CONSTITUTIONAL ORDER IN PAKISTAN: THE DYNAMICS OF EXCEPTION,
VIOLENCE AND HIGH TREASON

A DISSERTATION SUBMITTED TO THE GRADUATE DIVISION OF THE
UNIVERSITY OF HAWAI‘I OF MĀNOA IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

IN

POLITICAL SCIENCE

May 2012

By

Syed Sami Raza

Dissertation Committee:

Michael J. Shapiro, Chairperson
Roger Ames
Manfred Henningsen
Sankaran Krishna
Nevzat Soguk
## TABLE OF CONTENTS

Acknowledgments...........................................................................................................................................iii
Abstract.......................................................................................................................................................... v

Introduction .........................................................................................................................................................1

I. Disruption of the Constitutional Order and the State of Exception

1. Disruption of Pakistan’s and other Post-Colonial States’ Constitutional Order: Courts and Constitutional Theory.........................................................24

2. Disruption of Constitutional Order in Pakistan: Figuring the Locus of the State of (Religious) Exception.................................................................72

II. Disruption of the Constitutional Order and the Law of High Treason

3. Disruption of the Constitutional Order in Pakistan: A Critique of the Law of High Treason.........................................................................................100

4. Law of High Treason, Anti-Terrorism Legal Regime in Pakistan, and Global Paradigm of Security........................................................................148

Conclusion.........................................................................................................................................................196

Table of Cases ..................................................................................................................................................203

Bibliography..................................................................................................................................................206
ACKNOWLEDGEMENTS

I would like to thank my adviser—Michael J. Shapiro—for being friendly and supportive throughout the program. Without his continuous support, it would have been difficult to finish the program in four and a half years. As I appreciate Mike’s moral support, I also appreciate his academic and intellectual mentoring. In his classes and lectures, I acquired the taste for micro-politics, cinematic political thought, and critical methods. The reader will notice that the methodology of the dissertation is informed of critical methods, albeit the subject matter revolves around constitutional politics and theory.

I would also like to thank rest of the committee members for their support and feedback. Manfred Henningsen took keen interest in the constitutional politics and court decisions of the Supreme Court of Pakistan, and of several other post-colonial states. He helped me understand the German constitutional and political theory, which I engage in detail. Moreover, I appreciate Manfred for carefully reading the earlier drafts, giving valuable feedback, and assisting in proofreading. Sankaran Krishna and Nevzat Soguk provided valuable feedback on the subject matter. Since Krishna’s research focuses on South Asia and postcolonial world in general and Soguk’s research focuses on the Muslim World, they could not only challenge my earlier ideas, but also provided alternative ideas. Roger Ames contributed to my understanding of the War on Terror. I am also thankful to Deborah Halbert for reading parts of this dissertation and helping me articulate my ideas.
I am most grateful to my parents—Jawed Hussain and Perveen Jawed—as well as my siblings—Saima R., Anbarin F., Tahir R., Ali R., and Faisal R.—for their patience and moral support. Many thanks also to my friends, especially, Kavina Dayal, Azeema F., Aliza, Taira F., Melisa C., Brianne G., Shakeel M., Ayub J., Farzand A., Sam Opondo, Umi, Willy, Rex T., Guanpei and many others for their wonderful company.
ABSTRACT

Pakistan’s constitutional order has faced several disruptions over the past sixty years. The latest disruption occurred in 2007 when President General Pervez Musharraf declared a state of emergency in the country and suspended the constitution. Again, in the aftermath of the American Special Forces’ operation at Osama bin Laden’s hideout on May 2, 2011, the country came close to a military coup d’état as the relationship between the government and the army considerably deteriorated. Apart from the threat of a military coup d’état, the constitutional order of Pakistan has faced, directly or indirectly, two more threats: the Islamists’ struggle for Sharia and the anti-terrorism legal regime. In the summer of 2007, the Islamists of the Red Mosque revolted against the democratic constitutional system and demanded its replacement with Sharia. Around the same time, human rights activists challenged the anti-terrorism legal regime on the account that it violated constitutional rights and guarantees. Just as these political developments threatened the fledgling constitutional order, the juridical debate on the problem of constitutional disruption did not gain the necessary sense of urgency in the country. In this dissertation, I embark upon a critical and theoretical study of these political developments. To do this, I first analyze the decisions of the Supreme Court in various cases of constitutional disruption. Second, I search for constitutional reasons of the Islamists’ demand for the abolition of the constitutional order. Third, I identify and interpret the nature of law of high treason in the constitutional order and its perceived role in forestalling constitutional disruption. Finally, I take up the anti-terrorism legal regime from a genealogical and comparative perspective to analyze its disruptive impacts on the democratic character of the constitutional order.
INTRODUCTION

In the last decade (2000-2010), the year 2007 was one of the most tumultuous in Pakistan’s political and constitutional history. Several major developments of political and constitutional significance occurred in this year. For instance, lawyers and judges initiated a political movement—popularly known as the Lawyer’s Movement—to resist the arbitrary removal of judges and to uphold the independence of judiciary. Islamists of the Red Mosque revolted against the democratic constitutional order and demanded the implementation of Sharia in the country. The Supreme Court took up the cases of the so-called “missing persons” to the much vexation of General President Prevez Musharraf. In other words, the Court questioned the legality of the anti-terrorism laws under which the intelligence agencies operated to counter terrorism. All these developments, in one way or the other, related to resisting the dictatorial regime of Musharraf.

Despite facing tough resistance, Musharraf continued to jealously guard his power seat. In addition, he sought to extend his presidency for a term of five years. To do this, he prodded the outgoing parliament to re-elect him. Because his re-election was in contravention of the constitution, it stirred fury among those in the Lawyers’ Movement. For instance, the Supreme Court is petitioned to decide on the legality of Musharraf’s re-election. However, before the Supreme Court could give its verdict, Musharraf suspended the constitution and declared a state of emergency in the country. Then he proceeded to deal with the Supreme Court. He required the judges to take a
new oath under the Provisional Constitutional Order (PCO) and the Oath of Office (Judges) Order, 2007. But to his surprise, a large number of judges refused to take the oath. They instead joined the Lawyers’ Movement. Within a year, the movement grew so powerful that Musharraf was forced to resign.

Whereas the Lawyers’ Movement to depose Musharraf was successful, the Islamists' movement for the abolition of the democratic constitutional order and the implementation of Sharia was not. In fact, it met a violent end. The government ordered the armed forces to place the Red Mosque and its adjacent seminaries under siege. The state of siege continued for more than a week. Negotiations were arranged between the representatives of the government and the Mosque. However, the negotiations failed, and eventually, the government decided to suppress the Islamists’ revolt by military operation.

On the other hand, on the constitutional front, the battle between the general president and the judges did not end with his resignation. After the new government reinstated the judges, the Sind Bar Association petitioned the Supreme Court to take up the question of legality of Musharraf’s declaration of emergency and suspension of the constitution. The question of legality was an important juridical question, even though it was not a new question for the Supreme Court. Given the earlier opposing precedents established by the earlier benches of the Court, the question carried historical (and theoretical) significance. Moreover, the petition was significant from another legal dimension i.e., it involved charges of high treason against the military president. The court carefully reviewed the history of constitutional disruptions in Pakistan and concluded that Musharraf’s disruption of the constitution was invalid and illegal. The
court also observed that by disrupting the constitutional order Musharraf committed high treason.

One of the crucial dynamics that comes to fore from the above-mentioned developments of political and constitutional significance is the peculiar struggle over the constitutional order. On the one hand we see lawyers, judges and politicians protesting for the restoration of the constitutional order in its original form. On the other we see Islamists demanding abolition of the same order. At the same time, we also see the general president tampering with the constitutional order so as to extend his dictatorial regime. In this dissertation I aim to study this peculiar struggle over the constitutional order from historical and constitutional theory perspective.

**Literature and Methodology Review**

In her acclaimed book on Pakistan’s constitutional politics, Paula Newberg begins by quoting from Georg Buechner’s famous drama *Danton’s Death*: a constitution is “a transparent garment clinging to the body politic.”¹ Employing Buechner’s metaphor—the constitution as a transparent garment—Newberg comments on the dialectic between “the imperfections and the aspirations” and “the ideal and the real” in the constitutional mechanism of Pakistan. Although the constitution as a transparent garment is a powerful metaphor to reflect on the politics of Pakistan, I think, it has limited explanatory scope. It does not fully explain the interactive relationship

¹ Paula R Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge University Press 1995), 1
between the constitution and politics—the constitutional politics. For instance, the metaphor does not enable Newberg to ask whether a constitution merely reflects on the dialectic between the imperfections and the aspirations, the ideal and the real, or does it give those imperfections, aspirations, ideals and reals a normative existence? Secondly, how do we explain a politics that takes as its aim the suspension and destruction of the transparent garment? These questions highlight how the assumption of a constitution as a transparent (or even a reflective) garment is constrained to explain the crucial dynamic of struggle against the constitutional order, the suspension of law and the state of exception. In the context of constitutional politics in Pakistan, which shows many instances of suspension, subversion, and abrogation of the constitutional orders, metaphor as a methodological tool does not sufficiently enable the writer and the reader to grasp the nature of constitutional order and constitutional politics. If not metaphor, then what? I think that for investigating certain dynamics of constitutional politics, especially the dynamic of disruption, metaphor should give way to theory.

On the other hand, a similar question can be posed to the students of constitutional politics whether they should engage constitutional theory to inform academic discussions? I suggest that because the academic discussion can be a lot more flexible than a court discussion and decision, engaging constitutional theory can be useful. However, choosing a constitutional theory and demonstrating its relevance to the question at hand is often tricky. Fortunately, for the project at hand, the Supreme Court of Pakistan has made the task easier. In 1958, faced with the question of disruption, the Supreme Court resorted to the legal positivism of Hans Kelsen. Hence, I begin with a critique of Kelsen. And to do this, I engage Kelsen’s foremost critic, Carl Schmitt. Then
I engage Schmitt’s constitutional theory, especially the theory of state of exception, which I think is quite relevant to the problem of constitutional disruption.

It is worth noticing that in *Asma Jilani* 1972, the Supreme Court critiqued Kelsen’s theory. And in one of the latest decisions, in *Zafar Ali Shah* 2001, the Court once again declined to rely on Kelsen’s theory. The Court rather based its decision on a plain explanation of a gap between the given constitutional mechanism and the politics in the country. The Court says: “It is for representatives of people to see to it that everything is in order and no body can raise his little finger when their actions are in line with fundamentals of Constitution.”\(^2\) One of the consequences of this observation is that it reveals the shortcomings of the metaphor of transparent garment. In other words, the constitution of Pakistan was far from a transparent garment of the political process in the country. Rather there existed a peculiar politics in the country that was always directed against the constitution. In yet other words, the constitution did not appropriately respond to or evolve with the challenges of the politics in the country. Hence, the condition for the possibility of transparency and reflectivity of a constitution depends upon the continuous negotiation between the norms of constitution and the demands or aspirations of political process. If taken on constitutional theory level, the court’s observation resonates with Schmitt’s definition of the constitution: constitution

is a *dynamic emerging being*, "an active principle of a dynamic process of effective energies, an element of the becoming." ³

Much of the literature on the constitutional politics of Pakistan, in one way or the other, centers on the events and legal cases relating to constitutional subversion, suspension, abrogation and abolition. ⁴ But, surprisingly, there is

---

³ Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 61. Again the following assumption of Newberg shows her flawed understanding: Pakistan demonstrates "incomplete constitution-making [which] has placed the burdens of constitutional interpretation on state instruments ranging from the bureaucracy to the military to the judiciary." In light of the theory of constitution as dynamic becoming, it is almost impossible to show that a constitution making can be complete or that state institutions, especially administration and judiciary do not engage in constitutional interpretation. In fact, Pakistan’s constitutional dilemmas are the result of incongruous, uneven and a timely responses to political and social demands and upheavals. Newberg, *Judging the State* (n 1) 2

⁴ The literature on the problem of constitutional disruption in Pakistan is wanting, especially given the fact that constitutional disruptions are frequent and they entail dire constitutional consequences. Much of the literature available today was written in the decades immediately following the independence in 1947. Interestingly, what we would consider as recent literature, with the exception of a few write-ups, was also written almost two decades ago. Osama Siddique’s essay “Jurisprudence of Dissolution” (2008) is one of the few exceptions. However, Siddique’s essay does not engage juridical theory. It is written from the factual and jurisprudential vantage point. Osama Siddique, ‘Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and Its Discontents’ (2005) 23 Arizona Journal of International and Comparative Law 615. Another exception is Nasser Hussain’s book *The Jurisprudence of Emergency* (2003). Hussain’s work is the only work that meticulously engages juridical theory. In fact, it renders a detailed critique of the English legal principle of rule of law. In doing so Hussain partly engages the theory of state of exception. Because his work was published before Giorgio Agamben’s extrapolation of the theory of state of exception in *State of Exception*, he could not edify from the latter work. Nevertheless, it is quite interesting to notice that parts of the genealogy of the concept of state of exception that Agamben traces, Hussain had already traced in his book. For our purpose, although Hussain’s book is theoretically well-informed, it is focused on the emergency jurisprudence of the Raj. Neither does it engage post-colonial developments, nor the theoretical debate regarding the application of Kelsen’s legal positivism. Some of the works that consistently engage the problem of constitutional
hardly any work that has consistently edified from and drawn on juridical theory, especially the theory of the state of exception. This dissertation carries out a preliminary research that draws on the theory of state of exception, with the aim to develop a comprehensive theoretical response to the problem of disruption of constitutional order.

**Theory and Praxis of the State of Exception**

Admittedly, at the outset of 21st century, the theory of state of exception is relatively not a fully developed theory. Giorgio Agamben, who is one of the eminent contemporary theorists of the theory of state of exception, goes to the extent of saying:

_________________________

…there is still no theory of the state of exception in public law, and jurists and theorists of public law seem to regard the problem more as a *quaestio facti* than as a genuine juridical problem.\(^5\)

To make his contribution to the theory of state of exception, Agamben traces the century-long debate on the concept of the state of exception. Agamben informs us, that the German constitutional theorist, Carl Schmitt, was one of the first theorists who made significant contribution to the theory. In fact, Schmitt made the theory his lifelong endeavor. Before Schmitt, we find references about the concept of the state of exception in the works of several political philosophers of the early modern state. For instance, Jean Bodin is one of those earliest political philosophers. In fact, Schmitt himself learns from Bodin, as he writes:

To what extent is the sovereign bound to laws, and to what extent is he responsible to the estates? To this last, all-important question [Bodin] replied that commitments are binding because they rest on natural law; but in emergencies the tie to general natural principle ceases. In general according to [Bodin], the prince is duty bound toward the estates or the people only to the extent of fulfilling his promise in the interest of the people; he is not so bound under conditions of urgent necessity.\(^6\)

\(^5\) Giorgio Agamben, *State of Exception* (Kevin Attel tr, University of Chicago Press 2005) 1

\(^6\) Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005) 8
John Locke was aware of the problem of the state of exception. In the section on the concept of “prerogative” he writes: A prerogative is the “power to act according to discretion, for the public good, without the prescription of the law and sometimes even against it.” Similarly, Montesquieu limits “Political Liberty and the Constitution” by providing: “but if the legislative power believed itself endangered by some secret conspiracy against the state.” On the other hand, Jean Jacques Rousseau make an interesting comment:

The punctiliousness and leisurely pace characteristic of formal procedures demand an amount of time that circumstances do not always allow. [Therefore] no people should seek to stabilize its political institutions so completely as to divest itself of the power to suspend their operation.

At the end of World War I, Walter Benjamin, Carl Schmitt and Hans Kelsen engage the concept of the state of exception and present different views. In his 1919 essay *Critique of Violence*, Benjamin highlights the possibility of three types of violence—law making violence, law preserving violence, and pure violence. In the next year Schmitt, in his book *Dictatorship*, presents two types of dictatorship—commissarial and sovereign. These two types of dictatorship correspond to Benjamin’s law-preserving and law-making violence of the sovereign, respectively. According to

---

Agamben, while Benjamin acknowledges a propensity in the nature of the positive law to enfold violence inside its structure, the latter also presents the possibility of a violence, the pure violence, which resides outside the structure of law. On the other hand, Schmitt takes the task of proving that violence always resides inside the structure of law. In Agamben’s words:

> While the strategy of “Critique of Violence” was aimed at ensuring the existence of a pure and anomic violence, Schmitt instead seeks to lead such a violence back to a juridical context. The state of exception is the space in which he tries to capture Benjamin’s idea of a pure violence and to inscribe anomie within the very body the *nomos*. According to Schmitt, there cannot be a pure violence—that is, a violence absolutely outside the law—because in the state of exception it is included in the law through its very exclusion.\(^{11}\)

I do not intend to enter into the debate between Benjamin and Schmitt. Instead, I highlight another but related debate between Kelsen and Schmitt. I think that on the concept of the state of exception Schmitt not only engages Benjamin, but also engages Kelsen. In several of his books, especially the 1922 treatise *Political Theology* and 1932 book *Constitutional Theory*, Schmitt’s references to Kelsen’s pure theory of law and how that theory does not attend to the problem of exception are quite explicit and direct. It is in the light of the Kelsen-Schmitt debate that I read the state of exception in Pakistan, especially in chapters 1, 2 and 3. Part of the reason of engaging this debate is

\(^{11}\) Agamben, *State of Exception* (n 6) 54
the fact that the Supreme Court of Pakistan in *State v. Dosso* 1958 engages Kelsen’s theory and thereby sparks a debate regarding the sufficiency of Kelsen’s legal logical arguments.

Since the beginning of 20th century, even before Benjamin and Schmitt could extrapolate their conceptions of the state of exception, Hans Kelsen had already developed a response to political and constitutional emergencies. Kelsen proposed that a closed, structured and dynamic normative system, if properly understood and put in place, could contain the problem of the state of exception. Accordingly, he developed a legal logical methodology to explain the possibility of such a normative system. All legal norms, Kelsen wrote, draw their legality from the higher norms, for instance the norms of a constitution. The higher norms are themselves based on what Kelsen called the basic norm or the *Grundnorm*. In this way, Kelsen claims that his theory

\[\ldots\text{seeks the basis of law—that is, the reason of its validity—not in a meta-juristic principle [i.e., sovereign power and/or transcendental justice] but in a juristic hypothesis—that is, a basic norm, to be established by a logical analysis of actual juristic thinking.}\]

In *Dosso* (1958), the Supreme Court of Pakistan engaged Kelsen’s theory, and hence became a party to the debate. However, the court remained unaware of the broader theoretical debate surrounding the concept of the state of exception, especially

Schmitt’s critique of Kelsen. Hence the decision in *Dosso* remained insufficiently informed of the theory of the state of exception. The decision is overturned in 1972.

According to Schmitt, one of the primary weaknesses of Kelsen’s legal positivism is that it does not take into account the political crisis or the state of exception. He writes that Kelsen’s theory “is [a] system of ascriptions to a last point of ascription and to a last basic norm.” Schmitt believes that Kelsen’s all-comprehensive legal order is doomed to fail because norm “can never encompass a total exception.”¹³ The exception that threatens the security, political unity and existence of the state will cause ruptures in the closed positivist legal order devoid of personalistic sovereign power. He writes:

> The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.¹⁴

On the other hand, the story of the praxis or legislative response to emergency situations—the legislation relating to constitutional provisions dealing with the states of exception—goes back to World War I. According to Agamben, with the Defence of the Realm Act 1914 (DORA) and the Emergency Powers Act 1920 provisions relating to the state of exception were “firmly introduced into English law.” However, what he does not notice is how the history of the laws relating to the state of exception in the

---

¹³ Schmitt, *Political Theology* (n 7) 6
¹⁴ Ibid
English law goes back to 19th century colonialism. As I demonstrate in chapter 4, as early as 1804, the Regulation X, issued by the East India Company, had introduced in the legal structure of the colonial state of Bengal the principle of suspension of law and courts, and in their stead establishment of the martial law. The Regulation X read:

The Governor-General in Council is hereby declared to be empowered to suspend, or to direct any public authority or officer to order the suspension of, wholly or particularly, the functions of the ordinary Criminal Courts of Judicature…and to establish martial law…and also to direct the immediate trial, by Courts martial.

Later, in the wake of WWI and WWII, the British government in India adapts DORAs in the form of the Defence of India Acts 1915 and 1939. With these acts the principle of the state of exception is firmly introduced in the legal structure of the colonial state in India. After the independence in 1947, the two post-colonial states of India and Pakistan inherit the colonial legal structure and along with it the principle of state of exception.

In this dissertation I engage the theory of state of exception from two angles. First, I engage it in order to extrapolate the theoretical underpinnings of the phenomenon of the disruption of constitutional order, for instance, by the military intervention. From this angle, I highlight the juridical conundrum involved in the suspension of law, especially as the law courts face it. Accordingly, I engage the theoretical debate between Hans Kelsen and Carl Schmitt on the question whether the juridical system has an answer to the problem of dealing with disruption? If yes then
how does it do so? Kelsen and Schmitt propose contrasting answers. The Supreme Court of Pakistan, and later, several courts of other post-colonial states, choose Kelsen’s answer. However, in subsequent decisions, as I demonstrate the courts swing virtually to adopting Schmitt’s answer.

Second, I engage the theory of the state of exception in order to shed light on the juridical structure that enables the state to use physical force, for instance the so-called operations of police and armed forces against civilian protests, uprisings and revolts. The theory of state of exception allows us to discern how the state by way of (suspending) the law deals with protests, uprisings, and revolts, or in short, with the unarmed life. According to Agamben:

…if the law employs the exception—that is the suspension of law itself—as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.15

Learning from this angle of the theory of the state of exception, I shed light on the 2007 revolt of the Islamists at the Red mosque in Islamabad and its subsequent suppression by an army operation. As the revolt takes as its object the abolition of the erstwhile constitutional order, I search for the locus of its initiation in the constitutional order itself.

15 Agamben, State of Exception (n 6) 1
As I engage Carl Schmitt, who is considered as a controversial thinker, I have often been asked: Why Schmitt? I admit that the choice was not easy. However, inasmuch as I engage the theory of the state of exception, it was not only difficult, but also not prudent to ignore Schmitt. I am aware of the fact that Schmitt participated in the Nazi ideology for which there is hardly any acceptable apology. However, certain recent research works on Schmitt demonstrate that his ideas and writings can be divided into different phases. For instance, Joseph Bendersky has effectively demonstrated that not all of Schmitt’s ideas can be reduced and linked to his Nazi career from 1933 to 1936. Agostino Carrino demonstrates three phases in Schmitt’s writings—first from late 1910s to early 1930s, second from 1933 to 1936 and third from 1936 to 1943. Similarly, Andreas Kalyvas demonstrates in Schmitt’s writings “three moments of democracy.” The ideas of Schmitt that I engage in this dissertation are from his earlier phase of writing, which is clean from the racist polemic.

Another related question I have often been asked is why engage Schmitt or the Schmitt-Kelsen debate on the concept of exception or the disruption of constitutional order. As I mentioned above, in a cause célèbre Dosso 1958, the Supreme Court of Pakistan engaged Carl Schmitt’s rival theorist, Hans Kelsen. The debate between Schmitt and Kelsen on the key concepts of constitutional theory is well known. The Supreme Court engaged Kelsen’s theory without taking into consideration the larger

17 Agostino Carrino, ‘Carl Schmitt and European Juridical Science’ in Chantal Mouffe (ed), (Verso 1999)
debate. For two decades, Kelsen’s theory was debated in Pakistan’s courts. Eventually, in Jilani 1972, the Supreme Court overturned its earlier decision, and rejected Kelsen’s theory. It is also worth noticing that the approach of the Court was curious: the Court framed the question of disruption by using Kelsen’s concept of the Grundnorm and answered by proposing Schmitt’s concept of the “supralegality.” More precisely, the Court asked: what is the Grundnorm of constitutional order in Pakistan? The Court answered that the Grundnorm is the Objectives Resolution (1949). The Objectives Resolution was a resolution passed by the first Constituent Assembly to stipulate the objectives of constitution making in Pakistan. These objectives consist of Islamic values provisions. Later, the Objectives Resolution was made a part of the constitutions of 1958, 1962, and 1973. Thus when the Court identified the Grundnorm of Paktsitan’s constitution it suggested that the Islamic value provisions carry a supra-legal status, the one that is above the sovereign authority of parliament. Interesting, we notice that Schmitt had suggested, in his 1932 treatise Legality and Legitimacy, that the Christian values and traditions should be treated as supra-legal contents of the Weimar constitution, and that they provided the ground for the legitimacy of the democratic constitutional order.

In 2001, the Supreme Court of Pakistan deciding on Gen. Pervaiz Musharraf’s coup d’état does not resort to Kelsen, but to a concept of the constitution as the dynamic emergence of political unity. Although the Court does not rely on Schmitt, however, in using this concept the Court comes close to Schmitt’s understanding of the constitution.
The first constitutional disruption in Pakistan occurred in 1958. It is followed by disruptions in 1969, 1977, 1999, and 2007. With each of these disruptions, the Supreme Court was petitioned to decide whether or not the disruption of the democratic constitutional order was legitimate. In other words, the Court was petitioned to explain the nature of the disruptions as well as to minimize its consequences for democracy in the country. To answer these questions, in the very first case of Dosso (1958), the Court resorted to Hans Kelsen.

In his book, *The General Theory of State and Law*, Kelsen proposes a closed, hierarchical and structured conception of the juridical order. According to Kelsen there is a hierarchy of laws within the positive juridical order. The lowest rung consists of individual norms. Above the individual norms are statutes. Above the statutes are the constitutional laws, and in fact the constitution itself. On the top of the hierarchy is a legal logical constitution, which Kelsen called the *Grundnorm*. Kelsen builds a structured and hierarchical legal order, which with the help of judges becomes a dynamic and self-sustaining system. It is freed from gaps and antinomies, hence from the problem of exception.

Kelsen suggests, "[A] successful *coup d'état* is an internationally recognized legal method of changing a constitution." Pakistan’s Supreme Court follows Kelsen’s suggestion. However, Kelsen does not explain why a *coup d'état* takes place in the first place? And the Court does not ask this question either. In other words, Kelsen only addresses the legal dimension of the question of disruption. On
this his critic, Carl Schmitt, critiques him for ignoring the political and sociological dimensions of the question of disruption. According to Schmitt, constitution is a dynamic agreement or will to political unity, which must continuously evolve. It is always in the state of becoming. Secondly, Schmitt points out that the state of exception cannot be completely subsumed by law. Additionally, Schmitt writes a historical and theoretical treatise on the institution of dictatorship, which arises from coups and revolutions. According to Schmitt, a dictatorship is of two types, sovereign or commissarial. The sovereign dictatorship aims at abolishing the existing constitutional order, while the commissarial dictatorship aims at protecting constitutional order but only at the cost of suspending part or whole of it.

In 1972, 1977 and 2001 Pakistan’s Court distances itself from Kelsen’s theory. Especially in 2001 the Court holds that the constitutional disruption is not a problem of legality but of political legitimacy. The Court observes that the problem lies in the crisis of political unity and failing to run the government in accordance with the constitution. In this way the Court bases its decision on the political and sociological dimensions rather than on the legal dimension. I juxtapose these two different decisions of the court, i.e., the 1958 decision based on Kelsen’s theory and the 2001 decision that correspond to Schmitt’s theory. I point out a) the constitutional disruptions in Pakistan involved crisis of the will to political unity, b) the coups occurred because the constitution was not understood as an element of the political becoming, and c) for the court to minimize the consequences of dictatorship on democracy, it needs to explain the institution of
dictatorship as a time- and space-bound institution, rather a political *fait accompli*. To do this, the Court can shed light on whether the dictatorship is established for making a new constitutional order or safeguarding the existing one. In the case of the latter, which is often the case in Pakistan, the Court can determine the nature of the state of emergency, and accordingly specify a time line for dictatorship. Moreover, the Court can from time to time review the time period of dictatorship as well as review the actions of the dictator.

Pursuing the understanding of constitution as a dynamic emergence of unity, I study the Islamic revolt at the Red Mosque. Pakistan's constitution is split between the value-neutral and value-plenitude parts. In the value-plenitude part, the constitution provides for the religious values and social goals. In the value-neutral part it provides for the secular democratic institutions, their powers, functions and election procedures. The former is non-justiciable and the later justiciable.

From constitutional theory perspective, as for instance Schmitt demonstrates, modern constitutions are split between the value-neutral and value-plenitude parts. Given his Catholic affiliations, Schmitt expresses a sense of irony and shock over the democratic constitutional procedure, which he thinks leaves the value-plenitude part or social values and goals, at the mercy of the quantitative principle. Therefore, in one of his writings, he tries to raise the value-plenitude part of the constitution to a separate heterogeneous constitution, the one that cannot be amended or repealed.
In Pakistan, we see that Islamists express similar sense of irony and shock over leaving the Islamic value provisions at the mercy of the quantitative legislation. Therefore, they wish to raise the Islamic value-plenitude part to the status of superior heterogeneous constitution. On the other hand, as the constitution-making process got underway after independence, the constitution-makers knew that they would not be able to avoid the demand of Islamists to incorporate Islamic value-provisions in the constitution. So they agreed to incorporate the Islamic value-provisions in the constitution. However, they come to face a much larger task of reconciling the Islamic value provisions with the democratic organizational and procedural provisions. Thus the very introduction of the Islamic value-provisions in the constitution created gap and antinomy between the Islamic value-provisions and secular democratic provisions. Now the constitution makers came up with a unique solution: they made the Islamic value provisions non-justiciable and the secular democratic provisions justiciable. In other words, the constitution makers incorporated the Islamic value provisions inside the constitutional order so as to exclude the demand for Sharia by way making it “included-exclusion.” This solution however provoked the Islamists to begin a legal battle in the courts, and whenever they found themselves on the losing ground, they resorted to a direct course of revolt.

After repeated disruptions of the constitutional order, especially at the hands of the army, the constitution-makers of the 1973 constitution introduced the law of high treason. This was a bold attempt at the part of politicians to put a check on the military coups. Although the law could not stop military coups, the
legislators thought it still made difference. In 2007 when General Pervez Musharraf suspended the constitution, the Supreme Court brought the law into action.

I take up the court’s decision in the 3rd chapter of this dissertation. Analyzing the decision of the Supreme Court in *Sindh Bar Association 2009* from historical and juridical theory perspective, I find out that the roots of the Pakistani law of high treason go back to the application of Kelsen’s theory by the Supreme Court in 1958. Kelsen maintains that the successful *coup d’état* is an internationally recognized method of changing a constitution, but should the *coup d’état* fail it is punishable by capital sentence. The judiciary and constitutional-makers of Pakistan upheld Kelsen’s view. Secondly, that the initial relationship between the law of high treason and the constitution in Pakistan has recently transformed. While initially it was provided that disruption of the constitutional order or any part of it would amount to high treason, the latest decision of the Supreme Court suggests that only the disruption of the basic structure of the constitution would amount to high treason. For instance, the independence of judiciary is one of the features of the basic structure of the constitution. Should anyone try to destroy or compromise the independence of judiciary, as Musharraf purportedly did by arbitrarily deposing judges, he/she commits the crime of high treason. Finally, I point out that the court’s decision does not explain relationship between the proportionality between the capital sentence and the disruption of the basic structure.
In the last chapter I revert to the War on Terror in Pakistan, especially the anti-terrorism legal regime. The anti-terrorism legal regime includes preventive indefinite detention, special courts, and speedy trials. Since it suspends certain fundamental rights and guarantees, the legal regime virtually disrupts the democratic constitutional order. It establishes a parallel criminal code. Analyzing the anti-terrorism regime with genealogical and theoretical approach, I figure that the distant history of the anti-terrorism legal of Pakistan stretches back to the colonial security regime. While its immediate roots stretch to and connect with the anti-terrorism legal regimes in the Northern Ireland, the UK and the US. In other words, Pakistan’s anti-terrorism legal regime is a part of “the global paradigm of security.” I render a textual analysis of the Western and Pakistani anti-terrorism legal regimes and show that Pakistan borrows the textual and legal substantive contents of its anti-terrorism legal regime from the colonial security regime and the present Western anti-terrorism legal regimes. Therefore, it would not be an exaggeration to say that part of the problem of the disruption of democratic constitution order in Pakistan comes from the Western invention of colonial security and anti-terrorism legal regimes.
Part I

Disruption of the Constitutional Order and the State of Exception

*Quare siletis juristae in munere vestro?*

[Why are you jurists silent about that which concerns you?]
Chapter 1

The Disruption of Pakistan’s and other Post-Colonial States’ Constitutional Order: Courts and Constitutional Theory

Introduction

Making a constitution for the newly independent state of Pakistan (1947) was a challenging constitutional task. The agreement arrived at in the shape of the 1956 constitution—especially the questions of parliamentary representation, form of government, administrative and financial division among the provinces and ecclesiastical and sectarian issues—remained tenuous. Meanwhile, a multiple party system, divided on regional, ethnic, sectarian and linguistic lines, failed to form a stable interim government. Although a new constitution gave some hope for political stability, the erstwhile President of Pakistan was not convinced. According to him the new constitution was “full of dangerous compromises so that Pakistan will disintegrate internally if the inherent malaise is not removed.”¹ Thus on October 8, 1958, he abrogated the constitution and proclaimed martial law in the country.

