

Civil-Military Relationship in a Democratic Pakistan

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Source: *Policy Perspectives*, 2023, Vol. 20, No. 1 (2023), pp. 21-44

Published by: Pluto Journals

Stable URL: https://www.jstor.org/stable/10.2307/48774423

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Policy Perspectives 20:1 (2023): 21-44
https://doi.org/10.13169/polipers.20.1.ra2

Research Article

Civil-Military Relationship in a Democratic Pakistan

Muhammad Yunas Khan[*] *and Mubashar H. Jaffari*[**]

Abstract

The paper explores the futuristic calibration of Pakistan's constitutional development and its interpretation through precedents in the face of multiple sociopolitical, socioeconomic, and legal challenges. In particular, it analyzes the essential normative characteristics of constitutional legal framework based on separation of powers between pillars of the state vis-à-vis civil-military relationship. The article attempts to assess the constitutional direction from a broader legal and jurisprudential perspective meant to provide an avenue of progress and prosperity through its compatibility with sociopolitical norms. The main inquiry of the article is whether the constitutional evolution of Pakistan as a democratic state would be able to withstand the burden of contemporary socioeconomic, sociopolitical, and geopolitical challenges in creating a balance of power between civil and military institutions or would lead to more blurred boundaries instigating institutional conflicts and interventionist models. The paper through legal lens draws upon theories of legal positivism and its critique to understand the constitutional legitimacy of military interventions in democratic and political system. It covers the literature gap in analyzing jurisprudential approach of Pakistan's judiciary as custodian of constitutional and democratic norms vis-à-vis constitutional scheme of civil-military relations, and its institutionalization in comparison with other international models suggesting pragmatic civilian control. In the end, the paper recommends a comprehensive institutional framework carved out of domestic realities as well as internationally-recognized constitutional schemes.

Keywords: Constitution, Civil-Military Relations (CMR), Democracy, Political Opportunism, Legal Positivism.

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Introduction

Democracy has offered a successful model in many countries around the world but it still is not the only solution to all societal, economic, and political problems. In terms of democracy, Pakistan's credentials have remained controversial. Pakistan was acquired by the Muslims of the subcontinent through a political struggle. its journey of transforming into a democratic state was complex and prolonged. A major reason was the belated consensus over constitutional scheme which saw major revisions in 1956, 1962, 1970[1] and finally 1973.[2] The country with a diverse background of ethnic, cultural, sociopolitical and above all colonial administrative legacy faced challenges in developing consensus on foundational issues.[3] The controversies between Islamists and liberals, federalists and centrists, democrats and dictators, pro-parliamentary and pro-presidential embroiled the nation into a perpetual cycle of conflicts.[4] The discourse reveals the diversity in approaches, dissimilarity and at times controversy in the perspectives of respondents based on their affiliations. The gap between the mindsets and perspectives has a drastic impact on widening gaps in the constitutional understanding. The normative edifice of constitutional scheme of civil-military relations is blurred either with avoiding the issue or with application of ultra-vires doctrines.

The paper explores how civil-military relations are not just the mechanical relationship between two types of institutions but an entirely different school of thought with varying approaches of statecraft and administration-cum-governance system. The paper attempts to answer the question as to how the core social democratic norms could be secured throughout constitutional journey in a constantly evolving society where people are conscious of their rights in the age of information technology and artificial intelligence.

Agility and Resilience of Pakistan's Constitution

Constitution is a 'Grundnorm' that provides a foundation upon which the whole structure of sociopolitical, socioeconomic justice system is built.[5] All organs of state are connected through a thread. The constitution undoubtedly is an organism that represents life of a state system in modern world.[6] Throughout history the normative core of social contract between citizens and state is reflected through codes, doctrines, and characters that can be termed as constitution.[7] The constitutional evolution provides the stepping stone to the prosperity of a nation. Nevertheless, it has to be put to test to check its futuristic agility, adaptability and interpretability.[8] Hence, constitution is more

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like a tree that connects the nation with its roots and ensures that the progress and development bear fruits for the welfare of its people. Pakistan's constitution is one of the well-articulated constitutional manuscripts around the world.[9] It has been time tested for the last 50 years. It comprehensively covers and encompasses the normative formation of the morality of the nation, its core principles and decides the social contract between the state and its citizens.[10] At the same time, it upholds the delicate equilibrium of relationship between the pillars of state and most importantly the balance of power among the sate organs.

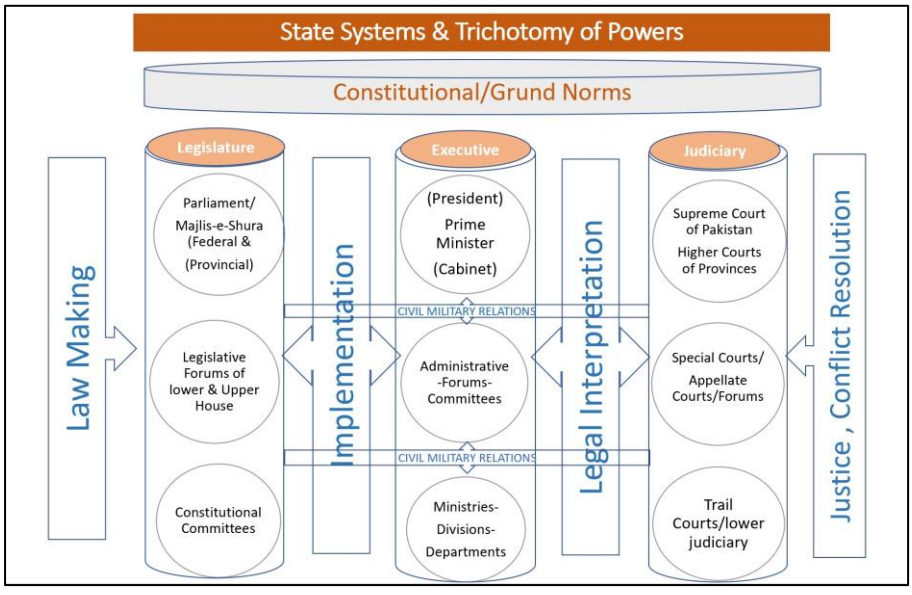
Without an exaggeration, Pakistan's constitution is the soul of nation and the most scared document providing assurance of durability of the state in the face of every internal and external challenge.[11] Constitutional manuscript reflects a collective verdict of the envisioned rights, obligations, relations and aspirations of a nation.[12] The words, however, are always subject to interpretations that evolve around the consciousness of community/society. The constitution is a dream that idealizes the perception of a just society seen by forefathers of a nation and framers of constitution. It provides a framework which connects the ideology with reality.[13] The nation through its constitution incorporates its basic tenets of socioeconomic, sociopolitical and even sociocultural justice giving a broader politico-legal framework of governance.[14]

Concordance in Principle: Discordance in Practice

In other words, the constitution provides a roadmap for the future. Nevertheless, it is not necessary that constitution provides concrete solution for every sociopolitical or sociocultural contradiction in a diversified social mosaic.[15] The consensus reflects the bare minimum agreement of all groups on most crucial and fundamental questions of state structure, governance system, socioeconomic outlook, and the mechanism through which the country will operate and ensure the supremacy of social contract with its citizens.[16] However, the necessary power equilibrium in state system requires a balance in civil-military relations (CMR) that have mostly remained imbalanced in Pakistan, upending the concordance theory the state has been through more discordance scenarios than concordance.[17]

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Figure 1: Model of Constitutional Trichotomy of Power and Nexus with CMR



Source: Developed by author(s) using multiple sources of constitutional laws, administrative laws and rules of business.

