

# Judging the state

*Courts and constitutional politics in Pakistan*

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## Introduction

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In Georg Buechner's drama recreating the conflicts of Jacobin France, a deputy of the National Convention describes a constitution as "a transparent garment clinging to the body politic."<sup>1</sup> His comment encapsulates the dialectic that is always present in constructing a constitution, for constitutions reflect at once the imperfections and the aspirations of a political community. Tensions between the ideal and the real – making a political community out of diverse parts, creating something new while retaining the identities of the old – highlight the obstacles and opportunities that states and citizens encounter as they configure their political means and ends. Similar problems confront old states and new, those seeking to redefine their ideological foundations within accustomed territorial borders, and those establishing legal entities in equally new physical circumstances.

The process of constituting a new state – literally, writing its constitution – involves both political and juridical tasks. In the first instance, writing a constitution provides a legal frame for the state, a method of organizing authority and adjudicating conflicts about power. It also speaks to the political pasts and futures of those who comprise it – establishing the sources, character and conditions of collective identity and sovereignty. These activities are mutually reinforcing: citizenship must be meaningful to individuals in political society and effective in the state structure. When collective memory and expectations do not support the ways power is distributed and used, relations between state and civil society can undercut the constitution and the institutions it creates, and erode the concept and practice of constitutionalism.

These conflicts are sometimes played out on the political stage in elections and constitutional draftings; sometimes they are inscribed in wider conflicts in society, in public actions against the state and occasionally, in civil wars. At other times, the state absorbs these tensions in

<sup>1</sup> Georg Buechner, *Danton's Death*, translated by Victor Price (Oxford: Oxford University Press, 1971), p. 7.

itself, reworking political arrangements within its own establishments while grasping tightly the framework that endows these institutions with their authority. Such choices and actions are as apparent today in constitutional struggles in Central Europe and the former Soviet Union as they are in third world states that have moved from colonial status to independence, and from authoritarianism toward democracy.

All of these problems are dramatically illustrated in Pakistan, where incomplete constitution-making has placed the burdens of constitutional interpretation on state instruments ranging from the bureaucracy to the military to the judiciary. The country has survived several wars, all of which have challenged variously the distribution of power in the state and the meanings that its citizens ascribe to it. Its civil war in 1971, which resulted in partition and the formation of Bangladesh, was the culmination of political conflicts that had raged since Pakistan's founding, and that linger in Pakistan today.

Pakistan's history has been defined by uneasy relationships between state institutions and civil society. In its executive-dominated state, the superior courts in particular have played unusually important parts in determining the country's political fate. When constitutions have not accomplished their tasks – when they have not adequately constituted the state in terms meaningful to its citizens – judges and lawyers have reconstituted the state anew. Courts engage in rituals of recreation: they interpret the constitution of the day, and read political history and constitutional language to establish new understandings of political community. Judicial proceedings thus embrace an autonomy only partly written into the constitutions that create them and lend to their judgments a crucial importance in the development of the state.

This study explores relationships between state and civil society through the medium of the superior judiciary. It shows how, over the course of almost five decades, the courts have influenced the development of its constitutions and the structure of the state. By examining judicial decisions, particularly at times of political crisis, it isolates discussions about concepts of constitutional rule between the judiciary and other institutions, and looks at the way tensions within the judiciary, and between courts and other state institutions, have affected the ways that political society sees itself. And finally, it explores the consequences of these debates for the formal organization of political power.

Pakistan's political history, like many of its neighbors, is one of frequent crisis and incomplete resolution. These crises are woven into the texture of its history, its concepts of itself and its sense of political possibility. The country has fought foreign wars over its physical and constitutional boundaries and domestic wars over conflicting concepts of

citizenship, equality and representation; the disruptions and discontents of civil society have often skirted the edges of state violence, and have given continued cause for citizens to reexamine their relationships to the state in which they live. Its history and future alike are intricately linked to its overlapping ideological moorings, its economic and social conditions, and the instrumental goals of the state. For almost five decades, conflicts over the role of religion in society, democracy in the polity and the transformative capacities of state institutions in the economy have been the underpinnings for a politics of unique opportunity and often, profound division and dismay.

