

Comparative Constitutional Law and Policy



UNSTABLE CONSTITUTIONALISM

Law and Politics in South Asia

Edited by

MARK TUSHNET
MADHAV KHOSLA

CAMBRIDGE

UNSTABLE CONSTITUTIONALISM

Law and Politics in South Asia

Although the field of constitutional law has become increasingly comparative in recent years, its geographical focus has remained limited. South Asia, despite being the site of the world's largest democracy and having a vibrant if turbulent constitutionalism, is one of the important neglected regions within the field. This book remedies this lack of attention by providing a detailed examination of constitutional law and practice in five South Asian countries: India, Pakistan, Sri Lanka, Nepal, and Bangladesh. Identifying a common theme of volatile change, it develops the concept of "unstable constitutionalism," studying the sources of instability alongside reactions and responses to it.

By highlighting unique theoretical and practical questions in an underrepresented region, *Unstable Constitutionalism* constitutes an important step toward truly global constitutional scholarship.

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COMPARATIVE CONSTITUTIONAL LAW AND POLICY

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Unstable Constitutionalism

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Edited by

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32 Avenue of the Americas, New York, NY 10013-2473, USA

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Information on this title: www.cambridge.org/9781107068957

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First published 2015

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Tushnet, Mark V., 1945– author.

Unstable constitutionalism : law and politics in South Asia / Mark Tushnet,
Harvard Law School; Madhav Khosla, Harvard University.
pages cm. – (Comparative constitutional law and policy)

Includes bibliographical references and index.

ISBN 978-1-107-06895-7 (hardback : alk. paper)

1. Constitutional law – South Asia. 2. Law – Political aspects – South Asia.

I. Khosla, Madhav, author. II. Title.

KNC524.T87 2016

342.54–dc23 2015003344

ISBN 978-1-107-06895-7 Hardback

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Contents

<i>List of Contributors</i>	<i>page ix</i>
Part I: Introduction	
1 Unstable Constitutionalism <i>Mark Tushnet and Madhav Khosla</i>	3
2 How to Do Constitutional Law and Politics in South Asia <i>Sujit Choudhry</i>	18
Part II: Forms and Sources of Instability	
3 The Locus of Sovereign Authority in Nepal <i>Mara Malagodi</i>	45
4 Competing Nationhood and Constitutional Instability: Representation, Regime, and Resistance in Nepal <i>Mahendra Lawoti</i>	86
5 Constitutionalism and Extra-Constitutionalism in Pakistan <i>Mohammad Waseem</i>	124
6 The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement <i>Osama Siddique</i>	159
7 Elections in "Democratic" Bangladesh <i>M. Jashim Ali Chowdhury</i>	192

Part III: Reactions and Responses to Instability

8	The Indian Supreme Court and the Art of Democratic Positioning <i>Pratap Bhanu Mehta</i>	233
9	The Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences <i>Ridwanul Hoque</i>	261
10	Debating Federalism in Sri Lanka and Nepal <i>Rohan Edrisinha</i>	291
11	Constitutional Form and Reform in Postwar Sri Lanka: Towards a Plurinational Understanding <i>Asanga Welikala</i>	320
12	Constitutional Federalism in the Indian Supreme Court <i>Sudhir Krishnaswamy</i>	355
	<i>Index</i>	381

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PART I

Introduction

Unstable Constitutionalism

Mark Tushnet and Madhav Khosla

One of the most significant developments in the study of constitutional law in recent years has been the comparative turn in the field. Although debates continue over whether and how domestic courts should rely on (or even refer to) foreign law in domestic legal disputes, the appropriate methodology for comparative analyses, and the potential and limits of comparative constitutional studies, many scholars and practitioners – including well-known judges – no longer believe that the task of constitutional law is solely domestic in nature.¹ Yet, despite the enthusiasm for comparative constitutional law and the emerging systematization of comparative work, the field has developed unevenly. A few countries figure in numerous studies: the United States; the United Kingdom and other Commonwealth jurisdictions, such as Australia and Canada; Germany; France; Israel; and South Africa. Other nations and even regions are neglected – and not merely because they are small in population or have little significance for international relations. This is neither entirely unexpected nor unintentional. Some countries invariably will inform comparative queries more than others, and the jurisdictional imagination adopted by scholars and practitioners will turn on the curiosities that animate their work.

