pakistan are the violent acts of territorial conquest, the offer or denial of state patronage, and the relative priority conferred upon regions and populations within a colonial political economy. Unequal relations established under colonial rule have continually impacted on the regimes of management through which the central government has sought to effect rule. Even in the waning decades of British colonial rule in India, the imperative of maintaining heavy administrative control was only nominally eroded by the demand for representative government. In the ferment of this time, with competing ideologies propelling the call for self-rule, the advantages conferred by the British on certain groups and within them upon manageable elites, allowed these groups to reinscribe such advantage into early state-making.

The continuities are expressed in the post-colonial Pakistani state in multiple ways. The second chapter identifies three predominant features that have had everlasting impact on the shape and abidance of formal constitutionalism in Pakistan. These include the marginalisation

of regionalist demands, a propensity for over-heavy administrative centralisation, and the shifting place of Islam as normative guidance for the nation. The distributions engendered by these have influenced the shape of three successive constitutions, in 1956, 1962 and 1973. The tendency to see independence from colonial rule as marking a definitive break, and the act of framing a constitutional accord as the means of determining the line between legitimate and illegitimate exercises of power alone, is already somewhat disproved in accounting for the continuities between them and what existed prior to independence. For dominant classes in the state, the achievement of independence was significant for ameliorating their position of disadvantage against the colonisers, but for the larger populace this transition was ultimately inconsequential for addressing the deeper structuration of power in the state.

While there is a clear debt and selective borrowing of some of the schematic elements that percolate through the critical literature on Pakistani state power in this volume, there is also an attempt to subtly undo the extreme determinism of accounts that see an absolute immovability of power in spite of constitutional adjudication. The centering of a formal, normative apparatus, the Constitution and law, certainly shifts the focus of analysis so that change, conflict, crisis are all shown as mediated within the bounds of higher level norms and their institutional expressions. The institutions themselves are studied formally as well as by reference to their competitive interplay with one another. Thus, the judiciary, the executive and parliament are described in this tussle. However, the identification of the fields of contest between them is suggestive of an inheritance of control and domination, oligarchic centralisation, core-periphery relations and the search for ideological unitariness or hegemony.

If not always central to organising conflict amongst national elites or between them and the spokespersons of regional interest or a statist Islamism, the constitutional structure and the broader apparatus of legality is always nonetheless at play. At times, alongside an understanding of specific provisions and their elaboration through judicial review, extensive descriptions of such phenomenon are presented in parallel to illustrate the slippages and omissions.

As already partly described above, the first two chapters of this book chart the incipient assembly and early organisation of the Pakistani state. The history in these first two chapters is intended to acquaint

the reader with particular strands of context entwined in the inheritance of a particular legalism and system of government. To a greater extent than is the case in some of the other volumes of this series, the remainder of this book foregrounds major features of the 1973 Constitution, its multiple alterations and the jurisprudence generated. If the Constitution is a mechanism of control and containment, it has already encoded a dispensation towards the conflicts investigated here and its further abrogations, mutations and revisions are invariably sites where these conflicts are opened up again.

The chapters are comprehensive rather than concise and a further set of contextual features are investigated that reflect both changes in the social sphere as well as those reflected in official policy. Chapters 3 to 5 investigate the institutions of a trichotomous governmental order and their transformations to present. Three additional chapters discuss the shape of federalism, rights guarantees and the place of Islam as given in this Constitution.

Chapter 3 presents a summation of the rules that govern the legislature, but, importantly seeks to expose the myriad ways in which the political sphere has been reshaped by successive regimes. Chapter 4 elaborates those features of the Constitution that allow for heavy executive centralisation, including emergency powers and the presidential powers to dissolve assemblies and enact legislation through Ordinances. It also traces the history of executive consolidation through military and civilian regimes and some recent movement by the higher judiciary to introduce principles of accountability into executive functioning. Chapter 5 focuses on the role of the judiciary as constitutional arbiter. By highlighting the principle of jurisdiction as conferred by the Constitution and law as the central motif of this chapter, a controversial history that includes both a wilful abidance of limitations on judicial review as well as more recent attempts to expand the powers of review is illustrated.

That the 1973 Constitution did not successfully accommodate regional and ethnic concerns through the federal formula it elaborated is made apparent by the passage of the Eighteenth Amendment to the Constitution in 2010. This package of constitution reform was intended to devolve greater powers to the provinces and Chapter 6 investigates the division of powers between federating units and the centre both prior to and after 2010. It also illustrates some instances of continuing conflict within the federation and the formal and informal

aspects of federalism that intersect the grievances over representation and resources driving these conflicts. Chapter 7 provides an overview of the fundamental rights that are accorded under the 1973 Constitution and the primary interpretive doctrines that are employed in their adjudication. Two detailed cases studies of the evolving jurisprudence of particular fundamental rights are undertaken; the first of protection against sex-based discrimination and the second pertaining to constitutional safeguards accorded to persons preventatively detained by the state. The final chapter focuses on the alterations made in order to impart a more Islamic character to the country's legal system. Most of these changes can be dated to Zia-ul-Haq's reign. These include the elevation of the Objectives Resolution to the status of a justiciable instrument of the Constitution, the establishment of a parallel Shariat court system and the enactment of various Islamic laws. The developments that follow these constitutional incorporations and the particular impact upon religious minorities and women are charted in this chapter.