Praetorianism & Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan

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"[H]owever . . . effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the courts recognize the Government as de jure."

"A judiciary's job is to interpret the law and administer justice, not to challenge the [martial law] administration."

I. INTRODUCTION

Over the last fifty years, many countries, having gained independence after external colonial rule, have searched for suitable constitutional frameworks to govern their societies. The search is frequently disrupted by the usurpation of political power by the military, engendering profound constitutional crises. Because military regimes usually take power in contravention of constitutional frameworks, what is the legal validity of such regimes? Can a constitutional order survive such a blatant disregard of its provisions? What is the scope of legislative power of such regimes? These questions are not of mere academic interest. Quite often, in the wake of extra-constitutional assumptions of power, courts have had to pro-

nounce upon these and related questions.³

Judicial review is the power of the courts to declare a governmental measure either contrary to, or in accordance with, the constitution or other governing law. Such a judicial pronouncement either renders the measure invalid and void or vindicates its validity. An independent judiciary's review of governmental acts is an essential feature of democratic governance because such a review facilitates orderly functioning of different organs of the state and maintains the efficacy of constitutional guarantees of individual and collective rights. Judicial review of military usurpation thus brings into the sharpest possible focus the tension between law and force.

In order to draw conclusions applicable to other post-colonial common-law settings, this Article will examine judicial responses to constitutional breakdowns in Pakistan. There are several reasons to make Pakistan a case study. During Pakistan's forty-six years of existence, the military has directly ruled the country for twenty-three years and has asserted dominant political control over Pakistan for another twelve.⁴ These military interventions occurred at different stages of constitution-building, and adopted different means and varied objectives for assuming political power. As a

³. As recent events in Russia demonstrate, this phenomenon is not confined to post-colonial states. On March 23, 1993, the Russian Constitutional Court decided that President Yeltsin's assumption of "special powers" violated the Constitution. Serge Schmemann, Yeltsin and Rivals Are in a Standoff in Power Struggle, N.Y. TIMES, Mar. 24, 1993, at A1. On September 21, 1993, the President disbanded the Parliament and on October 7, 1993, suspended the Constitution Court. Peter Reddaway, Dictatorial Drift, N.Y. TIMES, October 10, 1993, at A15. This Article, however, deals with a post-colonial common-law setting. Extra-constitutional regimes in post-colonial civil-law settings, particularly in Latin America, do not consider their legitimacy open to either domestic or international question. This position is reflected by the Estrada Doctrine in Latin America. The Estrada Doctrine, named after Don Genaro Estrada, the Mexican secretary of foreign relation who pronounced it in 1930, posits that foreign nations cannot affect the legitimacy of an incumbent regime by withholding recognition, even if the regime is an extra-constitutional one. Jurisprudentially, the doctrine embraces the principle of unfettered state sovereignty and implies that success is the only yardstick of the validity of extra-constitutional usurpation. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 422-23 (1991); BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 854-55 (2d ed. 1990); Philip C. Jessup, Editorial Comment, The Estrada Doctrine, 25 AM. J. INT'L L. 719, 719-23 (1931).

result, each intervention presented the Pakistani courts with a different set of constitutional issues and dilemmas. Judicial responses to these questions, while varied both in their doctrinal underpinnings and in their impact, have been adopted by other post-colonial common-law jurisdictions. This Article will both describe and critique these judicial responses.

Scholarly literature dealing with the problem, besides being scant, suffers from three shortcomings. First, this literature is dated. The most recent article directly addressing the issue appeared in 1983; much has happened since then. Second, the existing literature is primarily focused on one particular doctrine of extra-constitutional legality invoked by the courts of Pakistan, that of state necessity. Third, the literature is silent about the broader political and constitutional contexts within which the constitutional crises arose, contexts which may well have influenced the judicial responses. This Article aims to remedy these shortcomings by analyzing the judicial responses within the respective constitutional and political context of each crisis.

Pakistan is a praetorian state, one in which the military tends to intervene and potentially could dominate the political system. The political processes of this state favor the development of the military as the core group and the growth of its expectations as a ruling class; its political leadership . . . is chiefly recruited from the military, or from groups sympathetic, or at least not antagonistic, to the military. Constitutional changes are effected and sustained by the military, and the army frequently intervenes in the government. In a praetorian state, therefore, the military plays a dominant role in political structures and institutions.

Political analysts often treat the repeated military usurpation of political power in post-colonial states as a transient feature of political development. According to some theorists, traditional


7. By one count there were 232 coups d'état in the world between 1945 and 1978, and all but eleven of these were in developing countries. See Edward Luttwak, COUP D'ÉTAT: A PRACTICAL HANDBOOK 190–207 (2d ed. 1979).

8. See, e.g., Edward Feit, The Armed Bureaucrats 1–21, 62–87 (1973) (not-
states always have unruly armies; in modernizing states, armies depose governments to accelerate the inevitable movement towards the modern millennium, where the possibility of usurping armies withers away.9 Many see in the military of newly decolonized states a welcome instrument of modernization and change.10 Others characterize praetorianism as the result of structural deformation of post-colonial societies, whereby economically dominant classes can maintain their position only under the protection of the military.11 Still others see the military in post-colonial societies as a self-aggrandizing power unto itself, seeking a dominant political role to ensure perpetuation of its disproportionate share of societal resources.12 Military intervention into politics, whether sporadic or institutionalized, raises serious questions of conventional understanding about constitutional governance, the rule of law, and the role of judicial review.

9. See, e.g., Janowitz, supra note 8, at 105–06 (suggesting political involvement by military is transient feature in underdeveloped countries' political development); John H. Kautsky, Political Change in Underdeveloped Countries 51–52 (1962) (suggesting military leaders, due to heightened education and status, likely agents of post-colonial social change); Pye, supra note 8, at 74–87 (noting modernizing role of military in developing countries).


The successive constitutional crises that confronted the Pakistani courts were not of their own making. But the doctrinally inconsistent, judicially inappropriate, and politically timid responses fashioned by these courts ultimately undermined constitutional governance. When confronted with the question of the validity and scope of extra-constitutional power, the courts vacillated between Hans Kelsen’s theory of revolutionary validity, Hugo Grotius’s theory of implied mandate, and an expansive construction of the doctrine of state necessity. The judicial failure to challenge praetorian tendencies facilitated a systematic erosion of constitutional governance and the rule of law. The result was the institutionalization of a praetorian state, diminished power and prestige of the judiciary, and the waning of judicial review. A more principled and realistic response would have been to declare the validity of extra-constitutional regimes a nonjusticiable political question. Besides ensuring doctrinal consistency, a refusal to furnish extra-constitutional regimes with judicially pronounced validity may well have discouraged praetorian encroachment upon constitutional governance. A consistent refusal to pronounce upon nonjusticiable political questions might have promoted a democratic constitution-building process by implicitly reminding the body politic of its primary responsibility to build and preserve constitutional orders.

During the Fourth Republic, when the courts in Pakistan actually had the opportunity to exercise judicial review under a democratically framed constitution, they failed to enunciate a consistent and coherent standard of review. By misapplying the political question doctrine, the courts implied that democratically elected legislatures possess unfettered legislative power. By refusing to fashion judicial checks against potential tyranny of the majority, the courts acquiesced in the contraction of fundamental rights and the diminution of federalism during the Fourth Republic. This facilitated the demise of the Fourth Republic following yet another military usurpation of power.

A better approach would have been for the courts to invalidate any legislation which jeopardized the basic structure and essential features of the constitution. Thus, the Pakistani courts perversely validated military governance rather than using the political question doctrine to stand aloof from extra-constitutional uspurations of power. Conversely, when a democratic regime could have been held to the standard of the rule of law, the courts abandoned their role as guardians of the constitutional order by unnecessarily retreating to the political question doctrine.
PRAETORIANISM AND COMMON LAW


A. The Constitutional Framework

Pakistan came into existence on August 14, 1947, by means of the Indian Independence Act ("Act of 1947"). The Act of 1947 subjected the government of Pakistan to the provisions of the Government of India Act of 1935 ("Act of 1935") until the Constituent Assembly enacted a new constitution. The head of the state was the governor-general, and legislative functions were performed by the Constituent Assembly as the Federal Assembly.

The Act of 1935 contemplated a federal system, incorporating provinces into the federation. A council of ministers aided and advised the governor-general of the federation in exercising his functions. The governor-general appointed or dismissed ministers at his discretion. He also had powers to assent to or withhold assent from a bill, and could assume emergency power if the government of the federation could not be carried on under the Act of 1935. The Act of 1947, which was passed to guarantee sovereignty of the Indian and Pakistani legislatures, provided for a legislature that could legislate on all matters, including the constitution. The government continued to operate in accordance with the Act of 1935, subject to any changes introduced by the Constituent Assembly.

B. The Political Context: Authoritarian Centralism v. Representative Federalism

The Act of 1935, a framework designed by a colonial power to govern a colony, provided for a strong central government, an executive not answerable to the legislature, and limited representation. With the transfer of power in 1947, Pakistan inherited these centralized and nonrepresentative organs of government. Senior members of the federal bureaucracy under the previous colonial rule quickly came to assume leading political positions in the new government. Early on, the bureaucracy-dominated government ex-

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14. Id. at 8(1).
15. Id. at 5, 6(1).
18. Id. at 21.
19. A number of factors contributed to the early prominence of former members
pressed its preference for a constitutional arrangement providing for limited popular participation, a strong federal government, and limited provincial autonomy. The government would be headed by a strong executive, elected for a fixed term, and having little accountability to the federal legislature. The legislature, in turn, would have limited legislative power. Political parties representing East Bengal and the smaller provinces of the western wing of the country opposed these designs. The opposition expressed its preference for a directly elected representative government, a parliamentary system, limited powers for the federal government, and a greater quantum of provincial autonomy. In short, the regime wanted to maintain the relatively authoritarian, unresponsive, and undemocratic struc-

of the colonial bureaucracy in the federal cabinet and governorship of the provinces. First, Britain's two-hundred year colonial domination had left in its wake a sophisticated bureaucratic apparatus significantly overdeveloped in comparison with other sections of the society. See Hamza Alavi, Class and State in Pakistan, in PAKISTAN: THE UNSTABLE STATE, supra note 4, at 40, 49–50. Second, the leadership of the Muslim League, the political party which spearheaded the movement for independence, hailed from those parts of India which did not become part of Pakistan. While this leadership had a mass base of support in what became Pakistan, the local political organization and political cadres never developed a level of maturity necessary to become the obvious choice to lead the new state. See SAYEED, supra note 16, at 176–219. Finally, two events left the Muslim league without credible or popular leadership: the early death in 1948 of Mohammad Ali Jinnah, the leader of the independence movement and first governor-general; and the assassination in 1951 of Liaqat Ali Khan, Jinnah's lieutenant and the first prime minister. Senior bureaucrats quickly moved to fill this leadership vacuum. See AYESHA JALAL, THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENSE 49–135 (1990); KHALID B. SAYEED, POLITICS IN PAKISTAN: THE NATURE AND DIRECTION OF CHANGE 32 (1980); WASEEM, supra note 4, at 138–48.

20. See SAYEED, supra note 16, at 233–57. Jinnah's decision to become governor-general of the new state, instead of prime minister, as Jawahalal Nehru had done in India, was a signal that he wanted Pakistan to have a strong executive with sweeping authority. His decision was not without support. For example, the Prime Minister defended Jinnah's decision to appoint British officers as governors of three out of the four provinces, with the statement: "[U]nder the present Constitution, the man who has been vested with all powers is the Governor-General. He can do whatever he likes." Id. at 242 (quoting I(8) Constituent Assembly (Legislature) of Pakistan Debates 239 (Mar. 5, 1948)); see also ROBERT LAPORTE, JR., POWER AND PRIVILEGE: INFLUENCE AND DECISION-MAKING IN PAKISTAN 39–64 (1975) (describing Jinnah's rule as establishing "a tradition of strong, paternalistic executive rule"); SAYEED, supra note 16, at 233–300 (providing various theories on Jinnah's motivation to become governor-general); Ayesha Jalal, Inheriting the Raj: Jinnah and the Governor-Generalship Issue, 19 MOD. ASIAN STUD. 29, 29–53 (1985) (positing Jinnah's motivation was desire to avoid common governor-generalship with India). For comprehensive accounts of the political career of Jinnah, see AYESHA JALAL, THE SOLE SPOKESMAN: JINNAH, THE MUSLIM LEAGUE AND THE DEMAND FOR PAKISTAN (1985) and STANLEY WOLPERT, JINNAH OF PAKISTAN (1984).

tures inherited from the colonizers, while most of the people sought a more responsive and democratic system like that which the colonizers had at home.

The Constituent Assembly was the locus of the political struggle between these two tendencies. After meeting intermittently since 1947 to devise a constitution, the Constituent Assembly passed the Objectives Resolution on March 12, 1949. The Resolution provided the guiding principles for the country's constitution. The Resolution envisaged a representative government, a federal system with extensive provincial autonomy, and guaranteed fundamental human rights, the rule of law, and an independent judiciary. Realization of these objectives would have had three immediate results: first, a shift of power to the eastern wing of the country, as it comprised a majority of the population; second, a shift of power from the federal government to the provinces; and third, a shift of power from the bureaucracy-dominated executive to elected representatives of the people in the legislature.

C. The Constitutional Crisis

Those in control of the state apparatus were alarmed by the actions of the Constituent Assembly, which were designed to establish a parliamentary system and a federation with extensive provincial autonomy. As the Constituent Assembly prepared for the adoption of a new constitution, which was scheduled to follow the report of a draft constitution by its drafting committee on October 27, 1954, the governor-general, a retired bureaucrat, dissolved the Constituent Assembly by proclamation on October 24, 1954. While the governor-general accused the Assembly of being unrepresentative, "[h]is real objection was that the Assembly was about to adopt a Constitution of which he disapproved." Furthermore, the

22. See MAHMOOD, supra note 13, at 46 (providing complete text of resolution).
23. Id.
24. For the complete text of the draft constitution, see REPORT OF THE BASIC PRINCIPLES COMMITTEE, AS ADOPTED BY THE CONSTITUENT ASSEMBLY OF PAKISTAN ON THE 6TH OCTOBER, 1954, reprinted in MAHMOOD, supra note 13, at 157–287. While the draft constitution retained the basic structure of the Act of 1935, its allocation of 165 of 300 seats to East Bengal in the lower house of a bicameral legislature, id. (art. 46(2)(a)), and its requirement that the prime minister and cabinet be members of and supported by the legislature, id. (art. 30(3), (4)), ensured formidable political power for East Bengal.
25. See JENNINGS, supra note 17, at 80 (providing complete text of proclamation).
legislative initiatives by the Constituent Assembly had "put the governor-general in an intolerable situation."27 Not sure of its political strength, the bureaucracy-dominated executive branch decided to recruit the military to its side.28 Simultaneously with the proclamation of dissolution, the governor-general restructured his council of ministers, and General Ayub Khan, the commander-in-chief of the army, was sworn in as the defense minister. This appointment was contrary to the express provisions of the Act of 1935, which stated that only a member of the legislature could be a minister. With these changes, the military formally entered the political arena, setting Pakistan's course towards praetorianism.29

D. The Judicial Response: Doctrine of Necessity

The president of the Constituent Assembly petitioned the Chief Court of Sind Province30 to issue a writ of mandamus to restrain


28. Until then, the military had been used as an instrument of internal coercion only when political struggles resulted in a breakdown of law and order. See REPORT OF THE COURT OF INQUIRY CONSTITUTED UNDER PUNJAB ACT 11 OF 1954 TO ENQUIRE INTO THE PUNJAB DISTURBANCES OF 1953, at 1, 151 (1954).

29. Starting in 1953, Pakistan joined regional defense agreements such as SEATO and CENTO, and entered into bilateral defense agreements with the United States. One immediate result was the expansion of the military through foreign military assistance. The strengthened military quickly established direct channels of communication with its alliance partners, bypassing the political leadership. See JALAL, supra note 19, at 180–93; Selig S. Harrison, Case History of a Mistake: India, Pakistan and the U.S.—I, NEW REPUBLIC, Aug. 10, 1959, at 10, 14–17. As early as 1954, the military was drawing up blueprints for a desirable political structure. In his autobiography, General Ayub Khan reproduced a remarkable memorandum he wrote on October 4, 1954, prompted by "a premonition that [the Governor-General] might draw [him] into politics," and which "contained [his] thinking and set out [his] approach to the problems facing the country." MUHAMMAD AYUB KHAN, FRIENDS NOT MASTERS: A POLITICAL AUTOBIOGRAPHY 186 (1967). In this memorandum, entitled "A short appreciation of present and future problems of Pakistan," General Ayub Khan envisaged "abolishing provincial ministries and legislatures" in the western wing of the country, id. at 188, "creating one province of it under a Governor," id. at 191, and establishing a "controlled form of democracy," id. at 188.

30. During the First Republic, the high court of the province was the Chief Court and the highest court in the country was the Federal Court. After 1956, these courts were renamed the High Court and the Supreme Court, respectively. The basis of judicial review in Pakistan is furnished primarily by the writ jurisdiction of high courts whereby a high court may declare "that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect." PAK. CONST. of 1973, art. 199; see Leslie Wolf-Phillips et al., The Islamic Republic of Pakistan, in XIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein &
the Federation of Pakistan from dissolving the Assembly and a writ of *quo warranto* to determine the validity of the appointment of the members of the reconstituted council of ministers.\(^{31}\) The Federation of Pakistan contended that the dissolution of the Assembly was valid and that the court had no jurisdiction to issue the writs. The federation argued that the Government of India (Amendment) Act, 1954, which had given the superior courts power to grant such writs, was unenforceable for want of the governor-general's assent.\(^{32}\)

In *Tamizuddin Khan v. Pakistan*,\(^{33}\) the court issued the writs prayed for, unanimously holding first, that acts of the Constituent Assembly did not require the assent of the governor-general when it functioned as a Constituent Assembly rather than as the federal legislature; second, that the powers of the governor-general were limited to government of the dominion; and finally, that such powers did not extend to participation in constitution-making.\(^{34}\) On appeal, the Federal Court of Pakistan, in *Pakistan v. Tamizuddin Khan* ("*Tamizuddin Khan*"),\(^{35}\) reversed, holding that the chief court's assumption of jurisdiction to issue writs was invalid because the enabling legislation had not received the governor-general's assent.\(^{36}\)

*Tamizuddin Khan* deepened the constitutional crisis. It invalidated most of the legislation of the Constituent Assembly, because those laws had not been assented to by the governor-general. In order to fill the constitutional vacuum, the governor-general sought

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\(^{31}\) Gisburt H. Franz eds., 1986) [hereinafter XIII CONSTITUTIONS] (compiling constitutional text and commentary from various countries).

\(^{32}\) This unique situation issued from the Assembly acting as both a Constituent Assembly and as the federal legislature. The enactment practice from 1947-1954 had been to “present Bills passed by the Assembly, when acting as federal legislature, for the assent of the Governor-General, but legislation of the Constituent Assembly, when acting in that capacity, had been authenticated by its President, and published in the Pakistan Gazette.” 8 GLEDHILL, supra note 27, at 73.

\(^{33}\) 1955 P.L.D. (Sind) 96, 97 (Pak.); see 8 GLEDHILL, supra note 27, at 73.

\(^{34}\) Id.

\(^{35}\) Id. at 315. The Court recognized that “in the Act of 1947 there was no express provision for the dissolution of the Constituent Assembly.” Id. at 255. However, the Court held that “extra legal acts . . . become legal concepts where the people, deprived of political sovereignty which in a democracy is their birthright, seek to assert that right.” Id. Curiously, the Court viewed the governor-general, in his capacity as the head of the state, as representing the sovereign will of the people, and accordingly said, “in the case of a conflict between the ultimate and legal sovereign, the latter must yield.” Id.
to validate selected acts of the Constituent Assembly by indicating his assent, with retrospective operation, by the Emergency Powers Ordinance No. 9 of 1955. Upon challenge, the Federal Court, in Usif Patel v. The Crown, held this emergency ordinance invalid on grounds that the governor-general had acted beyond the scope of his powers. Although not mentioned in the case, a political issue of vital importance lay behind the technicalities about retroactive validation: The governor-general, besides claiming constituent powers generally, had already attempted to enact a most sensitive piece of constitutional change, the amalgamation of the western provinces into a single unit.

The governor-general responded to Usif Patel by summoning a constitutional convention and issuing a proclamation granting him such powers as were necessary to validate and enforce the laws needed to avoid a constitutional and administrative breakdown. The governor-general then exercised these powers by validating and declaring enforceable those laws declared null and void in Usif Patel. The governor-general then sought an advisory opinion from the Federal Court to determine the legality of his actions.

The Federal Court, in a three-to-two decision, held that under the doctrine of state necessity, which forms "part of the common law of all civilized States and which every written Constitution of a civilized people takes for granted," the governor-general could act

37. The ordinance provided:
"Whereas none of the laws passed by the Constituent Assembly of Pakistan under the provisions of subsection (1) of section 8 of the Indian Independence Act . . . received the assent of the Governor-General . . . it is hereby declared and enacted that every law specified in . . . the Schedule to this Ordinance shall be deemed to have received the assent of the Governor-General on the date specified in . . . that Schedule, being the date on which it was published . . . and shall be deemed to have had legal force and effect from that date."