The uneven development of comparative constitutional law has rendered the field only modestly comparative – focusing on a few select jurisdictions – rather than truly global. In particular, Asia has received less attention than we might expect. Moreover, in Asia, whereas there have been notable contributions on East Asia, rather little attention has been devoted to South Asia. In that region, India is the only country to appear in comparative discussions,

¹ For an exploration of methodological questions and concerns, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (New York: Oxford University Press, 2014).

but the attention here is also less than we would expect, focusing primarily on questions that are of immediate interest to the West, such as the recognition and adjudication of social rights. This lack of attention is unfortunate because South Asia is a region of vibrant if rambunctious constitutionalism. Many South Asian nations face profound social and political challenges that they seek to address within their specific constitutional traditions.

A major motivation for this volume, therefore, is to include South Asia in the comparative discussion. This attempt expands the countries that currently constitute the field, and it also broadens the field's inquiries and the terms on which it is conducted.² Other than a recent valuable collection of essays – to a large extent, focused on religion's place in South Asian constitutionalism – there have been few attempts to bring together South Asia's different nations and grapple with their constitutional predicaments.³ One reason may be that many of the issues now arising in South Asia implicate questions of basic constitutional design in nations where design choices are self-evidently bound up with political contention. As a result, scholars may think that the tools of comparative politics, with an emphasis on power, are more appropriate for those studying the region than the tools of comparative constitutional law, with an emphasis on law as sufficiently distinct from power to warrant separate consideration.

This volume considers five South Asian nations – Bangladesh, India, Nepal, Pakistan, and Sri Lanka – in an attempt to understand the region as a whole. These nations are dissimilar in important respects, and each has been subject to varying degrees of interest among comparative constitutional lawyers. Having survived as the world's largest democracy and with an active and politically significant Supreme Court, India is the best-known country in the region. Pakistan and Sri Lanka have invited some degree of interest: Pakistan in part because of its geopolitical importance and Sri Lanka because of its violent civil conflict. Both seem to be nations with long-term constitutional crises. In Pakistan, this is represented most starkly by tensions between military and civilian rule, which in many ways has defined the nation's history. In Sri Lanka, the crisis was the civil war between the Sinhalese majority and the Tamil minority populations. The other two countries examined herein – Nepal and Bangladesh – generate very little interest, despite the fact that the former is

² For instance, a recent contribution on linguistic nationalism and constitutional design in South Asia is a fine example of this. See Sujit Choudhry (2009), "Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia," 7 *International Journal of Constitutional Law* 577.

³ Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds.), *Comparative Constitutionalism in South Asia* (New Delhi: Oxford University Press, 2013).

involved in one of the most intense constitution-making processes in the world and the latter has been under democratic rule for more than two decades.

Despite the important differences that characterize their history and politics, the five South Asian countries explored in this volume share more than geography. In particular, in one form or another, constitutional developments in these countries represent recurring tensions that lie at the intersection of law and politics. Such tensions are part of any constitutional democracy, but what makes the South Asian experience different and, in this respect, unique is a far greater degree of conflict between substantive normative formulations of the law and the social and political realities to which it is required to conform. In some nations, this tension is managed successfully and less so in others.