In wake of the coup d’état, the Supreme Court of Pakistan in a cause célèbre, State v. Dosso (1958),² comes to face one of the most problematic questions of legal theory: How to decide on the disruption of constitutional order? Positively understood,

² State v. Dosso [1958] PLD 533 (SC)
this question anticipates several more basic questions. What guarantees a constitutional order? In other words, what is the force of law? What and who can disrupt the law or constitutional order? When is the disruption “successful”? These are the much-debated and unresolved questions of legal and constitutional theory. Faced with these questions, the Court seeks to find an answer in Hans Kelsen’s legal positivism. There was, of course, an advantage in resorting to Kelsen. Legal positivism was one of the celebrated approaches of liberal constitutionalism, and thereby the Court could find some comfort in that fact. However, the Court missed to notice that the question of disruption of constitutional order was the Achilles Heel of Kelsen’s legal positivism. The heydays of the approach were the opening decades of the twentieth century. By the 1920s, after the “successful revolution” of 1919 in Germany, the theory came to face serious critique from both the conservatives and revolutionaries; foremost among them was a young political and constitutional theorist, Carl Schmitt.³

The purpose of this chapter is to evaluate the application of Kelsen’s legal positivism to the question of disruption of constitutional order, especially in the light of Schmitt’s critique of Kelsen. Moreover, since some regard Kelsen’s theory “a last resort when other authorities are found wanting,”⁴ I assess whether Schmitt’s juridical theory, especially the themes pertaining to the exception, nature of the constitution and

³ Hans Kelsen, General Theory of Law and State (Anders Wedberg tr, Harvard University Press, Cambridge 1945); Both Kelsen and Schmitt use the phrase ‘successful revolution.’ In fact, it was commonly used by German constitutional theorists of the time. Carl Schmitt, Constitutional Theory (Jeffrey Seitzer tr, Duke University Press, Durham 2008)
institution of dictatorship, could be presented as an alternative. This is however not to say that Schmitt can be used more successfully to justify or validate a coup d'état. Rather the point to make here is that Schmitt’s legal theory corresponds well to appraising the question of disruption posed by the revolution and coup d'état.\(^5\) I am aware of the prospect that my suggestion will alarm the critics of Schmitt. And I understand their concerns, given Schmitt’s notoriety for his political radicalism and participation in the Third Reich. However, on the question of constitutional disruption, his constitutional theory cannot be discounted. If used selectively and carefully, I believe, Schmitt can offer some useful political concepts and a conceptual framework for answering the question of constitutional disruption.

The Application of Kelsen’s Theory by the Courts

Despite losing some ground to his critics in continental Europe, Kelsen remains adamant to see his theory succeed elsewhere. His movement to the United States at the beginning of WWII, and his academic experience at the University of California, Berkeley, allows him to “reformulate” his “thoughts and ideas,”\(^6\) which are later published in English in two voluminous books The General Theory of Law and State.

\(^5\) Appraisal of the juridical situation than decision/validation of it is often more compelling in juridical realm. In Dosso, the Chief Justice, for instance, states that it is "necessary to appraise the existing constitutional position in the light of the juristic principles which determine the validity or otherwise of law-creating organs in modern States" Dosso (n 2) 533; Also see, Farooq Hassan who calls the appraisal ‘a juridical critique of a successful act of treason.’ Farooq Hassan, ‘Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d’état in the Common Law’ (1984) 20 Stan. J. Int'l L. 191, 193

\(^6\) Kelsen, General Theory of Law and State (n 3) xiii
(1945) and *Pure Theory of Law* (1967). The reformulation that Kelsen does in these books allows him to add more detail and lucidity, and thereby render the defense of his ideas more vigorous. However, he does not depart, in any drastic fashion, from his earlier basic ideas. But interestingly, what drastically changes is the context of application of his theories. The new context of application is the English Common Law and the American law jurisdictions. Thus in the preface to his *The General Theory of Law and State* he chastises his critics from Germany, pointing to Schmitt for supporting “party dictatorship,” and claims: “If the author, nevertheless, ventures to publish this general theory of law and State, it is with the belief that in Anglo-American world, where freedom of science continues to be respected and where political power is better stabilized than elsewhere, ideas are in greater esteem than power” (emphasis added). This shift of the context and ground of application brings Kelsen “near to readers who have grown up in the traditions and atmosphere of the Common Law,” which after WWII include the post-colonial states. One of those readers was Pakistan’s Chief Justice M. Munir.

---

9 Kelsen, *General Theory of Law and State* (n 3) xvii
10 Ibid xiii
Whether knowingly or unknowingly, C.J. Munir discounts Kelsen’s political stability warning and bases the substantiation of his decision on latter’s theory. The pivotal principle upon which the entire decision revolves is the principle of efficacy of change. The Court says, “Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change.”11 Moreover, that the disruption should be “an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution…”12 Lastly, that “a victorious revolution or a successful coup d’etat is an internationally recognized legal method of changing a constitution,” and the “basic law creating fact.”13 Accordingly, the abrogation of the constitution by the president is found to be a “successful revolution.”

The decision is severely criticized at home, especially in the public press and academic circles. However, it sets a precedent and gains acceptance elsewhere in several post-colonial states. Accordingly, its theoretical substantiation is summoned in a series of cases over the next four decades. The academically much discussed ones are Matovu 1966 (Uganda),14 Madzimbamuto 1968 (Southern Rhodesia),15 Lakanmi 1970 (Nigeria),16 Liasi 1975 (Cyprus),17 Bhutto 1977 (Pakistan),18 Valabhaji 1981

11 Dosso (n 2) 539
12 Ibid 538–39
13 Ibid 539–40
18 Nusrat Bhutto v. Chief of Army Staff [1977] PLD S.Ct. 657 (SC)
(Seychelles), Mitchell 1986 (Grenada), Mokotso 1988 (Lesotho), Matanzima 1988 (Transkei), Prasad 2000 (Fiji), and Qarase 2009 (Fiji). In some cases, Kelsen’s theory is discussed, but then turned down as “remote” (Sallah 1970, Ghana) and “obscure” (Jilani 1972, Pakistan).

Let us survey the legal theoretical basis of the decisions in the above cases. In Motovu (1966) the Ugandan court repeats Kelsen and Dosso verbatim. The Court says “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.” In fact the Court goes a step further by referring to two unique proofs of efficacy: the affidavits signed in by a large number of officials and the diplomatic recognition accorded by foreign countries to the new regime. In Madzimbamuto (1968), the positivist Chief Justice, Beadle, substantiates his decision

20 Mitchell v. Director of Public Prosecutions [1986] L.R.C. Const. 35 (Court of Appeals)
22 Matanzima v. President of the Republic of Transkei (1989) 4 S. Afr. L.R. 989 (General Division Court)
23 Chandrika Prasad v. The Republic of Fiji and Attorney-General (2001) NZAR 21 (High Court); Republic of Fiji v. Prasad [2001] NZAR 385 (Court of Appeal of Fiji); Qarase v. Bainimarama [2009] FICA 9 (Court of Appeal of Fiji
25 For a brief survey of some of these cases, see Hassan, ‘Juridical Critique of Successful Treason (n 5); Mahmud Tayyab, 'Jurisprudence of Successful Treason: Coup d'état & Common Law' (1994) 27 Cornell Int'l L.; Simeon McIntosh, Kelsen in the 'Grenada Court': Essays on Revolutionary Legality (Ian Randle, Kingston 2000) (see especially chapter 1)
26 Matovu (n 14) 515
27 Ibid 539
from Kelsen, Dosso and Matovu. He in effect simplifies the theory in the following terms: “success alone is the determining factor.”  

Ghana’s Sallah (1970) case is heard after the fall of military regime. The majority of judges reject to apply Kelsen’s theory. However, one judge upholds Kelsen’s theory and writes that the old legal order did “yield place to a new legal order under an omnipotent eight-member, military-cum-policemen sovereign.”  

In Lakanmi (1970) the Nigerian court does not reject Kelsen’s theory, but rejects its adoption by the new military regime. The Court holds that the constitution was only partially suspended and therefore the change did not amount to a revolution. Not happy with the decision, the new regime issues a decree to unilaterally declare the change as a revolution, which “[a] effectively abrogated the whole pre-existing legal order…[b] involved an abrupt change which was not within the contemplation of the Constitution…[c] established a new government…with absolute powers to make law.”  

The court capitulates. In the next decision in Adejumo V. Johnson, the court accepts the new regime as effective and legitimate.  

In Liasi, the Cyprus court edifying from the Roman Law puts forward two tests of a successful coup d’état: a) popular acceptance, and/or b) validation by the subsequent government—the one formed after the fall of a “coup d’état government”.  

In Bhutto (1977), the Pakistani court is once again faced with the question of disruption of constitutional order. This time the court basis its decision on the doctrine of state necessity, arguing

---

28 Madzimbamuto (n 15) 318  
29 Sallah (n 24) 499  
31 Adejumo V. Johnson Supreme [1972] 1 All N.L.R. 159 (SC)  
32 Liasi (n 17) 573
that although the change was “an extra-constitutional step, but obviously dictated by the highest consideration of State necessity and welfare of the people.”\textsuperscript{33} One judge, however, informs his decision of Kelsen’s theory and \textit{Madzimbamuto}. He argues that only a new regime “can enforce the execution of Law.”\textsuperscript{34} In \textit{Valabhaji} (1981), the Seychelles court follows Kelsen’s efficacy principle and finds while reading the history of court decisions of other countries that “there appears to be a consensus or at least a strong preponderance of opinion that once the new regime is firmly or irrevocably in control it becomes a lawful or legitimate government and entitled to the authority that goes with that \textit{status}”\textsuperscript{35} (emphasis added). In \textit{Mitchel} (1988), Grenada’s Court of Appeal gives four criteria for the success of a revolution/\textit{coup d’État}:

(a) the revolution was successful, in that the Government was firmly established administratively, there being no other rival one; (b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; (c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic.\textsuperscript{36}

In \textit{Mokotso} (1988), the Lesotho Court bases its decision purely on Kelsen’s theory. The exceptional point, however, that it makes as against other courts that apply the doctrine of state necessity is worth noticing. In order to make this point, the court

\textsuperscript{33} \textit{Nusrat Bhutto} (n 18) 703
\textsuperscript{34} \textit{Ibid} 743
\textsuperscript{35} \textit{Valabhaji v. Controller of Taxes} (n 19) 13
\textsuperscript{36} \textit{Mitchell} (n 20) 71-72
first takes into account the issue whether necessity faces the court (to decide) or the regime (to get validation). Then the Court says that the doctrine of necessity is “appropriate to the case of a national emergency during the administration of a lawful government.”37 On the other hand, “to speak of the doctrine operating to validate a new regime, rather than its action, is...in essence to apply the doctrine of the successful revolution.”38 In Matanzima (1988), the Transkei court bases its decision on Kelsen and Mokotso. Bophuthatswana sees a coup d'état in 1989. The constitutional question of legality of coup d'état is posed to the Court in the Banda case. However, this question related to yet another question of the statehood of Bophuthatswana. The court decides that Bophuthatswana was a sovereign state from the perspective of both constitutive theory (positivism) and declaratory theory (natural theory).39 Accordingly, the failed coup makers are charged of high treason. In Prasad (2000), the Fijian court declares the coup d'état “unsuccessful” for the reasons that the country’s court system remained unscathed during and after the revolution and that the “usurpation of power and acquisition of control of the country seemed rather tenuous.”40 In fact, the military commodore had stepped back and put in place an interim civilian government that remained tenuous. In December 2006 the military commodore intervenes once again in a fresh coup d'état. The Court of Appeal in Qarase (2009) decides upon the

37 Mokotso (n 21) 120–121
38 Ibid 123
40 Quoted in McIntosh, Kelsen in the ‘Grenada Court’: Essays on Revolutionary Legality (n 25) xxxii; It is worth noticing that in many cases of coup d’état the judiciary is left unscathed primarily with the hope to let is resolve the ‘knotty problem of continuity’ or to receive a title of honor in the form of validation. See, T.K.K. Iyer, ‘Constitutional Law in Pakistan: Kelsen in the Courts’ (1973) 21 Am. J. Comp. L. 759, 763; Tayyab, ‘Jurisprudence of Successful Treason: Coup d’état & Common Law’ (n 25) 104
intervention once again as illegal and invalid. But this time the commodore does not step back, rather decides to stay in power. He instead advises the President to revoke commission of judges, dissolve the parliament and abrogate the constitution.  

**Han Kelsen and the Question of Disruption of Constitutional Order**

Dealing with the question of constitutional disruption, how does Kelsen come up with the realist principle of the efficacy of change? This is puzzling given his legal logical methodology that is designed to eliminate power, the effective basis of efficacy. The history of legal positivism stretches back to John Austin in the 19th century who, according to Kelsen, initiates the “so-called analytical jurisprudence.”  

Kelsen aims to purify the analytical method of legal positivism by “confining jurisprudence to a structural analysis of positive law [such] that legal science is separated from philosophy of justice and sociology of law.” The technique of purifying however is simple. As Schmitt explains, Kelsen advances disjunctions such as “sociology/jurisprudence, and with a simplistic either/or obtaining something purely sociological and something purely juristic.” Although Austin initiates a scientific methodology, Kelsen believes

42 Kelsen, *General Theory of Law and State* (n 3) xv
43 Ibid.
44 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press, Chicago 1985) 18. Schmitt further writes, “The old contrast between is and ought, between causal and normative considerations, has been transferred to the contrast of sociology and jurisprudence, with greater emphasis and rigor than had already been done by Georg Jellinek and Kistiakowski, but with the same unproved certainty.”
that Austin’s understanding of sovereignty fails to eliminate the sociological elements from a juridical order. For instance, the notion of habitual obedience and sovereign’s status above the law, in Austin, defeat the purpose of rule of law. Moreover, because Austin’s juridical order, based on medieval political theology and in line with Hobbes and Jean Bodin, presupposes a sovereign for every independent political society, the passing away of the person of sovereign would bring the juridical order to an end.\textsuperscript{45} For Kelsen, the elimination of habitual behavior and “personalistic” element then are key to ensuring a non-arbitrary and coherent juridical order. Only in doing so is it possible to reach “the pure theory of law.”

However, the suppression of personalistic sovereign power opens up a closely associated question: what is the source and legitimacy of a juridical order?\textsuperscript{46} This question leads Kelsen to develop an extraordinary legal logical thesis. Accordingly, the Pure Theory of Law, Kelsen writes,

\begin{quote}
\ldots seeks the basis of law—that is, the reason of its validity—not in a meta-juristic principle [i.e., sovereign power and/or transcendental justice]
\end{quote}

\begin{flushright}
\textsuperscript{45} On this juristic dimension, see for instance McIntosh, \textit{Kelsen in the ‘Grenada Court’}: \textit{Essays on Revolutionary Legality} (n 25) 65; For Roman legal historical perspective on this aspect of discontinuity, see Giorgio Agamben, \textit{State of Exception} (Kevin Attel tr, University of Chicago Press, Chicago 2005) 65–73
\end{flushright}

\begin{flushright}
\textsuperscript{46} Kelsen mentions in the preface to his \textit{General Theory of Law and State} that the pure theory of law aims at scientific method whose “only purpose is the cognition of law, not its formation” (n 3) xiv. However, he could not avoid presenting an explanation of the latter. For instance see his discussion under the headings 'Validity and Efficacy' and 'Hierarchy of the Norm.'
\end{flushright}
but in a juristic hypothesis—that is, a basic norm, to be established by a logical analysis of actual juristic thinking.⁴⁷

The logical analysis, or positive methodology, begins at its lowest stage from a judicial decision whose reason of validity is said to be based on an individual norm. In its turn, an individual norm is valid because it is based on a statute, which is itself based on a constitution. Tracing the reason of validity further back, Kelsen argues that the reason of validity of an existing constitution originates from the older constitutions. Thus logically there must be a historically first constitution “laid down by an individual usurper or by some kind of assembly,” or the “fathers.” At this stage Kelsen’s logical methodology faces the Kantian transcendental dilemma: How is the first constitution possible? His answer, based on pure “juristic thinking,” comes to rest on “a hypothesis,” “a presupposition,” or (should we say) a logical theology that there exists something called “basic norm” that is “nothing but fundamental rule”⁴⁸ (emphasis added). Basic norm is “not created in a legal procedure…but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as legal, especially as a norm-creating, act.”⁴⁹ Finally, that “[t]he ultimate hypothesis of positivism is the norm authorizing the historically first legislator.”⁵⁰ With this hypothesis he virtually inverts

⁴⁷ Ibid xv
⁴⁸ Ibid 114–117 In his answer Kelsen first downplays realism and political theology by saying that “the characteristic of so-called legal positivism is, however, that it dispenses with any such religious justification of the legal order” (116) such as the will of fathers empowered by God. Indirectly the inference is to downplay the will itself.
⁴⁹ Ibid 116
⁵⁰ Ibid
the position of the conservative school as represented by Bodin, Hobbes, Rousseau, Austin, and Schmitt.

The basic norm or power-conferring norm is Kelsen’s solution to “the problem of the concept of sovereignty” or the rule of men.\footnote{See, Schmitt, \textit{Political Theology} (n 44) 21} It is an ingenious and original legal logical contrivance. Kelsen distinguishes between the basic norm, as the “constitution in the legal logical sense,” and the first Constitution, as “constitution in the positive legal sense.”\footnote{Hans Kelsen, ‘Professor Stone and the Pure Theory of Law’ (1965) 17 Stan. L. Rev. 1128} However, at times he uses the two terms interchangeably, presumably because the former “has no independent status”\footnote{Hopton, ‘Grundnorm and Constitution: The Legitimacy of Politics’ (n 4) 83} or it transforms into the latter, just as custom for Kelsen transform into norm. Accordingly, the courts in \textit{Dosso}, \textit{Matovu} and \textit{Madzimbamuto} also use the two terms interchangeably.\footnote{Ibid 81} In theory, the Basic Norm makes perfect sense, but in practice, for the courts faced with the disruption of the constitution, it poses practical problems, especially regarding its concrete identity and locus. For instance, as the court of Ghana puts it:

Suppose we apply this [Kelsen’s] juristic reasoning to the present case, it follows that when the proclamation suspended the Constitution of 1960, the old Basic Norm disappeared. What was the new Basic Norm? Was it the proclamation? It was not because it was not a constitution. How then do we trace the Basic Norm? Is the Basic Norm the people of Ghana who
supported the armed forces and the police or is the Basic Norm to be detected from the armoured cars at Burma Camp?\textsuperscript{55}

The court does not realize that in critiquing Kelsen’s Basic Norm and mentioning the sovereign power of the people and armored cars how close it comes to Schmitt’s constitutional theory. I revert to this point shortly. Here what needs emphasizing, however, is that for the courts faced with practical scenarios, the basic norm or legal positivism in general could not solve the problem of (personalistic) sovereignty. To address this problem, one apologist of Kelsen, after writing a vigorous and lengthy intellectual defense, proposes a “refinement” to Kelsen’s thesis. Accordingly, eh suggests the constitution should be considered as the basic norm and that its validity lies in its effectivity, which depends on the sovereign will of the state. Moreover, edifying from K. Dyson and M. B. Foster, he writes:

The debate, in which Austin, Hart, and Kelsen are involved, ultimately resolves into the question of sovereignty or the sovereign will of the State—the highest, legally independent, underived power. The existence of a State or legal order presupposes a sovereign will that commands the law and constitution of the State. The problem, however, is one of locating this sovereign will, and this entails a consideration of the nature of the State in question.”\textsuperscript{56}

\textsuperscript{55} Quoted in Tayyab, ‘Jurisprudence of Successful Treason: Coup d’état & Common Law’ (n 25) 67
\textsuperscript{56} McIntosh, \textit{Kelsen in the ‘Grenada Court’: Essays on Revolutionary Legality} (n 25) 72
In proposing this so-called refinement, he in effect adopts Schmitt’s language and theoretical position, thus reaching a conclusion that Kelsen takes pains to avert.\textsuperscript{57}

With his legal logical analysis, Kelsen builds a structured and hierarchical legal order. Not only that the reason of validity of one norm rests upon another especially a higher one, but each lower norm could be virtually interpreted and derived from a higher one. Moreover, the legal order, with the help of judges and higher norms, becomes a dynamic and self-sustaining system. It is freed from gaps and antinomies, hence from the problem of exception. Kelsen could congratulate himself for achieving this logical unity and coherence for his legal order except for the question of continuity, which troubled him all along. States of emergency, \textit{coups d'état}, and revolutions do occur. They do disrupt the unity and coherence of legal order. And Kelsen was well aware of the German and French legal histories, which furnished many such examples. However, with a peculiar legal logical methodology, Kelsen comes up with one solution: search for a higher norm, which can help explain, rather legalize, disruptions. Kelsen finds that higher norm in international customary law.

If a monarchy is transformed into a republic by a revolution of the people, or a republic into a monarchy by a coup d'état of the president, and if the new government is able to maintain the new constitution in an efficacious manner, then this government and this constitution are, according to

\textsuperscript{57} See for instance Schmitt,\textit{ Political Theology} (n 44) 17 It needs pointing out that Kelsen infers that revolution and \textit{coup d'état} change the form of the state, the former from a monarchy to a republic and the latter vice versa. This transformation in the forms of the state is what J. Finnis, S. McIntosh, and T. Mahmud miss to notice and hence engage in an extended debate. I return to this point at a later stage.
international law, the legitimate government and the valid constitution of
the State…To assume that the continuity of national law, or—what
amounts to the same—the identity of the State, is not affected by
revolution or coup d'état, as long as the territory and the population
remain by and large the same, is possible only if a norm of international
law is presupposed recognizing victorious revolution and successful coup
d'état as legal methods of changing the constitution.\(^{58}\)

In this way, by resorting to international law, the continuity of a national legal
order, in effect the State, is saved. Intriguingly, however, revolutions and coups d'état
are also legalized. But should they not be victorious or successful, revolutions and
coups d'état can provide grounds for the offence of high treason. Following Kelsen’s
hint, the Grenada and Bophuthatswana courts try the coup makers for the crime of high
treason. In Jilani, although Pakistani court does not adopt Kelsen’s theory, high treason
is approved and recommended. On the other hand, the question regarding the reason of
validity of international law itself remains a challenge to defend. Kelsen consistently
employs the same formula, which starts from inquiring the reason of validity of a
decision of an international court. The reason of validity of a decision rests on an
international treaty, whose reason of validity in turn rests on “a norm commonly
expressed by the phrase pacta sunt servanda.” This phrase is a principle/norm based on
international custom, or customary international law, which is considered as the basic
norm of international law. Minimizing the distinction between custom and fact, Kelsen
writes, “The basic norm of international law, therefore, must be a norm which

\(^{58}\) Kelsen, \textit{General Theory of Law and State} (n 3) 368,220-221
countenances custom as a norm-creating fact, and might be formulated as follows: ‘The States ought to behave as they have customarily behaved.’ This international custom has its logical counterpart in the local custom or customary law, which declares: “one has to act as the members of the community have always acted.”

Despite an “original” methodology and an impressive structural legal order, Kelsen remains hard pressed to inscribe the reason of validity of norms on norms. The question of disruption of norm (in other words the question of exception, coups d’état and revolutions) eventually compels Kelsen to propose the principle of efficacy at the base of any system of norms, i.e., the constitutional order. Kelsen thus writes, “A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity.” While the reason of validity are higher norms. Furthermore, he writes:

59 Ibid 369 The theoretical thread of customary basis resonates with the nineteenth century Historical Law School associated with Friedrich Carl von Savigny and German Idealists associated with Kant and Hegel. The former believed in abstracting from discrete social and political responses of individuals a composite whole equivalent to (what makes) law and/or gives it legitimacy. While the latter stressed on “idea.” See Friedrich Karl von Savigny, The Vocation of Our Age for Legislation and Jurisprudence (The Lawbook Exchange, Ltd. 2002). Also see his critique, Ernst-Wolfgang Bockenforde, ‘Die Historische Rechtsschule und das Problem der Geschichtlichkeit des Rechts’ in Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht (Suhrkamp Taschenbuch Verlag 1976)
60 Kelsen, General Theory of Law and State (n 3) 35
61 The principle is more openly admitted by McIntosh while seeking to defend Kelsen by way of “refinement” of latter's thesis. McIntosh, Kelsen in the ‘Grenada Court’: Essays on Revolutionary Legality (n 25) 69
62 Kelsen, General Theory of Law and State (n 3) 42
If they ['a group of individuals’ known as revolutionaries] succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed.63

This so-called principle of efficacy, in effect, is a thinly veiled Austinian principle of sovereignty, the principle that owes its modern theoretical patrimony to Jean Bodin in sixteenth century. Despite his subtle distinction between rule of law and rule of men—the former based on a pure juristic thinking although borrowing from the latter the principle of efficacy as its condition—Kelsen’s theory virtually comes a full circle arriving at the same point from where it took its departure.64 He restores Austin’s principle of “habitual obedience” in the form of what he calls actual behavior (“actually behave”). The courts repeat Kelsen’s principle of behavior verbatim, as in cases of Dosso, Matovu, Matanzima and Valabhaji. For instance, in Matanzima, the Court says that a new government becomes lawful when “its administration is effective, in that the people, by and large, have acquiesced in and are behaving in conformity with its mandates.”65 And in Motovu and Mokotso the courts accept affidavits as proof of

63 Ibid 118
64 Hassan goes to the extent of saying that Kelsen’s theory ‘results in an open repudiation of the rule of law.’ Hassan, ‘Juridical Critique of Successful Treason’ (n 5) 249 It is a rhetorical remark. Kelsen has however accepted the fact of states of exception that bring to fore the ascendancy of the rule of men.
65 Matanzima (n 22) 997
behavioral conformity. In other cases, courts add certain ethical and democratic strings to the principle. For instance as in *Mitchell* and *Mokotso*, the courts provide that the obedience should be due to popular acceptance and not out of coercion and fear.

However, Kelsen does not explain why individuals behave the way they behave. To answer this question Kelsen’s last line of defense would be custom. For instance, he explains that both individuals and states ought to behave according to custom. Furthermore, he assigns the “regulation” of a national order to the international law while the latter is supposed to be based on international customs. However, Kelsen’s engagement of custom remains weak without the principle of efficacy. As Schmitt writes, “The legal ground of a constitutional contract is not at all the general principle *pacta sunt servanda*. Still less is this principle a constitutional clause or a constitutional law.”

Hence Schmitt rejects the principle of *pacta sunt servanda* as a norm in a positive legal sense. Furthermore, tracing its history back to the Roman institution of *Praetor*, Schmitt writes that pacts are kept or are valid only because they presuppose an authority that wants them to be executed. He writes that not all contracts are kept or valid. “*[P]*acta sunt servanda’ says nothing about which contracts are valid and binding, therefore, which of them is to be enforced.” In modern times, they are valid because they presuppose a positive authority. Thus he chides Kelsen’s position as “tautological duplication and hypostatization”: “Every norm is valid, because the general norm is valid that there are norms, which should be valid, etc. They are entirely

66 Schmitt, *Constitutional Theory* (n 3) 119
67 Ibid 120
meaningless for the establishment of a concrete, existing political unity.” Schmitt however agrees with Kelsen on the assumption that contracts should be kept. Nevertheless, for him the more important questions are “whether in concreto a contract is present at all, whether this contract is valid, whether special grounds for invalidity or elimination come into consideration, etc.” These questions further lead to his central concern: “In fact, the question is *quis iudicabit*? Who decides whether there is a valid contract, whether the grounds to dispute it are persuasive, whether a right to withdraw is provided, etc?” The phrase *pacta sunt servanda*, or custom in general, he says, fail to answer these all-important questions.

**Carl Schmitt and the Question of Disruption of Constitutional Order**

Schmitt’s relevance to appraising the juridical question of constitutional disruption lies in the fact that his theory of the state, sovereignty and constitutional order begins with the question of disruption of norm and the existential question of the decision of a sovereign power. Moreover, he reinstates sociological and political elements that Kelsen eliminates from the juridical analysis. In the discussion that follows I engage four significant concepts that are not only central to any discussion of the disruption of a constitutional order, but also respond to the shortcomings of legal positivism.

---

68 Ibid 119–120
69 Ibid 120
70 George Schwab, ‘Introduction’ in *Political Theology; Four Chapters on the Concept of Sovereignty* (n 44) xlii
i. EXCEPTION

Schmitt render his first vigorous critique of Kelsen in his 1922 treatise *Political Theology*. According to Schmitt, one of the primary weaknesses of Kelsen’s legal positivism is that it does not take into account political crisis or the state of exception. Schmitt writes that Kelsen’s theory “is [a] system of ascriptions to a last point of ascription and to a last basic norm.” Furthermore that Kelsen assumes that the state is identical with a system of ascriptions or legal order. In such a legal order then “authorizations and competences emanate from the uniform central point to the lowest point.” Hence, Schmitt expresses his discomfort that

…[t]he highest competence cannot be traceable to a person or to a sociopsychological power complex but only to the sovereign order in the unity of the system of norms. For juristic consideration there are neither real nor fictitious persons, only points of ascription.\(^{71}\)

Accordingly, Kelsen’s legal order, Schmitt says, is a sovereign machine that runs itself.\(^ {72}\)

Schmitt believes that Kelsen’s all-comprehensive legal order is doomed to fail because norm “can never encompass a total exception.”\(^ {73}\) The exception that threatens the security, political unity and existence of the state will cause ruptures in the closed positivist legal order devoid of personalistic sovereign power. He writes,

\(^{71}\) Schmitt, *Political Theology* (n 44) 19
\(^{73}\) Schmitt, *Political Theology* (n 44) 6
The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.\footnote{Ibid}

For Schmitt, the incidence of exception is more interesting than the rule because it not only provides a concrete clue about itself but also proves the existence of the rule. Hence, “[i]n the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.”\footnote{Ibid 15} As a result the “exception confounds the unity and order of the rationalist scheme.”\footnote{Ibid}

According to Schmitt, the question of exception is inextricably tied to the question of sovereignty.\footnote{The relationship between exception and sovereignty is evident from the famous formulation by Schmitt: “Sovereign is he who decides on the exception.” Ibid 5} When Kelsen seeks to subsume, and eventually repress, exception within norm, he in fact deals with “the concept of sovereignty” and aims that it “must be radically repressed.”\footnote{Ibid 21} The question of exception or the disruption of legal order, however, returns to Kelsen’s much vexation, when he takes up the issue of the relationship between the law on the one hand and \textit{coup d’état} and revolution on the other. Kelsen’s introduction of the principle of abrupt change not within the contemplation of constitution, it can be said, is in effect an acknowledgement and response to taking into account the problem of exception. However, as I explain above, Kelsen’s primary conjuncture is pinned in a simple logic: the legal order survives
exception (as well as coup d’état and revolution) because there is always a higher norm or legal logical presupposition to that end. He could thus partially explain the phenomena of coup d’état and revolution on the basis of customary international law. However, the questions why coup d’état and revolution take place in the first place, and how they become “law-creating facts” go unexplained. These are the questions that the courts do not raise either. However, by saying that coup d’état and revolution are law-creating facts, Kelsen makes a major shift from his theoretical paradigm—the one from norm (or Grundnorm/custom) to fact.

ii. POLITICAL WILL TO UNITY

Almost six years after his first serious critique of Kelsen in Political Theology, Schmitt writes his magnum opus, Constitutional Theory. In this book he explains his theory of constitution, and at several turns engages Kelsen. To the question of disruption of norm (coups d’état and revolution), Schmitt suggests that one of the primary causes lies in the crisis of will to political unity, which is an existential crisis and the one that pertains to the form of political existence. A coup d’état and revolution involve change in the existing form of political existence.

Before we move on to the significance of the concept of political will to unity, let me point out that in Constitutional Theory Schmitt classifies constitutional disruptions into various types, which also include the type of disruptions that later on occur in the postcolonial states. Schmitt classifies disruptions into the following types: constitutional annihilation, constitutional elimination, constitutional change, statutory
constitutional violation, and constitutional suspension.\(^79\) In many cases discussed above, often three changes take place, successively or at once. First, a president dissolves a politically divided parliament. This type corresponds to the “constitution-disregarding [statutory] violation of the constitution.” Second, a president suspends a constitution, which corresponds to the “constitution-disregarding constitutional suspension.” Third, a president abrogates a constitution, which corresponds to the “constitutional elimination.” Practically speaking, in several of these and other cases, a constitution remains only temporarily suspended, while a government is run in line with the suspended constitution, which is often revised. This type corresponds to the “constitutional change.”

Schmitt believes that the constitution presents a concrete decision on political unity and social order. He agrees with Kelsen on the “absolute” or “whole” character of the constitution. However, he dismisses Kelsen’s notion of the constitution that a constitution is ‘not a concrete existing unity, but instead a reflective, ideal one.”\(^80\) On the contrary, he offers three different definitions of the concept of constitution demonstrating that the elements of political unity and social order are central to any definition of the concept. According to the first definition drawn from the understanding of Greeks, especially Aristotle and Isocrates, the constitution is “the

---

\(^79\) Constitutional annihilation is 'the simultaneous abolition of the existing constitution...and of the constitution-making power'; constitutional elimination is 'the abolition of the existing constitution' only; constitutional change is 'a change in the text of previously valid constitutional laws'; Statutory constitutional violation is 'the infringement of constitutional provisions; constitutional suspension is 'the temporary setting aside of single or multiple constitutional provisions.' Schmitt, Constitutional Theory (n 3) 147–148

\(^80\) Ibid 59–60
concrete, collective condition of political unity and social order of a particular state.” Moreover, it calls for “some decision-making authority that is definitive in critical cases of conflicts of interest and power.” Second definition is projected from the understanding of Thomas Aquinas, Jean Bodin, Hugo Grotius and Thomas Hobbes. It defines constitution as “a special type of political and social order.” A constitution is “part of every state and not detachable from its political existence, for example, monarchy, aristocracy, or democracy…” From the vantage point of this definition, understanding the disruption of constitution is easy, primarily because such a change can be discerned from the transformation of the form of the State. Schmitt writes, “A successful revolution directly establishes a new status and *eo ipso* a new constitution.”