38. Id. at 396.

39. The West Pakistan (Establishment) Order, 1955, Governor-General's Order No. 4 (Mar. 27, 1955) was issued the same day as the Emergency Powers Ordinance, which was formally at issue in Usif Patel.

40. The proclamation provided:
The Governor-General assumes to himself until other provision is made by the Constituent Convention such powers as are necessary to validate and enforce laws needed to avoid a possible breakdown in the constitutional and administrative machinery of the country and to preserve the State and maintain the government of the country in its existing condition.

See Jennings, supra note 17, at 53 (providing text of proclamation).

41. Reference by His Excellency the Governor-General, 1955 P.L.D. (F.C.) 435 (Pak.) ("Governor-General's Case").

42. Id. at 478. As is the practice in other commonwealth countries, Pakistan's
in a legislative capacity and retrospectively validate laws, even though he had no such authority under either the Act of 1935 or the Act of 1947. Relying upon the special circumstances set out in the Special Reference, the Court held that for the governor-general's extraordinary action, "the constitutional and administrative machinery of the country would have broken down." Usif Patel's contrary holding was distinguished on the ground that while the ordinance at issue in Usif Patel made no reference to a new Constituent Assembly, and thus implied extra-constitutional power unlimited in both its scope and duration, "the present Proclamation of Emergency is only temporary and the power has been exercised with a view to preventing the State from dissolution . . . before the question . . . has been decided upon by the new Constituent Assembly." While self-consciously fashioning a "legal bridge" across the constitutional chasm, the Court made it clear that the extra-constitutional power bestowed by the doctrine of state necessity was limited as to who can exercise such powers, to what ends, and for how long. By emphasizing that the governor-general had assumed extra-constitutional legislative power in his capacity as head of the state, the Court limited the doctrine to the existing head of state. The scope of the governor-general's extra-constitutional power was limited to acts immediately necessary for the preservation of the state. The power recognized "cannot extend to matters which are not the product of the necessity, as for instance, changes in the Constitution which are not directly referable to the emergency." The "legal bridge" provided by the doctrine was for a temporary period, lasting only so long as necessary to re-create an appropriate constitutional legislative organ and only until the validity of the exer-


courts have always treated the case law and writings of legal scholars of other common-law jurisdictions, particularly those of England, India, and the United States, as persuasive authorities. This is particularly true of constitutional cases. For example, the Governor-General's Case is rife with citations to, and discussions of, constitutional law doctrines developed in other common-law jurisdictions.

43. Id. at 520-29.
44. Id. at 477.
45. Id. at 478.
46. In the beginning of the opinion, the Chief Justice observed that "we have come to the brink of a chasm with only three alternatives before us: (1) to turn back the way we came by; (2) to cross the gap by a legal bridge; (3) to hurtle into the chasm beyond any hope of rescue." Id. at 445.
47. Id. at 485-86.
48. Id. at 486.
49. See id. Stanley de Smith notes that the Court "did not give the Executive carte blanche . . . . The principle did not invest the Governor-General with power to change the existing constitutional structure." de Smith, supra note 26, at 98; see also
The exercise of emergency power was decided by the new Constituent Assembly.50

The Court's enunciation of the doctrine was generally in line with historical and contemporary understanding of state necessity in other jurisdictions.51 In spite of the limitations placed on the application of the doctrine of necessity, one commentator issued the prophetic warning that "the rather extravagant sweep of the Court's decision in the Special Reference—both the actual holding and more especially the language of the majority opinion—may well embarrass the courts in Pakistan sorely in the future."52 Two factors made the Court's application of the doctrine problematic. First, the emergency that furnished the governor-general's justification for assuming extra-constitutional power was of his own making. It was the dissolution of the Constituent Assembly by the governor-general that had produced the constitutional crisis. Only where the emergency issues from circumstances outside the control of the executive, such as war or natural disaster, may assumption of necessary extra-constitutional powers be justified. Second, by acquiescing to the constitutional convention summoned by the governor-general, instead of insisting upon restoration of the dissolved Assembly, the Court rendered meaningless the enumerated limitations on the doctrine of necessity.53

Justice Cornelius, one of the two dissenting Justices, wrote that the doctrine of necessity is "recognised but only in relation to matters falling within the police powers of the State . . . but it is clearly

Stavsky, supra note 5, at 368 ("[T]he court seemed to draw narrow limits for the circumstances under which an individual could lawfully usurp legislative authority in direct violation of the constitution."). After the Governor-General's Case, an advisory opinion, in Pakistan v. Hussain Shah, 1955 P.L.D. (F.C.) 522 (Pak.), a contentious case, the Court held that a constitutional law not assented to by the governor-general could be given temporary retrospective validity by proclamation. Id. at 529.


53. The constitutional convention, summoned by the governor-general in response to Usif Patel, consisted of members of the old Assembly and new members appointed by the governor-general ostensibly to represent the tribal areas and the princely states. The appointed members ensured that the convention adopted a constitution in tune with the desires of the governor-general. See CALLARD, supra note 21, at 6; 8 GLEDHILL, supra note 27, at 76–77; JALAL, supra note 19, at 207–15; MCWHINNEY, supra note 52, at 146–48.
very far removed from the power of interference with constitutional instruments." He also took strong exception to the sources drawn from English history advanced by the federation and adopted by the majority in upholding executive exercise of broad legislative powers:

These affairs belong to periods when, and to territories where, the power of the King was, in fact, supreme and undisputed. The records of these affairs are hardly the kind of scripture which one could reasonably expect to be quoted in a proceeding which is essentially one in the enforcement and maintenance of representative institutions. For they can bring but cold comfort to any protagonist of the autocratic principle against the now universal rule that the will of the people is sovereign.55

Adoption of the principle identified by Justice Cornelius, namely that the will of the people is sovereign and is to be exercised through representative institutions as the essential feature of the constitutional order, would have saved the courts of Pakistan from their long but inconclusive search for a consistent yardstick of judicial review. Nonetheless, one significant impact of the decision was the invalidation of the governor-general's attempt to restructure the federal character of the state by executive order.56 Furthermore, the bureaucratic-military coalition was disabused of imposing on the country a constitution that provided for "controlled democracy" under a strengthened executive.57

Although commentators have been generally critical of the Governor-General's Case,58 courts in other post-colonial common-

55. Id. at 515-16 (Cornelius, J., dissenting) (emphasis added). The cases relied upon by the majority included the Saltpetre Case, XII Cox. Rep 12 (1606), and R. v. Hampdon 3 St. Tr. 825 (1636). Governor-General's Case, 1955 P.L.D. at 480.
56. Following the proclamation of dissolution, the governor-general, by the West Pakistan (Establishment) Order No. 4, 1955, dissolved the provinces of the western wing of the country and reconstituted them as one province to be named West Pakistan. This order was invalidated by Usif Patel, a holding which was affirmed by implication in the Governor-General's Case. The same result was later achieved politically, by the general constitutional compromise known as the "Murree Pact," and legally, by the Establishment of West Pakistan Act, 1955, adopted by the Constituent Assembly. See CALLARD, supra note 21, at 183-93.
57. The expertise of British constitutional lawyer Sir Ivor Jennings had been enlisted to draft such a constitution. GLEDHILL, supra note 27, at 77. For Sir Ivor Jennings's views of constitutional problems in Pakistan, see JENNINGS, supra note 17, at 38-75.
58. For Stanley de Smith, who characterizes the doctrine of necessity as "the unruliest of all horses, which can gallop away with constitutional law into the domain of political expediency," the decision "was a not very well disguised act of political judgment . . . . But the judges steered between Scylla and Charybdis and chose what seemed to them the least of evils." de Smith, supra note 26, at 98. Mark Stavsky, while characterizing the decision as an accommodation to an unconstitution-
law settings have found the doctrine of necessity to be a useful tool to validate politically motivated departures from constitutional frameworks.\textsuperscript{58} In my view, the appropriate response of the courts, al regime, states that the Court "[m]anaged to accomplish several seemingly worthwhile goals: (a) it officially eliminated a bickering, uncooperative, and ineffectual legislative body; (b) it placed doctrinal restrictions upon the Governor-General's emergency authority; and (c) it helped to establish a new Constituent Assembly." Stavsky, \textit{supra} note 5, at 370 n.120.

59. Attorney-General v. Ibrahim, 1964 Cyprus L. Rep. 195, validated extensive modifications of unamendable provisions of the Constitution of Cyprus on grounds of necessity. \textit{Id.} at 214–15. The Constitution was designed to ensure equitable participation in governmental structures by both the Greek majority and the Turkish minority. \textit{See Carter \& Trimble, supra} note 3, at 1299. The means of achieving this end were provisions of ethnicity requirements for all branches of government, including the judiciary. \textit{Cyprus Const.} arts. 46, 48(f), 49(f), 62(c), 123(l), 133(l), 153(l), 159. These provisions, which guaranteed proportionate representation, were unamendable. \textit{Id.} art. 182(l). Following armed confrontations between the Greek and Turkish communities, the Turkish Cypriots stopped participating in governmental organs, including the judiciary. The legislature, with its Turkish members absent, amended the Constitution in violation of Article 182(l) and created a new Supreme Court. In \textit{Ibrahim}, the new Supreme Court, after taking notice of the situation prevailing in the country, which had rendered the governmental organs dysfunctional, upheld the actions of the legislature on grounds of necessity. \textit{Ibrahim}, 1964 Cyprus L. Rep. at 265–67. The Court said "necessity renders validly applicable what would otherwise be illegal and invalid . . . . Otherwise the absurd corollary . . . . that a State, and the people, should be allowed to perish for the sake of its constitution." \textit{Id.} at 237. The Court surveyed the doctrine of necessity as applied in different countries and concluded that the doctrine can be read into provisions of the Constitution as an implied exception in order to ensure the very existence of the state. \textit{Id.} at 214, 265. The Court established the following prerequisites to invocation of the doctrine of necessity: "(a) an imperative and inevitable necessity or exceptional circumstances; (b) no other remedy to apply; (c) the measure taken must be proportionate to the necessity; and (d) it must be of a temporary character limited to the duration of the exceptional circumstances." \textit{Id.} at 265. While the decision has been called "predictable," "expedient[1]," and a "misappli[cation]" of the doctrine, Stavsky, \textit{supra} note 5, at 358, Pakistan's Supreme Court termed it "the true essence of the doctrine [which] provides useful practical guidelines for its application." Nusrat Bhutto v. Chief of Army Staff, 1977 P.L.D. (S.C.) 657, 710 (Pak.). In Lakanmi v. Attorney-General of the Western Region, 1971 U. of IFE L. Rep. 201 (Nigeria), the Nigerian Supreme Court validated the military's assumption of power in 1966 and suspension of many provisions of the 1963 Constitution on the basis of the doctrine of necessity. \textit{See Abiola Ojo, The Search for a Grundnorm in Nigeria—The Lakanmi Case,} 20 Int'l & Comp. L.Q. 117, 123 (1971). The Nigerian Court, however, held that the change in government was not a revolution creating a new legal order and that the 1963 Constitution remained the supreme law of the land. \textit{Id.} Further, the Court refused to extend the doctrine of necessity to validate the military regime's decrees which ousted the Nigerian courts' jurisdiction to reviewing orders of a newly constituted Tribunal of Inquiry and ad hominem decrees issued by the military regime. \textit{Id.} at 124. On May 9, 1970, within two weeks of this judgment, the military regime issued a decree that nullified the Court's decision and declared the military takeover a revolution. \textit{Id.} at 134; \textit{see} B.O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 203–08 (1973).
when confronted with constitutional rupture, is to hold that issues regarding the validity and scope of extra-constitutional regimes are nonjusticiable political questions. The political question doctrine states that certain issues are political in nature, and hence, best resolved by the body politic rather than by the judiciary. In other words, the subject is inappropriate for judicial consideration.\textsuperscript{60}

My position that the political question doctrine is a more suitable judicial response to the constitutional problem at hand is augmented by the fact that the Governor-General’s Case was an advisory opinion.\textsuperscript{61} One purpose of an advisory opinion is to allow the government, before initiating legislation, to procure an impartial authoritative opinion regarding the validity of a measure. An advisory opinion is not binding upon the executive.\textsuperscript{62} A judicial advisory opinion, by definition, necessarily precedes executive action. To seek an advisory opinion after executive action has been taken puts the courts in an unenviable situation: An opinion contrary to the action would be embarrassing for the executive, yet an opinion validating the action could put in question the integrity and credibility of the judiciary. Consequently, motivations for seeking an opinion after the executive has taken the relevant action are questionable. A court retains the discretion whether to answer the referred question.\textsuperscript{63} Where the answer to the referred question depends upon the presence or absence of facts of a patently political nature, a

\textsuperscript{60.} For a concise exposition of the political question doctrine, see \textsc{John E. Nowak et al.}, \textsc{Constitutional Law} 102–10 (3d ed. 1986); B.O. Nwabueze, \textsc{Judicialism in Commonwealth Africa: The Role of the Courts in Government} 20–48 (1977); and \textsc{Laurence H. Tribe}, \textsc{American Constitutional Law} 96–107 (2d ed. 1988). \textit{See also infra} part VILA (providing detailed analysis of suitability of the doctrine for Pakistan’s constitutional crises).

\textsuperscript{61.} Subsequent constitutions of Pakistan have retained the provision allowing the executive to seek an advisory opinion from the Supreme Court. \textit{See Pak. Const. of 1956, art. 162; Pak. Const. of 1962, art. 59; Pak. Const. of 1973, art. 186.}

\textsuperscript{62.} An opinion on a pure question of law, however, is by convention treated as authoritative. According to de Smith, “such opinions are truly advisory, though they will almost invariably be treated as authoritative.” \textsc{S.A. de Smith, Constitutional and Administrative Law} 143 (3d ed. 1977).

\textsuperscript{63.} The Indian Supreme Court has held:

\textit{The plain duty and function of the Supreme Court under Article 143(1) [the advisory opinion provision of the Indian Constitution] is to consider the question on which the President has made the reference and report to the President its opinion, provided of course the question is capable of being pronounced upon and falls within the power of the Court to decide. If, by reason of the manner in which the question is framed or for any other appropriate reason the Court considers it not proper or possible to answer the question it would be entitled to return the reference by pointing out the impediments in answering it.}

court should recognize its own limitations and decline to answer the question. Moreover, in its advisory capacity, a court does not sit as a fact-finding tribunal, and must necessarily rely upon any recital of facts by the referring authority. The Court in the Governor-General's Case recognized this limitation, but still saw fit to pronounce on the questions involved.

III. THE SECOND REPUBLIC, 1956–58: UNWORKABLE COMPROMISE

A. The Constitutional Framework

The new Constituent Assembly summoned after the Governor-General's Case adopted a new constitution, and the new Republic began its formal existence on March 23, 1956. The 1956 Constitution adopted the Objectives Resolution as its preamble, guaranteed fundamental rights, abolished the office of governor-general, and provided for power-sharing arrangements between the president and the prime minister. The president was to be elected by the national and provincial legislatures. The prime minister and the cabinet were to be members and enjoy the confidence of the legislature. The two wings of the country were to have equal seats in the national legislature. The Supreme Court could exercise judicial review. While parliamentary and federal in form, the 1956 Constitution's detailed provisions ensured both that the president retained supreme powers and that central legislation superseded provincial enactments.

64. The Court noted:

We cannot, on this Reference, undertake this enquiry or record any findings on the disputed questions of fact because any such course would convert us into a fact finding tribunal which is not the function of this Court when its advice is asked on certain questions of law. The answer to a legal question always depends on facts found or assumed and since we cannot try issues of fact the Reference has to be answered on the assumption of fact on which it has been made.


65. See MAHMOOD, supra note 13, at 247–332 (providing text of 1956 Constitution).

66. PAK. CONST. of 1956, arts. 3–22.

67. Id. arts. 32–42.

68. Id. art. 32.

69. Id. art. 37.

70. Id. art. 44.

71. Id. arts. 156–64.

72. Characterizing it as a constitution of mistaken identity, Ayesha Jalal, in her detailed analysis, shows how "[t]he Constitution's flirtations with parliamentary democracy and federalism were . . . light hearted." JALAL, supra note 19, at 215–16. Many members belonging to the eastern wing and religious minorities absented
B. The Constitutional Crisis

The first general elections under the 1956 Constitution were scheduled for February 1959. Before the election, it seemed that political parties likely to gain a popular mandate would be committed to asserting political leadership of the eastern wing, restoring the dissolved provinces of the western wing, granting a greater quantum of provincial autonomy, and increasing the powers of the prime minister at the expense of the president. 73

To forestall initiation of constitutional representative governance, 74 the president abrogated the 1956 Constitution on October 7, 1958. By proclamation, he dismissed the central and provincial governments, dissolved the national and provincial assemblies, abolished political parties, established martial law, and appointed the commander-in-chief of the army as chief martial law administrator. 75 This set the stage for yet another judicial examination of


74. One commentator asserts that:

[T]he coup-makers . . . aimed at forestalling the prospective elections for the fear that they would bring into power a regime based on popular support. In fact, the military-bureaucratic establishment was afraid that the election campaign had already opened up the floodgates of political participation, which therefore had to be closed effectively.

Waseem, supra note 4, at 246.

75. The proclamation gave the reasons for the Presidential Action:

My appraisal of the internal situation has led me to believe that a vast majority of the people no longer have any confidence in the present system of Government and are getting more and more disillusioned and disappointed and are becoming dangerously resentful of the manner in which they [are] exploited. Their resentment and bitterness are justifiable.

The Constitution . . . is full of dangerous compromises so that Pakistan will disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution. Then, it is my intention to collect a number of patriotic persons to examine our problems in the political field and devise a Constitution more suitable to the genius of the Muslim people. When it is ready, and at the appropriate time, it will be submitted to the referendum of the people.

It is said that the Constitution is sacred. But more sacred than the Constitution or anything else is the country and the welfare and happiness of its people.

an extra-constitutional assumption of power. The context had, however, changed substantially since the Governor-General's Case. Whereas in 1955, the civilian federal bureaucracy had attempted to frustrate the constitutional process in order to forestall losing power to a representative government, in 1958 the military played the central role.

C. The Judicial Response: Doctrine of Revolutionary Legality

The Pakistan Supreme Court examined the validity and scope of extra-constitutional power in the context of four criminal appeals pending before it. In State v. Dosso,\textsuperscript{76} announced on October 27, 1958, the Court, relying on Hans Kelsen's theory of revolutionary legality, ruled that the abrogated 1956 Constitution was no longer the governing instrument of the country, and that the new order was legitimate. The Court stated:

\begin{quote}
[If the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change.]

... [The revolution having been successful it satisfies the test of efficacy and becomes a basic law-creating fact.\textsuperscript{77}]
\end{quote}

\textsuperscript{76} 1958 P.L.D. (S.C.) 533 (Pak.).

\textsuperscript{77} Id. at 539-40. Chief Justice Munir, who relied upon Kelsen's theory of revolutionary legality, defined a "revolution" as a situation where "a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution" and "its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order." Id. at 538. Of significance is the following pronouncement, which did away with the limitation on the doctrine of necessity requiring that it be invoked by the existing sovereign:

\begin{quote}
From a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may take the form of a coup d'etat by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends.
\end{quote}

\textit{Id.} The Court found that in international law, such a change did not effect the "corpus or international entity of the State," and therefore, "a victorious revolution or
The Court held that the efficacy of the revolution not only legitimized the destruction of the old constitutional order, but also eliminated any limits to the legislative powers of the new order. Under the new legal order, any law could at any time be changed by the president. Therefore, there was no such thing as a fundamental right, there being no restriction on the president's law-making power. This doctrine was affirmed, even enlarged, by the Court in *East Pakistan v. Mehdi Ali Khan* and *Iftikhar-ud-Din v. Sarfraz.* The Court held that pursuant to the unfettered legislative powers of a regime born of a successful revolution, the regime could disregard any pronouncement of the superior courts. A more complete abdication of judicial power is difficult to imagine.

*Dosso* raised serious questions of doctrinal validity, the personal integrity of the Justices, and the political implications of the sweeping holding. In terms of legal doctrine, the Court “swallowed Kelsen hook, line and sinker,” in spite of the fact that Kelsen's

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a successful coup d'etat is an internationally recognised legal method of changing a Constitution.” *Id.* at 539. The Court then recognized the impact of a revolution on the power of judicial review: “Even courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution.” *Id.*

78. *Id.* at 541. In this sense, *Dosso* represents a radical departure from the Governor-General's Case regarding the limits attendant to the doctrine of state necessity. Specifically, questions such as who could invoke the doctrine, for what purpose, and for how long, became irrelevant. The sole inquiry under Kelsen's theory is the efficacy of the extra-constitutional change.