The character of South Asian constitutionalism is best described, we believe, by the term *unstable constitutionalism*. This refers to a phenomenon in which all participants in national politics appear to be sincerely committed to the idea of constitutionalism – if not always a fully liberal constitutionalism, then certainly one that hopes to establish reasonably permanent institutions with the capacity to address issues of daily governance – yet they struggle to settle on a stable institutional structure embodying a form of constitutionalism appropriate to their nation. The design issues are significant: a unitary national government, symmetrical or asymmetrical federalism, confederation, and more; multiculturalism, plurinationalism, or the dominance of minorities by majorities, and more. The instabilities can be described as arising from an inability to achieve stable agreement on any single design choice because each is a plausible option.

The theoretical commitments thought to define constitutionalism share an uneasy relationship with on-the-ground pressures that the politics of these regions generates. The term *unstable constitutionalism* aims to capture the difficulties that the law faces in mediating between legal norms and sociopolitical facts, as well as the pressing challenges involved in giving constitutionalism a character that can move a nation from civil disorder to stability, thereby importantly transforming persistent features of the nation's experience. We recognize that constitutional instability can be thought of as a difference of degree rather than of type. Nevertheless, it illustrates a different point of emphasis and concern for constitutional discussions than those familiar in the West. The central concern for the countries under study, for example, is not interpretive debates about a constitution's text or the appropriate role of Constitutional Courts in well-functioning democracies; rather, it is questions of constitutional design and negotiation that can address and resolve pressures on the overall system and the domestic risks to which it is exposed. Although constitutional instability often takes place under conditions of ethnic conflict,

social disorder, and profound diversity, the parties involved nonetheless are committed to the idea of a single state. They want to arrive at some type of constitutional contract rather than simply secede and not contract at all; the tensions exist because of disagreement about the terms of the contract.

We explore the theme of unstable constitutionalism in two ways: by studying the *forms* and *sources* of instability and the *reactions* and *responses* to instability. Constitutional instability can be revealed in several ways and can occur for various reasons. It may involve recurring extra-constitutional pressures on a constitutional system and extra-legal sites of power that challenge the system. On other occasions, institutions within the formal legal framework exercise powers in ways that begin to threaten the overall stability of the system. Forms of instability can persist and prevent the very construction of an institutional framework – that is, process-based and substantive disagreements impede constitution making. Similarly, there can be many responses – both intentional and inadvertent – to constitutional instability. A constitutional system may have the stresses that typically engender instability but develop institutional innovations – sometimes successfully and less so at other times – to absorb and tackle this instability. On other occasions, there might be attempts to develop responses to unstable constitutionalism, but they might be locked in unproductive debates and struggle to be implemented. This volume explores these responses and related ways in which unstable constitutionalism manifests. After reading the nation-specific studies, one observation is forced on us: in one way or another, the Indian experience looms large over constitutional discussions throughout the region, similar to the U.S. experience in connection with discussions of Canada’s constitutional arrangements.

We emphasize that whereas politics is central to the creation of many of the tensions explored in this volume and equally central to any actual or potential response to such tensions, law is of great significance to a proper appreciation of the phenomenon under study. The conflicts and mechanisms explored involve disagreement over *legal* arrangements; innovations through *legal* design; and, ultimately, problems and solutions that are articulated in *legal* terms. Law, in these jurisdictions, is not merely epiphenomenal or inconsequential with respect to some larger force at work. Implicit is an understanding that legal norms and institutions also have the potential to shape sociopolitical realities in their own distinct fashion; for that reason, legal design matters. The precise phenomenon of unstable constitutionalism exists because law is brought into discussion with politics.

This volume begins by considering the methodological ways of studying South Asian constitutionalism. Sujit Choudhry’s chapter reflects on two

important themes in India's constitutional experience – the basic-structure doctrine and reservations – to show how the study of constitutional law *and* politics could be performed. Standard analyses of these themes, Choudhry demonstrates, are incomplete, and they give insufficient attention to how the legal and political landscapes integrate. Both the basic-structure doctrine and reservations are – albeit in different ways – techniques through which the instability of India's constitutional order has been preserved. This opening contribution allows us to better appreciate the political and legal logic behind the development of these techniques.