We can recall that in *Valabhaji* the Court says that the new effective government has achieved a new “status.” In other words, its political form changed, presumably becoming a dictatorship.

Third definition is a modern one, based on the writings of Lorenz von Stein and Rudolf Smend, whose intellectual precursor is Hegel. Constitution is defined as “the principle of the dynamic emergence of political unity, of the process of constantly renewed formation and emergence of this unity from a fundamental or ultimately effective power and energy.” The first two definitions delineate a static concept of the constitution, while the third a dynamic. However, Schmitt prefers to reconcile the dynamic concept with the static one by arguing that the former “remains in the sphere

---

81 Ibid 59
82 Ibid 60
83 Ibid 61
84 *Valabhaji* (n 18) 13
85 Schmitt, *Constitutional Theory* (n 3) 61
of (emerging) being and of the existing.” Even in this mixed sense, the concept of constitution does not reduce to a legal positivist norm that aims to subsume fact, rather it remains “an active principle of a dynamic process of effective energies, an element of the becoming.” On the other hand, Kelsen’s conception of constitutional order, Schmitt says, is neither “an actual existing condition” nor “a dynamic becoming” of political unity. It is a legal unity (of norms). The judicial interpretation does not make it a dynamic process in the sense of effective energies, but perhaps a static dynamism of effective elimination of gaps and antinomies.

Unity is the “catchword” for Schmitt just as it is for Kelsen. For instance, the three different absolute conceptions of the constitution project three different manifestations of political unity. From the perspective of the first conception of constitution, political unity pre-exists positive constitution and the state. From the second, which is a “sense of a status identical to the entire condition,” the political unity arises along with the constitution and state. From the third, the formation of political unity and “its particular form of existence” follows from the positive constitution. And this particular form in the course of everyday political existence assumes “dynamic emergence.” Therefore, political unity gives a clue about the significance of continuous generation of consensus on the constitution. After the making of constitution the question of political unity and social order do not permanently recede. On the contrary, the question is regularly faced, especially during the time of political and constitutional crises. Dosso, and many other cases mentioned above, are the result of a crisis of

86 Ibid
87 Ibid 62,136
political unity and social order. It took nine years of bickering and quarreling for Pakistani constitution-makers to reach a compromise, but only after alienating sectarian minorities. Fiji is another paradigmatic example of the crisis of political unity. In 1970 Fijian politicians do not bicker much to adopt a constitution, though the formation of a popular and constitutional government proves quite difficult. Since then coup d’état becomes a standard answer to crisis of political unity and social order.

Even as Schmitt agrees with Kelsen on the principle of unity, for him what is more important is the question how does the unity occur? Schmitt writes that although Kelsen puts forward the idea of unity and coherence of legal order, but “without the slightest effort to explain the substantive and logical principle of this ‘unity’ and of this ‘system.’” Thus he asks “how this unity occurs and according to what necessity it follows that “many positive legal provisions of a state and the various constitutional law norms form one such ‘system’ or a ‘unity’,”88 especially, after purging the legal order from the classical theory of bourgeois Rechtsstaat, which bases the validity of laws on nature, reason and/or justice. By eliminating these fundamental grounds from his so-called analytical methodology, Schmitt says, Kelsen’s legal order becomes empty tautology. In contrast, Schmitt proposes that the principle and necessity that obtains the unity and coherence of a constitutional order is the political will. Moreover that the decision-making authority follows from the political will. He writes, “In contrast to mere norms, the word ‘will’ denotes an actually existing power as the origin

88 Ibid 63–64
of a command. The will is existentially present; its power or authority lies in its being."^89

Because Schmitt makes the principle of political unity and social order central to the definition of constitution, his theory carries a forceful explanatory significance for the cases involving emergency, coup d’état and revolution. First of all, these cases point to the political crisis that poses a threat to the constitutional order. Schmitt would not like to forfeit the centrality of the realm of the political to that of the legal. The entire debate can break down to this basic philosophical question: whether law as product of politics is consolidated power and contingency or it can prove its autonomy and demonstrate, as Jurgen Habermas believes, that it is “constitutive” of politics?^90 In the political realm, crises present challenge to the principle of political unity and hence to the decision-making authority. Should the decision-making authority not make a “genuine decision” or make only a “dilatory” compromise, thereby putting off the necessary decision, and should the crisis situation prevail for some time, it is likely to produce the conditions for coup d’état and/or revolution. ^91 Schmitt writes that in a legislative state, the decision-making authority resides in a parliament. However, in case the parliament is divided, conflict-ridden, and powerless then the president (and in...

^89 Ibid 64
^90 See, Carl Schmitt, The concept of the Political (George Schwab tr, University of Chicago Press, Chicago 2007); and, Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (William Rehg tr, MIT Press, Massachusetts 1996); For a critique on these works see, David Dyzenhaus, 'The Legitimacy of Legality' (1996) 46 The University of Toronto Law Journal 129-180
^91 Hassan suggests based on his study of Kelsen and especially Arendt that ‘if substantial dysfunctional conditions do exist at the time of the coup d’état, revolutionary changes could result.’ Hassan, 'Juridical Critique of Successful Treason’ (n 5) 197
the final direct case people) should exercise this authority/power. He writes, “Every genuine constitutional conflict, which involves the foundations of the comprehensive political decision itself, can, consequently, only be decided through the will of the constitution-making power itself.”92 Now in case the people exercise the constitution-making power it will amount to a revolution, and in case a president exercises this power it amounts to either a state of exception or *coup d’état.*

The context in which Schmitt develops his conception of the constitution, as a concrete decision on political unity, is worth noticing. Germany had undergone a “successful revolution” in 1919, which transformed the monarchy into a republic. The first experience with the republican democracy opened the German state to several centrifugal forces and divergent interests that led to, what Schmitt says, “development of parliament into a stage for the pluralist system and thus in that lies the cause of the constitutional entanglement as well as the necessity for establishing a remedy and countermovement.”93 In his 1923 book, *The Crisis of Parliamentary Democracy,* Schmitt had already commented on the parliamentary crisis in detail. There he warned that the parliamentary crises grows partly from the conflict and contradiction between liberalism and democracy.94 His remedy to the crises or constitutional entanglements is

---

92 Schmitt, *Constitutional Theory* (n 3) 126
the necessity of a decision-making authority.\textsuperscript{95} In the absence of such a decision making authority, ensuring the security of the state and stability of the public order could become difficult. In other words, the crisis of political will to unity and social order, especially in the face of vacuum of decision-making authority, produces the conditions of \textit{coup d'état} and/or revolution. In actual German experience from 1919 to 1933, the crisis of political unity and social order as well as the absence or weakness of the decision-making authority—the Reichstag and a strong Reich’s President—eventually lead to the \textit{coup d'état} of the National-Socialists.\textsuperscript{96}

In the context of constitution making in postcolonial states, the crisis of political unity and social order presents a formidable challenge. Several scholars who have carried out research on the disruption of constitutional order in postcolonial states have directly or indirectly led to the conclusion that the crisis of political unity is number one factor. For instance, Farooq Hassan after engaging in a detailed study of \textit{coup d'état} in several postcolonial states concludes:

\begin{quote}
...the occurrence of \textit{coup d'état} may not simply reflect a breakdown in the legal system, but rather may result from an unavoidable reaction to a series of circumstances in developing countries which lack the history,
\end{quote}

\textsuperscript{95} Schmitt keenly takes Max Weber’s idea of a powerful president. See Wolfgang Mommsen, \textit{Max Weber and German Politics, 1890-1920} (UCP, Chicago 1984) chapter 9

\textsuperscript{96} For a historical account see, Ernst Fraenkel, \textit{The Dual State: A Contribution to the Theory of Dictatorship} (E.A Shils, Edith Lowenstein and Klaus Knorr trs, Oxford University Press, New York 1941) 4
stability, and prosperity necessary for more orderly behavior”\(^97\) (emphasis added).

Moreover he writes that those states lack “minimum popular cohesiveness necessary for stable and progressive development of a regime of law.”\(^98\) Similarly, Tayyab Mahmud in his book-size essay on coup d’état in postcolonial states reaches a similar conclusion, “[t]he socio-political context in the post-colonial settings, however, does not accord with the conventional understanding,” which presupposes “a substantial measure of ethnic unity, linguistic uniformity, cultural homogeneity, political stability, and representative governance. All these lead to an assumption of general consensus about the constitutional order and legitimacy of the political order.”\(^99\)

At this stage, I deem that few lines on the political crisis in Pakistan leading up to Dosso are in order. The constitutional and political dilemmas in Pakistan begin with the passage of the Objectives Resolution (1949), which sets the broader principles for framing a constitution. The Resolution bars religious minorities from participating in the decision making process of national policy. Soon afterward the radical Islamists perpetrate violence against the Ahmedi community, who they want to be declared a religious minority. As violence against the Ahmedi community escalates in the Punjab, the Area Commander intervenes “on his own” and imposes martial law in the city of

\(^{97}\) Hassan, ‘Juridical Critique of Successful Treason’ (n 5) 194–5
\(^{98}\) Ibid 257
\(^{99}\) Tayyab, ‘Jurisprudence of Successful Treason: Coup d’état & Common Law’ (n 25) 101
Lahore.\textsuperscript{100} This was the first effective precedent of a \textit{coup d'état}. Interestingly, the liberal and moderate sections of society welcomed it. The Resolution also sparks controversy over the form of the State—secular versus Islamic Republic—and the place of \textit{Shariah} in the constitutional order. While the Resolution provides for a representative government, the representation of regional ethnic groups in the parliament, the principle of electorate, and ethnic share in civil and army services become extremely contentious. Meanwhile forming a stable interim government proves almost impossible, as a half dozen ministries fall in as many years. In East Pakistan by mid-1950s the political crisis attains a grim situation. During one unfortunate session of the legislative assembly the legislators hurl furniture at each other. They take the Deputy Speaker as one of the favorite targets, who later succumbs to injuries. With the political crisis accentuating, secessionist tendencies begin to surface. Khan of Kalat, for instance, declares secession of his princely state from the federation. At this point, the President, and the Army, figure that the political crisis was spinning out of control. Hence the President decides to suspend the parliamentary process.

Similarly, the political crises in Pakistan during the decades of 1970s and 1990s that lead up to coups emanate from divisive parliamentary conflicts.

\textbf{Iii. CONSTITUENT POWER}

For a constitutional order to come into force, it is required to prove the principle of its validity or legitimacy. In other words, it needs to demonstrate the power or

\textsuperscript{100} Ayesha Jalal, \textit{The State of Martial Rule: The Origins of Pakistan’s Political Economy of Defence} (CUP, Cambridge 2007) 177
authority that would guarantee its continued existence. Kelsen designates this principle as the “power-conferring norm,” variously termed as the basic norm and Grundnorm. As explained above, Kelsen assumes that the power-conferring norm can be a legal presupposition or hypothesis. Farooq Hassan, referring to R. Dias, makes an intriguing interpretation of what the Grundnorm is. He writes, “According to this theory, a written constitution or the will of a dictator which is in fact obeyed is the Grundnorm.” Theoretically speaking it is an incorrect interpretation, since as I mention above “the will of dictator” is what Kelsen had been aiming to suppress. However, speaking from a politically “concrete” perspective the interpretation is correct, not least because it juxtaposes Grundnorm with will, but also because constitution and will are equaled.

On the other hand, Schmitt strongly believes that the principle of validity must be real and concrete. He sees political will as this principle that guarantees the legitimacy of constitution. In the backdrop of the moment of constitution making (or its disruption), he calls the political will, following Abbe Sieyes, constituent power or constitution-making power. Thus he writes, “The constitutional laws are valid only on the basis and in the context of the constitution in the positive sense. The constitution, in turn, is valid only on the basis of the will of the constitution-making power.” The power constituent, for Schmitt, “is more than a mere conceptual fiction,” it is a concrete
praxis.\textsuperscript{101} Its praxis depends on the principle of homogeneity, a homogenous will of the people.

The power constituent is a “unified and indivisible” sovereign power. Moreover, “[i]t is the comprehensive foundation of all other ‘powers’ and ‘divisions of powers.’”\textsuperscript{102} A constitution is the result of comprehensive decision of the subject of constituent power, i.e., a people or a monarch, regarding the form of their political existence. Schmitt writes, “The constitution-making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence. The decision, therefore, defines the existence of the political unity in toto.” Hence, the constitution is based not on the (Grund-)norm but on the decision. Moreover, “The decision requires no justification via an ethical or juristic norm. Instead, it makes sense in terms of political existence.”\textsuperscript{103}

According to Schmitt, it is in the French Revolution that the existential political element of power constituent becomes manifest. Abbe Sieyes in his influential work, \textit{What is the Third Estate?}, intellectually extrapolates and inscribes it in the back drop of popular sovereignty. Accordingly, the power constituent is attributed to and exercised in the name of “sovereign people.” Interestingly, the concept of popular sovereignty and constituent power are conceptualized at almost the same time as legal positivism, hence the rational stands challenged with the ascendance of the irrational. Schmitt’s

\begin{flushright}
\footnotesize
\textsuperscript{102} Schmitt, \textit{Constitutional Theory} (n 3) 126
\textsuperscript{103} ibid 136
\end{flushright}
precursor, Max Weber, had already discerned how in the age ushered in by the Enlightenment, rationality displaced morality as the inherent basis of legal order. However, he did not put much store on the tenuous relationship between rationality and legality, especially in face of resurgence of the irrational force of the modern politics.\footnote{Max Weber, ‘Science as a Vocation’ in H.H. Gerth and C. Wright Mills (eds), \textit{From Max Weber: Essays in Sociology} (Routledge & Kegan Paul, London 1947) 155}

The primary function of the power constituent is the making of a constitution and resolving “genuine constitutional conflicts.”\footnote{Schmitt, \textit{Constitutional Theory} (n 3) 126} However, this primary function requires a degree of “conscious willing of political existence.” In other words, it requires rising from mere people, or divided and fragmented subjects, to “the people as a unity capable of political action.”\footnote{Ibid 127} With the making of constitution the power constituent “is not thereby expended and eliminated.”\footnote{Ibid 125} Rather it “remains alongside and above the constitution” so that it resolves constitutional conflicts, fills the constitutional gap and decides on the unforeseen critical political crises.\footnote{Ibid 126} The power constituent is hence a “permanent minimum,”\footnote{Ibid 141} unlike the Grundnorm that is not. However, the power constituent can be “exchanged,” in the sense that its subject (who exercises it) changes. For instance, in a revolution the constituent power of a monarch comes to an end, by getting transferred to the people. Whereas in a coup d’état opposite happens. Schmitt writes:

\textit{...}
A revolution can abolish not only constitutional legislation and the constitution, but also the previous type of constitution-making power, which is the very foundation of the prior constitution. By means of a democratic revolution, for example, the constitution-making power of the monarch can be eliminated, and through a coup d’état or a monarchical revolution, the constitution-making power of the people can be as well. Then, there is an exchange of the constitution-making power and a complete annihilation of the constitution.\(^\text{110}\)

In Sallah, when the Ghana court questions “what was the new Basic Norm?” and where to find its locus, it is immediately faced with three issues: a) the impermanence of the Basic Norm, b) the obscurity as to its subject, and c) the process of “exchange” that had just taken place. The court’s advertent or inadvertent reference to the “people” and “armoured cars” highlights two types of subjects—the popular sovereign and dictator. Thus the court decides that without determining the subject of sovereign power it was difficult to confer validity upon the new constitutional order. On the other hand, one of the central weaknesses of Dosso and those cases that follow it is that they postulate a norm of customary international law and avoid questioning the subject of coup d’état or revolution. For instance the court in Dosso goes to the extent of saying, “From a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial.”\(^\text{111}\)

\(^\text{110}\) Ibid 142

\(^\text{111}\) Dosso (n 2) 538
Schmitt’s above quote corresponds well to one of the first quotes by Kelsen mentioned further above.112 Both Schmitt and Kelsen articulate their theses within the political theory context of Aristotelian forms of state. Both agree that revolutions can transform monarchies into republics and that coups d’ état do the opposite.113 However, since the end of nineteenth century reversion to monarchy has become almost impossible, and the course of transformation of the form of state in coup d’ état now leads to dictatorship. And since the armed forces control the instruments of physical coercion, they or with their assistance anyone else can hope to install dictatorship. With dictatorship we return to the revival of personalistic sovereign power. To this aspect of dictatorship I return in a moment.

Just as in Political Theology Schmitt forcefully asserts that the sovereign power cannot be limited temporally or by the commission of a specific task, a year earlier in Die Diktatur and again almost a decade later in Constitutional Theory, he asserts a similar position now in relation to the constituent power. The all-powerful constituent power gives expression to its “power by means of ever new forms, and generates new

112 See (n 58) and the accompanying text
113 The criticism leveled against Kelsen, by Hassan and Tayyab as mentioned earlier, that he conflates coup d’état and revolution does not seem to me to hold. Hassan, ‘Juridical Critique of Successful Treason’ (n 5) 196 and Tayyab, ‘Jurisprudence of Successful Treason: Coup d’état & Common Law’ (n 25) 102. I think McIntosh’s lengthy reply to John Finnis on this question could have been simply rendered by a reference to these two quotes by Kelsen and Schmitt. On the other hand, the charge that while the state necessity doctrine allows limited validation of acts of usurper, but Kelsen ‘appears to justify the validity of the whole governmental edifice’ misses to notices that both Kelsen and Schmitt want to account for the transformation in the form of the state. However, it can be pointed out that although Kelsen invokes Aristotle, his legal positivism is stretched far apart from Aristotle’s “politics” and the political concept of the state. McIntosh, Kelsen in the ‘Grenada Court’: Essays on Revolutionary Legality (n 25) 73–78; Hassan, ‘Juridical Critique of Successful Treason’ (n 5) 246; Schmitt, Constitutional Theory (n 3) 60
forms and organizations out of itself, but it never conclusively subordinates its political existence to a particular form."\textsuperscript{114} Furthermore, the constituent power cannot be contained and restricted by liberal constitutional procedures—for instance, constitutional conventions, constituent assemblies, etc. Power constituent “is ‘always in the state of nature,’ when it appears in this capacity, which is inalienable.”\textsuperscript{115} Thus the possibility of reassertion or usurpation of the constituent power lies in the condition that it is always in a state of nature, ready for taping. What is decisive in its exercise is the formula emphasized by Sieyes that “it suffices if the nation wills it.”\textsuperscript{116} And this is the formula that often furnishes an excuse to both revolutionaries and coup makers for the disruption of constitutional order.

The democratic element in Schmitt rests in the belief that the people are the ultimate bearer of the constituent power. He writes that even a monarch “would be only a governmental form and dependent on the sovereign will of the people,”\textsuperscript{117} and aristocratic/oligarchic “minority” would not “conclusively renounce appealing to the will of the people.”\textsuperscript{118} This appeal to the will of people (or the above Sieyes’ formula) can, however, be turned around and manipulated by both revolutionaries and coup makers. For instance, in Pakistan the Governor General exercises it when he dissolves the Constituent Assembly, an act equivalent to a \textit{coup d’état}. His proclamation reads, “The ultimate authority vests in the people who will decide all issues including

\textsuperscript{114} Schmitt, \textit{Constitutional Theory} (n 3) 128
\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid.
\textsuperscript{117} Ibid 143
\textsuperscript{118} Ibid 130
Since then the coup makers have consistently used the appeal to the people, which over time institutionalized in the form of presidential referendum. Hence, although the people are ultimate bearer of the constituent power, manipulating the very democratic procedures can incapacitate them.

Schmitt contends that the people are not a “stable, organized organ.” However, in this resides both their strength and weakness. Since the people are not organized they cannot be dissolved, rather “so long as they exist at all and intend to endure, their life force and energy is inexhaustible and always capable of finding new forms of political existence.” On the other hand, their weakness is that they “should decide on the basic questions of their political form and their organization without themselves being formed or organized. This means their expressions of will are easily mistaken, misinterpreted, or falsified.” Moreover, “[s]pecial questions and difficulties stem from the distinctiveness of the subject of this constitution-making power.” The distinctiveness of subjects of post-colonial states resides in their ethnic, linguistic, religious and cultural diversity. And over long time, they have experienced a peculiar type of political organization i.e., a colonial state. The colonial state was not an independent and voluntary form of political existence. However, because they existed, intended to endure and finally give expression to the inexhaustible life force and energy, they disrupted the constitution of colonial state. Now their future democratic form of political organization also depends on the continuous exercise of this life force and energy.

---

119 Quoted in Hamid Khan, *Constitutional and Political History of Pakistan* (OUP, Karachi, 2005) 131
120 Schmitt, *Constitutional Theory* (n 3) 131
Schmitt writes that although the people can decide the form of their political existence by simple ‘yes’ and ‘no,’ the method is not free from procedural difficulties. In his 1932 treatise *Legality and Legitimacy* Schmitt clearly refers to the procedural dilemma faced by the people. He argues that the people “cannot counsel, deliberate, or discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its ‘yes’ the draft norms presented to it. Nor, above all, can it pose a question, but only answer by ‘yes’ or ‘no’ a question put to it.”¹²¹ Intriguingly, this method is often used in a military-President referendum. For instance both, Gen. Zia-ul-Haq (1984) and Gen. Pervez Musharraf (2002) introduced a simple yes or no question in their presidential referendums. The referendums were not only their election as head of the state, but also on the form of political organization, i.e., dictatorship.

During normal times the political role of the people remains “passive” rather than active.¹²² While during the crisis time the political role of the people either becomes hyper active such that it brings about a revolution or diminishes drastically such that it allows for usurpation of the constituent power in a *coup d’état*. The end result is in both cases, historically speaking, the installation of an all-powerful sovereign, in other words, a dictator. History of revolutions in the continental Europe and Russia speaks to that. As the political crises prevailed after revolutions in Europe and Russia, *coup s d’état* followed resulting in the “exchange” of constituent power in favor of personalistic sovereign dictatorship. Similarly, the history of postcolonial states speaks

---

¹²² Schueurman, ‘Revolutions and Constitutions: Hannah Arendt’s challenge to Carl Schmitt’ (n 110) 258
to that too. In many of the post-colonial states mentioned above the revolutions stirred by independence movements are followed by *coup d'état* and the installation of dictatorships.

iv. DICTATORSHIP

Both Kelsen and Schmitt agree that a *coup d'état* transforms the republic into monarchy. However, in the practical backdrop of the experience of European and Latin American states since the nineteenth century, it becomes obvious that the course of transformation of the form of the state tends toward dictatorship rather than monarchy.\(^{123}\) And after WWII a plethora of *coup d'état* and ensuing dictatorships in postcolonial states also bear out the course of transformation toward dictatorship.\(^{124}\)

Schmitt scrupulously takes into account the fact, rather, to borrow the phrase used by the courts in above-mentioned cases, “the notorious fact,” of the revival of the institution of dictatorship. On the other hand, Kelsen, given the aim of his so-called liberal constitutionalism, turns away from it.\(^{125}\) Schmitt’s interest in the institution of dictatorship is evident, apart from several other works, from his famous 1921 treatise.


\(^{124}\) According to one study, between 1950 and 2010, 145 coups occurred in Americas, 169 in Africa, 72 in Middle East, 59 in Asia, and 12 in Europe Jonathan M Powell and Clayton L Thyne, 'Global Instances of Coups from 1950 to 2010: A New Dataset’ (2011) 48 Journal of Peace Research 249-259

\(^{125}\) For detailed references see Tayyab, 'Jurisprudence of Successful Treason: Coup d'état & Common Law’ (n 25)
When put in historical light, the institution of (commissarial) dictator, Schmitt argues, is not necessarily and inherently a politically retrogressive institution. He blames the nineteenth century “bourgeois political literature” that places the classical concept of dictatorship in negative light. In *Die Diktatur*, and again a decade later in *Der Huter der Verfassung*, Schmitt traces the history of dictatorship back to the Roman Empire. The Roman Senate used to exercise the power to declare the state of emergency usually in the face of war, rebellion, or natural catastrophe. Then it elected a smaller body of (two) consuls and suspended itself. The consuls were endowed with the task of appointing a dictator. Once a dictator was appointed the consular body was dissolved too. The dissolution of Senate or legislative assembly and monarch (head of the state) was the test of installation of dictatorship. After completing his given time period, the dictator stepped down and the new Senate was convened, which exercised the discretion to validate the acts taken by the former. This is the test that Cyprus Court, as mentioned above, in *Liasi* suggested. Similarly, in case of Pakistan, the parliament reserves the right to validate the acts of dictators. For this purpose a constitutional amendment has to be introduced. General Zia and General Musharraf gained validity of their acts through the 8th and 17th amendments respectively.

The Roman dictator exercised his power without the restraint of norm or tradition. The only restraints on his power were that his office was for a limited time and bound

---

126 Carl Schmitt, *Die Diktatur* (Duncker & Humblot, Munich 1921); Schmitt, *Huter der Verfassung* (n 93)
127 Compare Schmitt’s remark in *Constitutional Theory* (n 3) 109
to the task at hand. In this “concrete situation” as he took over power, only political expediency defined the exercise of his commission. Schmitt writes “a procedure can be either false or true, in that this determination is self-contained by the fact that the measure taken is in a factually technical \[sachtechnische\] sense right, that is expedient.”\(^{129}\) Schmitt acknowledges that in effect a dictatorship was “a random despotism,” however, he proposes that it was the last resort to safeguard “the state of law” by suspending it:

A dictatorship therefore that does not have the purpose of making itself superfluous is a random despotism. Achieving a concrete success however means intervening in the causal path of events with means whose correctness lies solely in their purposefulness and is exclusively dependent on a factual connection to the causal event itself. Dictatorship hence suspends that by which it is justified, the state of law, and imposes instead the rule of procedure interested exclusively in bringing about a concrete success…[a return to] the state of law.\(^{130}\)

Just as the constituent power or “this political will remains alongside and above the constitution,”\(^{131}\) the office of dictator too remains alongside and above the law.


\(^{130}\) Schmitt, Die Diktatur (n 126) xvi; Quoted in McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers’ (n 93) 219

\(^{131}\) Schmitt, Constitutional Theory (n 3) 125–126
Schmitt’s distinction of the two types of dictatorship—commissarial and sovereign—carries added significance in the modern context of *coup d’état*. He writes, “While the commissarial dictatorship is authorized by a constituted organ and maintains a title in the standing constitution, the sovereign dictator is derived only *quoad executium* and directly out of the formless *pouvoir constituant*.”\(^\text{132}\) In other words, the commissarial dictatorship assumes the task of defending the constitutional order, although for that purpose the dictator can suspend it. The sovereign dictatorship aims at the abrogation of constitution and replaces it with a new one. His writings of the 1920s and early 1930s suggest that Schmitt remains torn between the two types. What is significant, for our purposes, is that the institution of dictatorship arises from a crisis of political unity and social order, and Schmitt saw in its revival the revival of a personalistic sovereign power. Just as the exception cannot be contained by the norm, a dictatorship cannot be contained by the rule of law. Its basis is either the constituted power—in that case the basis is legality—or constituent power—in that case the basis is legitimacy. In most of the postcolonial cases mentioned above, the type of dictatorship installed was the sovereign one with the constituent power as its basis.

For substantiating a decision on the disruption of constitutional order, the courts can simply determine two things: the crisis of political unity and form of new regime. The usurpation of power constituent of the people often takes place during the time of political crises. The form of government that presents itself to deal with political crises tends to be the dictatorship. Once installed the sovereign dictatorship usurps for

\(^{132}\) Schmitt, *Die Diktatur* (n 126) 145; Quoted in McCormick, ‘The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers’ (n 93) 227
effective purposes all competencies, including that of the judicial review. The sovereign dictatorship hence becomes the law-creating fact. Courts cannot give effect to their decisions, especially those held against the sovereign dictator. *Madzimbamuto* (1966) and *Qarase* (2009) bear out this situation. However, courts can still determine the form of dictatorship. In case they determine that the form of dictatorship is commissarial then they may also find it easy to justify striking down the unconstitutional decrees of the dictator. Moreover, courts can also order the dissolution of commissarial dictatorship. *Prasad* (2000) and (retroactively) *Jilani* (1972) present good examples of the court order for dissolving commissarial dictatorships.

**Conclusion**

The engaging of constitutional theory with the purpose of furnishing legality to a *coup d’état* or revolution is bound to fail. *Dosso* was hence invalidated by subsequent decisions. The aim of engaging constitutional theory instead should be to untangle and explicate the accompanying juridical change. It is in this line of argument that Kelsen once remarked that his theory does not “bind” the judge. However, in case of Kelsen’s theory, when the judge ventures to engage it in order to explicate the accompanying change, the structured and transcendental framework further complicates the question. As the theory reaches the apex of its legal logical reasoning, it ends up in hypothesizing and tautology. Moreover, Kelsen’s recourse to the principle of efficacy and placing it at the base of his theoretical framework, confounds the liberal logical groundwork that he initiates with the aim to eliminate the personalistic sovereign power.
On the other hand, Schmitt’s position on the explanatory significance of the constitutional theory can be understood from the following statement: “The legal force of a decision is different from the result of substantiation.” It follows that not only a decision is independent of its substantiation, but also the latter is as much independent of the former. With this rich philosophical insight, Schmitt points out to the judge, the possibility of using the theoretical substantiation in such a way as to discursively depart from its own verdict. For instance, the courts in post-colonial states, critics concur, were faced with the fait accompli of approving the coups d’état. In such a situation, the court could have departed from their approving verdict by way of registering a critical theoretical substantiation. Accordingly, while they decided on the legality, they could have commented on the (political) legitimacy of the disruption. In order to do this, Kelsen’s theory is not much help, because it addresses only the issue of legality. For Kelsen constitution is merely a system of legal ascriptions. Schmitt’s constitution by contrast is a decision on and dynamic emergence of the political unity. Such a conception that brings to central stage the principle of will to political unity explains why political crises lead toward the disruption of constitutional order. The guarantee of constitutional continuity lies in the continuous and dynamic exercise of the political will or constituent power. The political events that lead up to Dosso, and other cases

133 Schmitt, Political Theology (n 44) 32
134 Farooq Hassan observes that in wake of a successful coup d’état the court has four decision choices: validate, invalidate, avoid or resign. He suggests that avoiding a decision on the question of validity is appropriate. Tayyab Mahmud agrees with him. Simeon McIntosh however suggests that the court should not avoid decision. Rather it should engage theory and “construct an adequate explanatory narrative about [political facts] validity.” Hassan, ‘Juridical Critique of Successful Treason’ (n 5) 200; Tayyab, ‘Jurisprudence of Successful Treason: Coup d’état & Common Law’ (n 25) 100–135; McIntosh, Kelsen in the ‘Grenada Court’: Essays on Revolutionary Legality (n 25) 150
mentioned above—*Matovu, Sallah, Lakanmi, Liasi, Bhutto, Valabhai, Matanzima, Prasad* and *Qarase*—clearly demonstrate a divided and irreconcilable will to political unity. To give an example of another recent case, *Zafar Ali Shah 2000*, a case that challenged Gen. Prevaiz Musharraf’s *coup d’état*, the Supreme Court of Pakistan reminded the politicians and statesmen of their own failing in the following words: “It is for representatives of people to see to it that everything is in order and no body can raise his little finger when their actions are in line with fundamentals of Constitution.”¹³⁵ In directly, the Court holds the constitution as a dynamic emergency of political unity.

The concepts of political will and constituent power relate more closely to the principle of efficacy of change than the concept of *Grundnorm*. The constituent power is a permanent minimum. It has a palpable existence. On the contrary the *Grundnorm* is an *ex post facto* legal proposition. The subjects of constituent power can change or exchange, which explains the change in the form of a state. The *Grundnorm* does not have a subject. Theoretically speaking, the *Grundnorm* is a legal conceptual analogue of the political concept of constituent power. However, its weakness lies in its propositional or hypothetical character. The courts that based their decisions on a hypothetical assumption exposed themselves to political critique. Then as their last line of defense they rely on the principle of efficacy. However, in doing so, they depart from the initial and purportedly liberal constitutional substantiation. I think they could have mitigated and perhaps better defended against the critique by questioning and

investigating the form of regime after the *coup d’État*, i.e., dictatorship. Such an inquiry would have helped them justify the insufficiency of their judicial power to decide on the legitimacy of new regime. Furthermore, an explanation of the historical and logical basis and necessity of the institution of dictatorship could have helped limit its task- and time-bound role.
Chapter 2

The Disruption of Constitutional Order in Pakistan: Figuring the Locus of the State of (Religious) Exception

But in revolt there is hope at least.