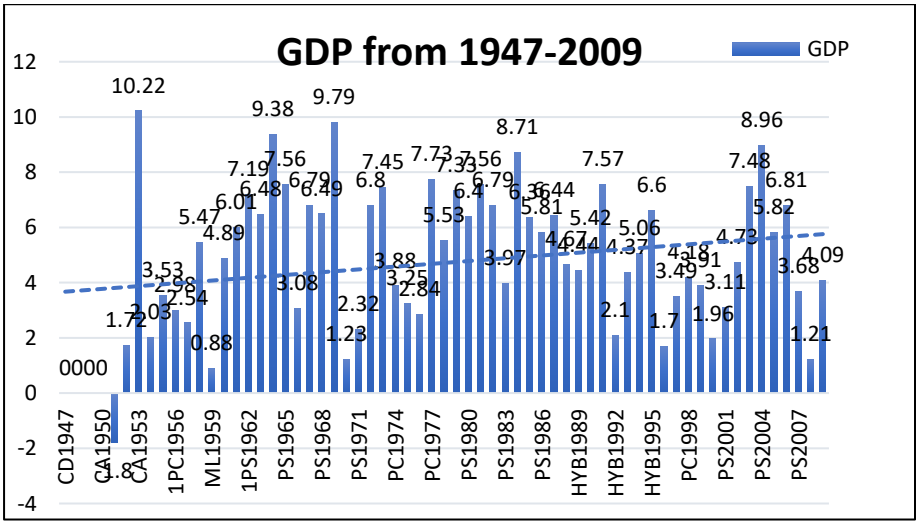
Constitutions around the world are embedded with a vision for future. They comprehend and cover the basic tenets of the balance between rights and obligations, individualism and collectivism, liberty, freedom and restrictions.[18] These basic laws minimize the discontent and maximize the consensus over principles, standards and morals in their respective jurisdictions. However, it is not possible for any constitution to completely eliminate the discontent on all trivialities or eventualities. There are always gaps, paradoxes, dichotomies and gray areas that need coverage, reformation, reconciliation and re-imagination. The constitutional amendments address these areas and prevent discord. Nevertheless, the dichotomies that turn into traumas not just haunt the national solidarity, can also lead to constitutional failures or even state failures if not reconciled. The flexibility of constitutional structure in accommodating centralization versus decentralization of the powers, the federal and unitary approaches also form crucial part of the constitution.[19]

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The CMR Conundrum

Pakistan's constitutional journey has been rocky as it has evolved through many hurdles and upheavals. The dimension that received the most attention for being critical has been the synthesis of Islam and democratic norms. Another dimension is the continuous debate of federalism and centralism and has always revived through abrogation or holding in abeyance of the incumbent scheme and promulgation of provisional constitutions and legal framework orders.[20] The democratic process including amendments shaped it into an Islamic-federalist and democratic constitution. Nevertheless, the greatest dichotomy that has shadowed the constitutional development is the invisible schism between civil and military perspectives.[21] The constitution has provided a broader framework to ensure the cordial civil-military relationship. However, the turbulent national history has proved that repeated enforcement of emergencies, abrogation, suspensions of constitution under autocratic, aristocratic and dictatorial regimes have normalized the authoritative imposition of extra-constitutional measures. On one hand, these actions created legal tolerance in the judiciary and on other, they emboldened administrators of coups d'état.[22] Interestingly, during the tenure of authoritative regimes with centralized power or hybrid presidential system, the country recorded more growth in Gross Domestic Product (GDP) than during functional democratic periods of parliamentarianism (see Figure 2).

Figure 2: GDP from 1951-2009 (Journey through Various Systems)

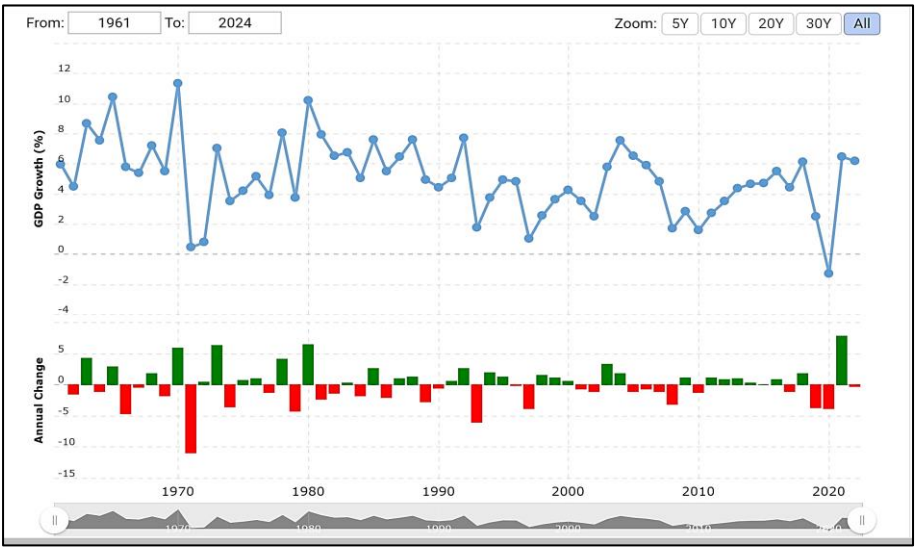


Source: Developed by author(s).

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The following graph reveals how interventions have impacted the growth trend and adversely impacted the economy.

Figure 3: GDP Growth Rate from 1961-2022 (Journey through Various Systems)



Source: "Pakistan GDP Growth Rate," *macrotrends.net*, accessed June 3, 2023, https://www.macrotrends.net/countries/PAK/pakistan/gdp-growth- rate.