FORMS AND SOURCES OF INSTABILITY

Constitutional instability can take numerous forms. Disagreement might be so intense that countries find it difficult to even draft a constitution in the first place, despite widespread support among different political actors for establishing a constitutional framework. Once established, the constitutional framework might be subject to various types of instability. Institutions may cross their demarcated boundaries to such an extent that they threaten the division of labor on which the constitution rests and then attempt to usurp power from other institutions and relocate sovereignty. Here, the obvious example is the military; a less obvious example might be institutions of civil society, especially religion, that are protected by constitutional rights. A constitution also might be threatened by extra-constitutional forces, such as paramilitary or radical ethnic and religious groups, that seek to construct an entirely different constitutional order.

Nepal, which in recent years has struggled to write a constitution, is the first country under study in [Part II](#). Two chapters explore the reasons why Nepal's constitution-making process, currently underway, has been locked in stalemate and why attempts at nation-building in Nepal thus far have failed. Mara Malagodi's chapter conducts the novel experiment of juxtaposing the idea of sovereignty with the physical architectural forms of Nepal's state institutions. Drawing on a wide range of work in cultural studies – which emphasize the physical manner in which political aspirations are articulated – and combining this with historical institutionalism, Malagodi studies six periods in Nepal's constitutional history, from the Shah period beginning in 1769 to the present. She reveals how the various *capitol* structures in Kathmandu have physically represented the articulation of sovereignty throughout Nepalese history. For Malagodi, the instability in Nepal's constitutional order and the historical failure to arrive at a stable constitutional regime stems from an inability to entrench the doctrine of popular sovereignty and to secularize political

authority. The failure of Nepal's various constitutional arrangements to give due importance to the representative arm of government, reining in monarchical and executive power, and to respond to calls for an inclusive democratic state have been notable features in its recent history. By exploring these features, Malagodi's chapter reveals how tensions between political actors over the location of sovereignty have manifested.

Mahendra Lawoti's chapter on Nepal has a different point of emphasis, focusing on the relationships among constitutional instability, identity politics, and diversity. Studying how Nepal's various constitutional arrangements have addressed the question of diversity and the degree of participation they have granted toward different groups, Lawoti argues that differences over the accommodative character of the nation-state comprise the reason behind unstable constitutionalism in Nepal. Exploring the transition from earlier constitutional arrangements to the Interim Constitution of 2007, Lawoti considers responses to diversity over time and why the traditional nation-state model was initially challenged. In doing so, his chapter highlights the struggle among different groups and multiple interests in Nepal throughout its constitutional history, as well as the nation's inability to construct a constitutional order that can unify without imposing the character of a single identity. Nepal's recent peace process and its nation-building attempts after the Maoist insurgency have drawn considerable attention.⁴ Together, the chapters by Malagodi and Lawoti capture the constitution-making feature of this transition and bring to light the reasons why constitution making in Nepal has been such a troubled affair.

Pakistan, the next country considered, is in many ways an ideal candidate for the study of constitutional instability. For much of its history, Pakistan has oscillated between military and civilian rule and has been a country defined by extra-constitutional pressures on its formal constitutional system. Mohammad Waseem's chapter explores three forms of instability that have threatened Pakistan's constitutional order. The first form consists of challenges to parliamentary sovereignty by the bureaucracy and – later and most notably – by the military.⁵ These challenges often placed the judiciary at the center of action – called to adjudicate the legality of such pressures – and the institution played a key role in legitimizing various extra-constitutional challenges. Second,

⁴ See Sebastian von Einsiedel, David M. Malone, and Suman Pradhan (eds.), *Nepal in Transition from People's War to Fragile Peace* (New York: Cambridge University Press, 2012); Prashant Jha, *Battles of the New Republic: A Contemporary History of Nepal* (London: Hurst Publishers, 2014).