This history poses problems of definition and interpretation that are embodied in the variegated traditions with which its constitutions describe the state. Many attempts to write and execute constitutions have defined the successes and failures of the federal state and its politicians, the nature of fundamental rights and the scope of dissent. Like other post-colonial states, Pakistan's constitutional law has developed partly from colonial legacy and partly from reaction to it; the two processes have been intertwined to produce a state of mixed political and legal parentage.

Early constitutional experiments combined two related and problematic efforts at self-definition. First, they attempted to provide a written constitution that would use the language of British constitutionalism to define sovereignty and yet separate the new state from the Empire. This was surely an imperfect enterprise, for sovereignty – overlaid with conflicting notions of territoriality, nationality, ethnicity, franchise and state authority – was paired with an executive-dominated state already created by imperial instruments of governance. The justices who ruled in 1954 in *Tamizuddin Khan's case*, the country's first major constitutional trial, initially tried to sort out these differences but ended by trying to combine them in the doctrine of necessity, presumptively defining public order as the paramount task of political rule. Not long thereafter, some of the same justices ruled in 1958 in *Dosso's case* to justify a military *coup d'état*, imposing a renewed centralism on the state through the doctrine of revolutionary legality. This doctrine, in turn, provided a legal basis for undemocratic rule for many years; only the end of the Bangladesh war provided the possibility in 1972 for a new judicial examination of this form of legality, in *Asma Jilani's case*. The vice-regal state, combined with an increasingly strong military and bureaucracy, surpassed colonialism only gradually and incompletely; the state, armed with legal support from the courts, developed in ways that still affect the polity today.

The first attempts to write a constitution also established a form of political dialogue that colors constitutionalism five decades later. The first drafters tried to describe a state comprised primarily of Muslims but not

necessarily or fully defined by Islam. A variety of philosophies was marshaled by political constituencies who eschewed compromise, setting an uncompromising tone for political debate and hardening the choices available to politicians and institutions like the judiciary. Moreover, the respective terms of identity and discourse that characterized each side – which offer vastly different notions of the individual's place in politics – undercut the process of constituting the state and making its sovereignty concrete. Nonetheless, deceptively similar vocabularies of constitutionalism permeate these political philosophies. The search for appropriate and acceptable ways to understand citizenship and its corollary rights – and political power and its corollary duties – has been both furthered and frustrated by these inherited languages. Neither elections nor parliaments nor courts – secular or religious – have successfully untangled the many layers of meaning and expectation that were cast so early on in political society.

A pattern of strong executive power was thus enshrined in constitutional instruments to sidestep political schism, although the concentration of power inevitably created additional conflicts. Ultimately, as we shall see, this habit became self-defeating for heads of state, heads of government, constitutions and citizens alike. Administering the state became an endeavor separate from resolving problems of political identity, and thus pushed problems of identity to the edges of the political agenda. Ideological issues were either set aside or manipulated – always present and contentious, frequently used to represent or disguise the pursuit of power, but rarely at the critical center of state authority. The end of stability has been used consistently to justify the means of maneuvering constitutions to suit the executive-oriented – and too often, praetorian – state.

That the same ends have been firmly inscribed in judicial judgments that were nevertheless intended to clarify and occasionally challenge the terms of power is a theme that characterizes much of Pakistan's history, and that reappears throughout this study. It surfaces not only in the ways that courts have defined and justified the mechanics of power in Pakistan, but also in the special contours of judicial independence. Courts everywhere live in a delicate balance between upholding and challenging the distribution of power, but courts in authoritarian states carry extra burdens. If constitutions and executives allow them to function, they must in some way heed them. Courts can limit some executive power, but executives possess the power to legitimate the capacity to judge; in turn, the polity must, however distantly in some instances, legitimize them both. When this equation has been broken in Pakistan, only the blunt force of military rule and martial law has kept the polity within bounds.

Thus, limits on judicial independence have always influenced the force of judicial judgments, and they in turn have determined the strategic calculations that underscore judicial doctrine. In this sense, by occasionally accepting – politically and jurisprudentially – the fact that they function on the basis of privilege as much as right, courts have both reflected and determined the ways that power works.