79. 1959 P.L.D. (S.C.) 387, 404 (Pak.) (“I am convinced more than before that [Dosso] was rightly decided.”).

80. 1961 P.L.D. (S.C.) 585 (Pak.). Speaking about the effect of the Laws (Continuance in Force) Order of October 10, 1958, which provided that “the Republic ... shall be governed as nearly as may be in accordance with the late Constitution,” *id.* at 590, the Court declared:

[The Constitution] stood abrogated in spite of such adoption, for it was no longer the supreme document to which all laws and all persons were subject ... . It was no longer the Constitution of the country, but a creation of the will of the President .... He could have adopted the Constitution of any other country but this was more convenient. It is ... an enactment adopted by the President and subject to his will.

*Id.* at 599.

81. The *Mehdi Ali Khan* Court declared:

As observed by us in the case of Dosso the present legal system derives its authority from the success of the October Revolution, and if the authority in whom, under the new regime, unfettered legislative powers vest, annuls or alters the law declared by the Supreme Court, the superseding law has supremacy over and prevails against the original law as declared by the Supreme Court.


82. de Smith, *supra* note 26, at 103.
theory of revolutionary legality was just that, a speculative theory, and not a legal principle that any court of law was obligated to accept.83

There are no certain grounds to claim that "[i]t is, of course, improbable that even if the Supreme Court's entire Bench had risen as one man in protest and opposition, it would have made the slightest difference to the changes that had taken place."84 The author of the main Dosso opinion had declared elsewhere that in determining the merits of a case with political implications, "I am quite clear in my mind that we are not concerned with the consequences, however beneficial or disastrous they may be."85 If the Court felt that a contrary decision would engender a political crisis of an unacceptable magnitude, it could have refrained from reaching

83. "[Kelsen's theory] is betrayed, on its own terms, if it is put to normative use as a practical principle for guiding judicial decision and action." J.M. Finnis & B.C. Gould, Constitutional Law, 1972 ANN. SURV. COMMONWEALTH L. 1, 53–54 (1973). Kelsen himself had occasion to clarify his position while responding to Julius Stone's penetrating critique of the theory of revolutionary legality. See JULIUS STONE, LEGAL SYSTEM & LAWYER'S REASONING 121–36 (1964); Julius Stone, Mystery and Mystique in the Basic Norm, 26 MOD. L. REV. 34 passim (1963). Kelsen said:

I myself never confused the legal norm with the statements of the legal science whose object is legal norms.

\[\ldots\]

\[\ldots\] [M]y thesis [is] that science cannot create a norm because it can only describe and not prescribe \ldots. The science of law, referring to the basic norm, does not arrogate a norm-creating authority.

\[\ldots\]

Never, not even in the earliest formulation of the Pure Theory of Law did I express the foolish opinion that the propositions of the Pure Theory of Law "bind" the judge in the way in which legal norms bind him. Hans Kelsen, Professor Stone and the Pure Theory of Law, 17 STAN. L. REV. 1128, 1132–34 (1965) (citations omitted). As for the relationship of efficacy and validity, Kelsen stated:

The essence of my view of the relationship between validity and efficacy of legal norms is that "the efficacy of the legal order is only the condition of validity, not the validity itself" \ldots positing (Setzung) of the norms and efficacy (Wirksamkeit) of the norms are "conditions of the validity"; efficacy in the sense that the established legal norms must be by and large obeyed and, if not obeyed, applied; otherwise the legal order as a whole, just as a single norm, would lose its validity. A condition is not identical with that which is conditioned.

Id. at 1139–40 (citations omitted). This attempted clarification still does not answer H.L.A. Hart's criticism that Kelsen's characterization of the "basic norm" as, for instance, "hypothetical," "postulated," and "existing in the juristic consciousness," "obscures, if it is not actually inconsistent with, the point \ldots that the question what the criteria of legal validity in any legal system are is a question of fact. It is a factual question though it is one about the existence and content of a rule."


84. FELDMAN, supra note 75, at 11.
the extra-constitutionality issue by deciding the case narrowly, by exercising judicial restraint by invoking the political question doctrine. That the military moved to oust the president from office only after Dosso was announced may well imply that the choices before the military were partially contingent upon the pronouncement of the Court. The question of whether the Court helped to establish, rather than merely recognized, a successful revolutionary order acquired critical importance because under Article 163 of the 1956 Constitution, the law declared by the Supreme Court was binding on all courts and eventually on all public authorities.

If "[t]he decision to accept a revolutionary regime as lawful is more obviously a choice between competing values than is the case with ordinary judicial decisions," then the Dosso Court, in relying upon Kelsen's theory of revolutionary legality, chose judicial abdication and surrender to praetorianism, because the "principle of political quietism is the core of Kelsen's attitude.

Moreover, these situations raise serious questions about the personal preferences and values of the Justices. After all, there is a view, professing a pessimistic realism, which would attribute the results of these [revolutionary legality] cases to personal or political motivation on the part of the judges. Sympathy with the revolutionaries, unwillingness to relinquish office, even an altruistic desire to prevent their replacement by lesser men may indeed all have played a part.

Chief Justice Munir, author of the main opinion in Dosso, advised the president before the president abrogated the 1956 Constitution,

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86. See infra notes 96–102 and accompanying text (discussing why and how Court could have narrowly decided the case).
87. See infra part VII.A (discussing political question doctrine and validity of extra-constitutional usurpation).
88. Dosso was announced on October 27, 1958. That evening, three senior army generals informed the president of General Ayub Khan's decision that the president relinquish his office and leave the country. The president agreed. KHAN, supra note 29, at 75.
89. PAK. CONST. of 1956, art. 163. In Asma Jilani v. Punjab, 1972 P.L.D. (S.C.) 139 (Pak.), Justice Yaqub Ali pointed out that by legally recognizing the new regime, the Supreme Court had tied the hands of all lower courts and public officials. Id. at 247. R.W.M. Dias, after examining Dosso and the Rhodesian grundnorm decisions, remarked that the judges "kept cementing effectiveness [of the revolution] layer by layer until it reached a point at which they could look back on their own handiwork and treat it as an objective fact." R.W.M. Dias, Legal Politics: Norms Behind the Grundnorm, 26 CAMBRIDGE L.J. 233, 253 (1968).
90. Dias, supra note 89, at 253.
and advised General Ayub Khan before the general ousted the president.\textsuperscript{93} Chief Justice Munir later acknowledged his prior involvement in these events but did not deem them inappropriate.\textsuperscript{94} Some have speculated about a "tacit understanding as to... reciprocal recognition" between the Chief Justice and the martial law regime.\textsuperscript{95}

In assessing the true significance of \textit{Dosso}, it should be noted that the Court could have avoided the political issue by deciding the case on narrow grounds. There is a "general and basic judicial duty to avoid decisions of constitutional questions."\textsuperscript{96} A court's passing upon the issue of constitutionality "is legitimate only in the last

\textsuperscript{93} In his autobiography, General Ayab Khan stated:

[T]he army's legal experts came up with the opinion that since the Constitution had been abrogated and Martial Law declared, and a Chief Martial Law Administrator appointed, the office of President was redundant ... . Chief Justice Munir was there, I think, when this point came up for discussion. He had been advising [President] Iskander Mirza about certain matters before the revolution. I called him and thought that I would see Iskander Mirza too. I asked Colonel Qazi to state his point of view. His position was that the President no longer had any place in the new arrangement. Munir disagreed. I told Qazi, "I agree with Munir. This is final. Accept this as a decision."

\textit{KHAN, supra note 29 at 76–77.}

In his \textit{Asma Jilani} concurrence, Justice Yaqub Ali quoted extensively from an article written by Chief Justice Munir:

I received through the Army a message from the President [then Army Chief] calling me to Karachi .... At Karachi I was told that subject to any order by the President or Regulation by the Chief Martial Law Administrator it was intended to keep the existing laws and the jurisdiction of the civil authorities alive, and that I was to scrutinise the draft instrument which the Law Secretary had been required to prepare .... I suggested certain modifications, particularly with reference to the superior Courts [sic] powers to issue writs and validation of judgments which had been delivered after the proclamation. The instrument was entitled the Laws Continuation in Force Order.

\textit{Asma Jilani, 1972 P.L.D. (S.C.) at 247 (Ali, J., concurring) (quoting Muhammad Munir, The Days I Remember, PAK. TIMES, Nov. 11, 1968)}. On the question of whether the Chief Justice, having associated himself with the drafting of the order, was in principle precluded from sitting in judgment on its validity, Justice Ali commented: "I can only venture to observe that no one was more deeply initiated in judicial propriety than the learned Chief Justice." \textit{Id.}

\textsuperscript{94} \textbf{MUHAMMAD MUNIR, HIGHWAYS & BYE-WAYS OF LIFE 262–74 (1978).}

\textsuperscript{95} Conrad, supra note 5, at 188 n.82. This charge is supported by the fact that the \textit{Dosso} decision was reached within three weeks of the Constitution's abrogation. Significantly, the question of the validity of the abrogation and the imposition of martial law was not put in issue by the parties. The Supreme Court noted this fact when it overruled \textit{Dosso} fourteen years later. \textit{See Asma Jilani, 1972 P.L.D. (S.C.) at 162–63.}

\textsuperscript{96} \textbf{JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12, at 88 (4th ed. 1991).}
resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.\textsuperscript{97}

The various appeals involved in \textit{Dosso} concerned proceedings and convictions under the Frontier Crimes Regulation (the "Regulation"), a holdover from the colonial administrative scheme. In 1957, two different high courts struck down the Regulation as violating the due process and equal protection provisions of the 1956 Constitution.\textsuperscript{98} Only if these holdings stood nullified by virtue of the president's abrogation of the 1956 Constitution did the Court need to decide whether thereafter the Constitution had been validly abrogated and replaced by the Laws (Continuance in Force) Order, 1958.\textsuperscript{99} Rather than address the question of constitutional abrogation, the \textit{Dosso} Court could have held that the Regulation remained invalid on either of two grounds. First, as the Regulation was void for inconsistency with the fundamental rights protected by the 1956 Constitution, it was not a law "in force" immediately before the Proclamation of Martial Law. As such, the Regulation could not be retained or revived under the Laws (Continuance in Force) Order, even if such order were itself valid.\textsuperscript{100} Second, because the Laws (Continuance in Force) Order stated that "[t]he Republic... shall be governed as nearly as may be in accordance with the late Constitution,"\textsuperscript{101} the Court could have held that such language included a reference by implication to the operation of fundamental rights. In this new context, if fundamental rights had lost their paramount status and retained only statutory force, they would still prevail over a conflicting pre-constitutional statute.\textsuperscript{102}


\textsuperscript{98} State v. Dosso, 1958 P.L.D. (S.C.) 533, 537, 544–45 (Pak.).

\textsuperscript{99} Id. at 540–41 (providing complete text of order).

\textsuperscript{100} This is consistent with the then leading interpretation of Article 4 of the 1956 Constitution, giving full effect to the article's use of the word "void." A.K. Brohi, \textit{Fundamental Law of Pakistan} 320 (1958). It is as if, from the date of adoption of the Constitution, an unconstitutional statute "had never been on the Statute Book." \textit{Id.} A pre-abrogation decision concurs with Brohi's view. \textit{See} Bashir v. West Pakistan, 1958 P.L.D. (Lah.) 853, 855–60 (Pak.) (holding law void if inconsistent with fundamental rights); \textit{see also} 1 \textit{William Blackstone, Commentaries on the Law of England} *70 ("[I]f it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was \textit{bad law}, but that it was \textit{not law}.")

\textsuperscript{101} \textit{See Dosso, 1958 P.L.D. (S.C.)} at 540–41.

\textsuperscript{102} The Court rejected this argument on the ground that the Laws (Continuance in Force) Order retained only those parts of the abrogated Constitution essential for an orderly running of the structure and machinery of the government. \textit{Id.} at 541. This did not include fundamental rights. Chief Justice Munir supported this inference
If the Court did not think it feasible to decide the case on narrow grounds, it should have declared the validity and scope of the extra-constitutional order a nonjusticiable political question. It is a significant sign of pervasive praetorianism in newly independent countries that many courts in other post-colonial states, confronted with extra-constitutional assumptions of power, found useful Dosso's doctrine of revolutionary legality. 103

by arguing that:

[T]he very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law and that it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law. Under the new legal Order any law may at any time be changed by the President and therefore there is no such thing as a fundamental right, there being no restriction on the President's law-making power.

Id. Misgivings about this particular holding were later expressed by Justices Cornelius and Kaikais. See East Pakistan v. Mehdi Ali Khan, 1959 P.L.D. (S.C.) 387, 436-39 (Pak.) (questioning view that Laws (Continuance in Force) Order could extinguish all cases which involved enforcement of a fundamental right); Iftikhar-ud-Din v. Sarfraz, 1961 P.L.D. (S.C.) 585, 598-600 (Pak.) (recognizing Dosso interpretation of Laws (Continuance in Force) Order was inconsistent with Article 2, which retained the Constitution).

103. In Uganda v. Commissioner of Prisons ex parte Matovu, 1966 E.A. 514 (Uganda), the Court upheld the repeal of the 1962 Independence Constitution and the concurrent adoption of the 1966 Constitution by the National Assembly. Id. at 539. While these actions were taken extra-constitutionally, the Court upheld them on the grounds of efficacy. The Court adopted Dosso's language extensively: "[T]he series of events which took place in Uganda . . . were law-creating facts appropriately described in law as a revolution; . . . there was an abrupt political change not contemplated by the existing Constitution, that destroyed the entire legal order and was superseded by a new Constitution . . . and by effective government." Id. at 515. The Court expressly adopted Kelsen's theory of the legitimacy of a usurper regime and Dosso's rationale, noting that the attorney general had "referred the Court to Kelsen's General Theory of Law and State . . . and the [Dosso case] as his authorities for the submission that the 1966 Constitution is legally valid and that the Court should so hold. These submissions are doubtless irresistible and unavoidable." Id. at 535. The Court concluded:

Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in Dosso, our deliberate and considered view is that the 1966 Constitution is a legally valid Constitution and the Supreme Law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity.

We have . . . a large number of affidavits sworn to by a large number of officials, the purpose of which is to prove to the satisfaction of the Court that the new Constitution is efficacious and that it has been accepted by the people.

Id. at 539. In Madzimbamuto v. Lardner-Burke, 1968 (2) S.A.L.R. 284 (Rhodesia), the Rhodesian High Court examined the validity of the white minority regime's 1965
Uniform Declaration of Independence, which announced a new Constitution that omitted the provisions for majority rule contained in the earlier 1961 Constitution. After quoting from *Dosso*, *Matovu*, and Kelsen, Chief Justice Beadle remarked that “[t]he authorities show clearly enough that success alone is the determining factor. . . . It may be accepted that a successful revolution which succeeds in replacing the old Grundnorm (or fundamental law) with a new one establishes the revolutionaries as a new lawful government.” *Id.* at 318. In light of the continuing efforts of Great Britain to regain control of the country, the Court held:

The “status” of the present Government is that of a *de facto* government, in the sense that it is in fact in effective control over the State’s territory, and that this control “seems” likely to continue. I do not find on the evidence before me that at this stage it can be said to be so “firmly established” as to justify a finding that its status is yet that of a *de jure* government.

*Id.* at 326. The Court then elaborated on the difference between a *de facto* and a *de jure* government:

The difference between the two types of government is the degree of certainty with which one can predict the likelihood of the régime continuing in “effective control”. The difference between the two types of government may be narrowed down to the difference between “seems” likely and “is” likely because a government which “is” likely to continue in effective control could be said to be “firmly established”. The difference here then is the difference between “seems” and “is”, a difference purely of the degree of certainty with which the future can be predicted.

*Id.* at 320. The Court proceeded to hold that the 1961 Constitution was still the grundnorm, but said that extra-constitutional actions of the *de facto* régime could be validated under Grotius’s theory of implied mandate. *Id.* at 348. Chief Justice Beadle captured the essence of *Dosso* and *Madzimbamuto* when he said that “nothing succeeds like success; and this is particularly true of revolutions.” *Id.* at 325. On appeal, the Judicial Committee of the Privy Council rejected the concepts of *de facto* and *de jure* government as inappropriate for dealing with the legal position of a usurper régime. *Madzimbamuto* v. *Lardner-Burke*, 1968 (3) All E.R.P.C. 561, 562 (Rhodesia). The Judicial Committee held that while the legitimate government was trying to regain control it was impossible to hold that the usurping government was for any purpose a lawful government. *Id.* at 573–74. In the lead opinion, Lord Reid drew attention to *Dosso* and *Matovu*, stating:

Their lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results . . . . It would be very different if there had been still two rivals contending for power . . . because that would mean that by striving to assert its lawful right the ousted legitimate government was opposing the lawful ruler.

*Id.* at 574. The Rhodesian High Court responded to this rebuff by the Privy Council in *R. v. Ndhlovu*, 1968 (4) S.A.L.R. 515 (Rhodesia). The Court held “the present Government is now the *de jure* government of Rhodesia and the 1965 Constitution the only valid Constitution.” *Id.* at 537. Consequently, the judgment of the Privy Council was not binding on the extant High Court of Rhodesia. *Id.* at 535–37. Commenting on *Dosso* and *Matovu*, the Court pointed out that when the judges in these cases continued to sit after they had found as a fact that as a result of successful revolutions the old constitutions had been effectively overthrown and replaced by new constitutions they, by continuing to sit, accepted the new constitutions, and when they held that the new constitutions were *de jure* constitutions they gave these decisions as judges sitting under the new con-
IV. THE THIRD REPUBLIC, 1962–71: "GUIDED DEMOCRACY"

A. The Constitutional Order

Having secured a stamp of validity and the license for unfettered legislative power in Dosso, the military regime, unencumbered by constitutional history or popular mandate, proceeded to fashion a new constitution for Pakistan. Under the 1962 Constitution, the executive power of the federation was concentrated in the president, who was to be indirectly elected by an electoral college consisting of 80,000 "Basic Democrats." These Basic Democrats were directly elected to perform local governmental duties but had the additional function of serving as an electoral college for the

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Id. at 522. In Mokotso v. King Mosheshoe II, 1989 L.R.C. (Const.) 24 (Lesotho), the High Court of Lesotho examined the validity of the regime established following the January 20, 1986 coup d'état staged by the Lesotho Paramilitary Force. Following Dosso and Kelsen, the Court held:

A Court may hold a revolutionary Government to be lawful, and its legislation to have been legitimated ab initio, where it is satisfied that (a) the Government is firmly established, there being no other government in opposition thereto; and (b) the Government's administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith.

Id. at 133. In Matanzima v. President of Transkei, 1989 (4) S.L.R. 989 (Transkei), the Transkei High Court examined the validity of the regime established following the Transkei Defence Force's usurpation of power on December 30, 1987. The Court held:

A revolutionary Government becomes lawful and its legislation is legitimate ab initio when

(a) it is firmly established, there being no real danger that it will itself be ousted from power, and

(b) its administration is effective, in that the people, by and large, have acquiesced in and are behaving in conformity with its mandates.


104. The military, however, claimed the mandate to enact the Constitution on the basis of a referendum held on February 14, 1960. The electorate for the referendum consisted of 80,000 members of local bodies. Almost 96% of the electorate voted for General Ayub Khan as president. Feldman, supra note 75, at 108–09 (1967); Waseem, supra note 4, at 154.


106. Id. arts. 155–58.
presidency and members of the federal and provincial legislatures. The prime minister’s office was abolished, and the president’s cabinet members did not have to be members of the legislature. The 1962 Constitution preserved parity between East and West Pakistan in a smaller federal legislature, which the president had the power to summon, prorogue, or dissolve. The presidential veto was strengthened by giving the president the right to seek a referendum of the electoral college when differences between the legislative and the executive branches arose. Fundamental rights did not form part of the 1962 Constitution. The president had the power to issue ordinances when the Assembly was dissolved or not in session and to issue a proclamation of emergency under which fundamental rights could be suspended. The central legislature could make laws respecting matters enumerated in the Constitution and, in cases where national interest required, on matters not so enumerated. Thus, the federation could usurp the provincial law-making powers on the basis of national interest. A bill to amend the Constitution required a two-thirds majority of the federal legislature before it was presented for the president’s assent. The president, however, had the option to refer the bill to a referendum. Most significantly, the intervention of the military in politics was institutionalized by a constitutional provision stating that for twenty years, the president or the defense minister must be a person who had held a rank not lower than that of lieutenant-general in the army.