⁵ For a recent study of the military in Pakistan's history, see Aqil Shah, *The Army and Democracy: Military Politics in Pakistan* (Cambridge, MA: Harvard University Press, 2014).

Pakistan has witnessed claims for decentralization and provincial autonomy by ethno-regional forces that have sought to restructure the relationship between the Pakistani state and its constituent units.⁶ Although significant devolution was undertaken by the 18th Amendment to the Constitution in 2010, the appropriate sharing of power remains a matter of intense political contestation. The third source of instability explored by Waseem is religion, which manifests through attempts at *shariatization* of the state and the steady increase in the religious character of Pakistani constitutionalism. Waseem's chapter brings into sharp focus the need to understand the role of radical Islamic groups, ethnic forces, and actors such as the bureaucracy and military if the character of Pakistan's constitutional order and the power dynamics within which it operates is to be understood.

Osama Siddique emphasizes a different institutional actor in Pakistan – the judiciary – and examines its role in contributing to unstable constitutionalism. The judicialization of politics is one of the most important developments in constitutional democracies around the world.⁷ The literature on judicialization typically emphasizes the *political* circumstances, including the acceptability of strong judicial power by different political actors, under which courts expand their ambit of operation. Siddique acknowledges the role of political factors in Pakistan but contributes to the burgeoning scholarship on judicialization by highlighting instead the major role that individual judges – and their personal ambitions and efforts – can play in this process. Appreciating the strategic interventions by judges, the particular features of their behavior, and the qualitative nature of judgments is central, Siddique suggests, to understanding why Pakistan's judiciary is such a powerful institution. In addition to intervening in the literature on the judicialization of politics, Siddique's chapter supplements previous studies on the influential role of the judiciary in shaping Pakistan's constitutional trajectory,⁸ as well as more recent reflections on judicial independence and accountability in Pakistan.⁹ Siddique's specific focus is on the Supreme Court after the Lawyers' Movement – a protest movement in 2007 following President Pervez Musharraf's removal

⁶ See, generally, Maryam S. Khan (2014), "Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity and Group Conflict," 30 *Harvard Journal on Racial & Ethnic Justice* 77.

⁷ See Ran Hirschl (2006), "The New Constitutionalism and the Judicialization of Pure Politics Worldwide," 75 *Fordham Law Review* 721; Ran Hirschl (2008), "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 93.

⁸ See Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995).

⁹ See Anil Kalhan (2013), "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," *Vanderbilt Journal of Transnational Law* 46: 1.

of Chief Justice Iftikhar Muhammad Chaudhry – and his analysis covers the Chaudhry Court’s expansion of power after its reinstatement. Regarding the Pakistani Supreme Court as the most activist in the region, Siddique explores the implications of its dramatic rise and the instability that it has brought to Pakistan’s constitutional system.

The final chapter in [Part II](#) considers Bangladesh’s remarkable experiment in conducting elections. Given that free and fair elections are at the heart of any democracy, constitutional arrangements in this regard assume great significance. New democracies often have given special attention to elections; India is a notable example with its unique Election Commission – a body that is often credited with conducting uncontroversial elections in an otherwise corrupt nation.¹⁰ Since Bangladesh’s emergence from military rule two decades ago, few issues have dominated its constitutional discourse as much as the electoral process. In 1996, the 13th Amendment to the Constitution of 1972 introduced a system of “caretaker governments” that gave the judiciary an extraordinary role in overseeing elections. M. Jashim Ali Chowdhury’s chapter is a study of this caretaker-government system that explains the historical and legal circumstances in which it arose and highlights its adverse impact on the Election Commission, the judiciary, and the democratic politics in Bangladesh more generally until it was scrapped by the 15th Amendment in 2011. The Bangladeshi experience vividly illustrates the challenges involved in making constitutions perform in unsupportive political climates and the institutional damage that can occur by being insensitive to formal standards and conventions. Bangladesh’s political actors lack agreement on the central democratic exercise of policing elections, which has been a profound source of constitutional instability in the country.