--Momin Khan Momin

The conflict over the state of exception presents itself essentially as a dispute over its proper locus.¹

--Giorgio Agamben

Introduction

On July 2, 2007, Pakistan’s armed forces are called in to lay siege to the famous Red Mosque in the capital city of Islamabad. The precincts of the Mosque are demarcated as red zone and put under curfew. The siege is laid to cope with the resident-students of the Red Mosque who engaged in a violent protest that involved vigilante activities, vandalism, armed incursion, and assorted kidnappings. In fact, the protest began peacefully several months ago over the Capital Development Authority’s (CDA) decision to raze some unlicensed mosques in the city. In order to force the government to reverse its decision and rebuild the razed mosques, the resident students took over a nearby public children’s library.

---

¹ Giorgio Agamben, State of Exception (Kevin Attel tr, University of Chicago Press 2005) 24
They blame the government to have failed to root out from the society certain unIslamic trends, institutions, and businesses, for instance, revealing dressing, fashion shows, music concerts, film shops, massage parlors, bootlegging, prostitution, etc. The mosque's leadership demanded of government to implement Sharia in the country. A couple many times the mosque leadership also gave deadlines to government for implementing Sharia. As the government does not heed to the deadlines, the mosque leadership and resident-students take on their own the task of forcibly implementing Sharia in the neighborhoods surrounding the mosque. For government, the mosque leadership and students had challenged it writ. As the campaign grows violent the armed forces are called in. The state of siege goes on for ten days. During this time period, apparently some negotiations take place between the mosque leadership and the government. However, the negotiations fail. Consequently, the government decides to carry out an army operation, named the Operation Silence.

What began as a protest against the CDA’s decision to raze certain unlicensed mosques gradually transformed into a revolt against the government, more specifically against what Abdul Rasheed Ghazi, the late deputy chief cleric of the Red Mosque, called “system.” In an interview he says:

We don’t care if [President General Pervaiz] Musharraf remains or not—we don’t want to change the face, we want to change the system....The system has failed; it is not working....We want to abolish
this system; an Islamic system should be enforced. There comes a point when people stand up, when they rise up against the system.²

There were various factors—ranging from Musharraf’s decision to join the War on Terror, carry out military operations in the tribal areas, and get mosques and seminaries registered with the government to the promotion secularism in the form of what Musharraf called Enlightened Moderation—that led toward the Red Mosque revolt. However, interestingly, the aim of the revolt was one: to abolish the “system.” What does Ghazi mean by what he calls the “system”? Furthermore, what significance does the term carry, especially in telling us about its juridical relationship with the revolt?

In his different interviews, days before the operation went into action, Ghazi alternatively used three legal terms—the System, the Law of the Land, and the Fundamental Law of the Land.³ In general, the three terms point toward the political system of the country. However, on careful and repeated listening to Ghazi’s interviews, it sounds that he attributes a different meaning to each of the

² Rageh Omaar, ‘Inside the Red Mosque’ (AlJazeera English August 1, 2007). Four years after the Red Mosque revolt, Abd al-Aziz, the chief cleric and older brother of Abdul Rashid Ghazi, reiterates that they wish to abolish the current system: “I believe that the sacrifice was a trivial one, whereas the benefits were great. I am talking about how Pakistan has benefited from this: today, the people want the Islamic law to be instated, and the Nizam (system) to be replaced. I see that many people now understand that the Nizam is the cause of Pakistan’s problems. That is why many people say that we must change the Nizam.” ‘Sheik Abd Al-Aziz Ghazi, Imam of the Red Mosque in Islamabad, Pakistan, Talks about the ‘Benefits’ of the 2007 Standoff with Police: Islamic Law Will Be Instated in the World’, July 15, 2011

³ Nick Lazaredes, ’The Girls of the Red Mosque’ (SBS Dateline May 30, 2007); Omaar, ‘Inside the Red Mosque’ (n 2)
terms. By the term “system” he means the constitutional order of the country. By the term “law of the land,” he means the public law, and by the term “the Fundamental Law of the Land,” he means the Islamic law, whose broader contours are given in the non-justiciable part of the constitution—the Objectives Resolution and the Directive Principles of State Policy. From the juridical point of view, what is worth noticing is that Ghazi demonstrates considerable understanding of the different types of law that constitute the country’s legal order.

Ghazi’s phrasing of his argument in legal terms is remarkably significant. It points to a real juridical conundrum at hand. For him the revolt was not merely an extremists’ political stunt. It had its basis in the constitutional order of the country. Although Ghazi did not explain how the religious revolt was a response to the “failed” constitutional order, his recourse to the different types of law within the legal order of Pakistan gives us a clue as to what the juridical conundrum was. In order to further pursue Ghazi’s cue, let us frame a question relating to the juridical conundrum posed by the revolt, the state of siege and violence—the three juridical phenomena together I call them state of religious exception. In other words, I ask what is the locus of state of religious exception in the constitutional order of Pakistan. A preliminary answer that I propose to this question is that the juridical locus of the state of religious exception lies in the lacunae and antinomies between the different types of law, especially the constitutional laws. These lacunae and

4 At one occasion Ghazi says the government has failed to root out message parlors, brothels, alcohol bootlegging, which “are according to the Law of the Land, they are not allowed.” Tom Lasseter, 'Transcript from Lasseter’s interview with Abdul Rashid Ghazi’, July 10, 2007
antinomies exacerbate due to certain critical political developments, for instance, presently the war on Terror. Due to an unequal response of the constitutional mechanism these critical political developments produce the conditions of exception or constitutional disruption.

**Structured Constitution, Gaps and Antinomies**

On constitutional theory level, Ghazi’s differentiation of three types of law, especially the differentiation between the political procedural laws of the constitution (which he calls system, and which brings “the same faces” again and again power) and the Islamic value provisions (which he calls the Fundamental law of the land) can be conceptualized as a structured conception of the constitution. Not all laws carry similar force of law, legality or legitimacy. From the quantitative principle of democratic constitutionalism, we know that certain laws require simple legislative majority while other special majority. For instance in Pakistan public laws require for their enactment, amendment or repeal a simple majority. On the other hand, constitutional provisions require $2/3^{rd}$ majority for the same. Moreover, there are certain provisions in the constitution whose amendment or repeal might not be possible even with $2/3^{rd}$ majority. For instance, whether the parliament of Pakistan can repeal or substantially amend the fundamental rights, the Objectives Resolution (Article 2-A) and the Directives Principles of Policy even with $2/3^{rd}$ majority is doubtful at the best.
Although the hierarchical structure of the legal order in Pakistan has its roots in the colonial history, the Supreme Court’s decision in *Dosso* (1958) opens up a theoretical dimension to it. The Supreme Court bases the decision in *Dosso* on Hans Kelsen’s legal positive theory. Kelsen proposed a closed, hierarchical and structured conception of the positive legal order. According, to Kelsen there is a hierarchy of laws within the positive legal order. On the lower rung of the positive legal order stand the individual norms. Above the individual norms are statutes. Above the statutes are the constitutional laws, and in fact the constitution itself. On the top of the hierarchy is a legal logical constitution, which Kelsen called the *Grundnorm*. As Pakistan’s Supreme Court adjudicates on the basis of Kelsen’s theory, the hierarchical conception of legal order gains ground in the juridical discourse of the country. For instance, in 1968-69, a couple of cases challenged certain laws and ordinances on the argument that Pakistan’s legal order was hierarchical. The petitioners argue that on the top of hierarchy is the Islamic law. Below Islamic law was the positive constitution and further below were statutes and ordinances.\(^5\) Accordingly, should any lower law not conform with the higher Islamic law it could be struck down. Kelsen had argued that the validity of lower norms was based on the higher norms and that the former could be derived and interpreted from the latter. In the above-mentioned cases, the petitioners argument came as a negative corollary of Kelsen’s argument: If the basis of the

\(^5\) In *Labour Federation of Pakistan v. Pakistan and another* [1969] PLD 188 (HC Lahore) petitioner challenged certain laws relating to trade unions arguing that in Pakistan there is a hierarchy of laws. On the top is Islamic law, which was fundamental and permanent law. Below it was the constitution and below the constitution were the statutes.
validity of the lower laws is not Islamic and that they could not be derived from the Islamic law then they could be struck down.

A couple of years later, in *Jilani* (1972) the Supreme Court declares that the Grundnorm of Pakistan’s constitution is contained in the Objectives Resolution—a resolution that provides for the Islamic value provisions. With this decision emerges the possibility of elevating the Islamic law, or more generally Islamic value provisions, above the positive constitution of the country. Furthermore, the court’s use of Kelsen’s concept of the Grundnorm, to explain the constitutional status of the Objectives Resolution, left certain crucial questions unanswered. First, Kelsen regarded the Grundnorm a destructible legal-logical constitution. Accordingly, a question arose whether the Objectives Resolution, or in general the Islamic value provisions, were destructible (or amendable)? This question carried consequences for the nature of different constitutional provisions as well as for quantitative legislative principle. Second, after elevating the Objectives Resolution to the status of Grundnorm, what was its new relationship with the positive constitution? To these questions I return in a moment.

---

7 The timing of the decision in *Jilani* was crucial. The decision came a year after the civil war in East Pakistan, which spiraled out into a war with India. The defeat in the war and separation of the eastern wing had put enormous pressure on the state. The decision in *Jilani*, and assertion of the Objectives Resolution as the new grundnorm, was hoped to give the state its lost strength, just as after independence the Objectives Resolution was hoped to give the state its identity and strength. For Islamists the decision in *Jilani* was a landmark achievement, especially as it came after a decade long secularism under Ayub Khan.
From a technical point of view, one of the major consequences of the decision in *Jilani* 1972 is that the court restored sociological and religious elements in the constitutional and legal order that the decision in *Dosso*, following Kelsen’s theory, eliminated. One of Kelsen’s foremost critics, Carl Schmitt, points out that one of the basic flaws in Kelsen’s theory is that it aims at eliminating the sociological elements, including the religious one, from the legal order with the hope to give the same some semblance of an analytical and scientific system. To answer Kelsen’s legal positivist challenge, Schmitt develops his own constitutional theory by drawing on John Austin, Thomas Hobbes, J.J. Rousseau and Max Weber. Certain aspects of Schmitt’s critique of legal positivism and liberalism as well as his constitutional theory are quite edifying for the purposes of our analysis of Pakistan’s structured constitution. Therefore, I think it would merit engaging those aspects in the subsequent discussion.

Schmitt sheds light on how the sociological and religious elements entail a structured conception of the constitution. In *Legality and Legitimacy* (1932) a critical treatise on the modern democratic constitutionalism, he writes, “The Weimar Constitution is literally split between the value neutrality of its first and the value plenitude of its second component.” With this argument, Schmitt, according to Gopal Balakrishnan, renders a “theoretical splitting” of the Weimar constitution into two parts, violable and inviolable, temporal and indefinite,

---

essential and non-essential or value-plenitude and value-neutral. The first part prescribed the procedural organization of popular sovereignty and the second the bourgeois and Christian core values—the rights, principles, goals and social demands. Schmitt goes to the extent of declaring the second part as “a second, heterogeneous constitution.” For Schmitt, the second part or the value plenitude part carried higher “substantive legal guarantees.” However, by virtue of this higher legal status, the guarantees “constitute a structural contradiction with the value neutrality of the First Principal Part.” Schmitt gives a simple instance: on the one hand constitution establishes “sacred institutions and entitlements, such as marriage (Article 119) and exercise of religion (Article 135), which should stand under the protection of the constitution itself,” and on the other these institutions are left at the mercy of quantitative legislative principle which could be brought to the service “for the elimination of just these sacred objects.”

10 Schmitt, Legality and legitimacy (n 7) 40
11 Ibid 45; Carl Schmitt, Constitutional Theory (Jeffrey Seitzer tr, Duke University Press 2008) 83
12 Schmitt, Legality and legitimacy (n 7) 46. With the ascendance of the quantitative legislative principle in the democratic Weimar, Schmitt observes a risky relinquishing of morality in favor of legality. Thus he writes:

And it is an inadequate, indeed, an immoral excuse, when one declares that the elimination of marriage or of churches is legally quite possible, but that it would hopefully not come to a simple or two-thirds majority, which would abolish marriage or establish an atheistic or a secular state. When the legality of such a possibility is recognized, and it is self-evident for the dominant functionalism of the concept of law and of constitutional law, then all the declarations of the Second Part of the Constitution are actually ‘hollow,’ sacred relics.
Schmitt’s splitting of the constitution highlights the inherent gaps and antinomies between the two parts. According to Balakrishnan, “A gap is a grey area in the Constitution, a point at which the Constitution avoids specifying how a particular conflict should be resolved, and leaves it open to interpretation, which in the absence of a norm invariably becomes political” (46). He further writes, “Emergency situations are like X-ray flashes which suddenly reveal the antinomies of legal reason” (2000, 45). To Schmitt, the gaps and antinomies between the two parts of the Weimar constitution were quite stark, and to his dismay the politics in the republic only exacerbated them. In words of Gopal Balakrishnan:

Schmitt had claimed as far back as Verfassungslehre that the constitutional Rechtstaat [legal state] lacked a co-ordinating principle [and/or institution] between the section which organized the political will of the community and the section which limited it in the name of individual freedoms: in simple terms, was the validity of the law based on the legislative will organized in the first section, or in the bundle of rights and goals laid out in the second?\footnote{13 Balakrishnan, The enemy (n 8) 161}

Broadly speaking, many constitutions of the world might show such a split between the value-neutral and value-plenitude parts. In the constitutions of Islamic states this split is often quite prominent. Pakistan’s constitution presents a good example of the split between its value-neutral and value-plenitude parts. In the value-plenitude part, the constitution provides for the religious values and

\footnote{13 Balakrishnan, The enemy (n 8) 161}
social goals. In the value-neutral part it provides for the secular democratic institutions, their powers, functions and election procedures. The former is non-justiciable and the later justiciable. Just as the catholic constitutional theorist, Schmitt, theoretically elevates the value-plenitude part of the constitution to a separate heterogeneous constitution in itself, Ghazi and in general the Islamists in Pakistan wish to elevate the Islamic value-plenitude part to a superior heterogeneous constitution. Jilani 1972 purportedly confirms the elevation, giving the Islamic value plenitude part a higher substantive legal guarantee. In doing so, the value plenitude part is thought to provide legitimacy to the value-neutral part of the positive constitution.

On the other hand, just as Schmitt expressed a sense of irony and shock over the democratic constitutional procedure, which leaves the value-plenitude at the mercy of the quantitative principle, similarly the Islamists in Pakistan express their sense of irony and shock over leaving the Islamic value provisions at the mercy of the quantitative legislation. For instance, Islamists consider marriage *between a man and a woman* as a sacred Islamic institution and constitutionally a guaranteed social goal for the government to propagate and maintain. Hence the prospect that a constitutional guarantee can be legislated upon in order to redefine it shocks the Islamists. Especially, as certain Western states have recently legislated on the question of same sex marriage, for the Islamists such legislation makes the entire democratic legislative system questionable.
Although the Islamic institution of marriage is hard to be subjected to legislation or executive order, at the Red Mosque we see the Islamic institution of mosque being debated. The government’s decision to demolish the unlicensed mosques in Islamabad raised the question whether or not the government has the authority to demolish the mosques. The question becomes complex as it relates to a more general theological question: whether or not a mosque can be demolished at all? These are highly sensitive questions in Pakistan (and the Muslim World in general), and any debate on them can easily spiral out into violence. The constitutional position on these questions is not much helpful rather it is ambiguous. Article 31 (2c) of the present constitution provides that “the state shall endeavor...to secure the proper organisation of zakat, ushr, aukaf and mosques.” The term “organisation”, however, is not explained. Seemingly, under the constitutional sanction provided by the Article 31 (2c) the government in 2002 and 2005 passed a couple of ordinances for the “registration” of mosques and seminaries. However, the government’s efforts to register mosques and seminaries faced tough resistance and eventually failed. In 2007, the government went on to raze the “unlicensed” mosques. On the juridical level, the question is whether the registration and demolition come within the scope of the constitution phrase “to secure the proper organisation.” Given the concerns of city planning this question becomes critically imminent. Islamabad’s “capital territory”, as it is officially called, is fully planned. Any construction, even a map or design of construction not approved by city administration is considered unlicensed and illegal. Accordingly, the concerns and principles of modern urban planning, which is in its own right
becoming a sovereign enterprise, conflict with the sovereign territorial practices of the traditional Islamic institution of the mosque.

It yet remains to be seen how the judiciary will interpret the phrase, “to secure the proper organisation” if a case is brought to it. However, on the matter of proper organization of aukaf, another Islamic institution provided for in the same article, an earlier bench of the court had held the matter as non-justiciable. In 1968, the Supreme Court was petitioned to decide on a government’s order to appropriate certain wakf (plural aukaf) property. The petitioner relied on the supremacy of the Islamic law over government’s legislation. Because the Islamic law allowed the petitioner to retain wafk property, the petitioner asked the court to strike down the order. However, the court declined the plea and held:

Such a plea is, however, not justiciable in Courts under the present Constitution. The responsibility has been laid on the Legislature to see that no law repugnant to the Islamic law, is brought on the statute book. The grievance, if any, therefore should be ventilated in a different forum and not in this Court.14

One of the results of dividing the constitution into two parts and thereby confining the Islamic value provisions and social goals in the non-justiciable part was that it went against the interests of the Islamists. Hence, they were left frustrated and with the passage of time their frustration kept on building.

14 Chaudhary Tanbir Ahmad Siddiky v. The Province of East Pakistan and others [1968] PLD 185, 203–205 (SC)
The struggle for Precedence between the Two Parts of the Structured Constitution

Historically speaking, the structured conception of the constitution, or splitting of the constitution into value-neutral and value-plenitude parts, sparked the question of which part would take precedence over the other, if at all. In fact, this question was a modest juridical corollary of the crucial post-independence political question of whether the Pakistani state should adopt Islamic (Sharia) or Westminster political system. For instance, Abd al-Aziz, the chief cleric of the Red Mosque, in a recent interview (July 2011), justifies the revolt in following words:

Pakistan was established so that Islam could be implemented there...Back then it was said that Islamic law would be the basis for the legal system in Pakistan, that the Koran and the Sunna would be the basis of everything. However, to this day this has not been implemented. This was the reason for many things [revolt/violence] that took place in Pakistan. What happened at the Red Mosque, in Islamabad, was due to Pervez Musharraf’s decision to destroy many mosques. Some of these mosques were built a hundred years ago.15

As the Pakistani state adopts the latter, the Islamists however do not give up their struggle for the implementation of Sharia. Instead they initiate a juridical

15 ‘MEMRI’ (n 2)
struggle for the precedence of Sharia law over the secular law from within the constitutional and legal order of the state. Their juridical struggle results in decades of heated debate in the courts, especially revolving around the value provisions contained in the Objectives Resolution. For instance, in 1991, commenting on the debate, the Supreme Court observed:

...in our *milieu* it has given rise to a controversy and a debate which has had no parallel, shaken the very Constitutional foundations of the country, made the express mandatory words of the Constitutional instrument yield to nebulous, undefined, controversial juristic concepts of Islamic *fiqh*. It has enthused individuals groups and institutions to ignore, subordinate and even strike down at their will the various Articles of the constitution by a test of what they consider the supreme Divine Law, whose supremacy has been recognised by the Constitution itself.\(^{16}\)

In constitutional theory the question of precedence between the value-plenitude and value-neutral parts is far from being settled. Schmitt, who effectively demonstrated the split between the two parts of the constitution, remained torn on the question of which, if at all, part should take precedence. In *Constitutional Theory* (1928) he argues that the procedural part should take precedence over the

\(^{16}\) *Hakim Khan v. Government of Pakistan* 1991 PLD 595, 629 (SC)
In the early 1930s Schmitt expresses his fear that given the democratic procedure of the Weimar constitution just any political party or class could come to power and thereby amend or destroy the bourgeois and Christian values. At this critical time in German history, to Schmitt it was the values and not any other principle or institution that conferred legitimacy on the constitution. He conceptualizes them as the “genuine fundamental principles” or the “original mandate,” which provide legitimacy and foundation to the constitutional system of Weimar. The possibility of disrupting or displacing the original mandate comes across to him as the paradox of the government by popular will, in fact of democracy. In order to defend the value part of the constitution, the Catholic scholar goes one step further, “over to some new principle.” First he advocates that one must exempt these interests from [mathematical-statistical legislative method] and privilege them in the democratic process.” Second, he aims to accord to the value part force of the “supralegal dignity.”

These fundamental principles contain a supralegal dignity, which raises them above every regulation of an organizational and constitutional type facilitating their preservation as well as over any individual regulations of a substantive law variety. As an outstanding

---

17 In 1928 the constitutional order was relatively safe from any grave threats. However, by 1932 the National Socialism threatened not only to suspend the constitution but also to abolish the core bourgeois and Christian values contained in it.
18 Schmitt, *Legality and legitimacy* (n 7) 45
19 Ibid
French public law specialist, Maurice Hauriou puts it, these principles have a ‘superlegalite constitutionelle’ that raises them not only above routine, simple statutes, but also over the laws of the written constitution and rules out their elimination through statutes amending the constitution.\footnote{Ibid 58}

In Pakistan’s constitutional context, the question of which part of the constitution takes precedence over the other has been a matter of debate in the constituent assemblies and judiciary. For the First Constituent Assembly the question of status of Islamic law in the constitution became one of the most contentious questions. Because the constitution-makers framed the constitution on the pattern of the British India Acts of 1947 and 1935, the value-neutral part of the constitution was already available. It was the value-plenitude part that was to be frame from the scratch. Moreover, the constitution-makers had to make sure that the value-plenitude part reconciled with the value-neutral or the secular democratic procedural part. However, the very introduction of the value-plenitude part, or Islamic value-provision in the secular constitutional mechanism, at the same time created a schism, a gap, an antinomy between the two parts.\footnote{It is worth noticing that the Islamic law was confined to family law during the Raj. After independence the Objectives Resolution stipulated that such laws should not be passed that conflict with Islamic teachings, but until 1968 no serious challenge was posed to any (secular) law on the touchstone of conflict with Islamic teachings. First of these challenges came in Chaudhary Tanbir Ahmad Siddiky v. The Province of East Pakistan and others [1968] PLD 185 (SC) and Labour Federation of Pakistan v. Pakistan and another [1969] PLD 188 (HC Lahore). However, the courts declined to}
In 1949 first step in the constitution making process was taken. The Assembly passed a resolution, which is called the Objectives Resolution, to stipulate the aims and objectives of the future constitution.\textsuperscript{22} Apparently, the Objectives Resolution was to become the Islamic touchstone for determining the Islamic legitimacy of the democratic and secular constitutional parts of the constitution as well as of statutes.\textsuperscript{23} Because Pakistan was to frame its constitutional democracy on the British pattern, the Objectives Resolution provided the test as to which democratic institutions and procedures qualified the Islamic test. Hence the Objective Resolution not only came to take a place above the secular political institutions, but also purportedly assumed supralegality.

\begin{quote}
apply the touchstone on the ground that the Objectives Resolution was the preamble of the constitution and hence not justiciable.
\end{quote}

\textsuperscript{22} The Resolution is a one-page document of 324 words. The preamble declares, “Sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust.” One of the declarations provides, “Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed.” Another provides, “Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah.” Yet another provides, “Wherein shall be guaranteed fundamental rights... subject to law and public morality.” Two other declarations reduce some sections of the populace to the status of permanent minorities on the basis of their religions. One of these declarations for instance says, “Wherein adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes.”

\textsuperscript{23} According to Fazlur Rahman Islam was introduced ‘as a “bounding” or limiting concept rather than as a positive or creative factor.’ The context of this bounding and limiting role of Islam in constitution mechanism of Pakistan was the result of an essential understanding of Ulama, led by Maulana Abu'l-A'la Mawdudi, in the decades after independence that Islam was a limiting force on human freedoms, which included freedom to legislate. Fazlur Rahman, ‘Islam and the Constitutional Problem of Pakistan’ [1970] Studia Islamica 275, 276-277
However, for the Pakistani forefathers, the passage of the Objectives Resolution, was neither a renewed faith in the political agency of the tenets of Islam, nor an ambivalent and idiosyncratic experiment. Religion, they knew very well, could not be left outside the constitutional order. Moreover, they were cognizant of the identity crisis faced by the state, a crisis that came as an epiphenomenon of the partition, which was based on a communal doctrine, known as the Two Nation Theory. Just as Schmitt had seen, in his imagination of the early 1920s, that a void, an absence of legitimating myth (or ideology) was at the heart of the modern European state, making it vulnerable to tendencies of instability, Pakistan’s founding fathers saw a void at the heart of the newly born Pakistani state. Moreover, just as Schmitt thought it “both possible and politically imperative to uncover the theological thought forms once used to imagine, build and defend the European state,” the Pakistani founding fathers similarly thought that the Islamic thought-form could fill the void, provide a legitimating myth, and esprit de corps for the constitutional order.

Liberals in Pakistan often criticize the Objectives Resolution as the core of the problem of religiosity and religious anomie in the country. In doing so, they discount the ingenuity of the formula of the founding fathers to capture pure religious anomie in the Resolution and to incorporate it in the constitutional

24 Balakrishnan, The enemy (n 7) 59
25 Ibid 48
mechanism, in order to the delimit the demand for a *Sharia* state.\(^{26}\) Technically, this intelligent formula becomes manifest as the Resolution is contained in the non-substantive part of the constitution. However, even as the formula of the founding fathers was intelligent, it could not settle the question of precedence and exception. The question then comes to the court. In *Asma Jilani* (1972)\(^{27}\) when the court held that inasmuch as the *Grundnorm* of the juridical order has to be furnished it can be located in the Objectives Resolution, the decision initiates a fresh debate. The Objectives Resolution as the *Grundnorm* means that it stands above the constitution.

In 1985 another important development takes place. The Objectives Resolution is taken out from the preamble and incorporated in Article 2. In this way, the Resolution is moved from the non-justiciable to justiciable part of the constitution. This created further confusion whether the Resolution was still the *Grundnorm* and at the same times a positive norm? For the court the confusion related to how to give effect to both legal forms of the Resolution. Chief Justice Hamood ur Rehman in *Asma Jilani* had predicted that if the Objectives Resolution “is not incorporated in the Constitution or does not form part of the Constitution it cannot control the Constitution.” His words come true: the objectives Resolution

\(^{26}\) Compare with Fazlur Rahman’s understanding. Rahman writes that inasmuch as the constitution-makers accepted God’s sovereignty they ‘succumbed to the conceptual framework of the rightists.’ He makes this point even though he acknowledges that such a provision in the preamble did not carry practical consequences. Rahman, ‘Islam and the Constitutional Problem of Pakistan’ (n 23) 278

\(^{27}\) *Asma Jilani v. Government of Punjab* [1972] PLD 139 (SC)
begin to control the substantive part of the constitution. The balance between the 
*Grundnorm* and the norm, the Islamic basis and the secular structure, which the 
founding fathers had managed to inscribe in the constitution, is tipped. Several 
petitions and suits are filed, especially by the Islamists, which challenge almost 
every secular provision and aspect of the constitution.28

In early 1990s, in *Hakim Khan* and *Kaneez Fatima*, the court decides on 
whether the Objectives Resolution and Islamic social values and goals can be made 
as touchstone for striking down secular constitutional and statute law. The court 
gives a careful decision: first, the court argues that because the courts are 
creatures of the constitution, they cannot strike down any part of it, second, that 
the Objectives Resolution should be given effect as the directive principle and not 
as the basis for challenging other provisions, and third, the court expresses its 
willingsness to “harmonize” the two parts of the constitution. In *Kaneez Fatima*, the 
court however observes that administrative order taken under any law can be 
invalidated on the basis of the Objectives Resolutions.

28 According to Martin Lau, ‘Between 1985 and 1992, when the matter was finally settled by the Supreme Court, at least 30 cases involving a consideration of the effects of Article 2-A were decided by the four High Courts and the Federal Shariat Court.’ He argues pursuant to above observation of the Supreme Court that it gives ‘a sense of doom, of country in the grip and at the mercy of “nebulous, undefined and controversial concepts of Islamic *fiqh.*” No longer was Islamic law seen as a benevolent additional source of judicial power to advance principles of justice and democracy...It had become a danger to the very foundations of the state...’ I think Lau makes a compelling point. However, the doom and danger should be seen as partial, threatening the secular structure. The Islamic theology which is already part of the ‘constitutional mechanism’ or dual framework is in this case displacing the secular structure. Martin Lau, *The role of Islam in the legal system of Pakistan* (Koninklijke Brill 2006) 48
The Structured Constitution and the Doctrine of Harmony

One of the dynamics of Kelsen’s legal positivism that might have left a lasting impression on Chief Justice M. Munir, as the latter engages Kelsen’s theory in deciding *Dosso*, is the special role that judges assume in making the hierarchical, positive constitutional order a dynamic system. Kelsen proposed two factors that would make the positive order a dynamic system: the interpretation by judges and the availability of higher norms. Accordingly, the sovereign machine of the positive legal order would run itself.

Despite Kelsen’s proposed role for the superior judiciary and superior norms, Schmitt on the other hand predicted that the legal order cannot “encompass a total exception.” According to his theory of state of exception, law aims not to leave outside its sphere any subject that matters to the state. Schmitt’s restoration of sociological and religious elements to the positive legal order was in one way an attempt to explain this attitude of the law and state. What better explanation can we present than the laws enacted by the colonial state in India, which incorporated in the legal order subjects ranging from organization of the state to such petty issues as nuisance. These laws and especially the British legal attitude were later on adopted by the postcolonial state of Pakistan.

As Agamben effectively extrapolates Schmitt’s understanding of the state of exception, even as law wishes to exclude or downplay any subject, it does so by
way of its incorporation. Agamben names this working of law, included-exclusion. However, for Schmitt, law could not completely exclude or downplay the included subject, which will always exist in its factual form (as distinct from its normative form). Hence, the included subject will augur a state of exception, which will “break[] through the crust of a mechanism that has become torpid by repetition.”

As I point out above in relation to the Objectives Resolution, to the extent the founding fathers and constitution makers of Pakistan wished to exclude religion or Sharia from the constitutional order of the country they incorporated it within the constitutional order. They did so by carefully inscribing the Objectives Resolution and other Islamic injunctions and value provisions in the non-justiciable part of the constitution. Then they provided for certain institutions that would ensure coordination and reconciliation between the two parts. Those institutions are the Islamic Ideology Council, the Federal Shariat Court with Islamic judicial review power, and the Supreme Court with general judicial review power. However, the constitution makers made sure that these institutions played only the role of coordination and reconciliation. They are not given allowed to strike down the constitutional provisions on the touchstone of Islamic values and goals. Accordingly, the IIC was made an advisory body, having the function of making recommendations to legislature and executive and preparing annual advisory reports for bringing secular law to conform to Islamic injunctions.29 On the other

29 One of the meritorious achievements that the IIC claims is the Enforcement of Shari’ah Act 1991. The Act declared the Islamic injunctions the supreme law of the land. Accordingly, a large number of directive principles of policy are introduced to
hand, the Federal Shariat Court was endowed with much more effectively power of Islamic judicial review, but it could not strike down constitutional law and statutes.

While the Federal Shariat Court was clearly denied jurisdiction over constitutional provisions, it remained ambiguous whether the Supreme Court was also denied just such jurisdiction. Interestingly, on this matter the Supreme Court itself had to decide. The Supreme Court adopted a consistent stance that striking down constitutional provisions was beyond its jurisdiction. However, for this stance at different stages the Court expounds different doctrines. In late 1960s, the court adopted the doctrine of non-justiciability. The Court argued that the Objectives Resolution was part of the preamble of the two constitutions, and other value provisions were provided in the directive principles of policy, both of which were not justiciable. Similarly, in 1976 when a retired judge filed a petition that on the touchstone of Islamic value provisions, the entire constitution of 1973 and the legal order of the country were unIslamic, the Lahore high court and later on introduce Islamic courses at educational institutions, to Islamize economy and to Islamize society by eliminating obscenity and moral vices. However, the Section 3(2) exempted the political system. It provided that “the present political system, including the Majlis-e-Shoora [Parliament] and Provincial Assemblies and the existing system of Government, shall not be challenged in any Court, including Supreme Court, the Federal Shariat Court or any authority or tribunal.” Similarly, the section also exempted the erstwhile economic system. The Shari’ah Act therefore did little to change the structured constitutional order. In 1992 Lahore High Court hearing a case under Shari’ah Act lamented that the Act suffered from “some of its apparent infirmities in the form of certain vague and exclusionary provisions aiming at saving the present political and economic system which is being perpetuated by a particular class to safeguard its own vested interest in violation of the basic concept of Shariah.” PLD 1992 45, 51 (Lah. HC)
appeal the Supreme Court in 1980, repeated the earlier doctrine of non-
justiciability.

However, in 1985, as the Objectives Resolution is taken out from the
preamble and incorporated in the justiciable part of the constitution (the Article 2-
A), it becomes difficult for the Supreme Court to defend its earlier doctrine.
Therefore, in Hakim Khan (1992) the court goes over the history of the Resolution.
The court points out that while introducing the Resolution in the justiciable part of
the constitution the intention of the government was not to allow the Resolution to
strike down other constitutional provisions. The court holds that “according to the
well-established rule of interpretation that a constitution has to be read as a
whole, any repugnancy between different constitutional provisions had to be
harmonized by the courts if at all possible.”

Justice Shah writing for the majority holds:

And even if Article 2-A really meant that after its introduction it is to
become in control of the other provisions of the Constitution, then
most of the Articles of the existing Constitution will become
questionable on the ground of their alleged inconsistency with the
provisions of the Objectives Resolution... Thus, the law regarding
political parties, mode of election, the entire structure of Government
as embodied in the Constitution, the powers and privileges of the
President and other functionaries of the Government will be open to

30 Lau, The role of Islam in the legal system of Pakistan (n 28) 66
question...Thus, instead of making the 1973 Constitution more purposeful, such an interpretation of Article 2-A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form.”