The 1962 Constitution established a model of praetorian “guided democracy,” which promised at best a benevolent dictatorship. The new regime dispensed with democratic representative government, fundamental rights, separation of powers, and provincial au-

107. Id. arts. 155-73.
108. Id. art. 33.
109. Id. art. 20.
110. Id. arts. 22-23.
111. Id. arts. 24, 27.
112. Fundamental rights were later introduced by the Constitution (First Amendment) Act, 1963. These were then suspended by the proclamation of emergency in September 1965, and not revived until the end of the Third Republic. See infra part IV.B (describing military coup of 1969 and popular pressure leading to restoration of fundamental rights).
113. PAX CONST. of 1962, arts. 29-30.
114. Id. art. 131.
115. Id. arts. 208-09.
116. Id.
117. Id. art. 238.
tonomy. Nevertheless, the new order did enjoy political stability and high economic growth for a few years.\footnote{For an evaluation of this military-dominated phase of Pakistani politics, see Feldman, supra note 75, at 194–211; Rounaq Jahan, Pakistan: Failure in National Integration 143–77 (1972); Lawrence Ziring, The Ayub Khan Era: Politics in Pakistan 1958–69 (1971); and Wayne Wilcox, Pakistan: A Decade of Ayub, 9 Asian Surv. 87, 87–93 (1969).} This prompted commentators to hail Pakistan as a model of political and economic development for newly independent states.\footnote{See, e.g., Stephen R. Lewis, Jr., Economic Policy and Industrial Growth in Pakistan passim (1969) (exploring reasons for Pakistan's spectacular growth in modern industry that occurred in an otherwise stagnant economy); Gustav F. Papanek, Pakistan's Development passim (1967) (discussing factors contributing to Pakistan's economic growth rate). But see, e.g., MahbubulHaq, The Poverty Curtain 12–26 (1976) (stating while Pakistan economic situation was strong, there were problems with development policies and outcomes); Pakistan: The Roots of Dictatorship (Hassan Gardezi & Jamil Rashid eds. 1983).} However, persistent demands for representation, fundamental rights, and democracy continued, erupting into a popular mass movement by fall of 1968.\footnote{For accounts of the mass movement against General Ayub Khan's regime, see Tariq Ali, Pakistan: Military Rule or People's Power 156–216 (1970); Herbert Feldman, From Crisis to Crisis: Pakistan 1962–1969, at 237–71 (1972); and Sayeed, supra note 19, at 143–52.} Mass demonstrations and civil disobedience paralyzed Pakistan's economy and social life.

B. The Constitutional Crisis

Following prolonged civil turmoil, the president resigned on March 25, 1969, and handed control of the country over to the armed forces.\footnote{The president wrote to the army commander-in-chief informing him of the change, saying that "all civil administration and constitutional authority in the country has become ineffective . . . . [I am left with no option but] to step aside and leave it to the defence forces of Pakistan, which today represent the only effective and legal instrument, to take over full control of the affairs of this country." Asma Jilani v. Punjab, 1972 P.L.D. (S.C.) 139, 183 (Pak.).} The next day, the commander-in-chief of the army, General Yahya Khan, declared martial law throughout the country and assumed the office of chief martial law administrator.\footnote{The president wrote to the army commander-in-chief informing him of the change, saying that "all civil administration and constitutional authority in the country has become ineffective . . . . [I am left with no option but] to step aside and leave it to the defence forces of Pakistan, which today represent the only effective and legal instrument, to take over full control of the affairs of this country." Asma Jilani v. Punjab, 1972 P.L.D. (S.C.) 139, 183 (Pak.).} On March 31, Yahya Khan announced that he had assumed the office of president, so that he could discharge essential state responsibilities.\footnote{On April 4, 1969, the Provisional Constitution Order, 1969, and Jurisdiction of Courts (Removal of Doubts) Order, 1969, were issued in the name of General Yahya Khan. Pakistan was to be "governed as nearly as may be in accordance with the [1962] Constitution." Provincial
resolved West Pakistan and restored the four provinces of the western wing. Furthermore, the regime accepted the principle of representation according to population instead of parity between the two wings of the country, and held direct elections for a new Constituent Assembly. In the December 1970 elections, a political party primarily representing the eastern wing and clearly committed to a parliamentary form of government, provincial autonomy, and fundamental rights, secured an absolute majority in the Constituent Assembly. Nevertheless, the military regime refused to summon the Assembly, which triggered a mass movement of civil disobedience in the eastern wing. The military's response was the infamous genocidal military action in East Bengal, which resulted in a war with India and culminated in Pakistan's dismemberment. Having lost the war and the eastern wing of the country, internationally isolated and condemned, and confronted with an enraged citizenry and mutinous troops, the military regime relinquished power in favor of the political party then commanding a majority in the Constituent Assembly.

C. The Judicial Response: Doctrine of Implied Mandate

Two pending criminal appeals, consolidated as Asma Jilani v. Punjab, furnished an opportunity to test the validity of the 1969 extra-constitutional change of power. The Supreme Court held that the assumption of power by General Yahya Khan was an illegal usurpation. The Court, after an extensive analysis of Dosso, re-

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124. For a detailed discussion of the political situation that forced the military regime to agree to these changes, see WASEEM, supra note 4, at 245–55.
126. 1972 P.L.D. (S.C.) 139 (Pak.).
127. Id. at 183–85. Before turning to the merits of the case, the Court considered it important to reaffirm the power of the judiciary:

The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right which has consistently been claimed by this and other Courts of superior jurisdiction in all civilised countries . . . .
nounced the doctrine of revolutionary legality and expressly overruled Dosso. One Justice saw fit to make a remarkable

. . . [S]o far as judicial power is concerned it must exist in Courts as long as the Courts are there . . . . [T]he Courts have and must have the power to determine all questions of their own jurisdiction. It is a proposition so well-settled that no one can challenge it.

*Id.* at 197–98.

128. *Id.* at 162–83. The Court provided several grounds for holding that Dosso improperly adopted Kelsen's theory of revolutionary legality. Both Dosso's interpretation and application of Kelsen's theory came under attack:

Kelsen's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence . . . .

. . . . [Kelsen] was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms". He was propounding a theory of law as a "mere jurists' proposition about law". He was not attempting to lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators".

*Id.* at 179.

The Court rejected the proposition that a successful assumption of power is itself sufficient to bestow legality:

It was, by no means, [Kelsen's] purpose to lay down any rule of law to the effect that every person who was successful in grabbing power could claim to have become also a law-creating agency. His purpose was to recognise that such things as revolutions do also happen but even when they are successful they do not acquire any valid authority to rule or annul the previous "grund-norm" until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens.

*Id.* at 180. The Court also expressly rejected the international law basis of Kelsen's theory:

Kelsen's attempt to justify the principle of effectiveness from the standpoint of International Law cannot also be justified, for, it assumes "the primacy of International Law over National Law." In doing so he has . . . . overlooked that for the purposes of International Law the legal person is the State and not the community and that in International Law there is no "legal order" as such. The recognition of a State under International Law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State. An individual does not become the Head of a State through the recognition of other States but through the municipal law of his own State.

*Id.* at 181.

In conclusion, the Court said:

[We] would agree with the criticism that the learned Chief Justice [Justice Munir, author of Dosso] not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone . . . .
pronouncement about the relationship between political reality and judicial review:

[Maybe], that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers. 129

By the time Asma Jilani was decided, Yahya Khan's martial law regime had fallen and been replaced by an elected government. The validity of the elected government rested on the elections of 1970, which were held under a framework pronounced by the martial law regime. Consequently, the Court considered giving legal effect to certain acts of the illegal usurper regime. 130 Having overturned Dosso, and confronted with limitations on the application of the doctrine of state necessity implied by the Governor-General's Case, 131 the Court employed the doctrine of implied mandate first enunciated by Hugo Grotius. 132 According to Grotius, courts may validate certain necessary acts of a usurper done in the interest of preserving the state, because the lawful sovereign would also want these acts to be undertaken. 133 The Court relied upon Lord

[The Chief Justice] erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is ... wholly unsustainable, and [we are] duty bound to say that it cannot be treated as good law either on the principle of stare decisis or even otherwise.  

Id. at 181-83.

129. Id. at 243 (Ali, J., concurring).
130. Id. at 204-05. The Court was careful to state that "this decision is confined to the question in issue before this Court ... and has nothing whatsoever to do with the validity of the present regime." Id. at 208.
131. 1955 P.L.D. (F.C) 435, 561-65 (Pak.); see supra notes 40-50 and accompanying text (discussing use of doctrine of necessity in the Governor-General's Case).
132. See HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 159 (Francis W. Kelsey trans., 1925).
133. Id. The Court quoted Grotius to frame the doctrine of implied mandate as follows:

Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, or king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts.
Pearce's dissent in the Privy Council's decision in *Madzimbamuto v. Lardner-Burke* to delineate the contours of the implied mandate doctrine. Accordingly, the *Asma Jilani* Court recognized that acts validated by implied mandate must

(1) [be] directed to and reasonably required for ordinary orderly running of the State; (2) not impair the rights of citizens under the lawful Constitution; and (3) . . . [not be] intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign.

The Court stated that this re-fashioned use of the doctrine of state necessity, coupled with the doctrine of implied mandate was not a vehicle "for validating the illegal acts of usurpers." Rather, the Court claimed that "this is a principle of condonation and not legitimization." The Court proceeded to pronounce four independent grounds upon which to condone the acts of an illegal usurper regime:

(1) [All transactions which are past and closed, for, no useful purpose can be served by reopening them, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, in our case, the objectives mentioned in the Objectives Resolution of 1954.

Because *Asma Jilani* was decided after the usurper regime had fallen, Mark Stavsky views the opinion as "extremely politic, in that the Court, by relying upon an implied mandate theory, had little to lose and everything to gain." The merits of *Asma Jilani* lie in its repudiation of Kelsen's theory of revolutionary legality and overruling of *Dosso*. The list of condoned acts, however, is problematic. Points one, two, and the first part of point four fall within the scope of the doctrine of necessity as developed in the *Governor-General's..."
The second part of point four validated the 1970 elections as a means of moving toward a representative, federal, and parliamentary system of government. But the sweeping principle of point three, with its omnibus term “good of the people” is troublesome. It is very close to constructs like “peace and good government,” traditionally used to denote unfettered legislative powers of a sovereign legislature. Furthermore, point three does not provide any verifiable standard and is silent about who shall determine the “good of the people.” This construction was later deployed to bestow unfettered legislative powers upon another military regime. The Court, by adding the “good of the people” language in its list of condoned acts, in effect gave full recognition to the military regime as the de facto government, with only some tenuous restrictions. The Asma Jilani Court’s use of such broad language is all the more surprising in light of a bold judgment of the Lahore High Court in Mir Hassan v. State, where the court restrictively construed the doctrine of necessity to assert jurisdiction of civil courts in defiance of martial law regulations.

A more suitable response would have been to decide the case on narrow grounds. The immediate issue in Asma Jilani was the valid-

141. 1955 P.L.D. (F.C.) 435, 436 (Pak.); see also supra note 51 and accompanying text (discussing use of doctrine of necessity in English and American jurisprudence).
143. The Court’s principle of condonation expressly excluded any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. I would not also condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity.
Asma Jilani, 1972 P.L.D. (S.C.) at 207 (emphasis added). The emphasized text again implies the broad legislative power of extra-constitutional regimes.
144. 1969 P.L.D. (Lah.) 786 (Pak.).
145. Id. at 804–05. The Mir Hassan court emphasized that ouster of jurisdiction was not dictated by necessity:
Martial Law in this country was imposed with a view to dealing with a situation in the creation of which the Courts had played no part, at all... The malady, which was sought to be cured by the imposition of Martial Law, was germinated and flourishing in places other than Courts of law. That being so, there could possibly be no justification for taking away the powers of such an institution.
Id.
The Court also stated that “the jurisdiction of the ordinary courts, therefore, continues to vest in them and the same cannot and has not been taken away by the Proclamation of Martial Law. Particularly since it has been imposed in times of peace and for the purpose of quelling riots and restoring order.” Id. at 809–10.
ity of a martial law regulation providing for preventive detention.\textsuperscript{146} The Court upheld the regulation because identical regulations were present in the statutory scheme prior to the 1969 abrogation of the Constitution.\textsuperscript{147} By confining itself to this holding, the Court could have avoided the wider question of the validity and scope of legislative powers of the extra-constitutional regime.

V. THE FOURTH REPUBLIC, 1973–77: THE DEMOCRATIC INTERLUDE

A. The Constitutional Order

The 1973 Constitution is unique for Pakistan because it is Pakistan's first constitution to be framed by elected representatives, and, in spite of ideological and other differences among political parties represented in the Constituent Assembly, the Constitution was passed unanimously.\textsuperscript{148} The 1973 Constitution provides for a parliamentary system in which the executive power is concentrated in the office of the prime minister.\textsuperscript{149} The formal head of the state is the president, but he is bound to act on the advice of the prime minister.\textsuperscript{150}

Parliament consists of two houses—the National Assembly and the Senate.\textsuperscript{151} The National Assembly members are directly elected for a period of five years.\textsuperscript{152} However, the National Assembly

\textsuperscript{146} Asma Jilani, 1972 P.L.D. (S.C.) at 207–08.
\textsuperscript{147} Id. at 261–62. The Court referred to The Security of Pakistan Act, 1952 and The Defense of Pakistan Rules, 1965. Both regulations, like the regulation issued under martial law, provided for the arrest of any person to prevent that person from acting in a manner prejudicial to the security, public safety and interest, and defense of Pakistan. Id. The martial law regulation, however, added an ouster of jurisdiction clause, which the Court struck down. Id. at 247–48.
\textsuperscript{148} The historic importance of the 1973 Constitution is accurately reflected in the following remark:
The fact that a consensus was reached is the greatest merit of the Constitution of 1973, which represents a social contract between the various sections of Pakistan's plural society and contains the terms by which they are willing to live together. It is improbable that another such consensus could take shape between the various political parties on constitutional issues.
Kamal Azfar, Constitutional Dilemmas in Pakistan, in PAKISTAN UNDER THE MILITARY: ELEVEN YEARS OF ZIA UL-HAQ 49, 64–65 (Shahid Javed Burki & Craig Baxter eds., 1991). The consensus became possible only after resistance within the ruling party, including resignation by the law minister, forced Zulfiqar Ali Bhutto, the leader of the ruling party, to suppress his preference for a centralized presidential system. STANLEY WOLPERT, ZULFI BHU'TO OF PAKISTAN: HIS LIFE AND TIMES 205–06 (1993).
\textsuperscript{149} Pak. Const. of 1973, art. 90(1).
\textsuperscript{150} Id. arts. 41(1), 48(1).
\textsuperscript{151} Id. art. 50.
\textsuperscript{152} Id. arts. 51–52.
can be dissolved at the will of the prime minister. The Senate, with equal members elected by the provincial legislatures, is a permanent body not subject to dissolution. Its members have a tenure of six years, half of them retiring every three years.

The prime minister is the chief executive of the federation and is elected by a majority of the National Assembly. Provincial governors are appointed by the president. Governors are bound to act on the advice of the chief ministers of the provinces, who are elected by a majority of the provincial legislatures. Federal Parliament has exclusive power to legislate on federal subjects. Both the national and provincial assemblies have power to make laws concerning matters of common interest. Matters not so designated remain with the provincial legislatures.

To coordinate relations between the federation and the provinces, the 1973 Constitution establishes a new institution known as the Council of Common Interests, consisting of the chief ministers of the provinces and an equal number of ministers from the federal government. Fundamental rights are guaranteed under the Constitution. In light of the constitutional vicissitudes of the country, subversion of the Constitution is designated "high treason." Finally, the 1973 Constitution provides for judicial review.

B. Scope of Judicial Review: Missed Opportunity

Adoption of the 1973 Constitution provided Pakistan's superior courts with a new opportunity to assert judicial independence and enunciate the scope of judicial review conducive to stable constitutional governance. This section will examine how the courts responded to this historic opportunity.

153. Id. art. 58.
154. Id. art. 59.
155. Id. The federal capitol and federally administered tribal areas are also represented in the Senate. Id. art. 59(1).
156. Id. arts. 90–91.
157. Id. art. 101.
158. Id. arts. 129–32.
159. Id. arts. 141–42, ch. 1, part V; see also, Craig Baxter, Constitution Making: The Development of Federalism in Pakistan, 14 Asian Surv. 1074, 1080 (1974).
161. Id.
162. Id. art. 153.
163. Id. arts. 8–28.
164. Id. art. 6.
165. Id. art. 199(1).
The Asma Jilani Court's designation of the military takeover of 1969 as an illegal usurpation left the civilian government, which had taken over as a martial-law government pending the adoption of a new constitution, without legal basis. This legal void was bridged by the 1972 Interim Constitution, which was promulgated one day after the announcement of Asma Jilani. This Interim Constitution was to provide for the functioning of the government until a constitution was adopted by the Constituent Assembly.\textsuperscript{166} Article 281 of the Interim Constitution validated all laws made after the military's usurpation of power in 1969, notwithstanding any prior judgment of any court. Furthermore, the article immunized from legal challenge all orders, proceedings, and acts taken pursuant to the validated laws.\textsuperscript{167}

The Pakistan Supreme Court examined the validity of Article 281 in \textit{State v. Zia-ur-Rahman}.\textsuperscript{168} The Court upheld the ouster of jurisdiction over validated laws and made extended pronouncements about judicial review under a written constitution.\textsuperscript{169} While Zia-
ur-Rahman has been hailed as "a tour de force in judicial review," others have criticized the decision for implicitly falling back on the doctrine of revolutionary legality to validate the Interim Constitution of 1972. The criticism is misplaced. To rule otherwise would have revived the 1962 Constitution, which even the Asma Jilani Court had refrained from doing. Instead, validity of the Interim Constitution of 1972 could be independently based on its ratification by the National Assembly, an assembly elected as a constituent body through the first general and fair elections held in the country.

Although Zia-ur-Rahman did not embrace the doctrine of revolutionary legality, it nevertheless suffered from three flaws which subsequently proved fatal to the democratic 1973 Constitution. First, validation of the blanket immunity for martial law legislation ignored the limits of condonation pronounced in Asma Jilani only two years earlier. In doing so, the Court undermined Asma Jilani, which is rightly hailed as "the bright star in Pakistan's constitutional firmament." Second, the Court's position, that no extra-constitutional principles exist to test the validity of a constitution enacted by a representative parliament, is potentially troublesome. Standing on its own, this proposition is unassailable. But Asma Jilani condoned martial law measures, as they related to the election of the Constituent Assembly, on the ground that these "would establish or lead to the establishment of... the objectives of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law if it has made it competently without transgressing the limitations of the Constitution. Again if a law has been competently and validly made the judiciary cannot refuse to enforce it even if the result of it be to nullify its own decisions. The Legislature has also every right to change, amend or clarify the law... The Legislature which establishes a particular Court may also, if it so desires, abolish it."

Id. at 70.

170. MAKHDOOM ALI KHAN, THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, 1973, at xxii (1986). "[N]ot only did the Court reject the doctrine of parliamentary sovereignty, but extended the power of judicial review to each and every legislative measure including constitutional amendment. The role of the judiciary in a federal system of government was emphasized with great courage and imagination." Id. at xxii–xxiii.


172. Azfar, supra note 148, at 64.

173. Zia-ur-Rahman, 1973 P.L.D. (S.C.) at 76. "There can be no question, therefore, of any organ or functionary under the Constitution questioning the authority of the Constitution under which it is functioning or striking down any provision of the Constitution on the basis that it is repugnant to some other document, however important or sacred." Id.
mentioned in the Objectives Resolution of 1954." Just as the validity of the Constituent Assembly rested upon *Asma Jilani*, and thus indirectly on the Objectives Resolution, the validity of the Assembly’s legislation could be tested against the directives of the same Objectives Resolution.

Lastly, and most dangerously, the Court held that disregard by the constituent body of a mandate by the people is a nonjusticiable political question, which only the people through the democratic process have the right and the power to correct. The Court acknowledged that the Objectives Resolution had been referred to in *Asma Jilani* as the “cornerstone of Pakistan’s legal edifice,” “the bond which binds the nation,” “a transcendental part of the Constitution,” and “a supra-constitutional instrument which is unalterable and immutable.” Nevertheless, the Court rejected any supra-constitutional principles, simply remarking that “[t]here is no mention in these observations . . . of the Objectives Resolution being the ‘grund norm’ for Pakistan.” By entangling itself in a Kelsenian search for a grundnorm, the Court put itself in a no-win situation. The Court had recently renounced the doctrine of revolutionary legality in *Asma Jilani*, and in the process had subjected Kelsen’s theories of law to serious criticism. To now provide a Kelsenian grundnorm for the constitutional order would have amounted to an unprincipled reversal. Concurrently, the preoccupation with Kelsenian concepts and language precluded identification of some other yardsticks for judicial review of legislation. This fail-

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175. *Zia-ur-Rahman*, 1973 P.L.D. (S.C.) at 76–77. The Court made this point by stating:

[The validity of the Interim Constitution] does not, however, mean that the body having the power of framing a Constitution is “omnipotent” or that it can disregard the mandate given to it by the people for framing a Constitution or can frame a Constitution which does not fulfill the aspirations of the people or achieve their cherished objectives political, social or economic. These limitations on its power, however, are political limitations and not justiciable by the judiciary. If a Constituent Assembly or National Assembly so acts in disregard of the wishes of the people, it is the people who have the right to correct it. The judiciary cannot declare any provision of the Constitution to be invalid or repugnant on the ground that it goes beyond the mandate given to the Assembly concerned or that it does not fulfill the aspirations or objectives of the people. To endeavor to do so would amount to entering into the political arena which should be scrupulously avoided by the judiciary. With political decisions or decisions on questions of policy, the judiciary is not concerned.