REACTIONS AND RESPONSES TO INSTABILITY

How can countries respond to these and other forms of instability? This is an important question for constitutional scholars and actors in South Asia, and the chapters in [Part III](#) explore either real-world attempts to meet unstable constitutionalism or theoretical possibilities that might hold this promise. [Part III](#) begins with India, a country that appears (at first glance) to exhibit a reasonably stable constitutional regime – despite the regularity with which important amendments have been made to the Constitution – and thus seems

¹⁰ See Bruce Ackerman (2000), “The New Separation of Powers,” 113 *Harvard Law Review* 633; Lloyd I. Rudolph and Susanne Hoeber Rudolph, “Redoing the Constitutional Design: From an Interventionist to a Regulatory State,” in Atul Kohli (ed.), *The Success of India’s Democracy* (Cambridge: Cambridge University Press, 2001).

an odd contender in a discussion on constitutional instability. Given its level of poverty and the presence of deep social and ethnic cleavages, there is no doubt that the success of India's democratic and constitutional experiment has defied conventional political science.¹¹ However, it is precisely for this reason that India is one of the more important case studies in our analysis. It has all of the features of a polity in which constitutional instability is likely to arise – unlike, for instance, a rich homogeneous Western European democracy – yet provides an example of how countries can respond successfully to the challenge of unstable constitutionalism. Pratap Bhanu Mehta offers one perspective on the Indian experience by examining the use and nature of judicial power. Whereas much of the literature, both in India and in comparative constitutional law, has considered the Indian Supreme Court's role in public-interest litigation and socioeconomic rights adjudication, Mehta turns instead to the underpinnings of India's judicial authority and the strategies and forms of judicial reasoning that define Court behavior. The Indian Supreme Court, Mehta argues, assumes its role in response to the drama of Indian politics, and its adjudicatory style – a style that emphasizes conflict management – departs from traditional rule-of-law understanding. To substantiate this account, Mehta considers the Court's recent role as an anticorruption and accountability institution, shedding light on the further issue of how we might think about constitutionalism in an age of corruption.

The Indian Supreme Court's approach allows it to respond to and contain certain forms of instability. Rather than choosing winners, it tries to accommodate different claimants. It is interesting to notice that whereas the exercise of judicial power has been a *source* of constitutional instability in Pakistan, as explored in Siddique's chapter, it has had the opposite effect in India. The Supreme Court's democratic positioning to which Mehta draws our attention may not necessarily be unprincipled in nature, but it embraces forms of judicial reasoning that depart from our traditional understanding of rules, formalism, precedent, and structures of authority considered integral to the rule of law. A certain instrumentalism, rather than integrity of process and interpretation, informs such adjudication. Perhaps the form in which judicial power is exercised – and its acute sense of its own position in India's political institutions – accounts for some of the difference with Pakistan.

Ridwanul Hoque's chapter draws our attention to judicial power in a third country: Bangladesh. Choudhry's chapter on caretaker governments in Bangladesh captures some of the constitutional instability that pervades that

¹¹ See Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (New York: HarperCollins, 2007), 1–15; Ashutosh Varshney, *Battles Half Won: India's Improbable Democracy* (New Delhi: Penguin, 2013), 3–44.

country. Hoque complements this with a careful account of the judicial response to unstable constitutionalism in Bangladesh. How has the judiciary engaged with politics, in which types of matters has it intervened, and what are the implications that its interventions have carried? By unpacking the Bangladesh judiciary's intervention in politics, from its understanding of the political question doctrine to its substantive review of constitutional amendments, Hoque captures how judicial power can play an important role in moderating political tension. Such success, however, requires "strategic intervention." Rather than serve to stabilize matters, excessive intervention that displays insensitivity to the overall political context may be a further source of constitutional instability.