The decision in *Hakim Khan* entailed that the constitution endowed upon the courts the task of harmonizing the various parts and provisions of the constitution. However, to Islamist petitioners the result of the decision in *Hakim Khan*, and later in *Kaneez Fatima* (1993) was the same old one: to not to allow the Objectives Resolution or in general Islamic law supremacy the secular positive constitution. Thus to the Islamist petitioners resorting to courts for striking down secular law and the value-neutral part of the constitution seemed futile. They begin to look toward the other course, revolt.

**Conclusion**

In order to reach a comprehensive understanding of the Red Mosque revolt, it merits grounding it in the constitutional theory and practice in Pakistan. Not least because the Islamists of the Red Mosque demanded for the abolition of the erstwhile constitutional order, and in its stead establishing *Sharia*, but also because the religious revolt grew from within the constitutional order. Since the

---

31 PLD 1992 SC 595, 617
earliest efforts at constitution making, the constitution makers and courts faced the demand for implementation of Sharia in the country. Apparently, they had two choices either to leave the demand for Sharia outside the positive constitutional order that they were framing or to include it in the constitution. However, they devised a unique compromise: they incorporated the religious value provisions inside the constitutional order so as to exclude the demand for Sharia law by the way of included-exclusion. Accordingly, they divide the constitution into value-neutral and value-plenitude parts, making the former justiciable and the latter non-justiciable. The religious provisions are carefully incorporated in the non-justiciable part.

With the incorporation of religious value provisions within the constitutional order, the Islamists struggle for implementing Sharia gets constitutionally internalized. In other words, it becomes a constitutional struggle for the precedence of the Islamic law over secular law. And it is pursued in the courts. Accordingly, Islamists petition against individual positive laws pointing to how those conflicted with the Islamic law. The courts either strike down individual laws or recommend the parliament to make amendments. However, the courts consistently declined to strike down the constitution. Rather they take up the task of defending the constitution by way of harmonizing its various provisions. As the legal struggle for the abolition of positive constitution seem to go no-where, the Islamists begin to look toward a direct course of revolt.
Part II

Disruption of the Constitutional Order and the Law of High Treason

Some of the most menacing encroachments on the individual liberty have been made in the name of democratic principles themselves.

--Justice Hamoodur Rehman
Chapter 3

Disruption of the Constitutional Order in Pakistan: A Critique of the Law of High Treason

Introduction: The High Treason Case Against Musharraf

On March 21, 2011, in a statement, Chief Justice of Pakistan, Iftikhar M. Chaudary, takes pride in saying that almost four years earlier the judges successfully resisted the validation of President General Pervaiz Musharraf’s coup d’état (of November 3, 2007). The resistance that Chaudary initiates snowballs into a large-scale lawyers movement, which is gradually joined in by various civil society groups and political parties. Within a year, which is by August 2008, the movement topples Musharraf from presidency. Recalling the success of the resistance, the Chief Justice claims: “Steps taken in the past [i.e., military coups d’état and validations by earlier benches of the Court] resulted in martial laws, but this trend must end now and there is need to put the record straight. Now there will only be the rule of law and supremacy of the Constitution in the country.”\(^1\) Moreover, he alludes in his statement that those who engaged in the disruption of the constitution (1973) can be tried for the crime of high treason in accordance with Article 6.

\(^1\) ‘No Room Now for Adventurism: Court’, *Dawn* (Karachi, 22 March 2011) <http://www.dawn.com/2011/03/22/no-room-now-for-adventurism-court.html> accessed 1 April, 2011
A more official version of this allusion can be found in the *cause célèbre, Sindh Bar Association* (2009). In this case, Chief Justice Chaudary rules that the proclamation of emergency and promulgation of the PCO, which put the constitution in abeyance, were “unconstitutional, unauthorized, without any legal basis, hence, without any legal consequences.” Thus Chaudary alludes to the possibility of charging Musharraf for high treason. However, this case was not specifically a high treason case against Musharraf, therefore, Chief Justice Chaudary was constrained to convict or pronounce punishment. In line with the constitutional provision in Article 6, he prefers to leave the question of convicting Musharraf to the parliament. The constitution gives authority to the parliament to initiate and decide on the cases of high treason, and that it does so by passing a law.

However, Article 6 is explained further by the 1973 High Treason (Punishment) Act. The Act is enacted on September 26, 1973, a month and half after the ordaining of the constitution, as a supplement to the Article 6. It stipulates punishment for persons guilty of high treason. The punishment is life imprisonment or death. However, the Act has two other significant juridical dimensions. First, it provides that courts can take cognizance of the offences of high treason. Second, that they will do so on the request from the federal government. In line with this provision, a petition filed by opposition party—Pakistan Muslim League-Nawaz (PML-N)—that lacked the support of the federal government, which sought conviction of Musharraf, is turned down by the Supreme Court. Similarly, the provincial Sindh High Court turns down a petition of

---

conviction against Musharraf. However, a petition in the provincial Lahore High Court is maintained. In the petition it is argued that in the Sindh Bar Association the Supreme Court has already found Musharraf guilty of having committed the offence of high treason. Hence, this Court is only petitioned to pronounce sentence, which it can do so under the section 2 of the High Treason Act.

From the second dimension of the High Treason Act mentioned above, it becomes clear that the petitions of the offences of high treason can be brought to the superior courts. However, still much depends on the courts, how will they interpret the Act, especially in relation to Article 6 of the constitution. Nevertheless, by vesting the power of initiation of high treason cases in the federal government, the Act clearly limits the right to petition of the opposition as well as of the common people. Thus despite Lahore High court’s repeated demands from the federal government, in fact for more than a dozen times, to file its position on the case, the latter has consistently dragged its feet. Therefore, a petition was filed in the same court in another high treason case, this one against the incumbent Prime Minister, Yusuf Raza Gilani, for striking down the clause. It is argued in the petition that the provision contravenes the fundamental rights.\(^3\) In the latest hearing of the high treason case against Musharraf, on October 7, 2011, the provincial Lahore High Court, upon the request of the petitioner, has transferred the case to the Supreme Court, with a request that a larger bench should be constituted for hearing.

On the other hand, the ruling party—Pakistan’s Peoples Party, PPP—since coming to power in 2008 has been reluctant to initiate a high treason bill in parliament against Musharraf. In fact, in August 2009, the prime minister announced in the parliament that the resurrection of democratic process has avenged the wrong done, and that his party does not support high treason charges against Musharraf. The opposition party, PML-N, however, has time and again called for initiating a high treason resolution against Musharraf. In June 2008, while Musharraf was still in power, PML-N chairman Nawaz Shareef called the former a traitor for the obvious reason that he broke his oath of loyalty to the constitution and resorted to unconstitutional means by removing Shareef from government. Furthermore, Shareef charged Musharraf of having done considerable “damage” to the country due to his war on terror policies. Later on, Shareef’s stance was formally brought to the parliament by one of his vocal party members, Chaudhry Nisar Ali Khan. Nisar Ali announced that he has prepared a draft resolution of the high treason case, which he could introduce should the ruling party support it. Although the ruling party is reluctant to initiating a high treason bill against Musharraf, it remains to be seen whether the opposition party, PML-N, initiates the bill should it win the 2013 election and become the new ruling party.

The record of trying military coup makers in Pakistan does not furnish any strong precedent. However, if Musharraf is brought back to the country and made to stand trial, he and his associates might be awarded capital sentences. Whether the trial takes place in the parliament or in a superior court, it will be by no means an easy one. First of all, there are political difficulties, for instance, extradition of Musharraf from the UK, agreeing to a consensus-based resolution, reconciling the Pakistan Army and/or Musharraf’s sympathizers within, as well as without, the country. On the other hand, the case will invoke some of the difficult constitutional history and theory questions: What is the historical and juridical basis of the law of high treason? How to justify the relationship between high treason and the capital sentence?

In this chapter, I primarily focus on constitutional history and theory questions. The chapter is divided into four sections. In the first section, I explore how the concept and law of high treason enters in Pakistan’s constitutional discourse. In the second section I give a broader historical and theoretical development of the concept and law of high treason. In the third section, I highlight the relationship between the concepts of the constitution and high treason in Pakistan. Finally, I take up Musharraf’s high treason case and point to the adverse precedents that make it considerably challenging. My general conclusion is that the law of high treason is flawed, historically because it is based on feudal and authoritarian baggage, theoretically because the relationship between the concepts of constitution and high treason is nebulous and arbitrary, and practically because punitive sanction cannot guarantee democracy.
Legal Background of the Law of High Treason in Pakistan

The judicial history of the law of high treason in Pakistan can be traced back to the 1958 cause celebre, Dosso. In this case, the Court was faced with a coup d’état of the then President Iskandar Mirza, who abrogated the constitution and invited the army commander to take control of the government. The constitutional disruption thus raised the question of legal validity of the new regime, which the Court deemed necessary to answering. One of the primary assumption that the Court puts forward was that a successful coup d’état or victorious revolution is a law-creating fact, while a failed coup d’état or revolution high treason. In Court’s own words:

a) “a victorious revolution or a successful coup d’état is an internationally recognized legal method of changing a constitution”;

b) intervention should be “an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution… [A] change is, in law, a revolution if it annuls the Constitution and the annulment is effective”;

c) but if the abrupt political change is not successful, “those who sponsor or organize it are judged by the existing Constitution as guilty of the crime of treason.”

Answering the question of disruption of the constitutional order, however, was not a matter of simple adjudication on the basis of a given positive law, but instead had to be based on some theory. The court chose the legal theory of one of the leading

7 State v. Dosso [1958] PLD 533, 538–539 (SC)
liberal constitutionalists in the 20th century, Hans Kelsen. Kelsen developed his ideas of liberal constitutionalism, or, more technically, legal positivism, in the early part of the turbulent 20th century in the continental Europe. In early 1940s he moved to the United States where he “reformulat[ed]” his ideas, especially to take into account the Common Law context. The two new volumes that he published portend to articulate pure and general theories of law. In his earlier volume, *General Theory of Law* (1945), Kelsen writes:

> If they [revolutionaries] succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order…[But]…If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.

Kelsen theorizes, what he thinks is, international custom as valid basis of positive law. The Supreme Court of Pakistan applies his theorization without much questioning. In fact, his theory is quoted generously in the decision. However, the decision sparks a prolonged judicial debate, which leaves its impact on the future constitution making.

---

9 Ibid 118
Some of Kelsen’s concepts for instance, that of *Grundnorm*, hierarchical structure of legal system, and the doctrine of high treason, reverberate in constitutional debates and cases to date.\(^{10}\)

A different bench of the Court in the 1972 *Jilani* case declined to accept Kelsen’s theory, especially the principle of efficacy or revolutionary legality.\(^{11}\) However, whether knowingly or unknowingly, the Court accepted and, in effect, strongly emphasized the doctrine of high treason. But for practical purposes the Court reasserted it in retroactive terms: “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.”\(^{12}\) Wary of the existential threat of coups, the constitution makers put enough store on the Court’s advice. Thus as they make the new constitution next year (1973), they incorporate the law of high treason in Article 6. The Article reads:

> Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason.

In order to supplement the Article 6, especially to pronounce punishment, the parliament on September 26, 1973, drafts the High Treason (Punishment) Act.\(^{13}\)

---

\(^{10}\) *Dosso* (n 7)


\(^{12}\) Ibid 243 (Yaqub Ali, J.)

\(^{13}\) ‘High Treason (Punishment) Act’, September 26, 1973
According to this Act anyone who “committed an act of abrogation or subversion of a constitution in force in Pakistan at any time since the twenty-third day of March, 1956,” when the first Republic was declared, or committed acts defined in Article 6 “shall be punishable with death or imprisonment for life.” The Act also provides for the procedure for trial in the courts, thus implying that high treason cases are not sole jurisdiction of the parliament. The Act reads: “No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by a person authorized by the Federal Government in this behalf.”

I find it worthwhile to add a few lines on the political and social backdrop in which the law of high treason pushes its way into the constitution. Jilani had curtailed martial law powers now exercised by a popularly elected head of State, Zulfiqar Ali Bhutto. Bhutto, after assuming power in late 1971, showed no scruples to extending the martial law imposed on the country in early 1969 by a military commander, General Yahya Khan. Jilani had condemned Khan’s martial law as usurpation of power, but interestingly Bhutto’s extension of the same was not condemned in similar fashion. On the other hand, the thrust of the decision was thought to be a strong punitive warning to the Army generals who might plot future coups d’état. Bhutto felt encouraged. He began to seriously think of transforming the warning in the decision into a constitutional law. Then such a law would not only bulwark the constitution, but also his personal ambition for absolute political power.

Bhutto swiftly purged the top brass of the military that had counseled Yahya. He appointed Lieutenant-General Gul Hassan the new commander-in-Chief and Air Marshal Rahim Khan the new Air Force chief. “Both officers had helped him into
office, and their appointment was a suitable reward.”\textsuperscript{14} However, Bhutto suspected the loyalty of the two ambitious commanders, and therefore, after few months on March 3, 1972, forced them to resign. “The two officers had not actively plotted against him, but their record suggested that they might.”\textsuperscript{15} Bhutto had come to believe that if there was any threat to his government, it was not any political party, movement, or bureaucracy, but the Army. Thus he concluded that browbeating the Army was \textit{sine qua non} to both his political survival and dominance.

Bhutto got such an opportunity next year. On March 30, 1973, Ministry of Defense, headed by himself, unraveled a plot of coup d’\textsuperscript{et}at. Two retired officers—Brigardier (Retd.) F.B. Ali and Colonel (Retd.) Abdul Aleem Afridi—were accused and brought before a special military court presided over by Major-General Muhammad Ziaul Haq. The accused however filed a petition in Lahore High Court and later an appeal in the Supreme Court against their trial by way of a court martial. They argued that a) they were retired officers and hence ordinary citizens; b) they should be tried in a civil court because they have a right of security of person and equal protection of law; and lastly that c) military courts did not follow procedures and norms necessary for a fair judicial trial. The courts turned down their appeal ruling that ordinances III and IV of 1967 under which the said martial court was set up were valid positive laws, especially because the ordinances were subsequently approved by the National Assembly. The court also declared that a trial by a martial court did not violate Fundamental Rights. Moreover, the argument that certain procedures and norms of civil

\textsuperscript{14} Salmaan Taseer, \textit{Bhutto: A Political Biography} (Vikas Pub. House 1980) 148
\textsuperscript{15} Ibid 149
courts were not followed was not viable justification to strike down the martial courts. The Court concluded: “the prevention of the subversion of loyalty of a member of defence services of Pakistan was as essential.”

Accordingly, the trial of the accused in the martial court proceeded. It is worth noticing that Bhutto “personally examined the relevant trial papers and intelligence reports and held discussions with prosecution lawyers. The officers were found guilty and sentenced to heavy terms of imprisonment.”

With some generals cooperating, Bhutto apparently succeeded in overcoming the threat of a coup d’état. However, he went about the menace only indirectly and diplomatically. Thus addressing the cadets at Pakistan’s Military Academy at Kakul next month, he justified his maneuvers by carefully choosing his words: “You are not playthings to be used and exploited for selfish ambitions. You are the custodians of our frontiers…the sword-arm of our defence.”

A year earlier he had coined the phrase “bonapartic influence,” for those generals who exhibited inclinations to intervene in the troubled politics of the country. Bhutto thought and determined that such influence has to be rooted out. In a speech he declared:

The people of Pakistan and the armed forces themselves are equally determined to wipe out Bonapartic influences from the armed forces. This is essential for the promotion of the high standards of the armed

---

16 Hamid Khan, Constitutional and Political History of Pakistan (Oxford University Press 2005) 521
17 Taseer, Bhutto: A Political Biography (n 14) 150
18 Quoted in Stanley A. Wolpert, Zulfi Bhutto of Pakistan: his life and times (Oxford University Press 1993) 214
forces...Bonapartism is an expression which means that professional soldiers turn into professional politicians. So I do not use the word Bonapartism I use the word Bonapartic [a subtle distinction only a Bonapartist like Bhutto would bother to make] because what has happened in Pakistan since 1954 and more openly since 1958 is that some professional Generals turned to politics not as a profession but as a plunder. 19

Bhutto’s efforts at rooting out bonapartic influence, however, were not disinterested. As is well known now “what he wanted was absolute power,”20 at cost of tolerance for other political parties and movements. This factor more than any other has twice impelled the military to intervene.

Feudal politicians dominated the politics of the 1970s, and Bhutto was a giant among them. In the name of democracy, he had the feudal politicians agree that bonapartic influence must be rooted out. However, they could not stop the feudal influence from taking its place. Feudal lords, over generations, had become professional politicians, and along with them they brought the feudal characteristics of intolerance, mistrust, punitive mentality, and exclusionary contest for power. In the predominantly agrarian economy, they possessed from medium to large-scale estates in the countryside where more than 2/3rd of the population subsisted. Much of the peasantry was bonded through generations of debts, and resistance was quelled with strict measures.

19 Quoted in Ibid 184
20 Lawrence Ziring, Pakistan: The Enigma of Political Development (Dawson Westview Press 1980) 191
Though Bhutto was a feudal lord, he ascended to power by raising populist slogans that had rallied the peasantry behind him. Populist forces, middle class unrest, and peasant revolution were brewing hard in the state run virtually without a constitution. Bhutto recognized that people had decided to assert their popular sovereignty. The challenge for him however was not how to help them assert it, but how to manipulate it at a moment when the stage for a new social contract was ready so that he could retain the personal power and balance the cracking feudal authority with fledgling popular sovereignty. The solution Bhutto proposed was a new constitution, which would assume the sacred and sovereign status. It would be inviolable and for all times to come. And Article 6 was to guarantee the constitution from both external disruption—by military coups—and internal subversion—the attempts at amending the system by the dissenting political forces. To achieve personal power, Bhutto elevated the executive beyond checks and balances of other branches. The judiciary was not yet separated from the executive and the Fifth Amendment further reduced its challenging power. In the words of one political historian, the constitution did “not obscure Bhutto’s efforts at forming a totalitarian system, something his predecessors considered but rejected as unsound.”

Despite Article 6 and the High Treason Act, Bhutto could not halt the much-feared Army coup d’état. On July 5, 1977 General Zia, who had presided over the high treason case of F.B. Ali and as such attracted Bhutto’s attention, himself committed

________________________

21 Ibid
high treason. Initially, Zia promised to hold fresh elections in 90 days and restore democracy but Bhutto is said of being “rude and insulting” to him.\textsuperscript{22} When Bhutto threatened Zia of the offence of high treason, the latter withdrew his promise of elections or relinquishing power. Instead of guaranteeing democracy, Article 6 had closed the door shut on it for a decade. Haq died in an air crash in 1988. His death seals the possibility of initiating a high treason case against him.

In October 1999 history repeats itself. General Pervaiz Musharraf in a \textit{coup d’état} suspends the constitution and removes the PML-N government. The fear of Article 6 once again blocks the possibility of the revival of democracy. And Musharraf rules the country for nearly a decade before succumbing to the Lawyers’ movement. After the fall of Musharraf, the parliament in 2010 passes the 18\textsuperscript{th} Amendment, which makes considerable changes to the Article 6. Instead of deleting the Article, its scope is further increased. In the first clause of the Article that defines the offence of high treason, two more phrases are added--“suspends” and “holds in abeyance.” The clause now reads:

\begin{quote}
Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate 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.\textsuperscript{23}
\end{quote}

\textsuperscript{22} Khan, \textit{Constitutional and Political History of Pakistan} (n 16) 581
\textsuperscript{23} ‘Constitution (Eighteenth) Amendment Act, 2010’, November 26, 2010
Furthermore, the Amendment adds one new clause to the article, which provides that the act of high treason or a *coup d’état* “shall not be validated by any court including the Supreme Court and a High Court.” The legal implications of this clause deserve a separate essay. However, it should suffice to mention here that the clause has finally decided on the debate whether the courts should directly take up the question of the validity of a regime or engage in validating the acts done by the regime, for instance, by the application of the doctrine of state necessity. The clause decides in favor of the latter. In *Dosso* (1958) the court decides according to the former position, while in *Bhutto* 1977 according to the latter. In *Zafar Ali Shah* (2000) the Court apparently takes both positions. Nevertheless, it can be questioned, does the clause go to reducing the (judicial) power of the courts or to save them from confronting a dictatorial regime? Furthermore, the primary question remains unresolved: when in wake of a *coup d’état*, as Article 6 is suspended and judges are required to take fresh oath on a provisional constitutional order, how will this clause be made justiciable? The practical answer to it, if any, is to be searched in the political arena than in the judicial one: a revolution against the *coup d’état*, just as lawyer’s movement amply demonstrates.

**High Treason, Constitutional Theory And History**

The Court’s choice of Kelsen’s general theory of law and state for explaining the disruption of constitutional order and validation of the new regime was justified on the basis that it is a logical, analytical, and liberal theory. However, can the doctrine of high treason, which comes along with it and becomes *sine qua non* for the defense of

---

24 Ibid
the constitutional order, be justified on the same grounds? We shall see this in a moment, as I turn to the historical development of the doctrine. However, at this stage I deem it important to give some evidence that Kelsen’s, and, in general, German constitutional theory influenced Pakistani law of high treason. Interestingly, such evidence can be easily furnished by a simple juxtaposition of the German law of high treason with that of the Anglo-American one.

According to the latter, high treason includes acts of personal disloyalty to the state, and are committed during or in relation to war. Thus the American constitution in Article 3, Section 3, terms following acts as high treason: a) levying war against the United States, and b) allying with enemy and giving aid and comfort to them. In England, along with these two acts of disloyalty, killing or compassing the killing of the monarch and the heirs to throne is regarded as high treason.


On the other hand, in Germany high treason is not associated with the acts of levying war or those committed during war. Rather the high treason acts are committed during peacetime and are associated with two primary objects: the territorial state and the constitutional order. Hence, the German Criminal Code of 1998 in article 81 provides that anyone who “undertakes with force or through threat of force” 1) “to undermine the continued existence of the Federal Republic of Germany” or 2) “to change the constitutional order based on the Basic Law of the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.”

Moreover, Article 83 adds an additional provision such that “specific treasonous undertaking against the federal government shall be punished with imprisonment from one year to ten years, [and] in less serious cases with imprisonment from one year to five years.”

The history of this additional provision dates back to the Code of 1934 that provided for death penalty or imprisonment for not less than five years for anyone who undertakes to deprive the President, the Chancellor or any member of the government of his constitutional powers or the exercise of the same. This provision in fact made it easier for the party in power to convict anyone “without the necessity of showing that the fundamental subversion of the constitution [was] intended.”

The primary two objects of high treason however remain intact in the 1934 Code. Article 80 reads:

---


28 Ibid.

Whoever undertakes by force or by threat of force to annex the territory of the Reich in whole or in part to a foreign state, or to separate from the Reich a territory belonging to the Reich, shall be punished with death.

Whoever undertakes by force or by threat of force to alter the constitution of the Reich shall be punished in like manner.\textsuperscript{30}

Before the enforcement of the 1934 Code, high treason clauses can be found in the two proposed statutes of Reichstag of 1926 (Article 85) and of 1917 (Article 86) that stipulated: “Whoever changes the Reich Constitution or that of a Land with violence or threat of violence.”\textsuperscript{31} The precursor of these statutes, and the penal codes, is the German Reich’s Criminal Code of 1871, which relates the offence of high treason to violently changing the constitution: “Whoever endeavors to violently change the constitution of the German Federation or of a federal state.”\textsuperscript{32} If traced further back, the first formal formulation of the law of high treason in Germany goes to the 1794 General State Law for the Prussian States (part II, 27, 92). It provides high treason as an undertaking that “is directed toward a violent transformation of the state constitution.”\textsuperscript{33}

It is in the backdrop of this codification exercise that Kelsen gives his doctrine of high treason. What is significant to notice however is that the codification was not of some pre-existing “custom,” a factor that makes one of the cornerstones of Kelsen’s

\textsuperscript{30} Quoted in Ibid 211
\textsuperscript{31} Quoted in Carl Schmitt, \textit{Constitutional Theory} (Jeffrey Seitzer tr, Duke University Press 2008) 165
\textsuperscript{32} Quoted in Ibid 164–165
\textsuperscript{33} Ibid 165
legal theory.\textsuperscript{34} Rather the codification was to compile and uniformly enforce various individual and dispersed over time and space decrees of princes and emperors of the Holy Roman Empire of the German Nation. The codification defined and limited the objects of high treason. Before the codification exercise began, the late medieval understanding took almost any act of defying authority and breaking a rule as high treason—an understanding that resonated with the one in England and France. For instance the 1532 penal decree of the German Emperor Charles V, in Article 127, says: “whoever incites dangerous, illegal, and malicious rebellion of the common people against authorities in a territory or city shall, according to the circumstances of his misdoings, be punished with decapitation or flogging and shall, in all cases, be exiled from the territory or city in which he incited rebellion.”\textsuperscript{35}

Kelsen does not further define, explain and limit the concept of high treason, and for this we shall turn to his contemporary and intellectual rival, Carl Schmitt, in a moment. However, he has two original dimensions of the concept, which are not provided or contemplated by the above German laws. First, the German legal order does not contemplate that a successful \textit{coup d’état} or revolution can assume the law-creating authority. This would of course contravene the purpose of law. Second, and more significant for our purposes, he defines the status of a constitution and elevates it to that of sovereign. This is a crucial political and theoretical assumption. One of its immediate

\textsuperscript{34} Kelsen, \textit{General Theory of Law and State} (n 8) 30, 128, 369
\textsuperscript{35} Peter Blickle, ‘The Criminalization of Peasant Resistance in the Holy Roman Empire: Toward a History of the Emergence of High Treason in Germany’ (1986) 58 The Journal of Modern History 88, 88
impacts is that with it the relationship or proportionality between breaking the supreme law and the supreme punishment could resume its historical justification.

Historically the concept of high treason has held a close relationship with the concept of sovereignty—especially the person of the sovereign. In Roman and medieval European laws, an attack on the person of sovereign was deemed as the commission of high treason. The Roman Lex Julia Majestatis of Augustus Caesar, for instance, provides:

He who shall meditate the death of those illustrious men who assist at our councils; likewise of the senators (for they are a part of ourself) or lastly of any of our companions in arms; shall forasmuch as he is guilty of treason, perish by the sword, and all his goods be confiscated; for the law will punish the intention, and the perpetration of the crime with equal severity... (Cod. 9, 8,5).³⁶

The medieval English Treason Act of 1351 makes the killing or an attempt to killing of the King or his heirs as primary object of high treason. Similarly, in France regicide remained one of the primary objects of high treason. And the punishment meted out to those who committed or attempted high treason was always severe. The

³⁶ Quoted in Steinhaus, ‘Treason, a Brief History with Some Modern Applications’ (n 26) 254
case of Robert-François Dameins for attempted regicide in the mid 18th century aptly illustrates the severity of sanction behind the law.\textsuperscript{37}

In modern times, beginning from the 17th century, the concept of high treason gradually dissociates itself from the person of sovereign, although not completely from the concept of sovereignty. Hence, as several new subjects of sovereignty emerge—for instance, the republic, parliament/congress, constitution, nation, flag—they become possible objects of high treason. But the new objects also make the definition and application of the concept of high treason problematic. The dissociation of the concept of high treason from the person of sovereign takes place at a time when, in England and continental Europe, the struggle to take apart the “two bodies” of the king had reached its height. The process of dissociation renders an important job: it lays unambiguous the difference of ratio between the act and the crime, and the crime and punishment (killing : Homicide :: regicide : torture and Death). The obvious purpose of the law of high treason thus seems to be to give special aura to that crime and thereby justify the proportionality between crime and the capital punishment.

The central theoretical question to return to, especially in the backdrop of the dissociation thesis mentioned above, is how the constitution assumes sovereign status and thus becomes the object of the medieval crime of high treason and the punishment associated with it? In other words, while homicide justified capital sentence, how does the disruption of constitutional order justify the same punishment? We can find a

plausible answer to this question in the constitutional theory of Kelsen’s intellectual rival, Carl Schmitt. In his book, *Constitutional Theory*, Schmitt writes that one of the major political questions posed by the 1830 July Revolution in France was whether King or the people should exercise the sovereign power of constitution-making. However, “[t]he advocates of the liberal Rechtsstaat sought to evade the alternative, either sovereignty and the king’s constitution-making power or sovereignty and the people’s constitution-making power, and they spoke of a ‘sovereignty of the constitution’.”

In Germany the 1848 revolution concluded on a compromise between the King and the people in order to allow for both royal government and popular assembly. “A dualistic intermediary condition thus results.” Interestingly, the advocates of liberal constitutionalism of the time claimed, albeit falsely, that such dualistic political form represented “sovereignty of the constitution.” Similarly the ascendant organismic theory of the state, according to Schmitt, proposed another position, which nevertheless “corresponded fully to the liberal method.” It said that the king was “only an ‘organ’ of the state and that neither the prince nor the people but instead the state as an ‘organism’ is sovereign.” These two arguments are clearly reflected in the 1934 and 1998 versions of the law of high treason in the German Penal Codes, which take territorial state and constitution as the two primary objects. Theoretically the latter argument was similar to the assumption of constitution as the sovereign, primarily because in both cases people as the subject of sovereign power were ignored. This juridical understanding of bourgeois liberal advocates, Schmitt

---

38 Schmitt, *Constitutional Theory* (n 31) 104
39 Ibid 105
40 Ibid 104–105
41 Ibid 106
chastises, “passed as ‘positivism’” and that “the empty husk of this type of liberalism sought to conserve itself for a time in Kelsen’ ‘normative state theory.’”

In Kelsen’s legal positivism we find an attempt to harness both the aspirations of the advocates of liberal constitutionalism—to elevate constitution to the status of sovereign—and those of the proponents of the 19th century state theory—to see the state as sovereign organism. Kelsen does this by proposing, as Schmitt puts in following simple equation, constitution=state. In Kelsen’s own words, which are in effect result of his analytical methodology, the term state or the political concept of the state is a mere hypostatization, which he aims to dissolve. Kelsen writes that his theory of law “shows that the State as a social order must necessarily be identical with the law or, at least, with a specific, a relatively centralized legal order.” Moreover, “[j]ust as the pure theory of law eliminates the dualism of law and justice and the dualism of objective and subjective law, so it abolishes the dualism of law and State.” He goes on to claim his pure theory is a monistic theory that “shows that the State imagined as a personal being is, at best, nothing but the personification of the national legal order.”

Constitution is thus understood as a norm, in fact the highest norm. Above a constitution can be only a legal-logical supposition, a Grundnorm. All other norms derive their reason of validity from and are traceable to the constitution. However Schmitt critiques this understanding: “In one such meaning of the word, the state becomes a legal order that rests on the constitution as basic norm, in other words, on a

42 Ibid
43 Ibid 63
44 Kelsen, General Theory of Law and State (n 8) xvi
unity of legal norms. In this instance, the word ‘constitution’ denotes a unity and totality.”⁴⁵ Schmitt further critiques:

The constitution is the state, because the state is treated as something genuinely imperative that corresponds to norms, and one sees in the state only a system of norms, a ‘legal’ order, which does not actually exist, though it is valid in normative terms. The legal order, nonetheless, establishes an absolute concept of the constitution because a closed, systematic unity of norms is implemented and rendered equivalent to the state. Therefore, it is also possible to designate the constitution as ‘sovereign’ in this sense, although that is in itself an unclear form of expression.⁴⁶

From Schmitt’s critique of Kelsen, what stands out is the assumption that building any case of high treason will depend on how a constitution is conceptualized. For courts to decide on the cases of high treason, it will not suffice to merely point to a factual incidence of disruption of the sovereign constitution, but also to explain the juridical theory (and history) upon which the constitution is based. This is in effect an enormous task, but only such a task should suffice to justify capital sentence for high treason, which is after all a political crime.

⁴⁵ Schmitt, Constitutional Theory (n 31) 62–63 Six years earlier in Political Theology Schmitt had noted, “The highest competence cannot be traceable to a person or to a sociopsychological power complex but only to the sovereign order in the unity of the system of norms. For juristic consideration there are neither real nor fictitious persons, only points of ascription.” Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab tr, University of Chicago Press 2005) 19
⁴⁶ Schmitt, Constitutional Theory (n 31) 63
Schmitt’s own conceptualization of constitution suggests that he puts higher premium on the building of a case of high treason. His argument projects on two stages. On the first stage, he contends that high treason is defined as “an attack on the constitution, [and] not on the individual constitutional law.” He also writes that there is a general consensus on this interpretation in the German criminal law literature. The inference of such an interpretation has two dimensions: first, a constitution is a monistic whole (--a complete decision--) and hence different from individual constitutional laws whose infraction should not constitute a high treason. Second, that not all provisions of constitution are equal in terms of their importance. This graded understanding, in the judicial context of Pakistan is well established as the doctrine of basic structure, to which I return in a moment. According to Schmitt, high treason is thus an undertaking directed to alter or overturn the most important constitutional provisions, which are “the foundations of political life.” He quotes German Reich Court to this effect: “objects of attack are only those components of the constitution that form the foundations of the state’s political life, and this is certainly without regard for whether or not their regulation occurs directly in the constitutional document” (original emphasis).