*Id.*
177. *Id.* at 72–73.
ure forced the Court to adopt a very restrictive approach to judicial review. Specifically, so long as the procedures of legislation were followed, the substance of legislation was outside the purview of the courts. The Court’s failure is even more surprising in view of the important distinction between judicial power and jurisdiction articulated in the opinion. An assertion of inherent judicial power could have easily preceded an enunciation of principles against which all legislation would be reviewed, even where these principles were not expressly within the four corners of a written constitution.

The Zia-ur-Rahman Court should have adopted a basic structure/essential features test to examine the validity of constitutional legislation. The basic structure/essential features test, fashioned by the Supreme Court of India in Bharati v. Kerala, provides that the theory of unfettered legislative power has no place under a written federal constitution. Additionally, due to implied and inherent limitations, the federal legislature cannot employ its power to amend, abrogate, or destroy the “basic structure” and “essential features” of the constitution. In later cases, the Indian Supreme Court has firmly held the position that it has the power to review constitutional amendments under the basic structure/essential features test, even in the face of the legislature’s incorporation of express ouster-of-jurisdiction provisions in constitutional amendments. The basic structure/essential features test recognized that a constitution “is an organic document which must grow and must take stock of the vast socioeconomic problems.”

178. See id. at 69–70; see also infra note 373 and accompanying text (articulating distinction between court’s judicial power as inherent under separation of powers, and jurisdiction as right to adjudicate given case).


181. Id. at 1565. The Court held that the power to amend bestowed by a written constitution “does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article”. Id.


183. Bharati, 1973 A.I.R. (S.C.) at 1566 (Shelat & Grover, JJ., concurring). This case significantly departed from earlier holdings of the Court whereby the Court held any infringement on a fundamental right unconstitutional.

The Indian Supreme Court’s inflexible protection of private property rights and its blocking of important socioeconomic legislation was reminiscent of the United States Supreme Court’s early response to the New Deal legislation. Compare Scindia v. India, 1971 A.I.R. (S.C.) 530, 555–58 (India) (finding Indian rulers have property
introduced flexibility in judicial review without giving the legislature the opportunity to bend the constitution out of shape. The Court found that the Preamble to the Indian Constitution furnished the primary key to the basic structure. The Court identified republicanism, democracy, equality of status and opportunity, secularism, adult franchise, separation of powers, and rule of law as basic features of the Constitution. Commentators characterize the basic structure/essential features test as "an important safeguard against legislative despotism and the tyranny of shifting majorities" and as "an instrument of control to prohibit a political party, ambitious of power with hatred of liberty and contempt of law, from destroying the democratic features of the [Indian] Constitution." The Fourth Republic in Pakistan needed such a safeguard, and the instrument of control could be furnished by the principles of democracy, federalism, guaranteed fundamental rights, equality of opportunity before the law, and independence of the judiciary, as enshrined in the Objectives Resolution.


185. Id. at 2465–66. The list is not exclusive. The Court observed that “the theory of Basic Structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem.” Id. at 2467.

186. KHAN, supra note 170, at xviii.

Zia-ur-Rahman represented a unique historic opportunity for the Supreme Court of Pakistan to make a fresh start by defining the scope of judicial review. The praetorian tendencies in the body politic lay defeated and marginalized, and had been repudiated by the Court itself in Asma Jilani. The new popularly elected representative government embarked on constitutional governance under a constitution created from a consensus of contending political forces. To prevent a temporary majority in the legislature from frustrating the agreed-upon constitutional order, it was imperative that the Court not leave such unlimited legislative power with the legislature. After Zia-ur-Rahman, the government in power, which had an absolute majority in the legislature, felt free to adopt constitutional amendments dictated by political expediency without fear of judicial intervention.

During the transition phase between the demise of the military regime and the adoption of the 1973 Constitution, the government called upon the Supreme Court to render an advisory opinion regarding the recognition of Bangladesh. The government favored recognition, but there was sharp division within the body politic on the issue. The Supreme Court considered the merits of the Special Reference and responded that the government may rightfully recognize Bangladesh. Recognition of foreign states has long been considered a nonjusticiable political question, and within the exclusive discretion of the executive branch of government.

The Court's willingness to participate in a politically contentious area beyond judicial competence raises questions about its independence and credibility. Later, the Court was drawn directly

189. See Azfar, supra note 148, at 91.
190. See Special Reference No. 1 of 1973, 1973 P.L.D. (S.C.) 563, 576 (Pak.). The military regime's refusal to abide by the results of the general elections of 1970 resulted in the dismemberment of the country, and the eastern wing declared itself a sovereign state and adopted the name Bangladesh. See WASEEM, supra note 4, at 285-96.
191. See, e.g., Baker v. Carr, 369 U.S. 186, 212 (1962) (stating courts should not interfere in executive decision to recognize foreign state). In a subsequent United States Supreme Court case, one Justice summarized the rationale of the political question doctrine in terms of three relevant inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring); see also THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 6, 31-44, 69-71 (2d ed. 1992) (illustrating origin and United States Supreme Court's use of political question doctrine).
into the vortex of politics when the government, having banned the main opposition party on charges of activities contrary to the security and ideology of Pakistan, sought an advisory opinion. Ignoring the unmistakable political nature of the issue, the Court approved the federal government’s action. As a result, during the Fourth Republic, the regime felt free to curtail political freedoms by successive amendments to the Constitution, which ultimately led to the downfall of the Republic.

In *Dewan Textile Mills Ltd. v. Pakistan*, the court heard a challenge to the validity of the Constitution (Fourth Amendment) Act, 1975. The amendment provided that an interim order, passed by the high courts in exercise of their constitutional jurisdiction in fiscal and financial matters, would cease to have effect after sixty days. The petitioner argued that the amendment effectively destroyed the judicial power bestowed by the 1973 Constitution. Moreover, Articles 238 and 239 of the Constitution precluded the legislature from effecting such a change. Reflecting the temper of the time set by Asma Jilani and Zia-ur-Rahman, even the Attorney General submitted that the judiciary has “the power to scrutinise the validity of even the constitutional measure seeking to amend the Constitution.”

The court found the amendment not *ultra vires* of the Constitu-
tion, as it only imposed a time limit on the courts' interim orders in certain specified areas, did not restrict the Supreme Court's power to decide the case finally, and permitted the courts to avoid this provision by deciding the matter within sixty days. The court, following Zia-ur-Rahman, deferred to the legislature's power to adopt constitutional measures so long as the legislature followed the procedure laid down in the 1973 Constitution. The court also rejected the proposition that there were any supra-constitutional limitations on the power of the legislature to amend the Constitution. In its insistence upon finding the scope of legislative powers within the four corners of the Constitution, the court rejected the petitioner's claim that the people, in exercise of the sovereign power vested in them, gave the Constitution to themselves and therefore the legislature could not exercise its legislative power to change the basic structure and essential features of the Constitution.

The validity of the Constitution (Third Amendment) Act, 1975, was challenged in the Lahore High Court. Under Article 232 of the Constitution, a proclamation of emergency, unless approved by a joint sitting of the two houses of Parliament within thirty days, ceased to be in force. Even the joint sitting of the Parliament could prolong the state of emergency for only six months, whereafter another resolution had to be passed to extend the state of emergency for another six months. The Third Amendment dis-

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200. Id. at 1407.
201. Id. at 1396, 1407.
202. See id. at 1391.
203. Id. at 1394-97.
204. Id. at 1391.
205. Id. at 1388-91. The court retorted: "[T]he proposition that the 'people' established the Constitutional fabric of the Government under a written Constitution is just a myth—perhaps a useful fiction—a convenient metaphor." Id. at 1388. The court then pointed out the "fact" that the Constitution had been drafted and adopted by the Constituent Assembly, not by the people. Id. at 1393. Compare this with the view of two Justices of the Indian Supreme Court:

Where there is a written Constitution ... there is, firstly, no question of the law-making body being a sovereign body, for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people. This is especially so where the Constitution contains a Bill of Rights, for such a Bill imposes restraints on that body, i.e., it negates the equation of that body with the people.


207. PAK. CONST. of 1973, art. 232(7).
208. Id. art. 232(7)(b).
pensed with the necessity of such biannual parliamentary approval. Under the Third Amendment, the proclamation continued until it was disapproved by a joint sitting of the two houses. 209

The court refused to strike down the amendment because the legislature's power over the subject remained intact, and only the procedure of its exercise had been changed. 210 Given the fact that any declaration of emergency suspended fundamental rights, the court's position is indefensible. By operation of the amendment, legislative inaction in the face of a declaration would result in suspension of fundamental rights. Legislative action required by un-amended Article 232 would have necessitated legislative deliberation and debate, which in turn would have invited public comment and scrutiny. Legislators consequently would hesitate to associate with legislation that left the citizens without constitutional protections against the powers of the state. The amendment tilted the balance of power in favor of the executive, precluded public deliberation, and allowed legislators, through their silence, to become party to the denial of the rights of the people.

The Constitutional (Fourth Amendment) Act, 1976, restricted the jurisdiction of the high courts from reviewing executive orders of preventive detention, and denied bail to a person detained under such an order.211 A challenge to the amendment reached the Su-

209. Constitution (Third Amendment) Act, 22 of 1975, § 3 (effective Feb. 13, 1975). Passage of the Third Amendment was in tune with the elected government's increasing use of arbitrary and extreme measures to deal with the political opposition. These measures included dismissal of Baluchistan's opposition government, deployment of the military to suppress the resulting protest, and banning the main opposition party, the NAP. For enumeration and analysis of the undemocratic tendencies of the elected regime, see SAYEED, supra note 16, at 84–112; and Ahmad, supra note 192, at 423–38. In 1976, the government secretly engaged Professor Leslie Wolf-Phillips of the London School of Economics to draft a new constitution providing for a centralized presidential system, which was to be introduced after the next general elections. See SAYEED, supra note 16, at 106; WOLPERT, supra note 148, at 267.

210. Suleman, 1976 P.L.D. (Lah.) at 1263. The court, after discussing implied limitations on the legislature's power arising from the separation of powers doctrine, made a remarkable display of judicial caution or even abdication:

We, however, should not be understood to have said that there are any fetters on the powers of the Parliament to amend the Constitution. The amendment, after it is made in conformity with the provisions ... of the Constitution, will be the expression of the will of the vast majority of the people, and the remedy for correcting such a violation will lie not with the Judiciary but with the people who are to express their will through their chosen representatives in the Parliament.

Id. at 1264.

211. Constitution (Fourth Amendment) Act, 71 of 1975, § 8 (effective Nov. 21, 1985).
Supreme Court in *Pakistan v. United Sugar Mills Ltd.* The petitioner argued that the amendment unconstitutionally eroded the high courts' judicial powers and violated the principle of separation of powers. The Court denied the petition on the grounds that the erosion of judicial power was not absolute. In the process, the Court again enunciated a restrictive view of the concept of separation of powers.

The Constitutional (Fifth Amendment) Act, 1976, further restricted the high courts' jurisdiction in relation to orders and procedures for preventive detention of any person. The amendment was challenged before the Peshawar High Court in *Jehangir Iqbal Khan v. Pakistan,* on the grounds of unconstitutional ouster of jurisdiction of the high courts and abuse of legislative power. The court upheld the amendment on the curious ground that the ouster of jurisdiction did not violate fundamental rights because those rights had been suspended by operation of a valid declaration of a state of emergency. The court did not examine what the impact of the amendment would be when Parliament lifted the state of emergency. In addition, the court failed to acknowledge that the right to enjoy the protection of the law and to be treated in accordance with law was enshrined in the 1973 Constitution apart from the chapter on fundamental rights. The court ignored the fact

212. 1977 P.L.D. (S.C.) 397, 401 (Pak.).
213. Id. at 404.
214. See id. at 411. The Court agreed that "it is not disputed that the power of making final decision[s] remains with the High Courts and not transferred to the Executive. Even the power to afford interim relief has not been entirely taken away; its operation has been curtailed ..." Id.
215. Id. The Court stated:

It is also important to observe that our Constitution, like many other modern written Constitutions, does not provide for rigid separation of powers. Indeed there is no direct provision in that behalf except that the Constitution by various provisions provides for the setting up of the principle institutions for the exercise of the sovereign powers of the State in the appointed field. In actual practice in all modern Governments, separation is only functional to subserve the practical necessity of an efficient and enlightened Government by providing for checks and balances to avoid abuse of public power. Nowhere ... the principle is pushed to its logical conclusion so as to create watertight compartments within the Government.

218. Id. at 69.
219. Id. at 74.
that, during the Third Republic, courts derived certain emergency-proof minimum guarantees of due process from the interplay of this right to legality with the superior courts’ extraordinary writ jurisdiction.\footnote{221}

The court’s decision proffered two curiously contradictory statements about legislative power and, by implication, judicial review. On the one hand, the court said that “[t]he Legislature is the supreme authority to make any amendment in any part of the Constitution or modify it short of complete abrogation or abrogation of the fundamentals of the Constitution.”\footnote{222} On the other hand, however, the court said that “[t]here should be no hesitancy in conceding that there are no fetters on the powers of the Parliament to amend the Constitution.”\footnote{223} If there truly were no fetters on Parliament’s power to amend the Constitution, it could abrogate the “fundamentals of the Constitution,” or for that matter, the entire Constitution. However, if Parliament could not abrogate the “fundamentals of the Constitution,” then there were limits on its powers, and the high courts, as guardians of the Constitution, had the duty to ensure that these limits were observed.

The Constitution (Seventh Amendment) Act, 1977, ousted the high courts’ jurisdiction with regard to areas where armed forces were called upon to act in aid of civil power under Article 245 of the Constitution.\footnote{224} The amendment was challenged in Arbey v. Pakistan.\footnote{225} The court held that because the conditions laid down in Article 245 for the ouster of jurisdiction were not met, the court had jurisdiction to hear and dispose of the merits of the petitioner’s grievances arising from the declaration of martial law in

\footnote{221. The court accomplished this by holding that the “subjective satisfaction” of the executive to invoke laws authorizing preventive detention is incompatible with Article 2, read in conjunction with Article 98 of the 1962 Constitution. See West Pakistan v. Kashmiri, 1969 P.L.D. (S.C.) 14, 31–33 (Pak.); Baluch v. Pakistan, 1968 P.L.D. (S.C.) 313, 325–26 (Pak.); Ghulam Jilani v. West Pakistan, 1987 P.L.D. (S.C.) 373 (Pak.). A similar result may be obtained by reading Article 4 of the 1973 Constitution in conjunction with Article 199.}

\footnote{222. Jehangir Iqbal Khan, 1979 P.L.D. (Pesh.) at 74. This language implies adoption of a basic structure/essential features test.}

\footnote{223. Id.}

\footnote{224. Constitution (Seventh Amendment) Act, 23 of 1977, § 4 (effective May 16, 1977).}

\footnote{225. 1980 P.L.D. (Lah.) 206, 218–20 (Pak. 1977). The Seventh Amendment was adopted against the backdrop of mass protest and civil disobedience. Uprisings began in the spring of 1977 following allegations of electoral fraud in the first general elections under the 1973 Constitution, held in February of 1977. After the civil administration’s failure to contain the disturbances, the regime declared martial law in selected urban areas under Article 245 of the Constitution. See WASEEM, supra note 4, at 342–58; SAYEED, supra note 16, at 157–64.}
In their concurring opinions, two judges referred to the basic features/essential framework judgments of the Supreme Court of India and Zia-ur-Rahman, and observed that any amendment of the Constitution must be within the broad contours of the Preamble and the Directive Principles of Policy of the Constitution. They identified Islam, federalism, and democracy as the essential features of the Constitution, and concluded that if these features did not survive on account of an amendment to the Constitution, then such an amendment would be ultra vires.

C. The Constitutional Crisis

Five years after Asma Jilani, Pakistan was embroiled in yet another constitutional breakdown. On July 5, 1977, the chief of the

227. Id. at 262–64, 295–98 (Kadri & Pal, JJ., concurring).
228. Id. As Judge Kadri stated, “[t]he power of Parliament to amend the Constitution certainly does not extend to alter, repeal, modify or replace the Constitution.” Id. at 262 (Kadri, J., concurring). During the Fifth Republic, some courts increasingly used the Objectives Resolution to test the validity of any law challenged as repugnant to the basic tenets of Islam. This resulted from the adoption of the Objectives Resolution as part of the text of the Constitution rather than the Preamble, and the establishment of the Federal Shariat Court, a parallel superior court with exclusive jurisdiction to examine and decide "whether or not any law or provision of law is repugnant to the Injunctions of Islam." PAK. CONST. of 1973, arts. 2-A, 203D, cl. 1 (1985); see id., arts. 2-A, 203C; Pres. Order No. 14 (1985), reprinted in KHAN, supra note 170, at 6 n.3; Pres. Order No. 3 (1979), reprinted in KHAN, supra note 170, at 149 n.194. Many subsequent cases then adopted the position that the Objectives Resolution was the supra-constitutional grundnorm of the polity, and its incorporation in the Constitution gave the superior courts the jurisdiction to examine all matters against the benchmark of Islam. See Haroon v. Durranii, 1989 P.L.D. (Kar.) 304, 312–17 (Pak.); Raza v. Begum, 1988 P.L.D. (Kar.) 169, 192–94 (Pak.); Bank v. Hussain, 1987 P.L.D. (Kar.) 612, 623 (Pak.); Khan v. Ajaz, 1987 P.L.D. (Kar.) 466, 474 (Pak.); Bank of Oman v. East Trading Co., 1987 P.L.D. (Kar.) 404, 432–36 (Pak.); see also Khalid Ishaque, Constitutional Relief: Need for a New Foundation, 1987 P.L.D. J. 213; Nasim Hasan Shah, The Objective Resolution and its Impact on the Administration of Justice in Pakistan, 1987 P.L.D. J. 186, 194 (discussing emerging dominance of Islamic Shariat legal system in Pakistan). Some commentators have questioned the validity of such use of the Objectives Resolution. See e.g., Asif Sayeed Khan Khosa, The Ineffective Effect of Article 2-A, Constitution of Pakistan, 1989 P.L.D. J. 50 (arguing that reliance on Article 2-A as supra-constitutional provision is temporary aberration, likely to be overruled by the Supreme Court following Zia-ur-Rahman). If the superior courts acknowledged the supra-constitutional status of the Objectives Resolution, there is no reason why they could not review legislation, including constitutional amendments, against the basic features of governance enunciated by the Objectives Resolution. One case along this line, Chaudhury v. Services Indus. Textiles, Ltd., 1988 P.L.D. (Lah.) 1 (Pak.), ruled that Article 2-A gave the courts the right to examine provisions of the Companies Act to ensure that the affairs of a company are not conducted in a manner prejudicial to the public interest. Id. at 44–45.
army staff, General Zia ul-Haq, declared martial law, removed the prime minister, dissolved the national and provincial assemblies, and dismissed provincial governors and their ministers. After proclaiming martial law, General Zia announced:

[The Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Martial Law Orders and Instructions, as and when required, will be issued under my orders . . . .

I hold the judiciary of the country in high esteem. However, under unavoidable circumstances, if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of law.]

D. The Judicial Response: Constitutional Deviation Dictated by Necessity

Begum Nusrat Bhutto, wife of the deposed and detained prime minister, in a petition before the Supreme Court under Article 184(3) of the 1973 Constitution, challenged the former prime minister's detention under Martial Law Order No. 12 of 1977. The Supreme Court admitted the petition for hearing, in apparent defiance of the Martial Law Proclamation that expressly ousted the jurisdiction of the courts. The military regime expressed its disapproval quickly by removing the Chief Justice within two days of admission of the petition. The petitioner, relying largely on

229. See KHAN, supra note 170 at 299 (providing complete text of proclamation of martial law). For events leading up to the declaration of martial law, see WASEEM, supra note 4, at 340–53; and William L. Richter, Persistent Praetorianism: Pakistan's Third Military Regime, 51 PAC. AFF. 406, 406–26 (1978).


231. Id. at 669. Relying upon the fundamental rights section of the 1973 Constitution, Bhutto argued that the Laws Order of July 5, 1977, violated numerous constitutional rights. The rights include the right to security of person (Article 9), the right to procedural protections upon arrest (Article 10), the right to freedom of association (Article 17), and the right to equal protection of the laws (Article 25(1)). See id. at 670. The Laws (Continuance of Force) Order, 1977, Section 2(3) provided that "the Fundamental Rights conferred by . . . the Constitution, and all proceedings pending in any Court, insofar as they are for the enforcement of any of those Rights, shall stand suspended." Laws (Continuance in Force) Order, 1 of 1977, § 2(3) (effective July 5, 1977), reprinted in KHAN, supra note 170, at 302.