The colonial legacy of legal regime provides a broader legal framework facilitating the ruler to invoke provisional and exceptional measures in tackling crises such as 'war or rebellion' and also an inherent potential to use executive powers—either constitutional or extra-constitutional—in dismissal of elected governments or legislation by issuing decrees,[23] ordinances or ordering preventive detentions using the pretext of Maintenance of Public Order (MPO).[24] It was demonstrated in the case of 1975-1977 by Indira Gandhi and Gen. Pervez Musharraf in 2007.[25] This provides a ready template for authoritarian rules to seize power, violate fundamental rights, and transform the constitutional landscapes in the guise of addressing crisis but at the same time these regimes cannot be declared 'lawless' entirely.[26] The analysis of both kinds of emergencies i.e. constitutional emergency versus extra-constitutional emergency,[27] functional resemblance and inherent motive of usurping or prolonging the rule through decree are observed. For instance, Indira Gandhi's creation of parallel legal

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regime, displacing constitutional order for preserving political status quo is a case in point.[28]

Classification of States Based on Civil-Military Relations

Civil-military relations being an inter-disciplinary field cannot be comprehended from singular lens instead it requires a multitude of theoretical underpinnings encompassing politico-legal and socioeconomic models of a particular state. However, types of military roles and the gravity of their intervention in state affairs leads to an appropriate classification of a state, varying in terms of maturity of its democratic norms.

There is no dearth of literature on classification of models of civil-military relationship in different states. Sameul Huntington's institutional control theory,[29] civilian objective control criticized by Morris Janowitz,[30] supplemented by Peter Feaver's agency theory[31] provide various methodical and conceptual frameworks that help in locating the horizontal and vertical role of military in a state. This is further elaborated in Finer's typology and Mehden's tabulation of coups.[32] However, Donald S. Travis' synergetic approach provides a better theoretical framework in its 'pragmatic civilian control' in comparison with other models.[33] The following figures give an idea of these classifications:

Figure 4: Matrix of Typology of States Based on CMR

Theorist	Methodology	Typology and Classification of States Based on Military Role in a State						
		1	2	3	4	5	6	7
Finer	Level of Military Intervention	Influence	Blackmail	Displacement	Supplantment			
Huntington	Types of Coups (CMR) Old Nations & New Nations	Place Coup Aristocratic	Reform Coup Democratic	Revolutionary Coup				

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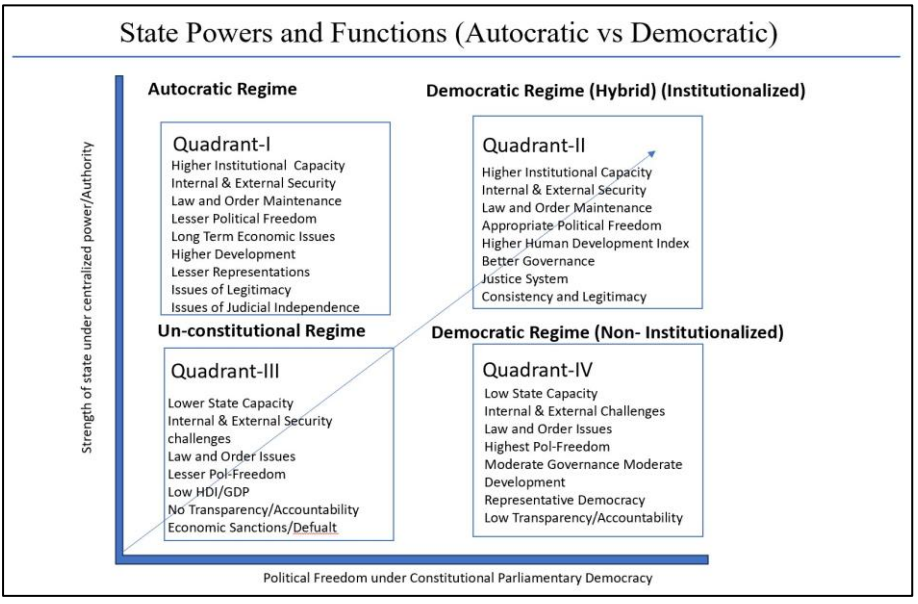
Janowitz	Typical Role of Military	Authoritarian (Personal	Authoritarian Mass Party	Democratic Competition				
Mehden	Typology of Military Role	Constitutional Care Taker	Reform or Revolutionary	Backer of Civilian	Civil Military Balanced			
Luckham	Typology of Military Role	Objective Control	Constabulary Control	Apparent Control	Nation in Arms	Subjective Control	Garrison State	Guardian State
Park		Military Dominant	Civil-Military (Fused)	Civilian Dominant				

Source: Developed by authors using multiple sources.

The following figure provides a hypothetical example of state powers and functions vis-à-vis determination of its characteristics as autocratic or democratic as regards to its placement in quadrants and tilt towards axis (X) and axis (Y). [34]

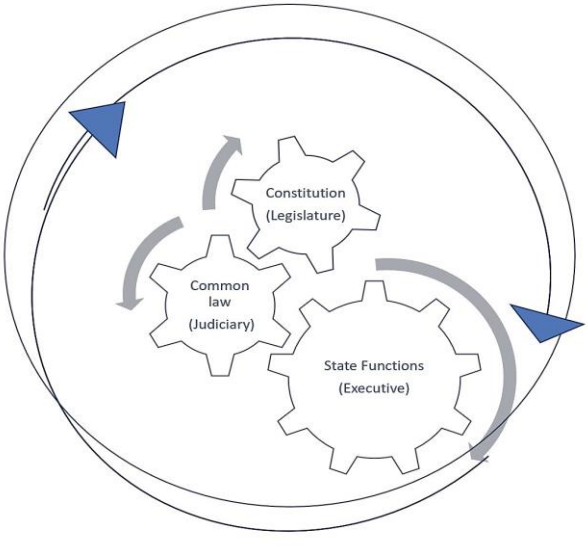
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Figure 5: Quadrants' Determination from State Characteristics



Source: Developed by authors on Analogy of Francis Fukuyama Model

Figure 6: Politico-Legal Process Running a Common Law State of Pakistan



Source: Developed by authors.

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Focused Group Discussions (FGDs) and Categorization of Participants

To analyze the complex and multifaceted phenomenon of CMR in Pakistan and the constitutional space available for adjustment of different judicial interpretations, open-ended in-depth interviews (IDIs) and FGDs were conducted with 22 senior and mid-level officials in the military, civilian government and judiciary to assesses the adequacy of constitutional provisions for emergency situations and the reasons for instances when the constitutional parameters are overstepped through ultra-vire actions in the constitutional scheme. Using the qualitative research method, the perspectives of respondents from the legal and civil-military stratum were compared with the empirical themes to reveal core factors and/or drivers of CMR. These factors were then used to develop well-informed hypotheses, which were tested through open-ended interviews for thematic analysis of the sample population.

Initially, to narrow down the discourse to Pakistan's domestic challenges, the participants were categorized into three main groups: (i) civilians (ii) military (iii) civil-military. Subsequently, their perspectives were categorized into four groups: i) democrats (divided into pro-parliamentary and pro-presidential); (ii) constitutionalists (staunch believers of constitutional norms); (iii) reformists (pragmatic about changes in constitution to bring it in conformity with ground realities); and (iii) conformists (those who believe in conservative realism and *real politik* in comparison with normative approach of Western ideals of democracy, liberalism, civilian supremacy, advocating accommodative approach in the interest of state).