On the second stage, Schmitt increases further the premium on building a case of high treason. He writes in one of the later sections of Constitutional Theory: “High

---

47 Ibid 81
48 Schmitt writes, 'The criminal law scholarship on this issue is thoroughly of one mind.' He gives examples of writings of F. van Calker, Frank, K. Binding, Count zu Dohna, and H. Anschutz. Ibid 165
49 Ibid
50 Ibid
treason, therefore, is only an attack on the constitution in the positive sense.\textsuperscript{51} Here in the positive sense of the constitution lies the secret of the complexity of the statement. The positive sense means that a constitution is a) a politically conscious act of the constituent power (for instance, of a people), b) a decision on the type and form of political unity/existence. By the type and form of political existence Schmitt points to the Aristotelian forms of state such as monarchy, tyranny, aristocracy, polity, etc. It is in the context of these forms of state that both himself and Kelsen speak about \textit{coup d'état} and revolution. Schmitt claims however that these forms can be interrupted and changed without harming the continuity of the state and the will to political existence of a people. To quote him,

\begin{quote}
The constitution in the positive sense entails only conscious determination of the particular complete form, for which the political unity decides. This external form can alter itself. Fundamentally new forms can be introduced without the state ceasing to exist, more specifically, without the political unity of the people ending.\textsuperscript{52}
\end{quote}

Prima facie, it can be argued that since the positive sense of the constitution means current form of political existence, high treason is then an attack on the current political form. However, this argument gets unsettled when one heeds to the fact that the form of political existence is “external” and thus alterable. What is relatively unalterable (compared to external form and note that the argument of unalterability is the same as in the first point) is the existential principle of will to political

\textsuperscript{51} Ibid 166
\textsuperscript{52} Ibid 75
unity/existence. If this logical extrapolation is sound, then I suggest, that for Schmitt high treason is an undertaking that takes as its aim a) the principles that are the foundations of political life, b) “the political unity of the people [to] ending” or “the state ceasing to exist.” Building a case of high treason then requires proving that the disruption of a constitutional order was aimed at or resulted in harming the fundamental principles of a constitution or/and the will to political unity and existence of the people (and the state).

**Constitutional Theory and Law of High Treason in Pakistan**

One of the lessons we draw from the German constitutional theory discussed above, is that there is an intimate relationship between the concept of constitution and high treason, especially Schmitt’s presumption that the concept of high treason comes after and derived from the concept of constitution. And since the concept of high treason is derived from the concept of the constitution, the nature of the crime of high treason and the punishment for it can only be derived and understood in the light of the constitution. In other words, the way constitution is conceptualized will determine the nature and crime of high treason. In the context of Pakistan, we find that the two constitutions of 1956 and 1962 come prior to the law of high treason that comes later in the third constitution of 1973. Moreover, it is also obvious from the cases of constitutional disruption that courts are impelled to engage in conceptualization of the constitution. For instance, the Supreme Court in *causes celebres, Dosso* (1958), *Asma Jilani* (1972), *Nusrat Bhutto* (1977), *Zafar Ali Shah* (2000), *Sindh Bar Association* (2009), among other cases, has engaged in detailed commentary on the constitutional theory underlying its decisions. The Court raises questions such as: What is a
constitution? What status does it enjoy in the political life of the country? How does its disruption be justified/unjustified and validated/invalidated? The concept of high treason, in fact, is an extension or a corollary to the conceptualization of the constitution.\textsuperscript{53} In case a disruption is not validated, then what to make of such an act? Is it a crime, and of what degree? Should it be punished? How to determine the proportionality between the crime and sentence?

Let us then figure out the relationship, if any, between the concept of the constitution and that of the high treason in Pakistan. While denouncing the latest constitutional disruption in the \textit{Sindh Bar Association}, the Supreme Court of Pakistan engages in explaining the concept of constitution and its relationship with high treason. The Court says:

\begin{quote}
Indeed, the Constitution is an organic whole and a living document meant for all times to come. We, therefore, are of the view that the holding in abeyance of the Constitution and/or making amendments therein by any authority not mentioned in the Constitution otherwise than in accordance with the procedure prescribed in the Constitution itself, is tantamount to mutilating and/or subverting the Constitution.\textsuperscript{54}
\end{quote}

The Court goes on to refer to another case—\textit{Al-Jehad Trust} 1996—where the conceptualization of the constitution is expressed in more clear organic terms:

\begin{center}
\textsuperscript{53} According to Schmitt the concept of high treason, as understood in Germany, is derived from the concept of the constitution. Ibid 145
\end{center}

\begin{center}
\textsuperscript{54} \textit{Sindh High Court Bar Association v. President General Pervez Musharraf} [2009] PLD 879 (SC) \url{<http://pakistanconstitution-law.org/p-l-d-2009-sc-879-3/>} accessed 1 October 2011
\end{center}
At this juncture, it may be stated that a written Constitution, is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people.\(^5\)

The constitution is conceptualized by developing an organic theory. It has three basic organic features: a) it is a whole, in that it is an organism; b) it is a living being, in that it has life; and c) it is for all time, in that it is immortal. Indirectly, the organic conception of the constitution plays a significant role; it elevates the constitution to the status of a living being. In this way, it prepares the ground for the next conceptual leap, if ever taken, whereby this modest theoretical semblance between the constitution and living being can be pressed to service of adjudicating the Islamic principle of life for life. Such an analogical adjudication will however face a definitional hurdle, relating to definitions of the terms abrogation, subversion, suspension and abeyance. It is obvious that each of these terms refers to a different type of constitutional incident, and consequently the implications arising from them for the constitution are different. Therefore, it is doubtful that all these incidents could equally qualify for the same high punishment stipulated by High Treason Act.

The organic concept of the constitution was too broad, partly because the Court realized that not all the provisions of the constitution could be guaranteed with immortal and immutable life. First, the court had already in several earlier decisions—*Nusrat Bhutto 1977, Zafar Ali Shah 2000, Qazi Hussain Ahmed 2002*—accepted the principle

\(^5\) Ibid
of exception or “deviation.” Accordingly, the Court had validated the suspension or abeyance (and to some extent subversion) of the constitution. In fact, the Court had declared deviation, in the face of exceptional political circumstances, as “an imperative and inevitable.” In Zafar Ali Shah the Court declared: “Fact remains that the Supreme Court is of the considered opinion that intervention by Armed Forces on 12th October, 199 was an imperative and inevitable necessity in view of exceptional circumstances prevailing at that time and, therefore, there is no valid justification for not validating extra constitutional measure of the Armed Forces.”

Second, the Constitution itself provides for making amendments, the procedure of which is clearly prescribed. But the Court was not ready to concede that the deviation or amending power could change or remove just any provision of the constitution. This appeared intriguing to the courts (beginnings in India then) in Pakistan that the immutability and immortality of the constitution was based on its very organic feature of mutability and mortality. In effect, they were faced with a dilemma similar to the one Schmitt was faced with in the first quarter of the last century when he took pain to prove that the constitution in its “concrete” sense could be boiled down to certain principles that are immutable. It merits quoting him in detail here:

That “the constitution” can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decision. The German Reich cannot be transformed

---

into an absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag. The “legislature amending the constitution” according to Art. 76 is not omnipotent at all. The manner of speaking associated with the ‘all-powerful’ English Parliament, which since de Lolme and Blackstone has been thoughtlessly repeated and applied to all other conceivable parliaments, has produced a great confusion. A majority decision of the English Parliament would not suffice to make England into a Soviet state. To maintain the opposite would not be a “formal way of thinking” at all. It would still be equally false whether taken politically and juristically. Only the direct, conscious will of the entire English people, not some parliamentary majority, would be able to institute such fundamental changes.\textsuperscript{57}

Just as Schmitt boils the Weimar constitution down to certain concrete and immutable principles, e.g., republicanism, constituent power, sovereignty of the \textit{Volk}, etc., Indian and Pakistani Courts also boil their respective constitutions down to, what they call, basic structure or salient features. The question then is whether with the conceptual transformation of the constitution, the relationship between the constitution and high treason has also undergone transformation? \textit{Sindh Bar Association} 2009 leaves us with a hint that this relationship has undergone some transformation. Let me take a brief descriptive detour into the doctrine of basic structure to reach this point.

---

\textsuperscript{57} Schmitt, \textit{Constitutional Theory} (n 31) 79–80
The history of the doctrine of basic structure goes back to *Golak Nath* 1967, when the Indian Court faced with the expanding powers of the parliament ventures to defend its own power of judicial review. Both India and Pakistan owe their constitutional heritage to the British Indian Constitutional Acts of 1919, 1935, and 1947. They adopt the British parliamentary form of government that ties together the executive and parliament. With the parliamentary form, patterned on the British model, comes the concept of sovereignty of parliament. By the late 1960s the Indian parliament begins to test its sovereignty by claiming the powers to restrict fundamental rights. Later it claims to pass laws as well as constitutional amendments beyond the purview of the judiciary. However, the judiciary strikes back. In a series of cases—*Golak Nath* 1967, *Kesavananda Bharati* 1973, *Minerva Mills Ltd.* 1980, *A.K. Kaul* 1995, *Raja Ram Pal* 2007—the judiciary decides that the parliament’s sovereign powers are limited and subject to judicial review. But for a compelling and successful defense the judiciary is impelled to develop a “theory,” which comes to be known as basic structure theory.\(^{58}\)

The judiciary ventures to theoretically prove that neither the executive nor the parliament is sovereign. But instead the constitution is sovereign, because on the one hand all organs of the state derive their limited powers from it and on the other there are certain principles and provisions that no state institution can amend. The Court in *Minerva Mills Ltd.* 1980 rules:

> Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the

\(^{58}\) *Minerva Mills Ltd.* Quoted in *Sindh Bar Association* (n 54)
Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.\(^{59}\)

In Raja Ram Pal 2007 the Court repeats:

Since British Parliament is also ‘the High Court of Parliament’, the action taken or decision rendered by it is not open to challenge in any court of law. This, in my opinion, is based on the doctrine that there cannot be two parallel courts, i.e. Crown’s Court and also a Court of Parliament (‘the High Court of Parliament’) exercising judicial power in respect of one and the same jurisdiction. India is a democratic and republican State having a written Constitution, which is supreme and no organ of the State (Legislature, Executive or Judiciary) can claim sovereignty or supremacy over the other.\(^{60}\)

\(^{59}\) Quoted in Ibid
\(^{60}\) Quoted in Ibid
In the earlier case, after discussing the functions of each organ of the state, Justice Bhagwati, claims the right of judicial review for the judiciary and classifies it as part of the basic structure:

I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution.\textsuperscript{61}

After the Indian Court, Pakistan’s Supreme Court adopts and gives expression to the basic structure doctrine in several cases, e.g., \textit{Azizullah Memon} 1993, \textit{Al-Jehad Trust} 1996, \textit{Mehram Ali} 1998, \textit{Syed Zafar Ali Shah} 2000, and \textit{Sindh Bar Association} 2009. In \textit{Sindh Bar Association}, for instance, the Court interprets Articles 6 and 237 and rules:

Parliament might not be able to do certain things, such as, its inability to legislate against Fundamental Rights, the Injunctions of Islam as laid down in the Holy Quran and Sunnah, etc. Therefore, Majlis-e-Shoora (Parliament) is not supreme over everything else as is put in the common parlance, or as it is said of the Parliament of the United Kingdom, rather it

\textsuperscript{61} Quoted in Ibid
is independent of other organs of the State, but it certainly operates within certain parameters.\textsuperscript{62}

The court, however, goes a step further to restricting parliament’s indemnifying legislative power, whereby it can validate ordinances, decrees, etc., of a “usurper” or a \textit{coup d'état} government.

On the consideration of the above two provisions [Articles 237 and 278], Ajmal Mian, CJ, in his leading judgment in Liaquat Hussain’s case, held that imposition of martial law in connection with the maintenance or restoration of order in any area in Pakistan had been done away with in the Constitution of 1973. Thus, unless Article 237 was first amended, no validation, affirmation or adoption of unconstitutional, illegal and void ab initio acts of a usurper of power could be made by Majlis-e-Shoora (Parliament), otherwise one provision would render the other redundant and nugatory.\textsuperscript{63}

Again:

Thus, so long as Article 6 is part of the Constitution, the Parliament is debarred from even condoning unconstitutional acts of a usurper, what to talk of validating, affirming and adopting the same, or deeming the same

\textsuperscript{62} Ibid
\textsuperscript{63} Ibid
to have been made by the competent authority on any ground whatsoever.  

In this way, both Indian and Pakistani Courts defend their judicial review power by restricting the sovereign powers of their respective parliaments and elevating the constitution, especially its basic structure, to sovereign, immortal and immutable status. With this they also reach a distinct concept of subversion, that pertaining to the basic structure. Accordingly, any attempt to amend or violate the basic structure, and not just any part or provision, of the constitution will amount to subversion. With the emphasis on Article 6, in the Sindh Bar Association, Pakistan’s Supreme Court further adds a link between the subversion and high treason. The Court says:

As a matter of fact, Article 6 has built a stronghold around the body of the Constitution to safeguard it from any encroachment or violation from without. If each time an authority were to put it aside at his will, and do whatever he liked to do with it, that too, by the use or show of force or by other unconstitutional means, the provisions of Article 6 would be rendered redundant and nugatory, rather meaningless, which was not the intent, nor was the same permissible.

Although Bar Association invokes Article 6 as a blanket safeguard for “the body of the constitution,” the context of the case—the removal of judges or broadly the independence of the judiciary—is very much focused and therefore quite telling: Article

---

64 Ibid
65 Ibid
6 as a safeguard was invoked to preserve the basic structure, which has all along been the most enduring concern of the Court. A large section of the detailed decision on the basic structure, judicial review, and appointment/removal of judges clearly allude to the centrality of the judiciary’s concern with the basic structure. Moreover, on earlier occasions of a coup d’état Article 6 was not invoked as the safeguard for the body of the constitution. In fact, in those cases the basic structure, and especially the independence of judiciary, were thought not to have been violated, even as the body of the constitution was so violated.

Just as Jilani 1972 was decided after the usurper had relinquished power, the Bar Association 2009 was decided after Musharraf had resigned from the presidency as well as the Army. Both Jilani and the Sindh Bar Association have suggested that as soon as power falls from the hand of a usurper, he be apprehended and punished. The suggestion in Jilani was distinct on the account that at the time of its decision the law of high treason did not exist. It only existed in the constitutional theory initiated by Dosso—the case Jilani had overruled. On the other hand, the Sindh Bar Association is distinct on the account that it seems to have narrowed down the scope of high treason. Given the specific circumstances, the Sindh Bar Association restricts the scope of high treason to attempts at disruption of the basic structure or salient features of the constitution.

Limiting the scope of the law of high treason, however, raises several questions. Is it an acknowledgement of the inevitability of constitutional deviations in the country? Pursuant to such an acknowledgement, has the judiciary come to realize that its actual line of defense should be the basic structure or the salient features along with the
fundamental rights so as to ensure modicum of constitutionalism even in face of a
deviated order? Is it the technical difficulty in adjudicating the law of high treason as it
is broadly defined in Article 6? Or is it a deliberate heightening of the premium on
building a case of high treason given the severe punishment associated with it? So far,
the court has not been squarely faced with these questions. However, if Musharraf’s
case proceeds we can expect answers to some of these questions.

The Challenges of Adjudicating the Law of High Treason in Musharraf’s Case

The petition against Musharraf’s November 3, 2007 coup d’état is based on the
argument that he undertook an extra-constitutional step of proclaiming emergency and
issuing a Provisional Constitutional Order. Musharraf takes the extra-constitutional step
at a specific time. The Court was hearing a case against his qualification for running for
president. While the case proceedings were going on, surprisingly, the Court allowed
the presidential election to go ahead as scheduled on October 6, 2007. However, the
Court instructed that the election result should not be officially declared until the case
had been decided. The constitution provides that government servants, whether in civil
or military service, are not qualified to run for the office of President. Musharraf at the
time of his election was the Chief of Army Staff, and hence constitutionally not eligible
for Presidential office. But interestingly, Musharraf was already the incumbent
President and Chief of Army Staff. He had been serving on those posts for almost half
dozens years by then. In 2002, by the way of a referendum, Musharraf had gotten
himself elected as the President. Referendum is not a constitutional procedure, but
interestingly the Court had upheld it, and later the parliament incorporated it into the
constitution by passing the 17th Amendment. This was his second election for the same
office. Musharraf had used all his resources, contacts and skills of bargaining to win the election. The only hurdle was the judiciary and its nascent but growing judicial activism.

Beginning in the first quarter of 2007, the lawyers’ movement gradually picked up momentum. In July a fourteen-members bench of the Supreme Court cleared presidential reference charging the Chief Justice of misconduct. The Court ordered reinstatement of the deposed Chief Justice. Musharraf feared that the reinstated Chief Justice would not write a favorable decision in his election qualification case. On the other hand, both his coercive and patronizing powers had already been exhausted. The only course left for the General-President was to resort to a *coup d’état*, proclaim emergency, issue a new constitutional order, and administer a fresh oath of loyalty to judges. To his surprise, in the evening, the Chief Justice calls a special bench of the Supreme Court. The bench passes a “restraining” order on the executive—the President and the prime minister—to stop them from taking any steps that could be prejudicial to the independence of the judiciary. Judges in large numbers refused to take oath and reverted to the resistance movement. In little over a month, Musharraf is forced to withdraw the Emergency. Meanwhile, the hitherto pro-Musharraf parties sense the changing popular mood, and switch to the side of the deposed judges. To add to Musharraf’s difficulties, the 2008 national election oust his party, Pakistan Muslim League Quaid-e- Azam (PML-Q), and brings back the two major political parties—PPP and PML-N—in the parliament. These parties, despite PPP’s sympathies for Musharraf, campaign to impeach him. Now Musharraf could see that his political career had come to an end, although he still retained one last trump card, the power to dissolve
assemblies. However, he chooses not to and instead resigns, but only after assurances from the new government as well as his foreign allies that he would be allowed a safe exit from politics.

It is in this backdrop that the high treason case is brought against Musharraf. The difficulty about the case, however, begins with the fact that it is based on his November 3, 2007 coup d'état, but it does not question the earlier coup d'état of October 12, 1999. The two coups are different in their objects. The object of November coup, in effect, was to subdue a defiant judiciary. The exact explanation of subduing, however, is contested by the executive and judiciary. According to President Musharraf, the November coup aimed to end the judicial activism. For instance the Proclamation of Emergency said:

Whereas some members of the judiciary are working at cross purposes with the executive and legislature…Whereas there has been increasing interference…Whereas some Judges by overstepping the limits of judicial authority have taken over the executive and legislative functions.\textsuperscript{66}

While according to Chief Justice Iftikhar Chaudary the coup aimed to put the independence of the judiciary to an end. In the \textit{Sindh Bar Association} the Court ruled:

\textsuperscript{66} \textit{Tika Iqbal Muhammad Khan v. General Pervez Musharraf} [2008] XXIX SC] 750
However, his November, 2007 action was a singular in nature, in that, the onslaught was on judiciary alone. All other institutions were intact. The independence of judiciary was given a serious blow.67

In any case, the November coup, unlike the October coup, does not affect legislative assemblies or federal and provincial governments. It affects only the judiciary. Now the dilemma the judiciary comes to face is that it had validated the October coup (as well as July coup of 1977) on the touchstone of the doctrine of state necessity, but rejected to validate the November coup. Thus judiciary has left precedents that point to principled inconsistency in its decisions that seem to border on arbitrariness. Now if Musharraf’s high treason case should proceed on the basis of the decision on the November coup he can be hanged, but should it proceed on the basis of the decision in October coup he will be congratulated.

Put in perspective, Musharraf had demanded of the superior courts judges, after both coups, to take a new oath. The question that arises then is whether administering a new oath to judges on a Provisional Constitutional Order amounts to harming the independence of the judiciary or the basic structure. Here again the precedents demonstrate inconsistency. After the October coup, as Nusrat Butto and Zafar Ali Shah demonstrate, the judges readily took fresh oaths. In fact, the Supreme Court ruled that such oaths do not affect their (original) jurisdiction. For instance in Zafar Ali Shah, the Court says:

67 Sindh Bar Association (n 54)
Mere fact that Judges of Superior Courts have taken a new oath under Oath of Office (Judges) Order No. 1 of 2000, does not in any manner derogate from this position, as Courts had been originally established under 1973 Constitution…That Superior Courts continue to have power of judicial review to judge validity of any act or action of Armed Force.\footnote{Zafar Ali Shah (n 56) 116–7}

Moreover, the Court goes to the extent of declaring that the judges took oath to save the judiciary:

New oath of office was taken…with a view to reiterating the well established principle that the first and the foremost duty of the Judges of the Superior Courts is to save the judicial organ of the State.\footnote{Ibid 1481–2}

Interestingly, in \textit{Tika Khan} 2008—the case overruled by the \textit{Sindh Bar Association} 2009—some judges who chose to take a new oath after the November coup also repeated the view established in \textit{Nusrat Bhutto} and \textit{Zafar Ali Shah}.

Supreme Court would continue to exercise power of judicial review under Art. 184(3) of the Constitution to judge the validity of Proclamation of Emergency of 3.11.2007 and other Orders issued by the President/Chief of Army Staff despite the non-obstante clause in Art. 3 ousting the jurisdiction of superior Courts.\footnote{Tika Khan (n 66) 732–3}
However, after the November coup, as the *Sindh Bar Association* demonstrates, the Court rules that oath taking on a provisional constitutional order is unconstitutional, illegal and *ultra vires*.

Should violation of the basic structure be presented as the basis for Musharraf’s high treason case, we again come across visible inconsistency in Courts decisions. For instance, one of the salient principles of the basic structure is parliamentary system of government. The parliamentary system envisages the election of the president by Parliament. The Court, however, validated an exception to the election principle by allowing Presidential election to take place by way of referendum, first in 1984 and then in 2002. The Court in *Qazi Hussain Ahmed* 2002 ruled:

As already observed by us, we have no manner of doubt that the present referendum like the earlier referendums held in this country twice before, is a step towards restoration of democracy.\(^7\)

In order to validate the referendum, the Court constructs a unique methodological principle, that it calls the “harmonious construction.” Accordingly, one provision of the constitution is harmonized with another in such a way to allow a different or desired interpretation. The Court observed:

Mr. Syed Sharifuddin Pirzada urged that Article 41 and Article 48(6) of the Constitution, if read together and harmonized, provide plural remedies, courses and options. It may be observed that the principles for interpreting

\(^7\) *Qazi Hussain Ahmed v. General Pervez Musharraf, Chief Executive* [2002] Vol. 23, Part-II SCJ 665, 744
Constitutional documents as laid down by this Court are that all provisions should be read together and harmonious construction should be placed on such provisions so that no provision is rendered nugatory.\textsuperscript{72}

Whether knowingly or unknowingly, the Court has introduced the principle of harmonious construction, which in effect helps to circumvent the inviolable principle of basic structure. If the basic structure provisions are read with other non-basic provisions, then the latter provisions can be indirectly given preference over the former. Validation of oath taking, which purportedly compromised the independence of the judiciary, was a virtual expression of this unique methodology.

One of the major reasons on which the referendum was validated is that a referendum is a call to the popular sovereign, a direct democratic process. Hence it cannot be termed as undemocratic or unconstitutional.

The learned counsel appearing for the respondents have rightly urged that appeal to the political and popular sovereign, i.e. the people of Pakistan cannot be termed as undemocratic and cannot be regarded as against the letter and spirit of the Constitution.\textsuperscript{73}

Prima facie, referendum cannot be deemed as undemocratic. However, the difference between non-constitutional democracy and constitutional democracy begins when democracy is made subject to certain constitutional rules prescribed in the constitution, which are agreed upon by the popular sovereign at one time. The choices

\textsuperscript{72} Ibid 754 \\
\textsuperscript{73} Ibid
before the Court are tempting: it can adjudicate purely on the basis of given constitutional rules and as such uphold the letter of the constitution or apply harmonious construction to support direct and pure democracy. Precedents demonstrate that the Court has kept switching between the two. For instance, in Musharraf’s referendum case the Court “harmonizes” Article 41 with Article 48(6) but in his presidential election case the Court was going to stick to the former Article, which spurred the coup and stopped the Court from delivering the decision.

The principled inconsistency in court decisions points to the unresolved distinction between exception and amendment regarding the basic structure. Exception, in effect, is temporary, while amendment is (relatively) permanent. From the present understanding of the doctrine of basic structure, the constitution can be amended, but not its basic structure. However, the above cases, relating to oath taking and presidential election, amply demonstrate that the court has made exceptions and claimed the right to allow (or disallow) exceptions to the basic structure. However, if the court is the final authority on deciding exceptions, then how can a principled decision be made on the cases of high treason, which are after all matters of either exception basic structure or deviation from non-basic structure provisions?

**Conclusion**

Carl Schmitt ingeniously extrapolates how in 19th century the struggles over sovereign power between the King and the bourgeoisie and later between the bourgeoisie and the masses result in agreements whereby the constitution is elevated to the status of sovereign. Legal positivism, as logically elaborated by Hans Kelsen,
theorizes the elevation of constitution to the status of sovereign and presents it as a perfected constitutional system. Kelsen’s legal positivism makes its way into Pakistan’s constitutional discourse through the Supreme Court’s decision in *Dosso* 1958. Edifying from Schmitt’s extrapolation, I have alluded to two stages in Pakistan’s constitutional history, on which the constitution is elevated to the status of sovereign. On the first stage, in early 1970s, Pakistani landed bourgeoisie-cum-political elite in the wake of the populist unrest and uprising as well as the threat of military coups d’état proposes the sovereignty of the constitution. The proposal that on the face of it seems commendable, however, in effect, was meant to surreptitiously preserve the political interests and powers of the landed bourgeoisie. In other words, behind the façade of constitutional democracy, feudal bourgeoisie comes to assume the state powers. It is in the backdrop of this new status of the constitution that Article 6 is introduced to bulwark against an external coup and internal subversion.

The second occasion arises when the judiciary faced with attacks on its independence from other branches of the state proposes a basic structure of the constitution and raises the same to the sovereign status. The judiciary points out that there are certain provisions in the constitution that cannot be amended by either parliament or executive. These provisions are termed as basic structure or salient features of the constitution. One of such salient features the judiciary stresses is its independence from other branches. It is worth noticing that on both stages it is some specific institutional interests that demand the elevation of the constitution to sovereign status.
Historically, the concept of sovereignty has intimately been tied to the concept of high treason. Attack on the life of a Prince always brought severe punishment. As the modern constitution assumes the status of sovereign (for instance in Germany) the old relationship between the person of sovereign and the crime of high treason is carried forward to reflect in the new relationship between the constitution and high treason. Accordingly, capital sentence and to some extent the spectacle associated with it is reincarnated. From Germany, through Kelsen, this new relationship enters Pakistani judicial and constitutional discourse, and finally supported by the feudal political interests into the constitution.

Contrary to the expectations, the law of high treason, four years after its making in 1973, fails to forestall the disruption of the constitution. Worse off, it forestalled the revival of constitutional democracy, because the threat of the crime impelled the General to change his mind. On its part, the Supreme Court terms the disruption mere temporary deviation, and validates it as touchstone of the doctrine of necessity. Again in 1999, the Court validates another disruption on similar grounds. Accordingly, the law of high treason comes to face its virtual antithesis in the doctrine of necessity. It needs emphasizing that in both disruptions the coup makers topple parliamentary governments, but they leave the judiciary alone or carefully co-opt it. In 2007, however, Musharraf does the opposite, but eventually fails.

The decision in the Sindh Bar Association not only declares Musharraf’s Proclamation of Emergency and Provisional constitutional Order unconstitutional and illegal, but also finds him guilty of having committed the crime of High Treason. Interestingly, the decision is starkly different from other decisions in similar cases, for
instance *Nusrat Bhutto* 1977, *Zafar Ali Shah* 2000, and *Qazi Hussain Ahmed* 2002. In the earlier decisions, the *coup d’état* are validated, but in the *Sindh Bar Association* 2009 the *coup d’état*, which according to the Court targeted the basic structure, is not validated. From these contrasting decisions what stands out is the transforming relationship between the concepts of the constitution and high treason. While the older relationship between the constitution and high treason has proved difficult to defend and uphold, the Court hopes to build and uphold a new relationship between the concept of the basic structure and high treason. However, for that relationship to establish, the Court will be called upon to explain the precedents of oath taking. Moreover, it might be called upon to explain the problematic relationship between the proportionality of capital sentence and the disruption of the basic structure, especially the independence of judiciary.
Chapter 4

Law of High Treason, Anti-terrorism Legal Regime in Pakistan and the Global Paradigm of Security

_He who fights with monsters should look to it that he himself does not become a monster. And when you gaze long into an abyss the abyss also gazes into you._

--Nietzsche, _Beyond Good and Evil_

_Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat._


Introduction

In a short PBS documentary on the subject of missing persons in Pakistan, the PBS correspondent, David Montero, interviews the then law minister of Pakistan Wasi Zafar.¹ Since in Pakistan’s official circles the subject of missing persons is deemed as highly sensitive, Zafar tries to avoid questions. Accordingly, the interview lasts for hardly a minute. However, this minute-long interview exposes the official stance on the subject. I think the conversation merits reproducing in detail:

---

¹ David Montero, ‘Pakistan: Disappeared, One Woman’s Search rouses a Nation’ (PBS September 6, 2007) Documentary
Montero:…if the government of Pakistan is violating the constitution by secretly detaining the suspects?

Zafar: It’s not necessary that family should contact to a terrorist…(Montero wants to add a question, but Zafar, with a sarcastic tone, reminds him of the situation in the West)….And in your countries, even in America, in Europe, everywhere…if one is a terrorist, he loses many rights, many constitutional rights he loses…when a person who is indulged in an anti-state activity, when he has nothing to do with the state, when he has become state enemy, he loses many rights.

Montero: So a person who is booked on Pakistan Security Act, they can be denied of their rights, cannot contact their family?

Zafar acerbically: As in your country…

Montero quickly tries to add: …but I am taking about Pakistan

Zafar: No…no…I am talking about whole of the world… (Montero insists on Pakistan again, but Zafar goes) No I will talk about whole of the world…as is the case in whole of the world so is the case in Pakistan…

Montero: Alright…but…but…I just wanna be clear on the law if under the Pakistan security Act…

Zafar cutting Montero’s question short: I have told you clearly the law…
In turn Montero hurries to cut the answer short by asking: there is no need to be any charge…

Zafar again: As in your country, there in many cases there does not need to be any charge, so is the case over here…

Montero continuously struggling to finish his question: They can be held indefinitely?

Zafar: …No…if in your country, in Europe or in developed countries if it can be done why not here…

Zafar’s sarcasm apart, if seen from a legal technical point of view, his last line of defense is a reference to the globalized security regime. Hence his stress: “No I will talk about whole of the world…as is the case in whole of the world so is the case in Pakistan…” There is no denying the fact that well before the War on Terror began in 2001, many western states had in place anti-terrorism legal regimes. As Giorgio Agamben demonstrates in his book, *State of Exception*, “the global paradigm of security” was in “unstoppable progression” since WWI. The genealogy of the concept of the “global paradigm of security,” according to Agamben, can be traced back to the concept of “global civil war.” Carl Schmitt and Hannah Arendt simultaneously extrapolated this concept in 1963. If traced further back, the concept of global paradigm of security takes us to early inter-war period, during which Walter Benjamin and Carl

---

2 Giorgio Agamben, *State of Exception* (Kevin Attel tr, University of Chicago Press 2005) 2
3 Ibid 2-3
Schmitt debated the state of emergency in Europe. However, in this essay I do not delve into the western history of the paradigm of security, except insofar as certain landmark developments relate and correspond to the colonial paradigm of security. From Agamben, I draw following two central characteristics of the paradigm of security: first that the paradigm of security accompanies and follows wars, and second that it brings “transformation of a provisional and exceptional measure into a technique of government.”

Edifying from Agamben’s historical and theoretical analysis of the paradigm of security, I aim to highlight the relevance of colonial underpinnings of the current global paradigm of security. In other words, I ask how does the colonial legal regime of security, especially that in British India, contribute to the current global paradigm of security? I frame this question in the backdrop of Charles Kennedy’s recent article on the subject of anti-terrorism legal regime in Pakistan. In his article, titled The Creation and Development of Pakistan’s Anti-terrorism Regime, 1997-2002, Kennedy sheds light on Pakistan’s emergency laws, special courts (including the Anti-terrorism and martial courts), the practice of speedy justice and preventive detention. After highlighting the fallouts of Pakistan’s anti-terrorism regime, Kennedy concludes: “The tortured history of Pakistan’s anti-terrorism regime should give pause to prospective latecomers to the process (e.g., the United States, Britain, EU, Australia)”. No doubt there is much for

---

4 Ibid 52–64
5 Ibid 6
6 Ibid 2
7 Charles H. Kennedy, ‘The Creation and Development of Pakistan’s Anti-terrorism Regime, 1997-2002’ in Satu P. LIMAYE and others (eds), RELIGIOUS RADICALISM
the West to learn from “the tortured history” of the anti-terrorism legal regime in Pakistan, however, Kennedy’s temporally limited research left me with a surprise: Is the West a latecomer in introducing exceptional laws and a juridical apparatus? Such a conclusion is possible only by glossing over the colonial legal genealogy of the current anti-terrorism regime. On the contrary, I demonstrate that what is today being termed as an anti-terrorism legal regime in Pakistan, in fact, was initiated by the British in the early 19th century colonial India. Only recently, with the War on Terror, has the colonial paradigm of security come a full circle in Pakistan, and interestingly in the UK as well.