232. See supra text accompanying note 229 (describing martial law proclamation).

233. The chief martial law administrator, by the Laws (Continuance in Force) (Fifth Amendment) Order of September 22, 1977, revoked the Fifth and Sixth Constitutional Amendment Acts insofar as they amended Article 179 of the Constitution. See KHAN, supra note 170, at 305. As a result, Yaqub Ali was forced to retire as the
Asma Jilani, contended that General Zia ul-Haq had no authority under the 1973 Constitution to impose martial law; that the general's action amounted to treason under Article 6 of that Constitution; and, as a consequence, the Proclamation of Martial Law and the Laws (Continuance in Force) Order, 1977, lacked lawful authority. The petitioner further contended that even if any or all of these were justifiable under the doctrine of necessity, the former prime minister's arrest and detention was highly discriminatory and mala fide.

The government argued that the petitioner could not maintain her action because Article 4 of the Laws (Continuance in Force) Order, 1977, precluded any court from questioning the validity of any martial law order. In addition, Article 2(3) of the same order provided for suspension of fundamental rights and their enforcement. Relying upon the Kelsenian arguments of Dosso, the government argued that the proclamation by General Zia ul-Haq established a new legal order, and that this new legal order, even if it were only temporary, had displaced the former legal order.


236. Id.

237. Id. at 671.

238. Id. at 671–72. According to the government, means not recognized or contemplated by the suspended constitution precipitated the transition to the new order, and therefore the new order constituted a meta-legal or extra-constitutional fact that attracted the doctrine of "revolutionary legality." Id. at 671. Confronted with this situation, the only tack of the Court was to determine the "constitutional fact" of acceptance of the new legal order by the institutions of state power. Id. The new legal order, if declared "effective," would then furnish the context for all questions of "legality." Id. The Court also had to deal with the fact that all Justices of the Supreme Court were required to take a new oath of office on September 22, 1977, under the President's (Post-Proclamation) Order No. 9 of 1977, Supreme Court Judges (Oath of Office) Order, 1977, at the pain of removal from office. In Nusrat Bhutto, the Chief Justice took the position that [the taking of the fresh oath ... does not in any way preclude [the Supreme Court Justices] from examining the question of the validity of the new Legal Order and decide the same in accordance with their conscience and the law.

Id. at 674. Moreover, the Chief Justice acknowledged that [It] only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also evident, that on the 5th of July 1977 a radical transformation took place in the pre-existing Legal
In the alternative, the government argued that the circumstances prior to July 5, 1977, "fully attract the doctrine of State necessity and of salus populi est suprema lex." Consequently, the government argued, the Court must accept all actions taken by the martial law administrator as valid and not merely condone the actions, as it did in Asma Jilani. The Court refused to resurrect Dosso, and rejected the government's argument that a political change not contemplated by the Constitution, if successful, is valid. The Court also rejected petitioner's argument that the Court declare General Zia ul-Haq a usurper and judge his regime by the terms dictated in Asma Jilani. Instead, the Court examined the "total milieu" of the circumstances in which the extra-constitutional assumption of power occurred to determine the new regime's validity. The Court concluded that the general's assumption of power constituted "an extra-constitutional step, but obviously dictated by the highest considerations of State necessity and welfare of the people." The Court reasoned that the Asma Jilani doctrine pertaining to usurpers only applies where there is no state necessity for an extra-constitutional assumption of power. The Court held that since state necessity justified General Zia ul-Haq's takeover of political authority, Asma Jilani was not applicable. The Court recognized its own limitation to determine "the factual correctness or otherwise of the several allegations and counter allegations made by the parties against each other." Nevertheless, it took judicial notice of "the broad trends and circumstances" which led to the change of regimes. Soon after the polls the power is to be transferred to the elected representatives of the people. It is true that owing to the necessity of completing the process of accountability of holders of public offices, the holding of elections had to be postponed for the time being but the declared intention of the Chief Martial Law Administrator still remains the same, namely, that he has stepped in for a temporary period and for the limited purpose of arranging free and fair elections so as to enable the country to return to a democratic way of life.

In the presence of these unambiguous declarations, it would be high-
termed the new legal order “a phase of constitutional deviation dictated by necessity.” Having found the doctrine of state necessity applicable, the Court proceeded to limit the doctrine. For the doctrine to apply, the regime must demonstrate four criteria: “(a) An imperative and inevitable necessity or exceptional circumstances; (b) No other remedy is applicable; (c) The measure taken must be proportionate to the necessity; and (d) It must be of a temporary character limited to the duration of the exceptional circumstances.”

The Court held that “the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity.” The Court also asserted its power of judicial review in defiance of the Laws (Continuance in Force) Order, 1977, but dis-

245. Id. at 716. The Court reasoned that

[t]he new Legal Order is only for a temporary period, and for a specified and limited purpose, and does not seek to destroy the old Legal Order but merely to hold certain parts thereof in abeyance or to subject it to certain limitations on the ground of State necessity or on the principle of salus populi suprema lex. . . . [T]he new regime then represents not a new Legal Order, but only a phase of constitutional deviation dictated by necessity. [T]he Court would like to state in clear terms that it has found it possible to validate the extra-Constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional break-down, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the dictates of the Constitution.

Id. at 723.

246. Id. at 710. Having determined that the new legal order met the first requirement, the Court did not even attempt to apply the other three limitations to the facts of the case. It merely concluded: “[O]n facts, of which we have taken judicial notice, namely, that the imposition of Martial Law was impelled by high considerations of State necessity and welfare of the people, the extra-constitutional step taken . . . stands validated in accordance with the doctrine of necessity.” Id. at 712.

247. Id. at 715.

248. The Court reasoned that:

The 1973 Constitution provides for a clear trichotomy of powers between the executive, legislative and judicial organs of the State. However, owing to reasons of necessity, the executive and the legislative power now stands combined in one authority, for the reason that these two organs of the State had lost their constitutional and moral authority . . . but no such considerations arose in regard to the judicial organ of the State. Accordingly, on no principle of necessity could powers of judicial review vested in the superior
missed the petition on the ground that the martial law regime's suspension of fundamental rights had the same effect as the Proclamation of Emergency contemplated in the 1973 Constitution.249

Significantly, the Court held that the martial law regime was entitled to perform all such acts and promulgate legislative measures which fell within the scope of the doctrine of necessity, including the power to amend the Constitution:

(a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it; (b) All acts which tend to advance or promote the good of the people; (c) All acts required to be done for the ordinary orderly running of the State; and (d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution . . . 250

Only parts (c) and (d) fall within the scope of the doctrine of necessity enunciated by the Governor-General's Case.251 The Court drew the part (b) omnibus provision from Asma Jilani, which, in combination with part (a), bestows upon the extra-constitutional regime the license for unfettered legislative power.252

In later years, the military regime amended the Constitution wholesale and cited this judgment as an answer to all resulting charges of abuse of power. Indeed, the Supreme Court retained for the superior courts the jurisdiction to examine all acts and measures of the military regime on the criterion of necessity. But when there appeared a conflict between the regime's and the courts' view of what was necessary, the courts lost. The military regime used the sword supplied by the judiciary to strike at judicial power.

In Nusrat Bhutto, the Court addressed the preventive detention of the deposed prime minister and other leaders of his party under a martial law order. The Court could have disposed of this question on the narrow grounds suggested above in relation to Asma Jilani.253 In the alternative, the Court could have declared the issue of the validity of extra-constitutional power a nonjusticiable

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249. Id. at 716–17.
250. Id. at 716.
253. See supra part IV.C (discussing Asma Jilani).
political question. The Court would have therefore avoided the doctrinal vacillation apparent in its jurisprudence and would have denied the extra-constitutional regime the stamp of judicially pronounced legitimacy and acceptance.

Almost immediately, the opportunity arose to test whether the courts would assert their right to ensure that the military regime's actions remain within the bounds enumerated in Nusrat Bhutto. In Nusrat Bhutto, the Court used as a rationale the new regime's stated objective of providing the earliest possible return to civilian rule by holding free and fair elections under the 1973 Constitution. In contrast, the military regime, by presidential orders, made numerous changes in laws related to the holding of the elections and the structure of the election commission. These orders were challenged on the grounds that they were an impermissible departure from the constitutional provisions and fell outside the scope of the doctrine of necessity. The Supreme Court held that once the Court validated a regime under the state necessity doctrine, the regime's individual actions had to be construed as being necessary, if the actions reasonably fell into one of the categories enumerated in Nusrat Bhutto. Moreover, the Court recognized the executive's broad discretion in this respect. The Court's notion of constructive necessity, moving from validation of the regime to legality of its individual acts, expanded the doctrine of necessity beyond recognition, and destroyed its practical value as a constitutional limitation upon legislative powers of any extra-constitutional regime. The Supreme Court's virtual abdication of its role as the guardian of the Constitution was quickly duplicated by the appellate courts.

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254. These orders included appointment of the high court judge, who was presiding over the murder trial of the deposed prime minister as the chief election commissioner. WASEEM, supra note 4, at 371-72.
256. Id. at 57-59.
257. Validating all the challenged orders, the Court stated: [It must be clearly understood that in judging whether an action taken by the President or the Chief Martial Law Administrator is valid under the law of necessity, the Court is not to sit in appeal over the executive or legislative authority concerned, nor substitute its own discretion for that of the competent authority. The responsibility for the relevant action, its methodology and procedural details, must rest on that authority.]
258. For example, the Quetta High Court, relying on Zulfiqar Ali Bhutto, defined as "necessary" any "such action which in normal course the Government thinks is necessary to take." Khudiadad v. Deputy Martial Law Adm'r, 1978 P.L.D. (Quetta) 177, 185 (Pak.). The Karachi High Court then followed suit: [If a power to amend the Constitution was recognised by the Supreme
Even in the posture of general retreat, the superior courts occasionally asserted their right to determine the scope of the doctrine of necessity. The superior courts claimed exclusive jurisdiction over ordinary criminal cases, military interference in civil disputes was prohibited, and martial law administrators were directed to give reasons for their orders transferring cases from ordinary to military courts and to show how this would serve law and order or public interest. When Article 212-A was inserted in the Constitution by the Constitution (Second Amendment) Order, 1979, to bar the jurisdiction of the superior courts in matters tried by military courts, the Karachi High Court held that pending petitions had not abated.

When the Constitution (Amendment) Order, 1980—which ousted jurisdiction of the superior courts to issue process or make any interim or final order in respect to acts, proceedings, or orders of the military courts or tribunals—amended Article 199, the Karachi High Court upheld the validity of the legislation. While two judges dissented from the holding, even the majority recognized that trichotomy of powers was a basic feature of the Constitution. Nevertheless, the majority held that this trichotomy of powers was not displaced or impaired, because the amendment was of a transitory nature and would become ineffective with the lifting

Court this Court cannot sit as an Appellant Tribunal to find out if the test of necessity or public good or achievement of the objects of Martial Law was fulfilled in accordance with the Supreme Court judgment . . . How, and in what circumstances [the Chief Martial Law Administrator] would utilise that power has to be judged by him and we would reiterate . . . that embarking upon such an enquiry was indeed a perilous path to tread.

Abdullah v. Presiding Officer, Summary Military Court No. 9, 1980 P.L.D. (Kar.) 498, 523 (Pak.). Compare this with the restrictive approach to the doctrine of necessity taken by a court in the wake of the Governor-General's Case: "If any thing was conceded to the Governor-General, it was conceded grudgingly. We do not, therefore, wish that the opinion of the Federal Court should be misunderstood at this critical juncture as conceding anything beyond the starkest, barest necessity, and to the starkest, barest limit we shall confine it." Akram Shah v. The Crown, 1955 P.L.D. (Lah.) 464, 478 (Pak.).

262. See KHAN, supra note 170, at 174 n.238 (providing text of order).
263. Nazir v. Chairman Summary Military Court, 1980 P.L.D. (Kar.) 444, 448-49 (Pak.).
264. See KHAN, supra note 170, at 144 n.180 (providing text of order).
266. Id. at 312 (Mirza & Memon, JJ., dissenting).
267. Id. at 295.
of martial law. The Quetta High Court announced a contrary holding on the question of the validity of amendments to Article 199. The court held that the amendments failed to meet the test of necessity laid down by Nusrat Bhutto, and were therefore invalid. The court specifically remarked that attempts to remove the superior courts' power to determine the necessity of the actions of the martial law regime would signal "the stage where doubts would be cast as to the continued validity of Constitutional deviation." More significantly, the court broadly pronounced that "the interim Government is not entitled to make basic changes in the Constitution so as to alter the fundamental structure of the Constitution.

Besides these periodic assertions of judicial independence and power, as long as the military regime's legitimacy issued from Nusrat Bhutto, its obligation to restore normal constitutional process remained. Encouraged by a favorable international climate, the military regime broke with the minimal limitations upon its legislative powers implied by Nusrat Bhutto and issued the Provisional Constitutional Order, 1981. With this order, the regime dispensed with its earlier pretense that the 1973 Constitution was alive, though in abeyance. The import of Nusrat Bhutto was nullified by the following provision:

Notwithstanding any judgment of any Court, including any judgment in respect of the powers of the courts relating to judicial review, any Court, including the Supreme Court and a High Court, shall not . . . make an order relating to the validity or effect of any Order or Martial Law Regulation made by the Chief Martial Law Administrator or any Martial Law Order made by the Chief Martial Law Administrator or a Martial Law Administrator or of anything done, or action taken, or intended to be done or taken, there-

268. Id. at 312.
269. Suleman v. President Special Military Court, 1980 N.L.R. (Civ. Quetta) 873, 887-90 (Pak.).
270. Id.
271. Id. at 888.
272. Id. at 891 (Chaudhary, J., concurring). Suleman was still pending on appeal before the Supreme Court when the military regime promulgated the Provisional Constitution Order, 1981. Justice M.A. Rashid and Chief Justice Mir Khuda Bakash Marri lost their offices as a consequence of their refusal to take a new oath of office on the provisional Constitution. See Mir Khuda Bakhsh Marri, A Judge May Speak 71-120 (1990).
274. See XIII Constitutions, supra note 30, at 149-58 (providing complete text of order).
This blanket ouster of the courts' jurisdiction over any matter which fell under the various martial law enactments was coupled with the requirement that all superior court judges take a new oath of office. The text of this new oath included fidelity to the Provisional Constitutional Order. This situation, which "sealed the defeat of the courts' constitutional endeavors," had been foreseen by perceptive commentators of judicial practice.

VI. THE FIFTH REPUBLIC, 1985–PRESENT: INSTITUTIONALIZED PRAETORIANISM

A. The Constitutional Order

The regime sanctioned by Nusrat Bhutto on grounds of necessity came to a formal end with the promulgation the Provisional Constitutional Order. The military regime secured the obedience of the judges by yet another oath of office, which included a pledge to abide by the Provisional Constitutional Order. Only selected judges were invited to take the new oath. Under Article 16 of the order, the military regime assumed the power to amend the Constitution at will. For the next four years, the military ruled

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275. Id. at 156.
276. See XIII CONSTITUTIONS, supra note 30, at 157 (providing complete text of new oath).
277. Id.
278. See Conrad, supra note 5, at 124.
279. As K.C. Wheare warned:

[A] suspension of constitutional government is justified on the ground that if it is to exist again in the future, it must be in abeyance for the present. There is nothing theoretically wrong in this. Human beings can understand that it may be necessary for them to submit themselves to supreme authority today, if they are to survive to enjoy freedom tomorrow. The danger in practice is that those to whom supreme authority has been confided may be reluctant to deliver it up. Temporary dictatorship may become an established and permanent tyranny. When the safeguards of constitutional government are delivered up to the rulers, the means of getting them back have been delivered up also.


280. See XIII CONSTITUTIONS, supra note 30, at 157 (providing complete text of new oath).
281. Id. Those judges not invited or who refused to take the new oath, including Chief Justice Anwarul Haq, author of Nusrat Bhutto, automatically lost their office. See Della Denman, Pakistan: Crack Down on the Courts, FAR E. ECON. REV., Apr. 3, 1981, at 14. Commentators have correctly pointed out that "[a]n interference with the composition of the superior courts and judicial independence on this scale is unprecedented in the history of Pakistan." Conrad, supra note 5, at 166.
282. See XIII CONSTITUTIONS, supra note 30, at 156 ("The President as well as
the country with complete immunity from judicial interference or review. This immunity gave the regime time to fashion a new constitutional order for the post-martial law period.

The regime unveiled the new constitutional order on March 2, 1985, when it promulgated the Revival of the Constitution of 1973 Order (Pres. Order No. 14 of 1985). The order effected such extensive amendments in the 1973 Constitution that it was the same constitution in name only. The regime deemed that a referendum held on December 19, 1984, furnished it with the legitimacy to redesign the constitutional order. Partyless nonpolitical elections were held for the two houses of Parliament. The Revival of the Constitution Order precipitated the Constitutional (Eighth Amend-

283. Fauji Found. v. Rahman, 1983 P.L.D. (S.C.) 457 (Pak.), is the only significant constitutional judgment of this period. The Court expressly refused to adopt the basic structure/essential features test fashioned by the Indian Supreme Court and held that an amendment to the Constitution “is a political question and a matter of policy for the Parliament.” Id. at 627. The Court further restricted the scope of judicial review by stating that “the scope of judicial review... does not extend to prying into the affairs of the Legislature.” Id. at 546. It also held that, “in our constitutional system though there is the trichotomy of powers... it is a misnomer to say that the separation of powers is an accepted feature of our Constitution.” Id. at 628. This judgment is viewed as being “instrumental in closing all doors of judicial review.” SHAMEEM HUSSAIN KADRI, JUDGES AND POLITICS 46 (2d ed. 1990).

284. For detailed discussion of the new constitutional order fashioned by the military and the political context in which this was done, see WASEEM, supra note 4, at 405-17; William L. Richter, Pakistan in 1985: Testing Time for the New Order, 26 ASIAN SURV. 207, 207-14 (1986) [hereinafter Testing Time]; William L. Richter, Pakistan: Out of the Praetorian Labyrinth, 85 CURRENT HIST. 113, 113-16 (1986); and Hasan-Askari Rizvi, The Civilianization of Military Rule in Pakistan, 26 ASIAN SURV. 1067, 1067-81 (1986).

285. See XIII CONSTITUTIONS, supra note 30, at 195-222 (providing complete text of order).

286. Testing Time, supra note 284, at 209-10. On December 1, 1984, the regime issued the Referendum Order, 1984, providing for a referendum on the question: [W]hether the people of Pakistan endorse the process initiated by General Mohammad Zia-ul-Haq, the President of Pakistan for bringing the laws of Pakistan in conformity with the injunctions [of Islam] as laid down in the Holy Quran and Sunnah of the Holy Prophet (peace be on him), and for the preservation of the ideology of Pakistan for the continuation and consolidation of that process and for the smooth and orderly transfer of power to the elected representatives of the people.

XIII CONSTITUTIONS, supra note 30, at 190. The order also provided that a consequence of the positive result of the referendum would be that General Zia ul-Haq would be deemed to have been duly elected president of Pakistan for a term of five years. Id. at 64.

With the lifting of martial law, the country is technically governed under the 1973 Constitution. But the Eighth Amendment’s fundamental changes in the structure of that Constitution warrant designating the new order as a new republic. The changes involved the parliamentary system, the federal structure, fundamental rights, the independence of the judiciary, and the role of judicial review. As General Zia ul-Haq observed, “[the new order] is no rival or adversary of the outgoing system. It is, in fact, the extension of the system in existence for the past several years.”

The Eighth Amendment fundamentally altered the basic structure and essential features of the 1973 Constitution to bring it in line with the military's preferences. It created a strong executive, a weak legislature, a docile judiciary, and diminished provincial autonomy. The executive authority of the federation was now vested in the president instead of the prime minister. The president was given power to appoint the prime minister, provincial governors, judges of the Supreme Court and high courts, and chiefs of the armed forces. He could also dissolve the National Assembly at his discretion. Moreover, the validity of anything done by the president in his discretion could not be called into question. The president's power to issue ordinances when the National Assembly was not in session was enlarged to include matters falling within the ambit of provincial legislatures. Provincial chief ministers were to be invitees of the provincial governors, who, in turn, were appointed by the president. The president could transfer a judge of a high court to another high court or any other assignment, and a judge who did not accept such transfer would lose his of-

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288. *Id.* at 209.
292. *Id.* at 1067 (quoting General Zia ul-Haq).
295. *Id.* arts. 48(2), 58(2).
296. *Id.* art. 89(1).
297. *Id.* arts. 101, 130.
298. *Id.* art. 200(4).
The only provision of the Revival of the Constitution of 1973 Order, 1985, that did not form part of the Eighth Amendment was the one designed to permanently institutionalize the military's supervision of the country's governance by establishing a National Security Council.

B. The Constitutional Crisis

A hand-picked prime minister, a nonpolitically elected and initially docile legislature, and a concentration of power in the hands of the president did not ensure stability for long. With the lifting of martial law, the political process assumed its own dynamic, and the news media sought independence in reviewing the governing process. Before long, conflicts appeared between the president and the prime minister. First, the prime minister encouraged the emergence of parliamentary groupings reflecting different political affiliations, in defiance of the president's desire to keep the legislature nonpolitical. Then, contrary to the president's desire, the prime minister was unwilling to aid the passage of a bill introduced in Parliament which would have obligated all courts to decide all suits in accordance with Islamic Shariah.