The remaining three chapters of [Part III](#) focus on federalism and the relationship between a state and its constituent units. The possibility of federalism as a response to constitutional instability forms the subject of Rohan Edrisinha's chapter on Sri Lanka and Nepal. Throughout its history, Sri Lanka has struggled with managing tensions between the dominant Sinhalese and the minority Tamil population. Tamil claims include linguistic autonomy, federal power-sharing, and secession; the failure to resolve these claims through the political process led to the eruption of a civil war in 1983. Sri Lanka's constitutional crisis involved vital disputes over matters of substance but, as has been pointed out, it also involved major disagreements over process.¹² That is, it included differences over how substantive issues should be resolved, such as the status of different parties and the procedures necessary to the successful adoption of a proposed measure. In 2009, the Sri Lankan civil war came to an end with the defeat of the Tamil Tigers. Political solutions have been attempted in the war's aftermath, with pro-Tamil political groups agreeing to a federal solution and retreating from previous calls for secession; however, to date, there has been little progress. Edrisinha's chapter builds on his previous work concerning the prospects for multinational federalism in Sri Lanka¹³ and specifically explores the federal question in postwar-reform proposals. He also considers Nepal, a country in which federalism has similarly been a central part of the constitutional-reform process. The emphasis on federalism, as well as its position during various constitutional negotiations, complements the contributions of Malagodi and Lawoti by focusing on a different aspect

¹² Sujit Choudhry, "Constitutional Politics and Crisis in Sri Lanka," in Jacques Bertrand and André Laliberté (eds.), *Multination States in Asia: Accommodation or Resistance* (New York: Cambridge University Press, 2010), 103–35.

¹³ Rohan Edrisinha, "Multination Federalism and Minority Rights in Sri Lanka," in Will Kymlicka and Baogang He (eds.), *Multiculturalism in Asia* (Oxford: Oxford University Press, 2005).

of the constitution-making process in Nepal. Federalism in both Sri Lanka and Nepal emerged from discussions about constitutional mechanisms that could be inclusive of minority or excluded groups. Whereas in Sri Lanka, the demand for devolution and federalism by Tamil political parties never acquired much traction, in Nepal, all parties agreed in principle to Nepal being a federal republic but have struggled to agree on the particular form that federalism should take. The rising importance of ethnic identification is a central feature of the politics in both nations, and Edrisinha explores how this has shaped the federalism debate. The growth of ethnic-based parties has rendered agreement on federalism more difficult because of the tension between shared rule and self-rule – that is, the desire to both affirm and transcend identity. Furthermore, definitions of identities have been contested, with the recognition of any ethnic category necessarily obscuring differences in that category.

Two types of concerns have been at issue throughout the federalism debate in Nepal and Sri Lanka. The first type is federalism's social and political consequences: although federal models can absorb conflict, there are concerns that it also can exacerbate it. Ethnicity can empower but also divide and polarize, and concerns have arisen over whether federalism is a steppingstone to secession. The second type is normative and involves the relationships among federalism, constitutionalism, and democracy. Federalism, as Edrisinha sharply observes, presumes the rule of law and certain background commitments to equality and individual freedom. It has clear possibilities and limitations, and it cannot work effectively as a design tool in the absence of these background commitments. Both Nepal and Sri Lanka, Edrisinha argues, must appreciate what federalism can and cannot achieve.

Asanga Welikala continues the discussion about Sri Lanka and encourages us to imagine constitutional solutions outside of the traditional unitary–federal dichotomy if we are to move beyond the impasse following the end of the civil war in 2009. Whereas the constitutional reform debate in post-war Sri Lanka is remarkably diverse, each of the institutional options offered to address ethnic pluralism operates within the traditional unitary–federal dichotomy. This model of internal constitutional organization, Welikala contends, cannot respond adequately to the type of pluralism persisting in Sri Lanka. Because Sri Lanka has been unable to succeed in the enterprise of nation-state building and construct a stable representative order that can transcend identity and delink ethnicity from citizenship, Welikala questions the continued allegiance to the nation-state model. Instead, he develops the alternate possibility of *plurinational constitutionalism*, in which Sri Lanka's polity is understood as including more than a single "nation" within its territorial