The themes that emerged in the FGDs mainly revolved around the question of military's constitutional role in state's policymaking and whether it corresponds to the adequate representation of their stakes or it limits their desired participation in the decision-making process. The meticulous discussion on events precipitating the military coups and interventions revealed that the distrust between civilian rulers on foreign policy matters was among some major issues. The discussions contextualized the domestic implications of foreign incidents which cause differences between civilian governments and military commanders on issues related to the foreign or defense policies.

The staunch democrats and constitutionalists (significant portion of participants) opined that the final decision must lie with the public representatives, who are chosen through elections, in all aspects of national

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life, including the foreign and security policies. The democrats among the participants advocated that there is no rationale of existence of democracy without civilian supremacy and opposed the contrary view of conformist participants. They suggested that the Egyptian, Turkish, and Israeli models were much more balanced in terms of the involvement of military in decision-making. However, the reformists (majority of participants) favored more flexibility towards making constitutional reforms on the US model to calibrate the policy by taking on board all stakeholders particularly military to avoid a drift towards military-dominated Myanmar or Thailand model.

The constitutionalists believed that the civil-military rift has stalled the country's progress and is a major impediment in the progression. Similarly, democrats believed that the repeated military interventions, whether justified or unjustified, have prevented democratic institution from evolving. Therefore, in their (democrats') view, it is unjustified to pass a judgment on democracy when political institutions have not been given the opportunity to grow and gradually improve themselves through public accountability. The reformists maintained that the military being a disciplined institution has outgrown other institutions and emerged as a stronger component of the executive. The conformists (few participants) believed that the majority politicians were incompetent and corrupt; their incompetence created gaps that were then filled by the military. The participants maintained varying, rather polarized opinions about the use of resources, budgets, perks enjoyed by military, their civilian postings, and quotas. These discussions raised the following fundamental questions vis-à-vis CMR:

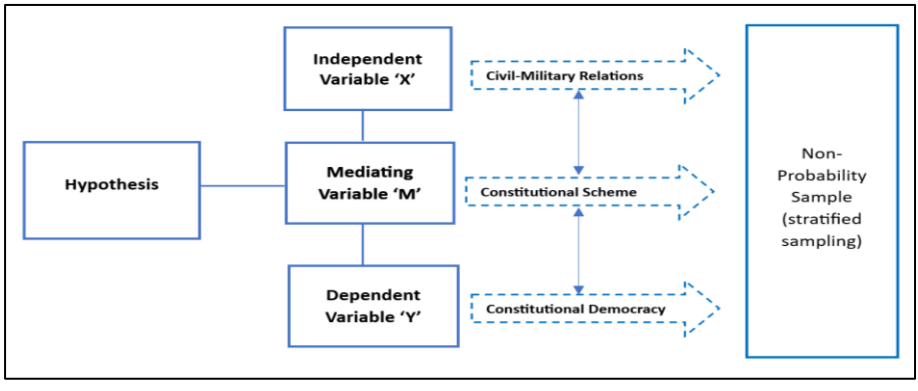
1- Is the civil-military relationship practically governed through constitutional scheme of balance of power?
2- Is the present constitutional scheme of civil- military relations adequate to maintain balance of power between civil-military institutions or needs reforms to provide *de jure* role to military in the affairs of the state?
3- Is it possible to assign constitutional role to military without compromising democratic norms and supremacy of the parliament in a democratic state?
4- Is the democratic principle of trichotomy of power working as lever to ensure supremacy of constitution in parliamentary democratic system or a reason of imbalance in CMR?
5- Do the geopolitical and geostrategic concerns of Pakistan warrant change in the constitutional scheme of civil-military relations?

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6- Does the parliamentary form of government in Pakistan synergize with the contemporary constitutional scheme of civil-military relations or it is an obstacle in the way of balance of power between civil-military?

In the quest for answers to all these questions, the hypothesis is that there is no relationship between constitutional supremacy and balance of power maintained through principle of trichotomy of powers in parliamentary democratic Pakistan (dependent variable) maintained through constitutional scheme of civil-military relations (mediating variable) and intra/extra-constitutional intervention (independent variable). The alternative hypothesis would be that there is a relationship between constitutional supremacy and balance of power maintained through principle of trichotomy of powers in parliamentary democratic Pakistan (dependent variable) maintained through constitutional scheme of civil-military relations (mediating variable) and intra/extra-constitutional intervention (independent variable). The following figures explains the relationship of variables:

Figure 7: Hypothesis' Variables Relationship



Theoretical Framework

The conceptual model of paper is based on legal theories from positivist school of jurisprudence[35] which provide the legal foundations and principles in understanding the legitimacy of state and its constitutional powers in ensuring rights and liabilities of its citizens.[36] The discourse about the legitimacy of state powers goes back to the sources of law and their validity that require deeper appreciation of the theories of John Austin (Command Theory), Hans Kelsen (Grundnorm Theory) and H.L.A. Hart (Legal Positivism) debating what law is or what law ought to be.[37] This ontological perspective provides a

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foundation in understanding the legal power of state, its organs and their relationship with its subjects as reckoned in Clausewitz trinity of the people, the government, and the military.[38]

Since the interpretation of constitutional principles and legal maxims in terms of the validity of state laws, and legitimacy of rulers has mostly been dominated by legal positivism of Pakistan's judiciary, the paper analyzes the judicial interpretations of extra-constitutional takeovers. These interpretations have developed the jurisprudential schools of thought leading to legitimacy of undemocratic authoritarian rules and transcendence through constitutional amendments. An interesting dimension of this discussion relates to the way the particular judicial review by the apex court has impacted social phenomenon and complicated the CMR scheme. Not surprisingly, the chronicles of history reveal that instead of evolving into a stronger constitutional democracy, Pakistan's system has revolved in perpetual cycles of confusion regarding democratic principles and authoritarian manipulations.

Judicial process works differently in common law tradition than the civil law. The role of common law is peculiar in jurisprudential methods of interpretation of constitution and upholding of its provisions.[39] Ideally, the constitution lends legitimacy to all pillars of state in their functions and furnishes mechanism for their interaction and accountability. This creates a cyclic process, where parliament legislates within constitutional limits, executive undertakes its functions within legal boundaries, and judiciary ascertains the constitutional consonance of laws, actions, and even the judicial verdicts.

CMR in Pakistan

Article 245 of Pakistan's constitution provides a mechanism of appealing armed forces in aid of civil authorities. This Article has the potential of drastically limiting the jurisdiction of high courts in terms of implementation of fundamental rights (ensured to them through Article 199 of the constitution). As an alternate scheme, the need for the armed forces to help the civilian government can be extended to offer the rationale for establishing Military Courts,[40] and ultimately defying trichotomy of power.[41] In this process the common law courts (through legal reasoning) create ratio and jurisprudence that further impact the way it would interpret the constitution and secondary laws.[42] This process of continuous judicial oversight determines the state function. However, during emergency and extra-constitutional interventions, the logical process stand reversed. Instead of adhering to the

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constitutional principles, the judicial interpretations develop exceptional jurisprudence by adopting more pragmatic legal positivism, reversing the constitutional primacy. The state pressure precipitates a conflict between all pillars of state and the role of judiciary becomes more critical in legitimizing or delegitimizing the authority of executive or a usurper.