These conundrums, and the institutional bargains they represent, deeply influence politics. From the country's first decade, Pakistan's judges have tried to match their constitutional ideals and legal language to the exigencies of current politics. Their judgments have often supported the government of the day, presumably to retain a degree of future institutional autonomy. This was their chosen path through the 1950s when there was no constitution; during the martial law period of the 1960s, when the constitution was a moving target; and under the mixed constitutional rule of Zulfikar Ali Bhutto in the 1970s, when hopes for democracy outweighed its reality. To remain open for business, courts accepted limits on their practice that were not always consonant with the conceptual foundations of their rulings – a disjunction that operates today. At the same time, when superior courts have felt emboldened by stronger constitutional instruments – as they did under the amended 1962 Constitution – or have chafed under political strictures that allowed them little constitutional ground – as they did under the early martial law of General Zia ul Haq – they have challenged the state on behalf of civil society. In both of these cases, however, they provoked the executive sufficiently to have their powers checked.

If the stature of the courts has almost inevitably waxed during democracy and waned under autocracy, periods of transition – certainly the most prevalent in recent Pakistani history – have provided the judiciary's most profound challenges. The superior courts have often been handmaidens of political change, and always guardians of legal transition. It is small wonder that by 1993 – after eight years of virtually perpetual transition from strict military rule toward civilian government under an internally contradictory constitution – almost every major political issue in the country found its way to the courts. During 1993 alone, the superior courts ruled on issues ranging from the disposition of territories contested as part of the Kashmir dispute to the right of former military officers to comment on past political activities to the constitutional division of powers and ultimately, the effect of past judicial judgments. The responsibilities imposed on the courts by the weaknesses of other institutions, and the additional obligations that their judgments (and their consequences) dictate, pose serious questions about the constitutional basis of the state and the abilities and proprieties of courts to navigate its complexities.



Relativism and related sensitivities to real and imagined political pressures have thus been constant factors in Pakistan's law as much as in politics. At times, judges and courts have by their undue prudence contributed to the uncertainty of Pakistan's experiments with democracy. At other times, their continued functioning has provided a tentative model of an open institution when others are absent or inadequate. As such, the judiciary's attempts to grapple with conflicts intrinsic to the process of building a state provide lessons, both inside and outside Pakistan, about the ways that courts try to speak to the state on behalf of society, and the ways that law tries to offer a meaningful context for politics.

The story of Pakistan's politics has been told in many ways for many different purposes. Each narrative chooses new victors and victims, internal and external. This book, however, takes as its starting point Pakistan's unique conjuncture of politics and jurisprudence, and particularly, the distinctive role that the superior judiciary and its judgments have played during the past forty-five years. It is therefore a story with neither heroes nor villains, although some will seem to emerge. Rather, it chronicles the ways the state has been viewed by one of its own institutions, and the intricate ways that sitting in judgment has affected courts and constitutions, and state and society.

The judicial role has never been appraised consistently in Pakistan. Indeed, when I visited the country to review its human rights record during the 1980s, politicians and lawyers would describe in detail the evolution of Pakistan's political travails by reciting the history of constitutional experiments and the role of the courts in various constitutional frameworks. Each recounting would begin by explaining that Pakistan's courts were the country's only independent institutions, and would end by castigating the courts for ensuring a persistently inequitable state burdened with frequently unpopular governments. The tensions between assumptions and conclusions, however – surely influenced by the times – were rarely explored.

My initial concern that something was missing in the myths of judicial independence and blame was confirmed by the contrary manner in which former judges themselves viewed the courts. They had come to see the judicial task as intensely political and the compromises struck between courts and state as open equally to praise and criticism. Supreme Court Justice Fakruddin Ebrahim, for example, has occasionally emphasized the successful efforts of superior courts to represent civil society during times of political strain, and his assessment is correct; but Baluchistan High Court Chief Justice Mir Khuda Bakhsh Marri has documented

lamentable miscarriages of justice by both civil and military courts, under both civilian and military rule. Responding to criticism that the courts should have done more to forestall repression, Supreme Court Justice Dorab Patel has asked pointedly, referring to past judgments, “how do you expect five men alone, unsupported by anyone, to declare martial law illegal?” Lahore High Court Justice K.M.A. Samdani, perhaps most critical of past behavior, finds judicial decisions wanting, lamenting that

most of the confusion that has arisen in the country as a result of which the institution of democracy has suffered almost irreparably, stemmed from the fact that by and large the judiciary in Pakistan tried, in times of crises, to avoid confrontation with the executive and went out of its way to take the path of least resistance. It upheld the de facto situation rather than declare the de jure position.