Apart from responding to Kennedy, I partially engage and respond to George P. Fletcher. Around the same time as Kennedy, and in the background of the War on Terror, Fletcher puts forward a thesis relating to a growing ambivalence about the law of high treason in the West. In his article, titled *Ambivalence About Treason*, Fletcher argues that although the law of high treason formally exists in the American constitutional order, the American liberal political and juridical culture is ambivalent toward it:

The mood now is better characterized as ambivalence. We supposedly hate treason, but we are unsure whether and how we should punish it. The last time the government prosecuted acts of adhering to the enemy was during World War II. Our contemporary ambivalence is expressed in opting for restrictive interpretations of key elements in the crime. […] Why are we so ambivalent about treason? Why threaten the supreme

*AND SECURITY IN SOUTH ASIA* (ASIA-PACIFIC CENTER FOR SECURITY STUDIES 2004) 411
penalty and then look for excuses not to apply the law? My thesis is that because of its feudal origins, treason no longer conforms to our shared assumptions about the liberal nature and purpose of criminal law. Our ambivalence about treason corresponds to legislative moves made in other countries to convert the offense into a crime with liberal contours.\(^8\)

It is true that in American juridical discourse there prevails an aura of ambivalence to the law of high treason, the reason for this ambivalence however is not the liberal juridical culture. In fact, one of the major reasons is the availability of new security of the state laws, which provide an alternative way of dealing with traitors—lately categorized as “enemy combatants” and “covered persons.” In other words, the ambivalence about high treason is because the so-called “key elements” of the law of high treason have been transferred to the anti-terrorism legal regime created by such statutes like the Authorization of Use of Military Force (AUMF) 2001, Patriot Act 2002, and National Defense Authorization Act (NDAA) 2011-2012.

**The English High Treason and the Colonial Paradigm of Security**

At the beginning of 19\(^{th}\) century, the scope and application of the English law of high treason was at decline in America and England. Courts, rather than legislatures, were instrumental in bringing about this decline by strengthening the procedural safeguards. In America, during the revolutionary war between the colonies and the British forces, the courts of colonies approached the law of high treason with

restrictive construction. For instance, in *Respublica v. Malin*\(^9\) the Pennsylvania court stressed upon “treasonous intent” for proving the charges of high treason. The accused claimed that he had mistaken the British troops for the American ones, and the court accepted his defense. Moreover, regarding his treasonable words the court observed that mere words fall within the principle of freedom of expression, a principle that was originally defended by English judges, notably Edward Coke, in similar cases. Accordingly, the court held that mere words could not qualify for treason unless they tend toward the overt act.\(^10\) In *Ex parte Bollman*,\(^11\) Chief Justice John Marshall restrictively interprets the act of assemblage of men for levying war. He observes: “if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose.”\(^12\) On the other hand, he notes: “the actual enlistment of men to serve against the government does not amount to levying of war.”\(^13\) Similarly, in a subsequent case, the Supreme Court declares that an attack by armed men upon United States border guards did not constitute levying war. After the War of 1812 the courts make certain careful decisions. For instance, it is held that the sale of foodstuff to the British amounts to high treason,\(^14\) but should someone go along with the enemy to purchase supplies does not constitute treason.\(^15\) On the whole, the courts do not embark upon the path of declaring treason by construction or

---

9 *Respublica v. Malin* [1778] 1 Dall. 34  
10 In some other cases the court ruled that taking a commission or persuading someone to enlist in the British Army constituted treason. *Respublica v. Abraham Carlisle* [1778] 1 US 35.  
11 *Ex Parte Bollman* [1807] 8 US 75  
12 Ibid 232  
13 Ibid 231  
14 *United States v. Lee* [1804] 26 Fed. Cas. No.15, 584  
broadly interpreting the provisions of the constitution. Rather they emphasize on strict adherence to the cumbersome procedure of treason trial—especially the requirements of evidence.

In England, around the same time, the law of high treason and treason trials provoke hot public debates. For instance, the treason trials that arise in the wake of the Spa Fields riots (1817), the Pentridge rebellion (1817), and Cato Street Conspiracy (1820) cause considerable public debate and consternation. However, “[a]fter 1820 the use of treason law and the horrible sentence it imposed subsid[e].” Moreover, two subsequent statutes—the Treason Act 1842 and An Act for the Better Security of the Crown and Government of the United Kingdom 1848—distinguish between the personal safety of the King from the security of the State. Then on, high treason consists in hostile acts directed against the “general safety of the state.”

Just as the law of high treason was at decline in the Anglo-American criminal jurisprudence and legal regime of state security, the colonial administration of the British East India Company, on the pretext of providing for the security of the fledging state in Bengal, modifies and adapts the same law in the

16 Four Spencean Philanthropists were brought to treason trial for exciting rebellion and war against the king. The jury however, held that the acts of rioting did not constitute levying of war. See, Lisa Steffen, Defining a British state: treason and national identity, 1608-1820 (Palgrave 2001) 145–147
17 Ibid 147–150
18 Ibid 150–155
19 Ibid 7
20 Ibid 160–161
form of Regulation X of 1804. Before we go on to see how Regulation X stands at
the origin of the colonial security regime in India, let us first uncover the juridical
kinship between the English Statute of high treason and the Regulation X. This we can
do by a simple juxtaposition of the two texts. The “certain offences against the state”
stipulated by the Regulation X are strikingly analogous to certain “offences” that the
English statute of 25 Edward III (1351) stipulates.21 The Regulation X reads:

Whereas, during wars…certain persons owing allegiance to the British
Government have borne arms in open hostility to the authority of the
same, and have abetted and aided the enemy, and have committed acts of
violence and outrage against the lives and properties of the subjects of the
said Government…

On the other hand, the English statute reads:

…compass or imagine the death of our lord the King…do levy war against
our lord the King in his realm, or be adherent to the King’s enemies in his
realm, giving to them aid and comfort in the realm, or elsewhere…

The object of the two laws is a sovereign power—king or the state. The subject
of the two laws is expressed in analogous phrases—levying war, aiding and abetting the
enemy, and rebellion. It is worth noticing that “violence and outrage against the lives

21 The phrase is used in the explanatory title of the Regulation, which reads: “…to
provide for the immediate Punishment of certain Offences against the State…” While the
explanatory title of the 25 Edward III reads: “Declaration of what offenses shall be
adjudged treason.” Also compare the treason act of the First Congress Session of the
United States, which reads: “…for the punishment of certain crimes against the United
States…” 11 Ch. 9 Sec. 1, 1 Stat. 112 (1790).
and properties of the subjects” provided in the Regulation used to be part of the Common Law of treason. The basis of this type of treason was allegiance-protection relationship between the King and his subjects.\(^{22}\) Both laws also provided a similar explanatory basis i.e., the bond of allegiance. Finally, there is the subject of “compassing” the offence of treason, which is explicitly provided in the English statute. In the colonial regulation it is only implied. However, it becomes explicit in a subsequent regulation, the Regulation III of 1818, which provides for the preventive detention in order to cope with the compassing of offence.\(^{23}\)

There are four key juridical dynamics of the colonial paradigm of security, which are traceable to the above-mentioned two colonial regulations—the Regulation X of 1804 and the Regulation III of 1818. These juridical dynamics are as follows: a) the state of war, b) Offences against the State, c) suspension of courts, d) preventive detention.

A. THE STATE OF WAR

Just as the Anglo-American law of high treason follows from and deals with the state of war, the Regulation X also follows from and deals with a state of war. The British East India Company was faced with a protracted state of war with Mughal kings and various other local princes. Interestingly, the state of protracted warfare was in its

\(^{22}\) For instance the offence of assaulting and forcibly detaining a subject of the King for ransom was considered treason in *Knight of Hertfordshire*. Richard Z Steinhaus, ‘Treason, a Brief History with Some Modern Applications’ (1955) 22 Brooklyn Law Review 254

\(^{23}\) The statute also points toward the scope of territorial jurisdiction. The two phrases “in his realm” and “elsewhere” point to the local and global jurisdiction of the current anti-terrorism regimes in the US, the UK, and Pakistan.
nature and scope small, irregular and spontaneous. Therefore, the British military classified the state of war as the “small war,” “savage war,” or “uncivilized war.”

It is in the backdrop of small, irregular, and protracted state of war that the Regulation X is introduced. Part of the reason for its introduction, was to establish a legal regime to discipline and punish defection from the assumed and forced allegiance to the colonial state. Similarly, in medieval England, the high treason statutes were introduced in face of a state of warfare between the king and his nobles or estates. The medieval state of warfare, in its nature and scope was also protracted, small and irregular. Interestingly, today many military strategists and historians classify the War on Terror as small and irregular warfare.

B) OFFENCES AGAINST THE STATE

Let us recall the statement of Pakistan’s Law Minister Zafar, when asked about the missing persons or the so-called suspected terrorists, he said: “when a person who is indulged in an anti-state activity, when he has nothing to do with the state, when he has become state enemy, he loses many rights.” This statement allows us to figure the official understanding of which acts or activity consist in terrorism. These are in fact the anti-state activity. While terrorism is a relatively new category, the category of

---

“anti-state activity” corresponds neatly with the older category of “offences against the state.”

The Regulation X of 1804 for the first time effectively determines which acts would constitute as offences against the state. Those were 1) levying war, 2) aiding and abetting the enemy, 3) rebellion, and 4) violence against the subjects and their property. Once these offences are determined, they become standard criminal categories that are invoked in subsequent regulations, ordinances and statutes. The Regulation X itself remains in force for more than a century.

Let us trace the trajectory of these offences in the subsequent colonial regulations, ordinances and acts. In 1818 Regulation III is issued in order to introduce preventive detention. The regulation justifies preventive detention on the pretext of curbing the offences against the state. It reads:

Whereas reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquility in the British dominions from foreign hostility and from internal commotion...

In 1860 several earlier regulations are consolidated into a comprehensive penal code. Chapter VI of the panel code is titled “Offences Against the State.” Two subsequent chapters also contain offences, which directly or indirectly relate to offences against the state. Collectively, these chapters enumerate following offences: waging war, abetting the waging of war, concealing the design of war, collecting men, arms and
ammunition, waging war against an ally, causing depredation on the territory of an ally, assaulting, restraining or trying to overawe authority, mutiny, and sedition.

In 20th century, WWI prompted the British government to introduce at home the Defence of the Realm Act, DORA, 1914. The DORA was meant to ensure “the public safety and the defence of the realm” as well as “to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.” It was in effect a newer version of the law of high treason. Same offences against the state, which could be tried under the law of treason were made subject to the new law for less cumbersome and speedy execution. The war ended in 1919 but the offences against the state remained the preoccupation of the British government. Accordingly, Emergency Act 1920 is introduced, which provided to deal with the following offences:

…interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation declare that a state of emergency exists.

In colonial India DORA is adapted in the form of Defence of India Act 1915. The Act aimed to curb high treason and other state offences, which were expected to spread especially in the Punjab. Hence the act provided to “securing the public safety and the defence of British India” and to dealing with those who wage war against the King and assist the enemy.
The end of WWI brought Anarchical and Revolutionary Crimes Act 1919, popularly known as the “Rowlatt Act.”[^26] The Act provided government with the power to cope with “anarchical and revolutionary movements,” a term that was not defined. In fact, the offences that were hitherto called as offences against the state were now termed as anarchical and revolutionary offences. Thus a schedule was attached to the act which declared following offences as anarchical and revolutionary offences: sedition, waging war against the government; attempting or conspiring to wage war; collecting arms with the intention of waging war; abetting mutiny; promoting enmity between different religious, racial or linguistic groups; and causing criminal intimidation. The government could also declare certain areas as “affected areas.”

In order to meet the “grave emergency” of WWII facing India, the British Governor General enacted The Defence of India Act, 1939. The preamble of the Act read:

> Whereas an emergency has arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences.

In fact, the “certain offences” mentioned in the act consisted in those offences that were already provided in the earlier acts (of 1915 and 1919). The Act in Section 2 endowed upon the Central Government the power to make rules for the matters pertaining to

…defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

Finally, the Enemy Agents Ordinance 1943 shows a distinctive link with the Regulation X of 1804 and Regulation III of 1818. Certain juridical features of the English law of high treason that were adapted in those two regulations are once again provided in the Enemy Agents Ordinance. The Ordinance declared:

Whoever is an enemy agent, or, with intent to aid the enemy, does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance too…the enemy or to impede…operations of His Majesty’s Forces or to endanger life…shall be punishable with death.

When Pakistan adopted this law the words “His Majesty’s Forces” are replaced with “the Armed Forces of Pakistan or the forces of a foreign power allied with Pakistan.” These words assumed significance in wake of the War on Terror as Pakistan enters into alliances with the United States and NATO.

C) THE SUSPENSION OF COURTS

The most unusual aspect of the Regulation X of 1804, was a provision for the suspension of ordinary law and courts, and in their stead declaring martial law and setting up martial courts. The regulation said:
The Governor-General in Council is hereby declared to be empowered to suspend, or to direct any public authority or officer to order the suspension of, wholly or particularly, the functions of the ordinary Criminal Courts of Judicature…and to establish martial law…and also to direct the immediate trial, by Courts martial.

This was the first effective provision in the colonial state of India for the suspension of law and the trial of the civilians by way of martial courts. The very provision amounted to introducing an exception to the rule of law. In 1840 the government passes Act V of 1841, which “authorized the Government to issue a commission for the trial of any such offences,” i.e., the offences against the state. The Act V of 1840 becomes one of the earliest precursors of the post-colonial juridical apparatus of special courts and speedy justice in South Asia.27

The Defence of India Act 1915 provided for issuing commission for setting up special tribunals that would have the authority to award capital sentence. A Special Tribunal consisted of three commissioners, who had qualifications equivalent to sessions Judges or Additional sessions Judges. The Act demanded legal knowledge and experience from only two of the three commissioners. The Act declared in section 6 that the decision of Special Tribunal was to be “final and conclusive.” Similarly, the Anarchical act 1919 provided for special courts and expedited procedures for trying the scheduled offences, which were believed to be sufficiently prevalent. Special courts were however set up at the direction of a High Court, if the High Court was satisfied about the strength of the charges gathered by the government.

27 Act V of 1841 was repealed by Act X of 1872, which consolidated the detailed Code of Criminal procedure.
The Defence of India Act 1939, in Chapter III provided for Special Tribunals. Provincial Government, under Governor, was given power to set up special tribunals, each consisting of three members, who qualified for the position of district magistrate or session judge, and at least one of the members should be qualified for the position of judge of High Court. Special Tribunals exercised jurisdiction over offences against the state prescribed in the Act or other acts. The tribunals were empowered to award punishments that included death sentence, transportation for life, and long-term imprisonment. The persons who were awarded capital sentences had

…a right to appeal to the High Court within whose jurisdiction the sentence has been passed, but save as aforesaid and notwithstanding the provisions of the Code…there shall be no appeal from any order or sentence of a Special Tribunal, and no Court shall have authority to revise such order or sentence, or to transfer any case from a Special Tribunal…

Moreover, the government could “in any such order direct the transfer to the Special Tribunal of any particular case from any other Special Tribunal or any other Criminal Court not being a High Court.”

The procedure of the Special Tribunals is worth noticing. In clause 1 Section 10, the Act provided: “A Special Tribunal may take cognizance of offences without the accused being committed to it for trial.” And in clause 2, it provided:

Save in cases of trials of offences punishable with death or transportation for life, it shall not be necessary in any trial for a Special Tribunal to take down the evidence at length in writing, but the Special Tribunal shall
cause a memorandum of the substance of what each witness deposes to be taken down in the English language and such memorandum shall be signed by a member of the Special Tribunal and shall form part of the record.

Moreover, the procedure provided that a Special Tribunal would not be bound by ordinary legal procedure to adjourn any trial and to recall and rehear any witness. Rather the Special Tribunal could proceed on with the trial on the basis of already recorded evidence. A Special Tribunal could try an accused in his absence, inasmuch as he appeared once. A Special Tribunal could also

…order the exclusion of the public from any proceedings, if at any stage in the course of a trial of any person before a Special Tribunal application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the safety of the state…

Provincial Government was given the power to determine the time and place for sitting of the Special Tribunals.

The Enemy Agents Ordinance 1943 did away with the three-member composition of tribunals set up under the Defence of India Act 1939. Now under the Enemy Agents Ordinance, a special tribunal consisted of one judge, who was to be persona designata of government. The tribunal tried persons accused of abetting and aiding the enemy. The qualifications of special judge were reduced so that a Session Judge or an Assistant Session Judge could be appointed as special judge. The
government determined the time and place of the trial. Moreover, the government could also transfer cases from one special judge to another. On appeal against the decision of a special court, the case was to be reviewed by another special judge, who was chosen from the Judges of given High Court. The decision of the appeal’s special judge was final. The higher courts were barred from exercising their administrative authority to transfer a case from special court to ordinary court.

The rights of accused were truncated. For instance, an accused was given the right to be defended by a legal pleader, but the Ordinance provided that “such pleader shall be a person whose name is entered in a list prepared in this behalf by the Government or who is otherwise approved by the Government.” Similarly, the accused was given the right to receive a copy of decision and other documents relating to the case, but he must return it within ten days after the end of proceedings and must not disclose information to anyone regarding the entire trial. This procedural setup was not only allowed to retain in the Ordinance as it was adopted by Pakistan after independence in 1947, but it was also inscribed in the Army Act 1952 (amended in 1965 and 1967). Under the Army Act civilians can be tried in a martial court with the truncated rights provided in the colonial Enemy Agents Ordinance.

D. PREVENTIVE DETENTION:

At the turn of the 18th century, England’s wars against revolutionary France provoked suspension of *habeas corpus* twice—May 1794 to July 1795 and April 1798 March 1801. After the end of war England faces economic depression, which provokes a proletariat movement for parliamentary reforms. By 1817 the reforms’ movement
grows violent. When the Prince Regent’s coach is attacked in January 1817, the parliament responds by passing Habeas Corpus Suspension Act 1817.\textsuperscript{28}

Next year in colonial Bengal, somewhat similar provisions are introduced in the form of Regulation III of 1818—A Regulation for the Confinement of State Prisoners.\textsuperscript{29} The Regulation declared:

Whereas reasons of state…occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper.

A detainee under the Regulation III of 1818 was stripped of several rights normally enjoyed by a person upon arrest, for instance, the right to be presented before a magistrate, the right of legal counsel, right to be informed about the grounds of detention, and the right of fair trial. The officer under whose custody the detainee was

\textsuperscript{28} 57 Geo. III, c. 3. The act is repealed next year. Also note that the Prince Regent’s father was also stoned/attacked previously in 1795. The attack had resulted in the passage of Treasonable and Seditious Practices Act 1795 (36 Geo. III, c.7).

\textsuperscript{29} The genealogy of preventive detention in colonial India goes further back to the East India Company Act of 1793. However, according to Dilawar Mahmood there is “no evidence that this Act was ever enforced.” The Act said:

It shall and may be lawful for the Governor of Fort William aforesaid for the time being to issue his warrant under his hand and seal, directed to such peace officers and other persons as he shall think fit for securing and detaining in custody any person or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any of the British settlements or possessions in India with any of the Princes, Rajas or Zamindars…

placed prepared bi-annual reports “on the conduct, the health, and the comfort of such
state prisoner, in order that the Governor-General in Council may determine whether
the orders for his detention shall continue in force or shall be modified.” Hence the law
provided the basis for indefinite detention. The law remained in force until after
independence of India in 1947.\footnote{Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller, and Jed S. Rakoff,
‘COLONIAL CONTINUITIES: HUMAN RIGHTS, TERRORISM, AND SECURITY
LAWS IN INDIA’ (2006) 20 Columbia Journal of Asian Law 93, 123–124}

In 1850, Act XXXIV, titled “An Act for the better Custody of State Prisoners”
was passed. This particular act served two goals. It extended the Governor-General’s
territorial jurisdiction under the Regulation of 1818 from the Presidency of Fort William
to all territories held by the East India Company by 1850. Second, it removed “doubts”
of courts as to whether the state prisoners could be “lawfully detained in any fortress,
gaol, or other place within the limits of the jurisdiction of any of the Supreme Courts of
Judicature established by Royal Charter.” In 1858 a similar act—Act III of 1858—
provided for removal of doubts of courts in Madras and Bombay. The 1858 Act also
empowered the governors to issue orders of preventive detention. Moreover, it provided
new power to the Governor-General-in-Council to order the removal of any state
prisoner from one place of confinement to another within territories of the East India
Company. In 1872, Act IV is passed to enforce the Regulation III of 1818 in the
province of Punjab, which after independence makes two provinces of Pakistan.

After the 1857 uprising the Indian Council Act of 1861 is passed. The Indian
Council Act gives the Governor-General power to unilaterally issue ordinances to
ensure “the peace and good government” in India. During emergency times, which the Governor-General himself decides, ordinances could be issued to authorize preventive detention and special tribunals.\textsuperscript{31} It was the beginning of what half a century later British Prime Minister Ramsay MacDonald termed “government by ordinance.”\textsuperscript{32}

The 19\textsuperscript{th} century colonial regulations in India had a visible impact on the British policy toward Ireland. In 1871, the British government introduced the Protection of Life and Property (Ireland) Act, which for the first time in Ireland allowed for detention without trial. Accordingly, the experience of early 19\textsuperscript{th} century Bengal regulations was transferred to Ireland in the later half of the century.\textsuperscript{33}

In mainland Britain, WWI prompted the government to introduce preventive detention. The Regulation 14 (b) under the Defence of Realm Regulations 1914 conceded to the government the power to detain civilians. The regulation declared:

Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the public safety of the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as

\textsuperscript{31} Indian Councils Act of 1861, 24 & 25 Victoria, c. 67, Sect. 23. Venkat Iyer notes that this ordinance-making power was used seven times before WWI and 27 times during the War, which included ordinance authorizing preventive detention. Venkat Iyer, States of emergency: the Indian experience (Butterworths India 2000) 68


are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order… (Emphasis added)

The detention without trial was challenged in the British courts. However, the courts upheld the discretion of the government to detain anyone even on mere suspicion. In Rex v. Halliday 1917 and later in Liversidge v. Anderson 1942 the British judiciary laid down the principle of “subjective satisfactions,” in contrast to “objective satisfaction,” as sufficient criteria for the reasonableness of suspicion to detain.

In India the powers of detention without trial were granted under the Defence of India Rules 1915. Even as the war ended, the detention without trial powers of the government were incorporated in the Anarchical Act of 1919, which authorized the government to issue preventive detention orders and other types of orders to restrict the freedom of movement of an individual for up to two years. Although the act gave detainees the right to appear before an investigating authority and be informed about the grounds of their detention, they were denied the right to be represented by counsel. Moreover, the government retained the discretion to withhold from detainees “any fact the communication of which might endanger the public safety or the safety of any individual.”
In the Northern Ireland after the end of WWI, the British government in 1922 enacted the Civil Authorities (Special Powers) Act (Northern Ireland) allowing for detention without trial, as well as searching any home. Both in colonial India and in the Northern Ireland, detention without trial was a kind of “imprisonment at the arbitrary Diktat of the Executive Government.”

Again the outbreak of WWII in 1939 the British government in both Britain and India imposed restrictions on movement and provided for detention without trial. Accordingly, the rule 26 of the Defence of India Rules 1939 provided:

So long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be detained in such place, and under such conditions…

Again the rule 129 provided that any police or other government officer so empowered might arrest any person without warrant “whom he reasonably suspects of having acted, of acting, or of being about to act” in such a way “to assist any State at war with His Majesty, or in a manner prejudicial to the public safety or to the efficient prosecution of war,” “or to assist the promotion of rebellion.”

**Post Colonial Anti-Terrorism Legal Regime and Global Paradigm of Security**

By classifying certain offences as offences against the state, making provisions for the suspension of law and courts, and legalizing detention without trial, the British colonial security regime prepared the juridical groundwork for the current global paradigm of security. Pakistan, India, and the British direct rule in Northern Ireland particularly edified from the colonial security regime.

In Pakistan the post-independence security regime consisted in two types of laws. Specific security of the state acts, which were passed in 1949, 1950, and 1952. The Security of Pakistan Act 1952 was originally enforced for only three years time period. However, it was extended from time to time, such that it is in force to this day. This act, like its predecessors, was based on the Defence of India Act 1939. The second type of security law consists in certain derogation provisions of the constitution, which provide for preventive detention in Pakistan. These derogation provisions are based on the India Act 1935.

In Northern Ireland, after the British government took over its direct control in 1972, emergency and anti-terrorism acts (NIEPA 1973 and PTA 1974) were introduced. The roots of these laws stretch back to the Special Powers Act 1922, but they also correlate to the British wartime legislation and the colonial security regime. At the outset of the 21st century, we see that the emergency and anti-terrorism laws of Northern Ireland are consolidated into the Anti-terrorism Act 2000, which is in force in whole of the UK.
The current anti-terrorism legal regime in Pakistan has two legal sources. Its immediate legal source is the British emergency and anti-terrorism laws enforced in Northern Ireland as well as in the UK. While its relatively distant legal source is the colonial regime of security in India.

A) STATE OF WAR:

Well before the beginning of the War on Terror, America, Britain and Pakistan were allied in the Afghan War or the Cold War of 1980s. The anti-terrorism legal regimes in these allied states grew directly or indirectly from the Cold War, which had an existential state of war about it. The War on Terror also has an existential state of war about it. Whether or not an actual state of war exists today, the allied states believes that it does. Even after the killing of Osama bin Laden, the pulling out of troops from Iraq, the democratic spring in the Middle East, and the gradual withdrawal from Afghanistan, US strategists believe that the War on Terror will continue. Accordingly, Congress has been prodded to pass the NDAA 2011-2012 with certain provisions that codify into law the detention without trial. The statute would remind us of Agamben's assumption that the paradigm of security tends to outlive war.

B) OFFENCES AGAINST THE STATE AND TERRORISM
The defence acts and regulations passed during two World Wars become standard legal instruments for legislating security law in Pakistan as well as in the UK. Just as the wartime laws categorized certain offences as offences against the state the laws of post-wartime followed the course. The categorization of certain offences as offences against the state is further strengthened by the technique of providing for schedules. For instance, Anarchical Act 1919, which aimed to suppress anarchical and revolutionary activities came with a schedule, which included those offences against the state that could be tried under the penal code and various other laws. Similarly, the post-war emergency and anti-terrorism acts for Northern Ireland and anti-terrorism acts and ordinances of Pakistan included schedules with those offences that could be tried under penal codes or other laws.

The Security of Pakistan Act 1952, repeating the language of Defence Act 1939, provides “for special measures to deal with persons acting in a manner prejudicial to the defence, external affairs and security of Pakistan.” Since the early security statutes are challenged in the court, the legislators make provisions in the new constitution of Pakistan 1956 for giving the security regime highest legal cover. The subsequent constitutions of Pakistan also allow for preventive detention for the offences against the state. It is worth noticing that all three constitutions of Pakistan are based on the 1935 India Act, which provided for the preventive detention. The Article 10 section 4 provides for detention without trial of

...persons acting in a manner prejudicial to the integrity, security or
defence of Pakistan or any part thereof, or external affairs of Pakistan, or
public order, or the maintenance of supplies or services.

At the end of Cold War, the frontline state of Pakistan, faced domestic violence and
security breakdown. The crimes relating to violence and security breakdown could have been dealt with the panel code. However, a separate legal regime was
instituted which redefined violence and security breakdowns as terrorism.

At this stage before looking at the acts, which were termed as terrorism in
Pakistan, I want to recall Kennedy’s conclusion that the West should learn a lesson
from the tortured history of Pakistan’s anti-terrorism legal regime and give a
pause to similar regimes. It is interesting to notice that a detailed definition of
terrorism in the Pakistani legal regime appears in the Anti-Terrorism Ordinance
2001. In the UK the definition of terrorism appears a year earlier. Let us compare
the text of two definitions, which is strikingly similar. The Pakistani Ordinance
2001 reads:

In this Act, “terrorism” means the use or threat of action
where:

(a) the action falls within the meaning of subsection (2), and

(b) the use or threat is designed to coerce and intimidate or overawe
the Government or the public or a section of the public or community or
sect or create a sense of fear or insecurity in society; or
(c) the use of threat is made for the purpose of advancing a religious, sectarian or ethnic cause.

(2) An "action" shall fall within the meaning of subsection (1), if it:

(a) involves the doing of anything that causes death;
(b) involves grievous violence against a person or grievous bodily injury or harm to a person;
(c) involves grievous damage to property;
(d) involves the doing of anything that is likely to cause death or endangers a person's life...

(l) is designed to seriously interfere with or ‘seriously disrupt a communications system or public utility service…

While the British Anti-Terrorism Act 2000 reads:

In this Act “terrorism” means the use or threat of action where—

(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,
(b) involves serious damage to property,

(c) endangers a person’s life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

Pakistan’s Anti-terrorism ordinance 2001 goes back to the 1997 Anti-terrorism Act. On the other hand, the British Anti-Terrorism Act 2000 goes back to the Prevention of Terrorism Act 1989, and further back to NIEPA 1973. Both PTA 1989 and NIEPA 1973 defined terrorism as “the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”

36 Sec 28 subsection 1, and Sec 20 subsection 1 respectively. Another aspect of comparison between the Pakistani and British anti-terrorism are provisions relating to proscribed organization. The British PTA 1989 provided:

A person is guilty of an offence if he—
(a) solicits or invites any other person to give, lend or otherwise make available, whether for consideration or not, any money or other property; or
(b) receives or accepts from any other person, whether for consideration or not, any money or other property, intending that it shall be applied or used for the commission of, or in furtherance of or in connection with, acts of terrorism to which this section applies or having reasonable cause to suspect that it may be so used or applied.
(2) A person is guilty of an offence if he—
(a) gives, lends or otherwise makes available to any other person, whether for consideration or not, any money or other property; or
Furthermore, the technique of adding schedules for providing the offences has been consistently used in both the British and Pakistani laws. For instance, NIEPA provided for offences such as arson and riot from common law, setting fire to private or public buildings, or other forms of property and machinery drawn from the Malicious Damage Act 1861, causing grievous bodily harm drawn from the Person Act 1861, (b) enters into or is otherwise concerned in an arrangement whereby money or other property is or is to be made available to another person, knowing or having reasonable cause to suspect that it will or may be applied or used as mentioned in subsection (1) above…

While Pakistan adopts these provisions ten years later in Anti-Terrorism (Amendment) Ordinance 2001:

A person commits an offence if he--
(a) invites another to provide money or other property, and
(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purpose of terrorism.

(2) A person commits an offence if--
(a) he receives money or other property, and
(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

(3) A person commits an offence if he--
(a) provides money or other property; and
(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

A further point of comparison can be the provisions relating to dress and symbols of prospective terrorists. The British NIEPA 1973 provides:

Any person who in a public place—
(a) wears any item of dress, or
(b) wears, carries or displays any article, in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation, shall be liable on summary conviction… (Sec. 2,1)

This provision is repeated in the section 2(1) of the Prevention of Terrorism (Temporary Provisions) Act 1974 and 1989 Act. In Pakistan a similar section is introduced in the Anti-Terrorism Act 2001, which reads:

A person commits an offence if he--
(a) wears, carries or displays any article, symbol, or any flag or banner connected with or associated with any proscribed organization; or
(b) carries, wears or displays any uniform item of clothing or dress in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization.
causing explosion likely to endanger life or damage property drawn from the Explosive
Substance act 1883, possessing, carrying, using firearms, ammunition etc., without
license under the Firearms Act (Northern Ireland) 1969, the Robbery and aggravated
burglary drawn from the Theft Act (Northern Ireland) 1969. Similarly, Pakistan’s Anti-
Terrorism act 1997 as amended especially in 2001 and 2004 provides for several
scheduled offences, for instance, killing, waging war, abetting war, causing depredation,
rape, which are drawn from the Penal Code, and several crimes relating to arms and
ammunition drawn from Arms Ordinance 1965.37

In the United States, the Patriot Act redefined terrorism by making amendment
in the United States Code, title 18, section 2331. Accordingly, the definition of
terrorism corresponds to those offences that we find in the British and Pakistani acts.
The Code says that terrorism consists in “activities that…involve violent acts or acts
dangerous to human life that are a violation of the criminal laws of the United States or
of any State.” Moreover, these acts “appear to be intended (i) to intimidate or coerce a
civilian population; (ii) to influence the policy of a government by intimidation or
coercion; or (iii) to affect the conduct of a government by mass destruction,
assassination, or kidnapping…” Section 411 of the Patriot Act further encompasses in
the definition of terrorism acts “indicating an intention to cause death or serious bodily

37 The 1992 Acts IX and X, which provided for creation of special courts, come with
schedules of offences. The schedules included several criminal offences provided in the
penal code and specifically other offences against the state provided in such acts and
ordinance as the Arms Act, 1878, the Telegraph Act 1881, the Explosive Substances Act
1908, the Pakistan Arms Ordinance 1965, the Anti-National Activities Act, 1974,
injury,” “to prepare or plan a terrorist activity,” “to solicit funds or other things of value.”