Thematic Discussion and Findings

To deliberate the complex and multi-layered phenomenon of CMR in Pakistan and the constitutional space available for adjustment of different judicial interpretations, open-ended in-depth interviews (IDIs) were conducted with 22 senior and mid-level officials in the military, civilian government and judiciary. Through the inputs received in these interviews, FGDs, and the literature consulted, this article assesses the adequacy of constitutional provisions for emergency situations and assesses the reasons for instances when the constitutional parameters are overstepped through ultra-vire actions in the constitutional scheme.[43] The answer lies in the understanding of contextual drivers of authoritarianism.

Constitutionalism in post-colonial states is not only haunted by intra-constitutional but extra-constitutional interventions, which are legitimized under emergencies by civilian or military rulers.[44] The legitimacy of emergency powers has been derived as a norm from colonial rule but it persists as an accepted and tolerated anti-democratic norm in South Asia.[45] It appears that the habitual tendencies have barred the rulers from adopting principles of egalitarianism and self-accountability. This discourse explores the discord over the issues of constitutionalism and the ills of extraconstitutional measures justified on pretexts of security issues, national interest and doctrine of necessity as elaborated in following thematic discussion of respondents below:

Constitutional Supremacy and Civil-Military Cooperation

The interviewees agreed upon constitutional supremacy and considered it vital for cordial CMR. They detested the extra-constitutional steps and interventions and advocated the supremacy of civilian parliament. They felt that there is no loophole in the existing constitutional scheme and that no amendment is required in the constitutional provisions that demarcate the CMR. They contended that the military must abide by the constitutional framework to ensure institutional balance of power. Although National Security Council (NSC) has incorporated the military representation on all

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issues of national security, the respondents considered it as extra-constitutional forum established during military regimes in 1969 and 2004.

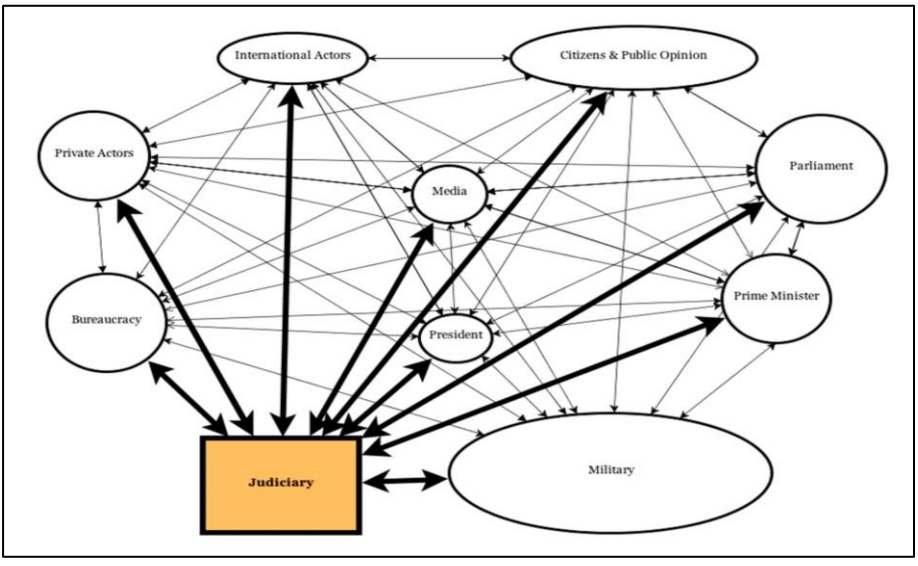
The reformists in approach maintained that NSC as a forum is an institutionalization in line with the US model and a solution to the distrust created due to the principle of trichotomy of power, and that it should be operationalized to take the military leadership on board in decisions concerning defense and strategic domains. However, the constitutional limitation as defined in Article 6[46] should be considered sacrosanct by civilian and military leadership alike. One of the respondents from judiciary recommended introducing preventive measures against the legitimization of the emergency/abrogation of constitution. Another respondent considered the civil-military model of constitution as adequate in terms of bridging the gap. However, the judicial independence and activism can be further regulated by judicial reforms of limiting role of apex court to a federal constitutional court in order to relieve it from administrating other ordinary cases. This, in turn, would provide the Supreme Court a prompt role in responding to the issues of constitutional deadlocks and maintain trichotomy of powers between three pillars. Similarly, one respondent opined that civil-military relations and extra-constitutional actions can be stopped by creating smaller and efficient administrative units (provinces). This would not only improve the governance in the provinces but stop the misuse of public funds by politicians and pave way for good governance and democratic accountability.

Judicial Independence and Doctrine of State Necessity

The use of doctrine of necessity reveals how various regimes of martial law and emergencies have had repercussions for the legislature, judiciary and executive.[47] These decisions, including the decision on General Musharraf's imposition of emergency (PLD 2008 Supreme Court 178) remained subject to the perceptions of judicial officers and their contextual understanding, explained in the following sections.[48]

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Figure 8: Judicial Independence: Arising from 'Relationship and Interdependences'



Source: Anil Kalhan, "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," *Vanderbilt Journal of Transnational Law* 46, no. 1 (2013).

This dilemma is more easily understood by the significance of logic behind imposing emergency than the formalization of the emergency through constitutional provisions. The traditional approach of institutional acceptability of the emergency is rather more important than its legitimacy of being constitutional or extra-constitutional.[49] The colonial legacy provides customary acceptance to the emergency measures on the pretext of their expediency and necessity.[50] However, the transformation of the 'Doctrine of State Necessity' as a tool for legitimizing extra-constitutional emergencies has caused serious impact on the state of governance and democracy in Pakistan.[51] The key factor that is operational in these conditions is the *real politik* and the historical complacency of judiciary in legitimizing the coups in Pakistan. However, the conformist (respondents) relying upon analysis of counterfactual situations justified those judicial decisions, which legitimized extra-constitutional emergencies. They endorsed the historical judicial tradition of using positivist approach for developing dictums to handle constitutional and extra-constitutional emergencies.[52] They (conformist) chose pragmatic approach over more idealistic school of thought i.e. naturalism.

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Judicial Positivism vis-à-vis Extra Constitutional Legitimacy

The respondents belonging to legal fraternity (lawyers/Judges) discussed the phenomenon of judicial pragmatism in legitimizing extra-constitutional takeovers. The opinions remained divided in two schools of thought: the positivists and naturalists. The positivists maintained that the law should not be concerned with the normative aspects of imposing emergency. The leading judgments in cases where judiciary used the doctrine of necessity and legitimized a coup were followed in Rhodesia[53] and other countries. The majority of respondents agreed over the importance of judiciary's role in maintaining balance of power among the pillars of state. Recent judgements of Supreme Court of Pakistan (SCP)[54] have overturned the premise of necessity and regarded it to be *burial* of doctrine of necessity. Some respondents maintained that the judicial activism of chief justice during General Musharraf's era was distinguished due to confrontation of judiciary with military dictator and it cannot be considered as a precedent of over-throwing extra-constitutional steps taken, without infuriating the judicial organ. However, all respondents had a consensus that the strong and independent judiciary is the only way to safeguard constitution as it can play its role as arbitrator between the executive and legislature.