299. Id. art. 200(1).

300. The Revival of the Constitution of 1973 Order, 1985, provided: "There shall be a National Security Council to make recommendations relating to the issue of a Proclamation of Emergency under Article 232, the security of Pakistan and any other matter of national importance that may be referred to it by the President in consultation with the Prime Minister." See XIII CONSTITUTIONS, supra note 30, at 212 (providing text of order). Under this provision, the chairman, joint chiefs of staff, and chiefs of staff of the army, air force, and navy were to be members of this council, along with the president, the prime minister, and the chief ministers of provinces. Id.


303. For examples of the media's assertion of independence, see Maleeha Lodhi, Towards Political Fragmentation, THE MUSLIM (ISLAMABAD), Jan. 8, 1987; and Abbas Rashid, Lahore Seminar Calls for Change in Afghan Policy, THE MUSLIM (ISLAMABAD), Jan. 5, 1987.


305. Id. at 144.

Finally, confronted with budgetary constraints, the prime minister expressed his desire to reduce defense expenditures. On May 29, 1988, the president issued an order under Article 58(2)(b) of the Constitution dissolving the National Assembly and the cabinet. Provincial governors followed suit and dissolved the provincial assemblies and cabinets.

C. The Judicial Response: Unfettered Executive Discretion

The Presidential Order of May 29 was challenged in *Pakistan v. Saiffullah Khan*. The Supreme Court, after reviewing the legislative history, held "[t]he discretion conferred by Article 58(2)(b) of the Constitution on the President cannot . . . be regarded to be an absolute one, but is to be deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it." After refusing to suspend judicial review on the ground that political questions were involved, the Court held the dissolution unconstitutional:

"Grounds stated in the Order for dissolution, were . . . extraneous having no nexus with the preconditions prescribed by . . . the Constitution empowering the President to dissolve the National Assembly in his discretion . . . . Hence, in the eyes of law, no basis existed on which the President could form the opinion "that a situation had arisen in which the Government of Pakistan cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.""

310. *Id.* at 189. The Court defined the scope of the president's "discretion" as follows:

> According to the rules of reason and justice, not private opinion, according to law and not humor, it is to be not arbitrary, vague and fanciful, but legal and regular, to be and for substantial reasons and must be exercised within the limits to which an honest man competent in the discharge of his office ought to confine himself i.e. within the limits and for the objects intended by the Legislature.

*Id.* (citations omitted). The Court held that before the president may exercise his discretionary power he must form a valid "opinion" about the situation described under Article 58(2)(b). *Id.* at 190. "[I]f it can be shown that no grounds existed on the basis of which an honest opinion could be formed, the exercise of the power would be unconstitutional and open to correction through judicial review." *Id.* (citations omitted).
311. *Id.*
312. *Id.* at 195.
313. *Id.* at 190.
The Court, however, declined the appellant's request for restoration of the National Assembly and reinstatement of the federal cabinet, on the grounds that an election campaign was afoot for new elections scheduled for November 16 and 19, 1988. The Court added, however, that in order "to see that elections are actually held on these dates, the said dates [are] made a binding part of the Court's judgment."314

It should be noted that by the time Saifullah Khan was decided, the president, along with a number of senior generals, had died in an airplane crash on August 17, 1988. The parallel with Asma Jilani, which declared General Yahya Khan to be a usurper only after his regime had fallen, is noteworthy.315 The courts of Pakistan have yet to dismount a military ruler still in the saddle.

Within two years after Saifullah Khan, the courts again confronted the question of discretionary exercise of presidential power. The political party whose government the military had overthrown in 1977 had won a majority in the National Assembly as a result of the November 1988 elections. The leader of the party was invited to become the prime minister, with the clear understanding that defense and foreign policy would remain under the president's control.316 Conflicts between the prime minister and the president soon emerged.317 These conflicts centered around the prime minister's declared aim to repeal the Eighth Amendment, her appointments of senior military commanders, and the use of the military to contain ethnic strife in the province of Sind.318

314. Id. at 195. Justice Shafiur Rahman, in his concurring opinion, supported the non-reinstatement decision on the ground that the Assembly had been chosen in the partyless elections of 1985:

Partyless elections are not in consonance with the Scheme of our Constitution and when this Court is possessed of a discretion, or a choice whether to revive, restore or perpetuate by resuscitating such Assemblies, the Court will stand for constitutionalism rather than departures and deviations from it and refuse to restore them.

Id. at 220. The Court's decision may have been influenced by a secret message from the chief of the army advising the Court against restoring the Parliament and reinstating the cabinet. See Candor and Contempt: Former General Starts a Political Row, FAR E. ECON. REV., Feb. 25, 1993, at 18.


317. See, e.g., Salamat Ali, Military Misgivings, FAR E. ECON. REV., Aug. 9, 1990, at 17, 17-18 ("[T]he immediate cause of the political speculation is ethnic strife in Sindh.").

318. See Ziring, supra note 316, at 113-22.
On August 6, 1990, the president issued an order under Article 58(2)(b) whereby he dissolved the National Assembly and dismissed the prime minister and her cabinet. The order was challenged in the Lahore High Court as being an unconstitutional abuse of power. The court, relying upon *Saifullah Khan*, reaffirmed the jurisdiction of the superior courts to examine the constitutionality of such orders, but carefully demarcated the scope of review. The court implied a two-prong test to examine the exercise of the president's discretion under Article 58(2)(b). The test was comprised of first, an objective test to determine whether the opinion about ungovernability was formed on the basis of material which could lead a reasonable person to form such opinion; and second, a subjective test to determine whether the opinion was an honest one formed in good faith.

Mindful of the holding and language of *Saifullah Khan*, the dissolution order specified thirteen reasons for the exercise of discretion by the president. Under the objective prong of its test,

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321. *Id.* at 138. As the court stated:

> The power of judicial review cannot be over-stated so as to make this Court an appellate forum against the order passed by the competent authority under the Constitution viz. the President in the instant case, so as to substitute his opinion by the opinion of the Court. The scope and extent of judicial review . . . would only be to the extent that the Court has to find out whether the opinion formed by the President is honest and is such which could be formed by a reasonable person keeping in view the attendant circumstances. If there be some material on the basis of which an opinion could be reasonably formed by the President, then the Court cannot interfere therewith merely because another view may be possible.

*Id.*

322. *Id.* at 103–04, 148. The court appeared to contradict itself elsewhere in the opinion, when it seemed to both champion the reasonable person standard and find application of the standard a nonjusticiable question. The court stated: “[T]he President applied his mind to the facts and accompanying events and recorded reasons in the self-contained Order. The sufficiency and adequacy of the reasons are not justiciable.” *Id.* at 110 (emphasis added).

323. *See supra* notes 309–14 and accompanying text (discussing *Saifullah Khan*).

324. One of the reasons given was that “the Superior Judiciary has been publicly ridiculed and its integrity attacked and attempts made to impair its independence.” *Tariq Rahim* 1991 P.L.D. (Lah.), at 94. The court found this to be an objectively valid reason for issuing the order because “[t]he material on the record further shows that the former Federal Government ridiculed the Judiciary, for instance, it allowed holding of a seminar where the verdict of the Supreme Court in a decided case, was publicly ridiculed and termed as a 'judicial murder'.” *Id.* at 112–13. The seminar to which the court referred analyzed the Supreme Court's 1979 decision to deny the
the court examined all these reasons on the basis of statements made in court, affidavits, newspaper accounts, and interdepartmental communications. The court then concluded that "the President had rightly formed an opinion, that a situation had arisen in which the Government of Federation could not be carried on in accordance with the provisions of [the] Constitution." \(^{325}\) Additionally, "the grounds which weighed with the President for passing the impugned Order had direct nexus with the preconditions prescribed by Article 58(2)(b) of the Constitution." \(^{326}\)

As for the subjective prong of the test, the court simply declared that the president's action was not "tainted with malice." \(^{327}\) Curiously, the only support the Court offered for this conclusion was [the] well-settled principle of law that before striking down an order passed by a public authority the Court must explore every possible explanation for its validity and examine the entire field of powers conferred on the authority by which the impugned order has been passed and all efforts must be made to uphold it. \(^{328}\)

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\(^{325}\) Tariq Rahim, 1991 P.L.D. (Lah.) at 110. The court admitted into evidence newspaper accounts and inter-departmental communications concerning the events leading up to the order. Id. at 105.

\(^{326}\) Id. at 116.

\(^{327}\) Id. at 107.

\(^{328}\) Id. at 147 (citing Lahore Improvement Trust v. Evacuee Property, 1971 P.L.D. (S.C.) 811, 837 (Pak.) and East Pakistan R.R. v. Sardar, 1966 P.L.D. (S.C.) 509, 513 (Pak.)). Both Lahore and Sardar involved challenges against administrative actions of governmental agencies, a factual situation far removed from a determination of inter se powers of separate branches of government.

The Supreme Court later used this "well-settled principle" of judicial deference toward public authorities in a related case. See Sherpao v. Governor N.W.F.P., 1990 P.L.D. (Pesh.) 192 (Pak.). Following dissolution of the National Assembly, the governor of the North West Frontier Province announced the dissolution of the Provincial Assembly and the dismissal of the provincial cabinet. The governor exercised the power conferred on him by Article 112(2)(b). A notification to the effect was issued August 7, 1990, under the signature of the Additional Secretary of the Law Department. The dissolution and dismissal were challenged in the Peshawar High Court, which held these actions unconstitutional under the test of validity laid down in Saifullah Khan. Id. at 211. Additionally, the court held the governor's actions suffered from fatal procedural defects. Id. On September 16, the governor formally corrected the dissolution/dismissal notification of August 6, 1990. The Corrigendum listed the factual grounds upon which the governor had based his opinion that the province could not be governed in accordance with the provisions of the Constitution, and removed the procedural defects. On appeal, the Supreme Court reversed the Peshawar High Court. See Pakistan v. Sherpao, 1992 P.L.D. (S.C.) 723, 749 (Pak.). The Supreme Court held that the grounds listed in the notification, by virtue of the Corrigendum, passed the test of validity set down by Saifullah Khan. Id. at 746-47. The Supreme Court then expressed disapproval of the high court's examination of procedural defects; such an examination, in the Court's view, violated the principle of
D. Is the Fifth Republic Legal?

Over the last few years, the courts in Pakistan have had occasion to address the validity of the Eighth Amendment, which contains the constitutional framework of the praetorian Fifth Republic. The Eighth Amendment incorporated Article 270-A into the Constitution. Article 270-A provides that all legislative measures made between July 5, 1977, and December 31, 1985, are valid and immune from challenge in any court on any ground whatsoever, notwithstanding any judgment of any court or anything contained in the Constitution. Thus, protection and immunity were extended to orders made and acts done, or purported to have been made or done, in exercise of powers derived from martial law enactments. Additionally, all orders made, acts done, and sentences passed, or purported to have been made or done in the exercise of such legislation, were deemed to be and always to have been valid and could not be called into question in any court on any grounds whatsoever.

Article 270-A was soon challenged. In Mustafa Khar v. Pakistan, the Lahore High Court held that while laws protected under the Eighth Amendment were immune, superior courts could judicial deference toward public authorities. Id. at 749.

The praetorian nature of the Fifth Republic is reflected in comments such as: “[The army chief along with the president and the prime minister forms the country’s ruling triumvirate,” Salamat Ali, Army Chief’s Tough Task, FAR E. ECON. REV., Jan. 28, 1993, at 17; and “the army chief is the most important member of the informal troika that rules the nation,” Salamat Ali, Mortal Blow, FAR E. ECON. REV., Jan. 21, 1993, at 19. The praetorian nature of the Fifth Republic has been underscored by the most recent constitutional crisis. In early 1993, the president appointed a new chief of staff of the army without consulting the prime minister. Salamat Ali, The Battle of Wits, FAR E. ECON. REV., Mar. 18, 1993, at 18–19. The prime minister reacted by taking steps aimed at repeal of the Eighth Amendment, the foundation of the Fifth Republic. Id. The president responded on April 18, 1993, when he dismissed the prime minister and dissolved the Parliament. Edward A. Gargan, President of Pakistan Dismisses Premier and Dissolves Parliament, N.Y. TIMES, Apr. 19, 1993, at A3. On May 26, 1993, the Supreme Court held the president’s actions unconstitutional and ordered the National Assembly and the dismissed government restored. Edward A. Gargan, Pakistan Chief’s Dismissal is Overturned, N.Y. TIMES, May 27, 1993, at A3. This decision failed to resolve the political crisis and the military forced both the president and the prime minister to resign on July 18, 1993. See Edward A. Gargan, Pakistan Government Collapses; Elections are Called, N.Y. TIMES, July 19, 1993, at A3. A “non-political” caretaker government was installed and general elections called for October 1993. Id.

329. The praetorian nature of the Fifth Republic is reflected in comments such as: “The army chief along with the president and the prime minister forms the country’s ruling triumvirate,” Salamat Ali, Army Chief’s Tough Task, FAR E. ECON. REV., Jan. 28, 1993, at 17; and “the army chief is the most important member of the informal troika that rules the nation,” Salamat Ali, Mortal Blow, FAR E. ECON. REV., Jan. 21, 1993, at 19. The praetorian nature of the Fifth Republic has been underscored by the most recent constitutional crisis. In early 1993, the president appointed a new chief of staff of the army without consulting the prime minister. Salamat Ali, The Battle of Wits, FAR E. ECON. REV., Mar. 18, 1993, at 18–19. The prime minister reacted by taking steps aimed at repeal of the Eighth Amendment, the foundation of the Fifth Republic. Id. The president responded on April 18, 1993, when he dismissed the prime minister and dissolved the Parliament. Edward A. Gargan, President of Pakistan Dismisses Premier and Dissolves Parliament, N.Y. TIMES, Apr. 19, 1993, at A3. On May 26, 1993, the Supreme Court held the president’s actions unconstitutional and ordered the National Assembly and the dismissed government restored. Edward A. Gargan, Pakistan Chief’s Dismissal is Overturned, N.Y. TIMES, May 27, 1993, at A3. This decision failed to resolve the political crisis and the military forced both the president and the prime minister to resign on July 18, 1993. See Edward A. Gargan, Pakistan Government Collapses; Elections are Called, N.Y. TIMES, July 19, 1993, at A3. A “non-political” caretaker government was installed and general elections called for October 1993. Id.


331. Id. art. 270-A(2).

332. Id.

333. 1988 P.L.D. (Lah.) 49 (Pak.).
review acts, actions, and proceedings for errors of jurisdiction, for *coram non judice*, or for taint with malice in law as distinguished from malice in fact.334

The Eighth Amendment had not merely incorporated Article 270-A into the Constitution, it had also radically altered the whole constitutional framework.335 *Mustafa Khar* presented the court with the opportunity to review the validity of the amendment. Relying upon two judgments of the Supreme Court of India, the petitioners argued that the Eighth Amendment was *ultra vires* because it altered the basic structure and essential features of the Constitution.336 In deciding the case, the court first looked at the text of Part XI of the Constitution, and noted that Article 238 gave Parliament the power to amend the Constitution subject only to the procedure laid down in Article 239. The court then focused on clauses (5) and (6) of Article 239, which affirmed Parliament's unlimited power to amend and oust the jurisdiction of the courts from the subject.337 The court acknowledged that clauses (5) and (6) of Article 239 were introduced by the Constitution (Second Amendment) (Pres. Order No. 20 of 1985), one of the military regime's presidential orders promulgated during martial law. But the court did not even attempt to test the validity of this legislation under *Nusrat Bhutto*. The court refused to adopt the basic structure/essential features test fashioned by the Indian Supreme Court in *Bharati* and its progeny338 on the ground that

there is no need to determine as to whether or not these amendments have the effect of altering fundamental character of the Constitution. . . . [T]he consistent view of our Supreme Court is that exercise of constituent power unduly or against the wishes of the people, is a political question which cannot be subjected to judicial scrutiny.339

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334. Id. at 65, 143.
335. See supra notes 293–300 and accompanying text (discussing changes in Constitution introduced by Eighth Amendment).
337. Mustafa Khar, 1988 P.L.D. (Lah.) at 116. Specifically, Article 239(5) provides: "No amendment of the Constitution shall be called in question in any Court on any ground whatsoever." Pak. Const. of 1973, art. 239(5) (1985). Article 239(6) provides: "For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the (Parliament) to amend any of the provisions of the Constitution." Id. art. 239(6).
The court’s reliance on the people’s “right to correct” ultra vires legislation is remarkable given that (a) the democratic process enshrined in the 1973 Constitution was in abeyance; (b) clauses (5) and (6) of Article 239 (which provided immunity from judicial review to amendments) were brought into existence by a presidential order of the martial law regime; and (c) the Eighth Amendment bill was passed by a Parliament not elected under the framework furnished by the 1973 Constitution.

A related issue before the court was a challenge to Parliament’s competence to pass the Eighth Amendment Act, which incorporated Article 270-A into the Constitution. The petitioner argued that the present Parliament had been installed, not under the terms of the 1973 Constitution, but through a process of nonparty elections. Under this nonparty process, political campaigning was restricted, discussion of fundamental issues was prohibited, candidates were arbitrarily disqualified, and public meetings, canvassing or campaigning were outlawed. Consequently, petitioner argued, Parliament did not have the mandate of the people to amend the Constitution or otherwise exercise authority in the nature of constituent power. In response, the court simply referred to Article 270-B of the Constitution, another insertion by the Eighth Amendment, which provided: “[N]otwithstanding anything contained in the Constitution, the elections held under the Houses of (Parliament) and Provincial Assemblies (Elections) Order, 1977 to the Houses and the Provincial Assemblies shall be deemed to have been held under the Constitution and shall have effect accordingly.”

The Supreme Court consolidated and ruled on all the cases dealing with Article 270-A in Pakistan v. Mustafa Khar. The Court’s language again underscored a narrow construction of legislation aimed at ouster of judicial review. The Court invoked the

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341. See Nusrat Bhutto v. Chief of Army Staff, 1977 P.L.D. (S.C.) 657, 672–73 (Pak.). While upholding the imposition of martial law, the Nusrat Bhutto Court called upon the regime to hold free and fair elections in terms of the 1973 Constitution at the earliest possible date. See supra notes 241–52 and accompanying text (discussing Court’s validation of General Zia ul-Haq’s extra-constitutional actions).
343. Id. at 92.
344. Id. at 112–13.
346. The Court took the view that “there is a presumption against ouster of jurisdiction of the Superior Courts and any law which has the effect of denying access to them has to be narrowly construed for the reason that these are the fora created by the people for obtaining relief from oppression and redress for the infringement of their right.” Id. at 44.
“constitutional deviation” doctrine of Nusrat Bhutto, and held that the enactment’s purpose was “merely to afford protection to the dispensation which came into existence as a result of ‘constitutional deviation’; it is difficult to interpret it as conferring validity and immunity upon such acts, actions and proceedings as were illegal or indefensible even under that dispensation.”

The Court then noted that the Lahore High Court confirmed both the validity the Eighth Amendment and the competency of Parliament to enact such an amendment. However, the Court refused to discuss these issues, thus implicitly adopting the Lahore High Court’s position as dicta. It is unfortunate that the Supreme Court shied away from squarely confronting the issue of the legality of the Fifth Republic. If and when it chooses to do so, even the Court’s restrictive scope of judicial review and misapplication of the political question doctrine enunciated in Zia-ur-Rahman will not save the Eighth Amendment. Zia-ur-Rahman held that the only limitation on Parliament’s power of constitutional legislation is the procedure laid out for the exercise of such power. In addition, constitutional legislation that goes beyond the mandate of the electorate presents a nonjusticiable political question that only the people “have the right to correct.”

Nothing is more fundamental to a legislature than the procedure of its establishment. The Parliament which adopted the Eighth Amendment came into existence in blatant disregard of the election procedures prescribed by the 1973 Constitution. The Saifullah Khan Court’s refusal to reinstate the National Assembly after declaring its dissolution invalid was expressly based on the fact that the Assembly had been elected through partyless nonpolitical elections. Later, in Benazir Bhutto v. Pakistan, the Supreme Court expressly ruled that partyless elections were unconstitutional. The political question proposition of Zia-ur-Rahman arises...