An interesting dimension of the American juridical and political discourse on the War on Terror is that terrorism and acts of war are often used interchangeably. For instance, in the above definitions, certain criminal offences are classified as terrorism. On the other hand, the same offences are categorized, as NDAA stipulates, as “hostilities against the United States or its coalition partners” (Section 1031). More clearly, John McCain, one of the sponsors of NDAA, defending the statute says: “…those people who seek to wage war against the United States will be stopped and we will use all ethical, moral and legal methods to do so.” In other words, there is an interesting tendency in American juridical discourse that first elevates certain criminal offences to the status of acts of war and then on the reverse boils them down to acts of terrorism. In this way, the legal basis of the criminal offences and acts of war is destabilized, which in turn helps create a separate juridical regime—the paradigm of security.

B) SUSPENSION OF COURTS:

In 1992, Pakistan’s government passed two remarkable acts—The Terrorist Affected Areas (Special Courts) Act X and The Special Courts for Speedy Trials Act

38 The phrase is also used in the Military Commissions Act 2005. The act relates to those persons who have either engaged in hostilities or have “purposefully and materially supported hostilities” against the United States and its allies.
IX. The aim of the acts, as declared in the preamble, was “to provide for the suppression of acts of terrorism, subversion and other heinous offences in the terrorist affected areas.” The nature of offences is further defined in the Act IX: “in the opinion of Government, [are] gruesome, brutal and sensational in character or shocking to public morality or has led to public outrage or created panic or an atmosphere of fear or anxiety amongst the public or a section thereof.” Chronologically, it is obvious that the legislation for establishing special courts in Pakistan comes after those of the British legislations for Northern Ireland (NIEPA 1973) and colonial India (1804-1939). Here I would like to highlight certain basic legal characteristics that the special courts of Pakistan draw on from their precursors.

The composition of special tribunals of Pakistan is drawn on the pattern of the colonial and Northern Ireland tribunals. The 1939 Act provided for three-member tribunals. This number is reduced to one-member for the tribunals set up under the Enemy Agents Act 1943. The NIEPA 1973 provides for one-member court. The special courts in Pakistan follow the one-member composition for anti-terrorism courts. Moreover, the 1939 Act provided that the members should be qualified for the position of high court judge, session court judge, additional session court judge, district or additional district magistrate. The 1992 Act and especially 1997 Act made similar qualification requirement.

The 1939 Act allowed the special courts to try all prescribed as well as other offences directed to them by the government. Similarly, NIEPA 1991 allowed the special courts to try both scheduled and non-scheduled offences directed to
them by the government (Sec 10). It is worth noticing the Special Powers Act 1922 for Northern Ireland had a clause that made all kinds of offences subject to special courts. In Section 2(4) the 1922 act had provided: “If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be guilty of an offence against those regulations.” In Pakistan, the 1992 and 1997 acts gave the special courts power to try both scheduled and non-scheduled offences.40

Just as the 1939 Act gave its provisions an “overriding effect” on all other laws, including the penal code, the Pakistani anti-terrorism acts gave their provisions overriding effect. As a corollary to the overriding effect of law, the special courts set up under the 1939 Act enjoyed overriding effect or precedence over lower ordinary courts. Similarly, the Pakistani special courts were given precedence over lower ordinary courts.41 Hence, a case proceeding in a special court against a person assumed precedence over any other case against the same person proceeding in any other lower court.42 Moreover, following the section 9 of 1939 Act, the anti-terrorism acts of Pakistan empowered the government to “transfer” cases from lower ordinary courts to special courts.

41 Act IX Article 5 stipulates: “The Special Court shall have the exclusive jurisdiction to try a case…and no other Court shall have any jurisdiction or entertain any proceedings…”
42 Act 1997, Article 29
The DORA and Defence of India Acts had allowed for summary trials and military courts. The summary trials could punish offenders for six months. The Anti-terrorism Act 1997 also allowed summary trials and the 1998 Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance allowed for setting up military courts with jurisdiction over civilians. In summary trials offenders could be punished with imprisonment for up to two years. The 1998 amendment for setting up military courts was however struck down by the Supreme Court in Liaquat Hussain (1999) as unconstitutional.

Certain basic elements of the trial procedure of Pakistani special courts are drawn on the colonial Defence of India Act 1939 and Enemy Agents Act 1943. First, a trial can be carried out in camera. Accordingly, a judge can order for the exclusion of the public. Second, an accused can be tried in his absence. Third, the court need not adjourn the daily proceedings except in the exceptional circumstances and that only a couple of days. Fourth, special court is not required to recall or re-hear witnesses on the account of change of composition of court or the transfer of case to another special court. Sixth, offences against the state were generally unbailable in the penal code 1860. The NIEPA 1973 allowed for bail, but only by a High Court, thus making the procedure cumbersome.

44 Compare Sec 10(5) of 1939 Act and Sec. 13 of Act X of 1992. In Mehram Ali the Supreme Court held that the procedures of the special courts should follow the established criminal procedure in order to ensure justice. Hence, in 1998 an amendment removed this provision.
45 This provision corresponds to section 10(3) of 1939 Act and Sec. 7 of the Enemy Agents Act 1943.
46 This provision corresponds to section 10(4) of 1939 Act.
Similarly, in Pakistan only anti-terrorism court could grant bail, only after receiving guarantees that the detainee would not abscond. Seventh, appeals against the judgment of special court lie with high Court.\textsuperscript{47} Eighth, the onus of proof in relation to proving oneself innocent lied on the accused. For instance, the section 25 of Act X 1992 provided that should any person be found in an affect area where firearms were being used or found in possession of firearms, “he shall be presumed to have committed the offence unless he can prove that he had not in fact committed the offence.”\textsuperscript{48}

In the United States, after 9/11, one of the first steps that the Bush administration took was setting up military tribunals. The November 13 Order, 2001, sanctioned special tribunals for the terrorists. The Secretary of Defense would appoint “one or more military commissions.” The Secretary determined where the commissions might “sit at any time and any place” as well as designate attorneys for the conduct of prosecution. The tribunals were given “exclusive jurisdiction with respect to offenses by

\textsuperscript{47} Originally appeals went to an appellate tribunal whose decision was deemed final. But in \textit{Mehram Ali} case the Supreme Court struck down that provision as constructing a parallel court system. The government amended the provision (Sec. 25 of 1997 Act) and allowed appeals to be made to High Courts. Compare with sec. 13 of 1939 Act, which allows appeals to High Courts.

\textsuperscript{48} This section corresponds to section 7(1) in the NIEPA 1973: “Where a person is charged with possessing a proscribed article in such circumstances as to constitute an offence to which this section applies and it is proved that at the time of the alleged offence—(a) he and that article were both present in any premises; or (b) the article was in premises of which he was the occupier or which he habitually used otherwise than as a member of the public; the court may accept the fact proved as sufficient evidence of his possessing (and, if relevant, knowingly possessing) that article at that time unless it is further proved that he did not at that time know of its presence in the premises in question, or if he did know, that he had no control over it.” In section 20(1) it was provided that the onus of proof that a person was not collecting information on the police or armed forces lied on the person.
the individual” who would not be allowed to “seek any remedy” in any US or foreign court. The tribunals were given the authority to award punishments “including life imprisonment or death.” After the commission had taken decision, the record had to be directed to the President or the Secretary of Defense “for review and final decision.”49

However, the Supreme Court’s decision in Hamdan struck a blow to the military tribunals.50 The Supreme Court held that the rules and procedures of the tribunals violated the Uniform Code of Military Justice and the 1949 Geneva Convention. According to the Supreme Court the rules and procedures should be that of a court-martial “insofar as practicable.” Justice Steven held that in Hamdan’s case military tribunal violated Common Article 3 (CA3) of the Geneva Convention, which applies to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” The article prohibits

…the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

Invoking CA3 created a strange juridical situation. The Bush administration maintained that the conflict was an international one, although it was not between two states. Al Qaeda was not a contracting party. Did enemy combatants deserve judicial

49 Sec. 4(a)
50 Hamdan v. Rumsfeld [2006] 548 U.S. 557
guarantees, which are recognized as indispensable by the civilized people? The court believed they did, but the administration did not.

As a response to the decision in *Hamdan*, and in fact, the increased judicial reviews by the courts, the administration moved the Congress to pass the Military Commission Act 2005. The Act prohibited invocation of the Geneva Convention in American Courts and stripped the courts of jurisdiction to hear *habeas corpus* applications of the non-citizens in Guantanamo.\(^5\) It is worth noticing that for aliens there is no right of *habeas corpus*, whether in Pakistan, the UK or the US.

**D) PREVENTIVE DETENTION:**

The history of preventive detention or detention without trial in the subcontinent, as I demonstrate above, stretches back to the Regulation III of 1818. In Northern Ireland (UK) it stretches back to the Protection of Life and Property Act 1871. In the UK, the history of detention without trial stretches back to WWI.

It is worth noticing that today in Pakistan (as well as in India) preventive

---

\(^{5}\) Section 7 of the MCA 2005 amended Section 2241 of 28 United States Code ousting the jurisdiction of courts “to hear or consider an application for a writ of habeas corpus” and to hear “to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien.” Also see Detainee Treatment Act of 2005, which also purportedly strips the jurisdiction of courts. The Patriot Act 2002 had originally restricted *habeas corpus* jurisdiction of courts in cases relating to non-citizens, however, on certain procedural requirements the courts exercised review. The Section 412 read:

Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.
detention is endowed with constitutional sanction. This constitutional sanction was first introduced in the 1935 India Act. As Pakistan (and India) adopted the 1935 India Act as their interim constitution and later on the same act serves as the basis of constitution-making, the constitutional provisions of preventive detention are carried forward.52

The constitution of Pakistan 1973 in Article 9 provides that, “No person shall be deprived of life or liberty save in accordance with law.” If read carefully, the Article 9 also provides for exception or derogation principle, by providing the phrase “save.” In Article 10, the constitution guarantees safeguards against arbitrary arrest and detention. Thus clause 1 of the Article 10 declares that the detainee has the right to be “informed, as soon as may be, of the grounds for such arrest” and “to consult and be defended by a legal practitioner of his choice.” In clause 2 of the Article, it is provided that the detainee “shall be produced before a magistrate within a period of twenty-four hours.”

52 The 1956 Constitution provides for the right of habeas corpus in Article 7, which is part of Fundamental Rights. However, in the same Article habeas corpus is denied to a person “(a) who for the time being is an enemy alien; or (b) who is arrested or detained under any law providing for preventive detention.” Such a person can be detained for three months unless an “appropriate Advisory Board” advises for ending or extending the detention for another three months. Moreover, the detaining authority is given discretion whether or not to disclose and communicate to detainee the grounds on which the order has been made. In the Fifth Schedule, the federal legislative list provided the federal government with the power to legislate on “Defence of Pakistan and of every part thereof, and all acts and measures connected therewith.” In entry 18, the Schedule provided: “Central intelligence and investigating organization; preventive detention for reasons connected with defence, foreign affairs, or the security of Pakistan; persons subjected to such detention.” The Fifth Schedule, in provincial list, provided the provincial government with the power to legislate on: Preventive detention for reasons connected with the maintenance of public order; person subjected to such detention.” The second constitution of Pakistan, 1962, repeated word to word the preventive detention provisions of the first constitution in its Fundamental Rights chapter. Similarly, the Third Schedule in entries 33 and 34 repeated the provisions pertaining to intelligence agencies and preventive detention as provided by 1956 constitution.
However, according to clause 3 these safeguards are not available to non-citizens and to those citizens held under a special class of detention called “preventive detention.”

A person can be put under preventive detention for up to three months. Toward the end of three months an “appropriate Review board,” consisting of judges of the superior courts, review the detention and decide on whether to release the detainee or extend the period to three more months. Again at the end of the extended period the procedure is repeated. With this procedure a detainee can be held for up to three years. Although the three-year period of time is long enough, however, clause 7 provided it does not apply to persons “employed by, or works for, or acts on instructions received from, the enemy.” With this clause they virtually incorporated the Enemy Agent Act 1943 into the constitution. In February 1975, the Third Amendment added new categories of offences subject to indefinite detention. Accordingly, the Amendment stipulated indefinite detention for any person

who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity.

Just as the 1935 Act had provided for the subject of preventive detention in federal and provisional legislative lists, the constitution of Pakistan 1973 also made similar provisions. Recently, the Schedule 4 of the 18th amendment 2010 provided the provincial governments with power to legislate on “Preventive detention for reasons
connected with the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.” In this way, the colonial law relating to preventive detention is reinstituted in Pakistan.

Let us turn to Northern Ireland (UK). The NIEPA 1973 was one of the earliest preventive detention laws that the post-War British government enacted in Northern Ireland (Emergency Provisions). The subject of the Act was to deal with “certain offences, the detention of terrorists, the preservation of the peace…” The Secretary of State could order to put a person in “interim custody” for a period of 28 days. Before the expiry of that period an appointed (quasi) judicial commission would decide on the release or further custody of the detainee on the basis of “the protection of the public.” Only seven days before a commissioner hears the case the detainee is served with a written statement regarding his/her terrorist activities. The NIEPA 1973 was amended and reenacted in 1978, 1987, 1991 and 1996.

In the later acts, for instance those of 1991 and 1996, the period of “interim detention” is reduced to 14 days, and the Secretary of State could make “detention”—

53 Before amendment both federal and provincial governments exercised the power to legislate on the subject of preventive detention. The 4th Schedule, modeled on the 1935 Act, provided the federal government with the authority to legislate on “preventive detention for reasons of State connected with defence, external affairs, or the security of Pakistan or any part thereof.” (Federal Legislative List Part I, Entry I)
54 It is worth noticing that these offences which are classified as scheduled offences were given priority or overriding effect over non-scheduled offences, just as anti-terrorism laws and trials enjoy overriding effect over other laws and trials. (Sec 2,3 read: “Where an indictment contains a count alleging a scheduled offence and another count alleging an offence which at the time the indictment is presented is not a scheduled offence, the other count shall be disregarded.”)
55 Schedule I part II 11 sub-entry 3.
56 Sch 1 Part II Entry 13.
preventive detention—order only after receiving report from a judicial Advisor. However, the procedure for preventive detention is interesting to note, partly because it is reminiscent of the procedure laid down in 1818 regulation. After a person is arrested and detained for the interim period, the case is referred to an Advisor within 14 days. Under 1818 regulation the officer in charge of custody used to be both a custody officer and Adviser. After referral to the Adviser, the detainee is served with a written statement regarding the nature of his suspected activities. The detainee may send written representations to the Secretary of State and a request that he/she wants to see the Adviser in person. The Adviser prepares a report, taking into consideration representations made by the detainee. The report is then sent to the Secretary of State who makes the decision on (further) detention. After making the detaining orders, he can at any time again refer the case to an Adviser. The detainee can also request for reconsideration of the order, but only after one year. The detention may go on for virtually indefinite time period.

The Anti-Terrorism, Crime and Security Act, 2001 (ACS), provided for indefinite detention of non-citizens. Under section 23 non-citizens could be indefinitely detained without trial. With a certificate of Home Secretary any non-citizen could become “a suspected international terrorist.” The provision of indefinite detention was inconsistent with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), which protects the right to liberty and security of the person. Therefore, in December 2004, the House of Lords held in A v. Secretary of State for the Home Department that Section 23 was illegal on two grounds. First, it was a disproportionate response to what was “strictly required by the exigencies
of the situation” and infringed Article 5 of the ECHR. Second, the Section 23 violated the right of all human beings to be free from discrimination enshrined in Article 14 of ECHR. Thus the Lords observed that the section clearly discriminated between citizens and non-citizens without a rational and objective justification.

The government responded by passing an amendment—the Prevention of Terrorism Act (PTA) 2005. The PTA 2005 provided for two types of “control order”—the derogating and non-derogating control orders. The derogating control orders can be issued to control individuals who pose serious risk to the public safety. By the order of a high court they can be place under house arrest for six months unless renewed. The non-derogating control orders impose specific combination of restrictions for instance curfew, electronic tagging, restriction on association, searches of residence, restriction on use of telephone and Internet. These orders can extend up to twelve months unless renewed.

Apart from detention without trial and control orders, there is another type of detention allowed in the UK called “pre-charge detention.” The Anti-Terrorism Act 2000 had provided for only forty-eight hours pre-charge detention. In 2003, the Criminal Justice Act increased pre-charge detention to fourteen days. In 2006, the Terrorism Act further increased pre-charge detention from fourteen days to twenty-eight days. The anti-terrorism legal regime in the UK provides for yet another type of detention for the purposes of questioning and searches of persons on borders, port, and airports. This type of detention, which is reminiscent of stop and search detention power under NIEPAs, is allowed for nine hours.
In the United States detention without trial is one of the legal instruments available to the executive to detain persons against whom there is lack of substantial evidence necessary for trial. Both citizens and non-citizens can be placed under preventive detention.\textsuperscript{57} The detention without trial in the US is not constrained by the law, whether international or local, and judicial oversight. This style of detention, and for that purpose deployment of armed forces in civilian areas, resembles detention without trial and military deployment in Northern Ireland of 1970s (and even further back of 1920s). Just as detention system of Northern Ireland, the US detention system is also free from constraints of law and judicial oversight. Moreover, it is beyond the purview of the human rights law, as the Bush administration claimed that human rights law does not apply “to the conduct of hostilities or the capture and detention of enemy combatants” because such matters are “governed by the more specific laws of armed conflict.”\textsuperscript{58} In fact, it is regulated by the orders of the executive branch. Then-Deputy Assistant Attorney General John Yoo had remarked: “What the Administration is trying to do is create a new legal regime.”\textsuperscript{59}

At the outset of the War on Terror, the military order of Nov. 13, 2001 declared that citizens of the United States would not be subject to the Order. For United State citizens there existed another law—the Article III of the constitution. The subjects of

\textsuperscript{57} In \textit{Hamdi} the Supreme Court held that the AUMF conceded to the President power to detain US citizens captured on the battlefield. 542 \textit{Hamdi} 507, 517. The NDAA 2011-2012 has recently codified the detention without trial of American citizens apprehended anywhere in the world including the United States. Section 412 of the Patriot Act authorizes the Attorney General to detain foreign nationals he/she certifies as terrorist suspects without a hearing and without a showing that they pose a danger or a flight risk.


\textsuperscript{59} Warren Richey, ‘How Long Can Guantánamo Prisoners Be Held?’, April 9, 2002
the November military order were members of al-Qaeda or those who have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism.” Although citizens of the United States were declared not to be the subject of the November Order, covertly they remained so. They could be detained, sent on rendition, or permanently incapacitated. Hamadi was detained for over three years before the Supreme Court took up his case. The prosecution did not charge him of “espionage, treason, or any other crime under domestic law.”\textsuperscript{60} Two judges, Stevens and Scalia, in the plurality decision, held that the U.S Constitution required that Hamadi is “entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus.”\textsuperscript{61} The criminal proceeding meant proceeding for high treason. On the other hand, Justice Thomas held that the president of the United States had the power to “unilaterally decide to detain an individual if the Executive deems this necessary for the public safety even if he [was] mistaken.”\textsuperscript{62} Although the plurality decision in Hamadi granted the right of \textit{habeas corpus} to Hamadi,\textsuperscript{63} the passage of NDAA 2011 has eventually withdrawn that right. Accordingly, those American citizens who are “covered persons” will be denied habeas corpus.\textsuperscript{64}

\begin{center}
\textsuperscript{60} Hamdi v. Rumsfeld, 542 U.S. 507, 540.
\textsuperscript{61} Hamdi v. Rumsfeld, 542 U.S. at 573 (Scalia, J. & Stevens, J., dissenting). Article 1, section 9, clause 2 of the US constitution provides the Congress power to suspend the writ of habeas corpus in “times of Rebellion or Invasion.”
\textsuperscript{62} Hamdi v. Rumsfeld, 542 U.S. at 590 (Thmas, J., dissenting).
\textsuperscript{63} Due process required the government to provide Hamdi notice of the factual basis for his detention and a meaningful opportunity to contest the government’s allegations before an independent adjudicator. Id at 533.
\textsuperscript{64} NDAA Section 1031. A covered person is one
Conclusion

Undoubtedly the West can learn from the fallouts of the legal regime of anti-terrorism in Pakistan. However, Pakistan is not one of the first states to have introduced the legal regime of anti-terrorism. Before Pakistan, the UK had established a legal regime of anti-terrorism in the Northern Ireland in the 1970s. Later that anti-terrorism legal regime served as textual and substantive basis for the anti-terrorism acts of 2000 and 2001 in the UK. Interestingly, as I have demonstrated, Pakistan borrows both the textual and substantive content from the British anti-terrorism acts for its own anti-terrorism acts of 1997, 2001, and 2004. I also trace the genealogy of the anti-terrorism legal regime in Pakistan and the UK to the colonial regime of security in India. In the early 19th century, two regulations—the Regulation X of 1804 and Regulation III of 1818—initiated the colonial regime of security. The textual and substantive content of these regulations was strengthened, increased and carried forward by the subsequent colonial legislations. In the 20th century, the two World Wars impelled the British government to introduce a regime of security at home as well as in the Northern Ireland, which was not very different from the one established in colonial India. Accordingly, the Defence of the Realm Acts and Regulations were passed. These acts and regulations were adapted for India as the Defence of India Acts and Regulations (1919, 1939). After

(1)…who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
(2)…who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”
independence in 1947, the two post-colonies of India and Pakistan adopt the colonial regime of security. Due to domestic political problems as well as external wars, the colonial legal regime of security is adopted in both Pakistan and India. Recently, in the wake of the War on Terror, security laws have once again been enforced in Pakistan, but only with a new name, the anti-terrorism acts. However, the textual and substantive content the anti-terrorism acts is not very different from the old colonial security laws.
Conclusion

Almost four years after the last declaration of emergency and suspension of the constitutional order in Pakistan in 2007, once again rumors are flying around the country that a coup d’état is in offing. In the aftermath of the US Special Forces attack on Osama bin Laden’s hideout inside Pakistan on May 3, 2011, the relationship between the Pakistan Army and the executive began to deteriorate. In the days that follow the attack, a political scandal, as known as the Memogate Scandal, begins to unfold and gives a further blow to the already deteriorating relationship between the army and the executive. A controversial article in the Financial Times, by Mansoor Ijaz, a Pakistani-American businessman, initiates the scandal. Ijaz claims that Asif Ali Zardari, the President of Pakistan, tried to reach Admiral Mike Mullen and the American military high command requesting them to assist him in establishing executive control over the Pakistan Army and the Inter-Services Intelligence agency (ISI). The article catches extraordinary attention in Pakistan. It leads to a power showdown between the army and the executive. The government orders an inquiry commission to find facts in the scandal. But interestingly, the army and the executive reach an understanding before the inquiry commission could find facts and make them known. For our purposes what is significant to notice from the entire episode of the Memogate Scandal is how the circumstances for a coup d’état and constitutional disruption quickly build in Pakistan.
On the other hand, recently (July 2011) the chief cleric of the Red Mosque has vowed that he would continue to struggle for the replacement of the current constitutional order with the Sharia. To government’s dismay, over the last couple of years several new unlicensed mosques have been built in Islamabad. In this scenario, it is likely that at some point in future the issue of unlicensed mosques is going to produce confrontation between the government and the Islamists.

In short, the two major threats to the constitutional order—the army coup and Islamists’ demand for Sharia—continue to exist. Hence as the possibility of constitutional disruption looms large in Pakistan, I suggested that in order to strengthen the constitutional democracy, there is an urgent need for a vigorous debate on the earlier constitutional disruptions, demand for the replacement of democratic constitutional order, and the judicial decisions on the same. In pursuance of this suggestion, in this dissertation I shed light on both the earlier constitutional disruptions and the demand for its replacement. And in order to make my discussion meaningful I engage constitutional theory and carry out a detailed study of various judicial decisions.

General Pervez Musharraf disrupted the constitution twice, first in 1999 and then in 2007. Interestingly, the Supreme Court validated the first constitutional disruption on the basis of the doctrine of state of necessity, but it invalidated the second. In its earlier decisions the court validated the coups on either Kelsen’s theory (1958) or the doctrine of state of necessity (1977). But in 1972 the court neither accepted Kelsen’s theory nor the doctrine of state necessity
as the legal basis of the dictatorial regime. Given the inconsistency in judicial decisions, some scholars suggested that the judiciary should avoid from making decision on the cases involving constitutional disruption. They made the suggestion in the backdrop of, what they called, the “fait accompli” which faces the courts as a result of the coup d’état. They argued that the courts have no choice but to validate the coup d’état. Therefore, they proposed that instead of validating, courts should abstain from making judicial decision. However, I argued that they fail to observe that the function of court while adjudicating on the cases of constitutional disruption is not merely to announce decisions as to the validity or invalidity, but also to engage in yet more important task of explaining what constitutional disruption is and how does it come about. Accordingly, I begin with the Dosso case arguing that when the Dosso court resorted to Kelsen it was this task of explaining the constitutional disruption and how it came about that the court wanted to address. Unfortunately, the subsequent benches of the court neglect to take up this task. Rather they dismiss it as only an academic exercise.

Abstaining from making decision, practically speaking, is not much different from a validation decision. Therefore, I suggested that the judiciary should make decision. It is in the details (or substantiation) of its decision that the judiciary can throw (critical) light on the nature of the problem. In this way the judiciary can take up educative and critical role for the politicians, statesmen, generals and in general the public. As I demonstrate above that the problem of constitutional disruption in Pakistan is going to last in near future, therefore the educative and
critical role of judiciary can assume greater importance in strengthening the constitutional democracy.

In order to enhance our understanding of the question of constitutional disruption and to carry forward the debate on it, I juxtapose Pakistani court's application of Kelsen's constitutional theory with that of Carl Schmitt’s. I find that Kelsen’s theory was not much help to the courts because, a) it does not explain well the phenomenon of constitutional disruption, and that b) it focuses more on the issue of legality than on legitimacy. On the contrary, Schmitt’s theory begins with the problem of constitutional disruption and remains centered on the issue of legitimacy. For Kelsen, constitution is merely a system of legal ascriptions. But for Schmitt constitution is the dynamic emergence of political unity—an element of the becoming. The juxtaposition of the two conceptions of constitution when brought to the central stage of constitutional politics in Pakistan helps us understand how political crises lead toward constitutional disruption. When constitution is thought of as a fixed and static legal ascription, rather than a dynamic and evolving legal system, then the constitution is thought of as part of the problem. Interestingly, the courts, following the precedent set by the Indian court, have sought to find something fixed and immutable in the Pakistani constitution, which they term as basic structure. On the contrary, I argue that the guarantee of constitutional continuity lies in an understanding that takes the constitution as an element of the becoming. In other words, the guarantee lies in the continuous exercise of the political will and dynamic emergence of the constitution.
In 1972, the Supreme Court of Pakistan declines to accept Kelsen’s theory. In stead of contriving a legal logical supposition as the Grundnorm of the constitution, the court holds that one of the pre-constitution resolutions, called the Objectives Resolution, was the Grundnorm. The decision marks an important change in the understanding of constitution. Indirectly, the Court observed that the Islamic injunction, values and social goals were the Grundnorm of the constitution. On the other hand, as I demonstrate, Schmitt had criticized Kelsen’s theory for eliminating the sociological, including the religious, elements from the constitutional order. On his part, Schmitt visualized that at the heart of modern constitutional order existed a void, an absence of legitimating myth (or ideology) leaving it vulnerable to the tendencies of political instability. Moreover, he thought it “both possible and politically imperative to uncover the theological thought forms once used to imagine, build and defend the European state.” Similarly, I demonstrate that the Pakistani court saw a void and absence of legitimating myth at the heart of the constitutional order, and therefore it proposes that the Islamic thought-form could fill the void, provide a legitimating myth, and esprit de corps. However, as the Islamic thought-form, more specifically the Islamic injunctions, assume normative existence in the constitution a) there arises a question relating to static and dynamic nature of the constitution, and b) there arise gaps and antinomies between the religious and the secular-positive part of the constitution. These gaps and antinomies, I further argue, give constitutional form to the Islamists’ revolt against the peculiar constitutional order.
Apart from the gaps and antinomies between the secular and religious parts of Pakistan’s constitution, there exist gaps and antinomies within each of those parts. For instance, in the secular part of the constitution, Article 10 provides for the fundamental right of freedom from arbitrary arrest and detention. However, in the same article an exception is made. Those persons who are involved in the offences against the security, peace, and ideology of the state are not guaranteed the freedom from arbitrary arrest and detention. This exception in the constitution, in wake of the War on Terror, allows the government to establish a detailed system of laws known as anti-terrorism legal regime. The anti-terrorism legal regime stands as a parallel criminal code alongside the original criminal code of 1898. Constitutionally, it widens the gap and antinomy between the provisions of fundamental rights and their derogatory provisions. However, I demonstrate that the gap between fundamental rights and their derogatory provisions is not a contrivance of Pakistan’s constitution-makers, but it goes back to colonial times, and today can also be seen in the constitutional orders of the UK and the US.

To safeguard against constitutional disruption, Pakistani constitution-makers provided for the law of high treason in Article 6. The origin of the law of high treason in Pakistan goes back to the application of Kelsen’s theory, and the German law of high treason in general. However, despite having the law of high treason, constitutional disruption could not be stopped. Interestingly, the court does not invoke the law of high treason. It is only in 2007, in the Sindh Bar Association case, the court not only invalidates Musharraf’s suspension of the constitution, but also boldly observes that in suspending the constitution he
committed high treason. I read this decision in detail and demonstrate that the relationship between law of high treason and the constitution has transformed. The court charges Musharraf of high treason after finding that he violated the basic structure of the constitution and not because he also violated other provisions.
**Table of Cases**

**PAKISTAN**


*B. Z. Kaikaus and 10 Others v. President of Pakistan and 15 others* [1980] PLD 160 (SC)

*Brig. (Retd.) F.B. Ali and another v. The State* [1975] Supreme Court 506 (SC)

*Chaudhary Tanbir Ahmad Siddiky v. The Province of East Pakistan and others* [1968] PLD 185 (SC)

*Federation of Pakistan et al. v. Moulvi Tamizuddin Khan* [1955] FC 240


*Labour Federation of Pakistan v. Pakistan and another* [1969] PLD 188 (HC Lahore)

*Nusrat Bhutto v. Chief of Army Staff* [1977] PLD S.Ct. 657 (SC)

*Qazi Hussain Ahmed v. General Pervez Musharraf, Chief Executive,* (2002) 23 Part-II NLR Supreme Court Judgments 665

*Sindh High Court Bar Association v. President General Pervez Musharraf,* PLD 879 (2009)

*Reference by His Excellendcy the Governor-General* [1955] PLD 435 (FC)

*State v. Dosso* [1958] PLD 533 (SC)

*State v. Abdul Wali Khan and others* [1977] PLD Journal 315 (Special Court)

*State v. Zia-ur-Rehman and Others* [1973] PLD 49 (SC)


Zia-ur-Rehman v. The State [1972] PLD 382 (HC Lah.)

OTHER JURISDICTIONS

Ex Parte Bollman [1807] 8 US 75
His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another (1973) AIR 1561 (SC)
I.C. Golak Nath v. Punjab (1967) AIR 1463 (SC)
Matanzima v. President of the Republic of Transkei (1989) 4 S. Afr. L.R. 989 (General Division Court)
Minerva Mills Limited v. Union (1980) AIR Supreme Court 1789
Chandrika Prasad v. The Republic of Fiji and Attorney-General (2001) NZAR 21 (High Court)
Respublica v. Malin [1778] 1 Dall. 34
Republic of Fiji v. Prasad [2001] NZAR 385 (Court of Appeal of Fiji)


Bibliography


——, ‘Pakistan High Court Refuses Musharraf Treason Charges Petition’, August 28, 2009.


Iyer, Venkat, States of emergency: the Indian experience (Butterworths India 2000).


Jennings, Ivor, Constitutional Problems in Pakistan (University Press 1957).


——, Der Soziologische und der juristische Staatsbegriff (2nd edn, Tubingen 1922).

——, Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatz (2nd edn, Tubingen 1923).

——, Allgemeine Staatslehre, 1925.


Khan, Hamid, Constitutional and Political History of Pakistan (Oxford University Press 2005).


Lau, Martin, The role of Islam in the legal system of Pakistan (Koninklijke Brill 2006).


McIntosh, Simeon C.R., Kelsen in the ‘Grenada Court’: Essays on Revolutionary Legality (Ian Randle 2008).


Montero, David, ‘Pakistan: Disappeared, One Woman’s Search rouses a Nation’ (PBS September 6, 2007).


Schmitt, Carl, Die Diktatur (Duncker & Humblot 1921).

——, The Crisis of Parliamentary Democracy (Ellen Kennedy tr, MIT Press 1923).

——, Huter der Verfassung (Duncker & Humblot 1931).

——, Legality and legitimacy (Jeffrey Seitzer tr, Duke University Press 2004).

——, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab tr, University of Chicago Press 2005).

——, The concept of the Political (George Schwab tr, University of Chicago Press 2007).

——, Constitutional Theory (Jeffrey Seitzer tr, Duke University Press 2008).


Schwab, George, ‘Introduction’ in Political Theology; Four Chapters on the Concept of Sovereignty (University of Chicago Press 2005).


Smith, de, ‘Constitutional Lawyers in Revolutionary Situations’ (1968) 7 Western Ont.Rev.


Walter Benjamin, ‘Critique of Violence’ in Manfred B. Steger and Nancy S. Lind (eds), Violence and its alternatives: an interdisciplinary reader (Palgrave Macmillan 1999), 57.


Ziring, Lawrence, Pakistan: The Enigma of Political Development (Dawson Westview Press 1980).