The Securitization under Military Regimes: Pros and Cons

The respondents from both civil and military strata agreed about the geostrategic and geopolitical compulsions of Pakistan. The securitization in the contemporary international scenario and imperialistic attitude of superpowers and hegemonic regional powers lent legitimacy to the military in taking major share of resources and having a strong voice in decision-making. However, most respondents emphasized that the militaristic policy orientations are not without cost, as they undermine the geoeconomic outlook. The long-term impact of geopolitical preferences outweighs their benefits under the looming danger of economic default.

There was a consensus among respondents over the point that security cannot be maintained without economic independence and the country needs recalibrations of policy by bringing civil and military leadership on one page. The internal conflicts are draining the political resources and without coordination between legislature, judiciary and executive, the future challenges cannot be met. One respondent with dual experience of military and civil positions pointed out about the sincerity of the military leadership in steering the country out of disasters— be they internal or external. However,

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he maintained that this must not be the reason for outcasting and creating suspicion regarding the intentions of civilian leadership. The confidence-building measures (CBMs) between military and civilian leadership are the need of the day. However, all respondents had a consensus that the military must avoid political overtures to secure its stature and enable civilian governments in free and fair elections. The only future course of action is genuine democratization of the system for national reconciliation in the interest of integrated development and progress.

Conclusion

The literature appraisal and subsequent empirical findings (FGDs/Interviews) highlight that the constitutionalism is a universally accepted democratic phenomenon. However, its implementation cannot be alienated from the contextual atmosphere of sociopolitical and socioeconomic realities. The adherence to the sanctity of the *grundnorm* is based on the habitual acceptance of its articles as sacrosanct by all subjects. The institutional compliance is a result of surrender before the principles enshrined in constitution. Hence, extraneous checks and balances over the protection of constitutionalism have their limits and repercussions. In fact, what actually protects the normative framework of the sociolegal and sociopolitical system is largely reliant upon the self-restraint and self-accountability of the state institutions rather than the deterrence created by any external factors. The principle of trichotomy of power ideally creates balance among all cardinal pillars of the state but it requires balance in civil-military relations. Nonetheless, the realistic perspective reveals that situational exigencies provide primacy to one institution over others and create an imbalance in the absence of coordination, trust, and accountability. The inefficiency of civilian institutions not only creates a vacuum but also strains the civil-military relations on security and foreign policy issues, gravitating all powers towards executive components such as civil-military bureaucracy.

Empirically, participants of FGDs and open-ended interviews have rejected the null hypothesis (H_0) and approved the alternate hypothesis, (H_1) reinforcing the importance of the constitutional scheme of civil and military relations. There is consensus among civil and military stakeholders over the sacredness of constitution. Although the historical pragmatism of state institutions legitimizing unsolicited actions is justified as a necessity in Pakistan's history; most respondents rejected this premise and termed it as opportunism. Nevertheless, there is consensus among participants/ respondents that nation-building requires adhering to a normative approach

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instead of stark legal positivism, political opportunism to meet the needs of geopolitical compulsions. The respondents both (democrats and constitutionalists), while maintaining their normative ideals, opposed the idea of enshrining any *de-jure* role of military in constitutional scheme, since it will negate the cardinal democratic principle of civilian supremacy and would constitute a paradigm shift from parliamentary democracy to authoritative models.

The primary data-based discussion reveals that constitutional scheme of trichotomy of power does not directly address the issue of balance of power between civil-military relations rather it creates a hedge. It confines the role of military as part of executive and does not allocate any *de-jure* role to military beyond civil supremacy. However, in this context, the civil-military relations remain abstruse and do not correspond with the geopolitical and geostrategic reality of Pakistan, eventually impacting fragile parliamentary system of state, and in the process, widening the divide between civil and military leadership.

Recommendations

The institutions need to have introspection to increase their consensual approach in maintaining balance of power adhering to their entrusted domains and adopting pragmatic civilian control, more appropriate to existing civil military ecosystem. However, normatively the role of judiciary being trustee of constitution and as an arbitrator is primary in upholding the principles of constitutional democracy. Improving civil-military relations requires realistic review of constitutional scheme to break out of perpetual legal and political debacle. There are precedents that consensual CMR helped in combating the menace of terrorism and paved way for future collaboration and narrative building to meet internal and external challenges.

In line with respondents' recommendations, national consensus over provision of smooth sailing to democracy through enhanced civil-military cooperation is imperative. The pragmatic perspective of reformist (respondents) in favor of conceding limited but explicit constitutional space can be experimented through reinvigoration of 'National Security Council' as constitutional forum. The reformist school contended that the balance requires institutionalization through NSC and that it should be mandated to set the agenda of 'National Security Policy' in advisory capacity subject to approval of the parliament and publicizing the non-confidential issues through open parliamentary debates. This explicit constitutional scheme accommodating the military perspective in decision-making related to foreign policy and

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strategic and security issues would enhance civil-military coordination and prevent ultra-vires adventurism and ensure the sanctity of constitution.

Annexure

Table 1: Details of Respondents Interviewed (Open-Ended) Transcribed/ Concurrent Notes

	Civil Component (Constitutional/Judicial) Former officers			**Military Component (Civil/Forces) Former Officers**		
S/No	**Status/ Posting**	**Stratum/Field Civil/ Legal and Experience**	**S/No**	**Status/ Posting**	**Stratum/ Field and Experience**	**Mode of interview**
1	Higher Judiciary/ Legal Officers/ Bureaucrat	Judicial	13	Senior Most Officer (General)	Military	Transcribed /
2	Senior Most Officer	Judicial	14	Senior Most Officer	Military	Concurrent Notes
3	Senior Most 1 Officer	Judicial	15	Senior Military Officer	Military	Transcribed
4	Senior Officer	Judicial	16	Senior Police Officer	LEAs/Civil	Concurrent Notes
5	Senior Most Officer	Judicial	17	Senior Officer	Military/Civil	Transcribed
6	Senior Officer	Judicial	18	Senior Officer	Military/Civil	Concurrent Notes
7	Senior Most Law Officer	Judicial	19	Senior Officer	Military (Experience of Work in Civil Areas on deputation)	Transcribed
8	Senior Most Civilian and Judicial Officer	Judicial	20	Senior Officer	Military and Expert on Civil/Military Affairs	Transcribed
9	Senior Most Law Officer	Judicial	21	Senior Most Civilian Law Enforcement Officer	Civilian DG of LEA closely interacting with Military	Transcribed

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10	Senior Law Officer	Judicial	22	Mid-Level Officer	Military and Expert on Security/ Legal Officer of JAG (Judge Advocate General) Legal Directorate of Military	Concurrent Notes
11	Senior Law Officer	Judicial	23	Senior Officer of LEA	Expert on Intelligence/Security	Concurrent Notes
12	Senior Most Civil Officer	Administrative	24	Senior Most Officer	Military/ Posted on Civilian Post	Concurrent Notes

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Notes

[1] National Assembly of Pakistan, GoP, "Parliamentary History" (Government of Pakistan, 2029), accessed June 1, 2023, https://na.gov.pk/en/content.php?id=75#:~:text=The%201956%20constitution%20 provides%20for,hold%20office%20for%205%20years.