And former Peshawar High Court Justice Qazi Muhammad Jamil reflects a continuing debate between the political and judicial branches of government when he notes that by fighting their political battles in court, politicians and government alike have prevented the judiciary from becoming truly independent.<sup>2</sup>

These evaluations – neither fully consonant nor completely contradictory – reflect the unseemly weight that has been placed on the courts for the entire period since independence. In the absence of workable constitutions, participatory politics and representative governments, the superior courts have stubbornly persevered in their appointed tasks – when their judgments were unlikely to be heeded as often as when they were likely to be castigated for having issued them. Their persistence has created a breach between the fact of judging and the judgments themselves, a gap between process and substance that parallels so much else in Pakistan’s politics. The difference between keeping the courts open for business on the one hand, and tailoring their decisions for expedience or, at times, simple survival on the other, has led to these divergent assessments of success and failure. Superior court judgments have, indeed, sometimes helped to cement the overweening power of the state, or at the least, not judicially prevented usurpers from keeping their power. However, open courts have helped to retain the possibilities of open politics and the possibility that citizens will have yet another day in court.

The contours of this political landscape thus offer opportunities to question the judiciary’s institutional reach, and, more generally, the

<sup>2</sup> Fakruddin Ebrahim, interview with Zafar Abbas, *Herald*, May 1990, pp. 157–62; Dorab Patel, interview in *Newsline*, February 1993; K.M.A. Samdani, untitled, unpublished manuscript, p. 1; Mir Khuda Bakhsh Marri, *A Judge May Speak* (Lahore: Ferozsons (Pvt.) Ltd., 1990); Qazi Jamil, interview with Syed Haider Ali Shah, *Frontier Post*, 1 January 1990, p. 11. See also Dorab Patel, interview with Wahab Siddiqui, *Mag*, 22–28 March 1984 and 31 January–6 February 1985.

attributes of a jurisprudence of crisis and the political prerequisites for justice in a conflicted state. Pakistan's superior courts provide intriguing vehicles with which to discover the ties that bind state and citizen. The superior judiciary is important precisely for the analysis it brings to bear on critical constitutional issues. Unlike the subordinate courts, which rule on the daily problems of living within the legal confines of the state, the superior courts take as their starting point the critical issues that define society and state, and thus provide the context for choice and judgment. The courts teach us that the content of their developing jurisprudence, as well as the role of legal exposition and decision, provide keys to understanding political change.

Taken together, these judgments demonstrate the influence of judicial precedent in politics. The doctrines of necessity and revolutionary legality used to judge crucial executive actions have not only determined a long course of events, but also have provided incremental blueprints for constitutional design and policy – a useful reminder in a world coping with similar problems elsewhere today. The state has used these judgments to imbue executive action with colors of constitutionalism even when its actions were anticonstitutional, offering a veneer of legitimacy through the medium of legality. But the superior judiciary has kept alive political ideals that have often been attacked or allowed to erode by the same state that its judgments sustain. The judiciary's pursuit of these ideals has helped to create a constituency for ideas of citizen rights and state obligations within a state that sometimes seems impervious to sustained rights claims, and, more broadly, meaningful politics. Its quest calls into question the distance between the ideal and the real, and the depth of the prudence and realism that have guided judgment; it also provokes us to ask serious questions about the final impact of their accomplishments.

The quality of this political debate is often more elusive than its legal language conveys. Ultimately, courts cannot take decisions about ideology and power or constitute the state as the polity should. As Thomas Paine cautioned in *The Rights of Man*, a country's constitution is "not the act of its government, but of the people constituting a government." The dilemmas of this difference continue to face Pakistan today.