347. Id. at 54.
348. Id. at 45.
349. See Zia-ur-Rahman, 1973 P.L.D. (S.C.) at 76–77; see also supra note 175 and accompanying text (discussing justiciability of constituent body’s disregard of constitutional mandate).
351. See supra note 314 and accompanying text (discussing Court’s decision not to reinstate National Assembly in Saifullah Khan).
353. Id. at 540. Since the institution of martial law in July 1977, significant amendments have been made to the Political Parties Act, 1962. The amendments were instituted through Ordinance No. XLI of 1978, Ordinance No. XLII of 1979, Ordinance No. LIII of 1979, and Act XXII of 1985. For the texts of the amendments, see id. at 465–74. See also KHAN, supra note 29, at 323–41 (providing complete text...
from the assumption that when electoral processes envisaged by the Constitution are in place, the body politic has the opportunity to check Parliament's power of constitutional legislation. Consequently, because the parliament which adopted the Eighth Amendment was the product of an unconstitutional electoral process, and because the body politic did not have an opportunity to check that parliament through normal electoral process, the judiciary could review the amendment. The standard of review, in turn, can be furnished by the basic structure/essential features test. At the first opportunity, the Supreme Court should hold the Eighth Amendment invalid because it destroyed the basic structure and essential features of the 1973 Constitution. Such a course of action, by restoring the 1973 Constitution as the only true social contract of the people of Pakistan, would help to rehabilitate the prestige and integrity of the courts, would roll back institutionalized praetorianism, and would move the country towards stable rule of law.

VII. ROADS NOT TAKEN: APPROPRIATE JUDICIAL RESPONSES TO CONSTITUTIONAL BREAKDOWNS

In this Article, I have taken the position that each time the courts of Pakistan were confronted with the question of the validity of extra-constitutional power, they should have avoided the constitutional issue by deciding the cases on narrow grounds. Where this was not possible, the courts should have declared the issue a nonjusticiable political question. The first part of this section will examine the rationale of the political question doctrine to demonstrate why the courts of Pakistan should have used it to respond to extra-constitutional usurrpations of power. The second part of this section critically examines the discontinuity-of-law posture adopted by the Pakistani courts when confronted with constitutional ruptures. My position is that while extra-constitutional usurpation of power is a nonjusticiable political question, subsequent actions of an extra-constitutional regime should be reviewed by the courts. A continuity-of-law approach provides a more coherent and consistent yardstick of judicial review in this context.

of Political Parties Act). The amendments, along with the Freedom of Association Order, 1978 (President's Order No. 20 of 1978), were challenged as unreasonable restraints on the functioning of political parties, thus violating the fundamental right of association provided by the Constitution. Benazir Bhutto, 1988 P.L.D. (S.C.) at 474–75. The Supreme Court found the amendments unconstitutional because so many provisions unreasonably burdened political parties. Id. at 540–41. The Court found that the existence and free functioning of political parties were indispensable for a parliamentary democracy. Id. at 515–16.
A. The Political Question Doctrine and the Validity of Extra-constitutional Usurpation

The United States Supreme Court provided a succinct enunciation of the political question doctrine in Baker v. Carr. Many have cautioned against lightly accepting the idea that under a written constitution, any parts or provisions of the constitution are not justiciable. Others have pointed to the realism and functionality of the doctrine. In ascertaining the doctrine's suitability to the constitutional crises of Pakistan, Alexander Bickel's view is very useful. According to Bickel:

Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally, . . . the inner vulnera-

354. 369 U.S. 186 (1962). In Baker, the Court held:
Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The political question doctrine was first enunciated in Luther v. Borden, 48 U.S. (7 How.) 1, 39–55 (1849).


bility, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.\textsuperscript{357}

As acknowledged in \textit{Nusrat Bhutto}, for example, there is the problem of ascertaining facts, compounded by the lack of judicially discoverable and manageable standards. All extra-constitutional regimes in Pakistan claimed to have assumed power because the replaced order had degenerated into chaos and threatened the security and stability of the state. In \textit{Nusrat Bhutto} the Court indulged in a laborious discussion of this issue but, lacking any standards and comprehensive evidence, adopted the new regime’s pronouncements at face value.\textsuperscript{358} Unacceptable chaos for one may be the normal tumult of democratic political process for another. Determination of facts in the midst of political struggles and characterization of sociopolitical situations uninformed by opinion of disinterested and trained observers is a hazardous task in any circumstance. This endeavor becomes inexcusable when a court ventures along this path knowing that its “factual” pronouncements are pregnant with far-reaching political implications. The problem is compounded because any “factual” finding of acceptability of the extra-constitutional order is used to equate efficacy with legitimacy. To designate as acceptance the palpable silence that descends on the society for a few days when troops in full battle gear are deployed at every intersection is a grave error. Furthermore, a sudden change of facts in the midst of political instability can embarrass a court. This occurred in Pakistan when the regime that was legitimized based upon efficacy in \textit{Dosso} was itself overthrown within one day of the Court’s pronouncement.\textsuperscript{359}

There is also the problem that determining the validity of extra-constitutional regimes is an issue intractable to principled resolution. Even a cursory survey of the leading cases on the issue shows that while the Pakistan Supreme Court validated most extra-constitutio

\begin{itemize}
  \item \textsuperscript{357} See \textit{Bickel}, supra note 356, at 184.
  \item \textsuperscript{358} Nusrat Bhutto v. Chief Army Staff, 1977 P.L.D. (S.C.) 657, 693–703 (Pak.). The \textit{Nusrat Bhutto} Court admitted that it was in no position to determine “the factual correctness or otherwise of the several allegations and counter allegations made by the parties against each other.” \textit{Id.} at 693. Nevertheless, it relied upon “the broad trends and circumstances” which led to the replacement of the constitutional government. \textit{Id.}
  \item \textsuperscript{359} See \textit{Khan}, supra note 29, at 75 (stating that President Iskander Mirza stepped down after discussion with three senior generals). This has led one perceptive commentator to remark, “[w]hat appears debatable in \textit{Dosso} are the timing and some peculiar circumstances surrounding that judgment; more precisely, the question as to what is implied by ‘success’ or ‘efficacy’ of the revolutionary change, and whether the Court helped to establish, rather than merely recognize an established revolutionary order.” Conrad, supra note 5, at 127.
\end{itemize}
constitutional arrangements, these decisions demonstrate a singular lack of consistency of rationale. At various junctures, the Supreme Court adopted and rejected the Kelsenian theory of revolutionary validity and gave varied content to the theory of implied mandate and the doctrine of state necessity. Utterly lacking in legal coherence and any measure of continuity, the contradictory pronouncements rendered the Court vulnerable to the charge of political expediency. Even if the earlier cases are considered excursions into unchartered waters, by the time it decided Nusrat Bhutto, the Court was well aware, as its own laborious review of the case law and legal doctrines shows, that there was no room for doctrinal continuity or consistency of principle. Such a situation warranted a declaration of nonjusticiability, instead of adding new twists to the doctrinal maze.

Finally, there is the problem that the sheer momentousness of the issue of the validity of extra-constitutional regimes may unbalance judicial judgment. Constitutional ruptures and extra-constitutional assumptions of power are highly charged and volatile social events often accompanied by the risk or actuality of loss of life, rebellion, and civil strife. Such circumstances are ill-suited for considered and coolheaded judicial inquiry and pronouncement.

There are two other fundamental justifications for holding that the question of the annulment of a constitution is not justiciable. First, courts, being products of a constitution, cannot logically determine that the constitution under which they were created has disappeared; nor can they logically continue, after dissolution of the constitution, to enforce some other constitutional order. Second, the success of a usurpation depends upon its effectiveness. But effectiveness is conditioned not by law, but by the ability of the usurper regime to compel acceptance of, and obedience to, its authority. Not being governed by law, the effectiveness of a usurper regime is a political, nonjusticiable, question. Consequently, the Pakistani courts should recognize that "all legal questions are political, but some political questions should not be legal."

There remains the issue of whether Pakistan's judiciary could have diverted constitutional developments in the country in differ-

ent directions by adopting alternative approaches to the question of the validity and scope of extra-constitutional assumptions of power. After all, "[a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." The ability to enforce its judgments is critical to the very identity and nature of a judiciary. "If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then . . . all the attributes of judicial power are plainly present." Would the military regimes have abided by contrary rulings in Dosso and Nusrat Bhutto? The answer to this question must be speculative. However, given the importance of the issue, any doubts about the ability of the judiciary to enforce its decisions in revolutionary situations makes invoking the political question doctrine more desireable. Invoking the political question doctrine signals to the populace that those in power have gone above the law and refers the issue back to the body politic, where it belongs.

B. Continuity of Laws and the Scope of Extra-Constitutional Legislative Power

The Pakistan Supreme Court's various responses to extra-constitutional assumptions of power, while premised on varied theoretical and doctrinal approaches, have had one uniform implication: all these responses have adopted the discontinuity-of-law approach following constitutional ruptures, leaving the judiciary without any pre-rupture yardsticks by which to measure the postrupture order. Dosso, along with its progeny of African cases, explicitly adopted the Kelsenian view of revolutionary legality and discontinuity-of-law. While in theory Nusrat Bhutto proclaimed the survival of the pre-rupture constitution, its broadening of the scope of the doctrine of state necessity, and the Court's deference to the discretion of the extra-constitutional regime amounted to an implicit adoption of the discontinuity-of-law view. In its basic form, this view postulates that any extra-constitutional change in the constitution

365. See supra part III.C (discussing Courts' reasons for adoption of Kelsenian theory).
366. See supra note 247 and accompanying text (discussing Court's pronouncement that 1973 Constitution remained in effect).
367. See supra notes 250–58 and accompanying text (discussing Court's validation of martial law regime's amendment of 1973 Constitution).
of a state is a revolution, and that all revolutions overturn the entire legal order, replacing it with a new one.

By adopting the theory of revolutionary legality and discontinuity-of-law, the judiciary wittingly or unwittingly becomes party to its own powerlessness. The view has been rightly characterized as being "not only mistaken, but . . . it also arbitrarily and dangerously limits the scope of juristic thought." This view, as rooted in the positivist theories of law, has been adequately critiqued by others and thus need not detain us. I will instead focus on how the Supreme Court of Pakistan could have and still can exercise its power of judicial review to examine the conduct and powers of any post-rupture extra-constitutional regime.

The constitutional ruptures in Pakistan, like such ruptures elsewhere, did not aim at any fundamental reordering of the society; that is, reordering which may warrant a fundamental change in the entire legal system. In fact, among the first actions of the extra-constitutional regimes in 1958, 1969, and 1977 was to issue an order proclaiming the continuation in force of all preexisting laws. The only laws not retained were those related to the functioning of political organs of the state, which were directly affected by the extra-constitutional assumption of power. In light of this, adherence to a theory of revolutionary discontinuity-of-law simply perpetuates a legal fiction suitable only for abdication of judicial responsibility and cessation of legal inquiry. In Nusrat Bhutto, the Court itself enunciated a distinction between constitutional rupture and discontinuity-of-law, but then made limited use of the distinction in its

368. Eekelaar, supra note 92, at 23; see also J.M. Finnis, Revolutions and Continuity of Law, in OXFORD ESSAYS IN JURISPRUDENCE 75 (A.W.B. Simpson ed., 2d ser. 1973) ("A revolution is neither a necessary nor a sufficient condition for anything that should be described as a change in the identity of the state or the legal system.").


370. As the Court stated:
substantive holding.

Another argument, rooted in the discontinuity-of-law theory, is that courts, being the creatures of the constitution in force, cannot extend their inquiry beyond that source of their jurisdiction to question its validity. This argument, while structurally elegant, suppresses many relevant questions rather than accounting for them. Where the constitutional rupture does not directly affect the jurisdiction of the courts, or where continuation of the nature and scope of jurisdiction is confirmed, the courts remain creatures of the prerupture legal order. Accordingly, any formal "continuance in force" provision, being merely declaratory in character, does not change the identity or jurisdiction of the courts. Even where the post-rupture regime reconstitutes the courts, requires new oaths, and alters their composition and jurisdiction, the courts are not necessarily rendered impotent to review conduct and powers of the post-constitutional regime. In these situations, the important distinction between judicial power and jurisdiction, as articulated in Zia-ur-Rahman, becomes relevant. The courts' very existence

[If it is assumed that the old Constitution has been completely suppressed or destroyed, it does not follow that all the judicial concepts and notions of morality and justice have also been destroyed, simply for the reason that the new Legal Order does not mention anything about them. On the contrary, I find that the Laws (Continuation in Force) Order makes it clear that, subject to certain limitations, Pakistan is to be governed as nearly as may be in accordance with the 1973 Constitution, and all laws for the time being in force shall continue. These provisions clearly indicate that there is no intention to destroy the legal continuity of the country, as distinguished strictly from the Constitutional continuity.


371. This argument, while implicit in Dosso, was developed at great length in Madzimbamuto. See supra note 103 and accompanying text (discussing awkwardness of court's declaring invalid a constitution establishing that court's own jurisdiction).

372. See Inayat Khan v. Anwar, 1976 P.L.D. (S.C.) 354, 373-75 (Pak.). This interesting case was a contempt proceeding brought against a lawyer for blaming in a newspaper interview all of Pakistan's misfortunes squarely on the Supreme Court itself, and particularly on Chief Justice Muhammad Munir, the author of the main opinions in the Governor-General's Case and Dosso. Referring to the abrogation of the Constitution in 1958, the Supreme Court said:

The change in the nature of the jurisdiction enjoyed by the High Courts . . . was not of such a radical character as to lead to the inference that there was a break in their continuity . . . we have no doubt in our mind that the Supreme Court as establish[ed] under the 1956 Constitution continued in existence, without a break, even though the 1956 Constitution itself was abrogated in 1958 on the proclamation of Martial Law . . . . It follows, therefore, that it is a misconception to think that the present Supreme Court . . . was, in any manner, a new or a different institution.

Id.

373. As the Court stated in Zia-ur-Rahman:
bestows upon them an inherent power to determine the law and inquire into their own jurisdiction. During or after a constitutional crisis, such inquiry may lead to a paradoxical impasse. If the court finds the constitution—the basis of its jurisdiction—invalid, the court's own identity and thus its inherent power of inquiry is put in doubt. But such a legal impasse, just because it cannot be resolved with reference to any enacted text, does not have to end the matter and result in judicial abdication. The courts, confronted with such an impasse, may rightfully invoke the doctrine of state necessity as a source of their power and continuing jurisdiction to examine the validity and legislative powers of the extra-constitutional order. There is no logical reason why the judiciary is any less entitled than the executive to assume extra-constitutional powers under the doctrine of state necessity, in order to bridge legal chasms and effect a transition to legality. Confronted with a constitutional crisis, the courts may invoke the doctrine of state necessity as an independent basis of their jurisdiction. For example, courts in Cyprus, Malta, and Grenada have adopted this route when confronted with a constitutional breakdown.374

That an extra-constitutional regime may require the judges to take a new oath of office does not necessarily change this position. Madzimbamuto and Nusrat Bhutto addressed this issue without any uniform resolution.375 A new oath does not preclude courts from...
inquiring into the scope of legislative powers of the extra-constitutional order if the nature and function of the courts are defined and understood in relation to the aggregate legal system rather than to a particular political constitution. Typically, the new oaths administered by the extra-constitutional regime include the obligation to uphold the law.\textsuperscript{376} Regardless, the general duty to uphold the law is a legal reservation implicit in any oath sworn under any constitutional or extra-constitutional order. This position enables a court to retain its inherent judicial power to inquire into the scope of legislative powers of any order, constitutional or otherwise, even though the court's jurisdiction is expressly conferred by that order.

This express or implied duty to uphold the law, in turn, opens the door for courts to adopt a continuity-of-law posture and seek out legal principles from the legal culture of the society relevant to test the scope of legislative power of extra-constitutional regimes. In this inquiry, courts will find useful the distinction drawn between “rules” and “principles” by Ronald Dworkin\textsuperscript{377} and J.M. Eekelaar.\textsuperscript{378} Principles to be identified may be ones whose “authority lies outside the four corners of the positivist legal system”\textsuperscript{379} and whose origin is to be found “not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over a time.”\textsuperscript{380} This construction leads to a certain inevitable vagueness regarding the content and source of validity of these principles. But such vagueness calls for legal analysis, not judicial abdication. Varied catalogues of such relevant principles forwarded by Eekelaar,\textsuperscript{381} John Finnis,\textsuperscript{382} and

\textsuperscript{376} For example, in Pakistan, the new oath prescribed by the martial law regime under the Supreme Court Judges (Oath of Office) Order, 1977 (Pres. Order No. 9, 1977 of September 22, 1977), simply adopted the wording prescribed in the third Schedule to the 1973 Constitution after deleting references to the Constitution: “I will discharge my duties, and perform my functions, honestly, to the best of my ability and faithfully in accordance with [the Constitution of the Islamic Republic of Pakistan and] the law . . . .” Id.


\textsuperscript{378} See Eekelaar, \textit{supra} note 92, at 30–37 (arguing difference between rules and principles is one of degree of generality, not difference in kind).

\textsuperscript{379} Id. at 34.

\textsuperscript{380} See Dworkin, \textit{supra} note 377, at 41.

\textsuperscript{381} Eekelaar's list includes:

[T]he principle of effectiveness; the principle of legitimate disobedience to authority exercised for improper purposes; the principle of necessity; the principle that violation of a right demands a remedy and that no one should profit from his own wrongful act . . . ; the principle that a Court will not permit itself to be used as an instrument of injustice; the principle that it
Deiter Conrad\(^{383}\) may be instructive. In fact, in *Nusrat Bhutto*, the Court itself cited with approval Eekelaar's contribution in this regard,\(^{384}\) but then expanded the doctrine of necessity beyond recognition. As the Court recognized in both the *Governor-General's Case* and *Nusrat Bhutto*, the doctrine of state necessity is extra-constitutional, or at best implied in any constitution.\(^{385}\) If this is true, the doctrine's sweep must be tempered in light of other countervailing principles emanating from the wider legal culture. Consequently, when construed narrowly and applied grudgingly, the doctrine of state necessity may become an instrument of affirmation and continuation of the rule of law. But where, as in *Nusrat Bhutto* and its progeny, the doctrine is grossly expanded to grant what is, in effect, a carte blanche to an extra-constitutional regime, the deployment of the doctrine of state necessity simply "transforms naked power into legal authority."\(^{386}\)

VIII. CONCLUSION

Representative constitutional governance is the exception rather than the rule in most societies today. This is particularly true of new post-colonial states whose search for stable and democratic constitutional frameworks is repeatedly derailed by the military's extra-constitutional usurpations of power. Very often, courts, partic-

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\(^{382}\) Finnis fashions the basic principle thus:

>A law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, or it is repealed in accordance with conditions of repeal in force *at the time of its repeal*.


\(^{383}\) According to Conrad, the "cardinal, and perhaps the first, guiding principle" is "that continuation of ordinary judicial functions in non-constitutional matters ought to be ensured as long as at all possible." Conrad, *supra* note 5, at 140. Then he offers "[t]he most important countervailing principle," quoting Eekelaar: "[A] Court will not permit itself to be used as an instrument of injustice." *Id.* at 142. Lastly, Conrad states "that the courts should minimize, as far as possible, the degree of recognition accorded to illegal constitutional change." *Id.* at 143.

\(^{384}\) *Nusrat Bhutto* v. Chief of Army Staff, 1977 P.L.D. (S.C.) 657, 688-89 (Pak.).


\(^{386}\) Stavsky, *supra* note 5, at 344.
ularly in common law jurisdictions, are called upon to determine the validity and scope of extra-constitutional power. These judicial responses, while doctrinally inconsistent, typically validate the extra-constitutional assumption of power and hold the legislative power of extra-constitutional regimes as unfettered. The result is gradual institutionalization of permanent praetorian rule and blockage of all avenues towards representative democratic governance. Not surprisingly, the fate of the courts is diminished power, restricted jurisdiction, and waning prestige.

There is a better way. When confronted with the question of the validity of an extra-constitutional assumption of power, courts should avoid the constitutional issue by deciding the case or controversy on narrow grounds. Where this is not feasible, courts should designate the extra-constitutional assumption of power a nonjusticiable political question. This response will be doctrinally consistent, deny extra-constitutional regimes judicially pronounced legitimacy, keep the judiciary insulated from politics, and acknowledge that the primary responsibility for establishing and safeguarding representative democracy lies with the body politic.

Designating an extra-constitutional assumption of power as a nonjusticiable political question does not necessarily imply subsequent unfettered legislative power of extra-constitutional regimes. Theories of revolutionary legality and discontinuity-of-law which warrant abdication of judicial review are to be eschewed. To examine the legislation and acts of extra-constitutional regimes, courts should seek the basis of their power, scope of their jurisdiction, and standards of review in the aggregate legal system and the wider legal culture. Effective judicial review in this context calls for the courts' adoption of a continuity-of-law approach, developed over time in the legal culture, in order to identify principles of appropriate conduct by public officials. During the period that the body politic resolves the question of a suitable constitutional order, such active judicial oversight is essential to protect minimal basic rights of citizens against arbitrary and repressive exercise of power by extra-constitutional regimes.

Judicial oversight of extra-constitutional regimes will be facilitated if courts develop consistent yardsticks of judicial review when constitutional orders are in place. The courts must guard against whims of shifting majorities in order to promote stability and continuity of constitutional orders in post-colonial societies, remarkable for their cultural, linguistic, and regional diversity. Once a written constitution has been adopted through a representative process, courts must dispense with doctrines of unfettered legislative capacity and scrutinize any attempts to amend the constitution, by ensur-
ing the survival of the basic structure and essential features of the constitution. In the end, continuity of constitutional frameworks promotes political stability, which is the best antidote for praetorian tendencies in any society.