[2] Pakistan Senate, GoP, "The Constitution of the Islamic Republic of Pakistan" (Government of Pakistan, 2018), accessed November 19, 2023, https://senate.gov.pk/uploads/documents/Constitution%20of%20Pakistan%20(25th%20amendment%20incoporated).pd.

[3] Arshad Syed Karim, Samina Saeed and Nabila Akber, "Ethnic Diversity and Political Development in Pakistan," *Government: Research Journal of Political Science* 7, no. 7 (2018): 163-168; and Shuja Nawaz, *Countering Militancy and Terrorism in Pakistan: The Civil-Military Nexus* (Washington, DC: United States Institute of Peace, 2016).

[4] Stephen P. Cohen, "The Nation and the State of Pakistan," *Washington Quarterly* 25, no. 3 (2002): 109-122, https://muse.jhu.edu/article/36698/pdf; and Fareed Zakaria, "Islam, Democracy, and Constitutional Liberalism," *Political Science Quarterly* 119, no. 1 (2004): 1-20, https://doi.org/10.2307/20202302.

[5] Nicholas W. Orago, "Poverty, Inequality and Socio-Economic Rights: A Theoretical Framework for the Realisation of Socio-Economic Rights in the 2010 Kenyan Constitution" (PhD diss., University of Western Cape, Cape Town, 2013), https://core.ac.uk/download/pdf/58914081.pdf.

[6] Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia: Columbia University Press, 2012).

[7] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015), https://doi.org/10.1017/CBO9781139976664.

[8] Ayesha Siddiqa, "Pakistan's Civil-Military Balance: The Fourth Round," in *Demilitarising the State: The South and Southeast Asian Experience*, eds. Rajesh Basrur and Kartik Bommakanti, Monograph 25 (Nanyang: Rajaratnam School of International Studies, 2012), https://www.files.ethz.ch/isn/152518/Monograph25.pdf.

[9] Hasan Askari Rizvi, "Pakistan: Civil-Military Relations in a Praetorian State," in *The Military and Democracy in Asia and the Pacific*, eds. Ronald J. May and Viberto Selochan (Canberra: ANU Press, 2004), https://library.oapen.org/bitstream/id/2236dfc1-9af9-4ed8-879b-fae8caa670c1/459372.pdf.

[10] Clark Lombardi, *Islamic Constitutionalism Beyond Liberalism*, eds. Michael W. Dowdle and Michael A. Wilkinson (Cambridge: Cambridge University Press, 2017).

[11] Naveed Ahmed, "A Critical Analysis of Fundamental Rights under the Constitution of Pakistan, 1973," *Journal of Political Studies* 28. no. 1 (2021): 11-21, http://pu.edu.pk/images/journal/pols/pdf-files/2-v28_1_2021.pdf.

[12] Robert Hayden, "Constitutional Nationalism in the Formerly Yugoslav Republics," *Slavic Review* 51, no. 4 (1992): 654-673, https://doi.org/10.2307/2500130.

[13] Ruth Gavison, "What Belongs in a Constitution?" *Constitutional Political Economy* 13, no. 1 (2002): 89-105, https://www.ghandchi.com/iranscope/Anthology/Constitution/WhatBelongs.pdf.

[14] Bishnu Pathak, *Politics of People's War and Human Rights in Nepal* (Kathmandu: Bimipa Publications, 2005).

[15] Irshad Ahmad Haqqani, "Failure of Democracy in Pakistan?" *The Muslim World* 96, no. 2 (2006): 219-232, https://doi.org/10.1111/j.1478-1913.2006.00125.x.

[16] Joseph H. H. Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision," *European Law Journal* 1, no. 3 (1995): 219-258, https://doi.org/10.1111/j.1468-0386.1995.tb00030.x.

[17] Rebecca L. Schiff, *The Military and Domestic Politics: A Concordance Theory of Civil-Military Relations* (London: Routledge, 2009).

[18] Anil Kalhan, "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," *Vanderbilt Journal of Transnational Law* 46, no. 1 (2013): 1

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[19] Alex Schank, "Constitutional Shari'a: Authoritarian Experiments with Islamic Judicial Review in Egypt, Iran, and Saudi Arabia," *The Georgetown Law Journal* 102 (2013): 1-95, https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1246&context=vjtl.

[20] Lawrence Ziring, "From Islamic Republic to Islamic State in Pakistan," *Asian Survey* 24, no. 9 (1984): 931-946, https://doi.org/10.2307/2644077.

[21] Hasan Askari Rizvi, "Civil-Military Relations in Contemporary Pakistan," *Survival* 40, no. 2 (1998): 96-113.

[22] Raashid Wali Janjua, "Civil-Military Relations in Pakistan: Quest for an Ideal Balance," *IPRI Journal* 21, no. 1 (2021): 1-26, https://doi.org/10.31945/iprij.210101.

[23] Nasir Islam, "Colonial Legacy, Administrative Reform and Politics: Pakistan 1947-1987," *Public Administration and Development*9, no. 3 (1989): 271-285.

[24] Ammar Ali Jan and Zoha Waseem, "Crossing Red Lines: Exploring the Criminalization and Policing of Sedition and Dissent in Pakistan," *Southern and Postcolonial Perspectives on Policing, Security and Social Order,* ed. Roxana Pessoa Cavalcanti, Peter Squires and Zoha Waseem (Bristol: Bristol University Press, 2023), 82-102, https://doi.org/10.2307/jj.3102547.10.

[25] Jamshed Khan and Asmat Ullah Wazir, "Civil-Military Imbalance in the Administration of Pakistan: A Case Study of Musharraf Era," *The Dialogue* 6, no. 2 (2011): 147-160, https://qurtuba.edu.pk/thedialogue/The%20Dialogue/6_2/Dialogue_April_June2011_147-160.pdf.

[26] Ramachandra Iyer, "Constitutional Law in Pakistan: Kelsen in the Courts," *The American Journal of Comparative Law* 21, no. 4 (1973): 759-771.

[27] Imtiaz Omar, "The Extra-Constitutional Emergency Powers: Martial Law," in Imtiaz Omar, *Emergency Powers and the Courts in India and Pakistan* (The Hague: Kluwer Law International, 2002).

[28] Anil Kalhan, "Constitution and 'Extraconstitution': Colonial Emergency Regimes in Postcolonial India and Pakistan," in *Emergency Powers in Asia*, eds. Victor V. Ramraj and Arun K. Thiruvengadam (Cambridge: Cambridge University Press, 2010), https://ssrn.com/abstract=1398545; and Mohd Aminul Karim, "Civil-Military Relations in Democratic South Asia: A Comparative Framework," *The Korean Journal of Defense Analysis* 28, no. 2 (2016): 277-297, http://dx.doi.org/10.22883/kjda.2016.28.2.006.

[29] James Burk, "Theories of Democratic Civil-Military Relations," *Armed Forces & Society* 29, no. 1 (2002): 7-29, https://www.jstor.org/stable/45346973.

[30] Peter D. Feaver, "The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control," *Armed Forces & Society* 23, no. 2 (1996): 149-178, https://www.jstor.org/stable/45347059.

[31] Mackubin Thomas Owens, "Civil–Military Relations," *Oxford Research Encyclopedia of International Studies*, 2010, https://doi.org/10.1093/acrefore/9780190846626.013.123.

[32] Keith Hopkins, "Civil-Military Relations in Developing Countries," *The British Journal of Sociology* 17, no. 2 (1966): 165-182.

[33] Donald S. Travis, "Saving Samuel Huntington and the Need for Pragmatic Civil–Military Relations," *Armed Forces & Society* 43, no. 3 (2017): 395-414, https://www.jstor.org/stable/48609209.

[34] Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Ithaca: Cornell University Press, 2004).

[35] Wilfrid E. Rumble, "Legal Positivism of John Austin and the Realist Movement in American Jurisprudence," *Cornell Law Review* 66, no. 5 (1981): 986-1031, https://scholarship.law.cornell.edu/clr/vol66/iss5/4; and Herbert Lionel Adolphus Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958): 593.

[36] Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis," *European Journal of International Law* 15, no. 5 (2004): 907-931, https://doi.org/10.1093/ejil/15.5.907.

[37] James W. Harris, "When and Why Does the Grundnorm Change?" *The Cambridge Law Journal* 29, no. 1 (1971): 103-133, https://www.jstor.org/stable/4505440; and Rakesh Kumar, "Structural Analysis of the Indian Legal System Through the Normative

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All use subject to https://about.jstor.org/terms

Theory," *Journal of the Indian Law Institute* 41, no. 3/4 (1999): 500-512, https://www.jstor.org/stable/43953347; and Zsolt Ződi, "Felix Somló and John Austin Building Blocks of Two Analytical Theories," *Hungarian Journal of Legal Studies* 59, no. 2 (2018): 156-168, https://doi.org/10.1556/2052.2018.59.2.3.

38 Edward J. Villacres and Christopher Bassford, "Reclaiming the Clausewitzian Trinity," *The US Army War College Quarterly: Parameters* 25, no. 1 (1995): 9-19, DOI:10.55540/0031-1723.1730.

39 Dilshad Jaff, Lewis Margolis and Edward Reeder, "Civil–Military Interactions during Non-Conflict Humanitarian Crises: A Time to Assess the Relationship," *Defence Studies* 22, no. 3 (2022): 398-413, https://doi.org/10.1080/14702436.2022.2046471.

40 Mirza Hasib Hussain Baig, "Abusive Constitutionalism and Military Courts in Pakistan," *Islamabad Law Review* 4, no. 1/2 (2020): 1-8, https://www.iiu.edu.pk/wp-content/uploads/2021/04/full-vol-4-1-2.pdf.

41 Bakht Munir and Ataullah Khan Mahmood, "Establishment of Military Courts in Pakistan and its Effects on Trichotomy of Powers: International and Domestic Standards," *Pakistan Vision* 21, no. 2 (2020): 249-262, http://pu.edu.pk/images/journal/studies/PDF-FILES/18_v21_2_20.pdf.

42 Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 2002).

43 Najiyah Khan, "Civil-Military Relations: A Case Study of Pakistan" (PhD diss., University of Nevada, Las Vegas, 2010), http://dx.doi.org/10.34917/2228992.

44 Shoaib A. Ghias, "Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf," *Law & Social Inquiry* 35, no. 4 (2010): 985-1022, https://doi.org/10.1111/j.1747-4469.2010.01211.x.

45 Filippo Boni, "Civil-Military Relations in Pakistan: A Case Study of Sino-Pakistani Relations and the Port of Gwadar," *Commonwealth & Comparative Politics* 54, no. 4 (2016): 498-517, https://doi.org/10.1080/14662043.2016.1231665.

46 Pakistan Senate, GoP, "The Constitution of the Islamic Republic of Pakistan." 'Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to brogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.'

47 Muhammad Nasrullah Virk, "Doctrine of Necessity-Application in Pakistan-Cases of Immense Importance-A Critical Review," *International Journal of Social Science & Education* 2, no. 2 (2012): 82-87.

48 Leslie Wolf-Phillips, "Constitutional Legitimacy: A Study of the Doctrine of Necessity," *Third World Quarterly* 1, no. 4 (1979): 97-133, https://www.jstor.org/stable/3990400.

49 Saima Naz and Lubna Kanwal, "Civil-Military Relations in Pakistan 2008-2013," *Journal of the Research Society of Pakistan* 59, no. 1 (2022): 90-99, http://pu.edu.pk/images/journal/history/PDF-FILES/11_59_1_22.pdf.

50 Mark M. Stavsky, "The Doctrine of State Necessity in Pakistan." *Cornell International Law Journal* 16, no. 2 (1983): 341, https://scholarship.law.cornell.edu/cilj/vol16/iss2/2.

51 Rebecca L. Schiff, *The Military and Domestic Politics: A Concordance Theory of Civil-Military Relations*, CASS Military Studies (London: Routledge, 2008).

52 For instance, see: Federation of Pakistan v. Tamizuddin, [1955] PLD FC 240; Asma Jilani v. Govt of Pakistan, [1969] PLD LAH 786; Begum Nusrat v. COAS, [1977] PLD, SC 657; Haji Saifullah v. Federation of Pakistan, [1989] PLD SC 166; Mian Nawaz Sharif v. President of Pakistan, [1993] PLD SC 473; and Muhtarma Benazir Bhutto v. President of Pakistan, [1998] PLD SC 388.

53 Stella Madzimbamuto v. Desmond William Lardner-Burke and Frederick Phillip George, [1968] 3 WLR 1229.

54 Syed Yousaf Raza Gillani v. Assistant Registrar, Supreme Court of Pakistan, [2012] SC 466; Government of Pakistan v. Pervez Musharraf [2019] IHC 208; Doctrine of Necessity from Zafar Ali Shah vs Pervez Musharraf, [2000] PLD SC-1208; Tika Iqbal Muhammad Khan v. Gen Pervez Musharraf, [2008] PLD SC 178; Government of Pakistan v. General Pervez Musharraf, [2019] IHC 208; and Justice Hasnat Ahmed Khan v. Federation of Pakistan, [2011] PLD SC.

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