space. Plurinational constitutionalism, Welikala suggests, can reorient the current debate in Sri Lanka by focusing on the normative principles underlying constitutional approaches to national pluralism and models of constitutional design that can accommodate it. Although there have been noteworthy efforts at moving beyond liberal constitutionalism in political theory – such as in the work of James Tully – there has been limited work on such possibilities in constitutional studies.¹⁴ Through the idea of plurinational constitutionalism and its application to Sri Lanka, Welikala makes a critical contribution to constitutional theory in general, in which nation-states are regarded as either federal or unitary in nature.

Sudhir Krishnaswamy's chapter on federalism similarly wrestles with federalism's accommodative potential. It focuses on cases involving two aspects of Indian federalism. The first is the very character of India's federal model. Indian federalism has always been regarded as somewhat unique, and early reflections on its design went so far as to ask whether India might be accurately termed a federation at all.¹⁵ More recently, political scientists have come to recognize India's "state-nation" structure, in which separate units are held rather than come together¹⁶ and have explored the federal model's capacity to satisfy state-based aspirations.¹⁷ Drawing on this literature and conceptual apparatus, Krishnaswamy considers how cases involving the representation in India's Upper House of Parliament, the redrawing of state boundaries, and the asymmetric federalism might be better understood through the state-nation framework.

Partisan federalism is the second important theme explored in Krishnaswamy's chapter.¹⁸ Here, the problem involves distinguishing genuine federal conflicts from those that have a purely partisan political character. Exploring regional emergencies and the proclamation of President's Rule, the appointment and role of governors, and the creation of new states, Krishnaswamy considers how the Indian Supreme Court attempted to draw this distinction and to grapple with the problem of partisan federalism. Together, the study of both themes illuminates ways in which the Indian Supreme

¹⁴ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

¹⁵ See, for example, C. H. Alexandrowicz (1954), "Is India a Federation?," *International and Comparative Law Quarterly* 3: 393.

¹⁶ See Alfred Stepan, Juan Linz, and Yogendra Yadav, *Crafting State-Nations: India and Other Multinational Democracies* (Baltimore, MD: Johns Hopkins University Press, 2011).

¹⁷ See Ashutosh Varshney (2013), "How Has Indian Federalism Done?," *Studies in Indian Politics* 1: 43.

¹⁸ For a recent exploration of partisan federalism in the United States, see Jessica Bulman-Pozen (2014), "Partisan Federalism," 127 *Harvard Law Review* 1077.

Court has responded to a diverse set of federal tensions and challenges. For more than six decades, India's constitutional democracy has been successful in important ways. The existence of an independent judiciary, a system of free and fair elections, a robust rights discourse, and the like – in short, the attributes of traditional liberal constitutionalism – all highlight the differences between India and its neighbors. However, as the contributions by Mehta and Krishnaswamy reveal, greater exploration is needed about whether India has succeeded in establishing a constitutional democracy that meets traditional rule-of-law standards. Krishnaswamy's analysis, for example, raises questions about whether there are any guiding principles that must inform the creation of new states within a polity and whether certain types of federal asymmetries can infringe citizenship, equal treatment, and standards of public justification.¹⁹ An interesting example is the case of *R. C. Poudyal*, in which the Indian Supreme Court permitted the entry of a new state into the Indian Union.²⁰ Controversy arose over the terms of entry – in particular, the validity of a provision by which the state legislature would have quotas for certain groups in excess of their population, thereby departing from the norm in Article 332(3) of the Indian Constitution that requires reservations to be proportionate to a community's population. The Court allowed such quotas and the state's entry, emphasizing the diverse nature of Indian federalism. In response to concerns about democratic participation, it is interesting that the Court observed that the Constitution tolerated departures from the principle of "one person, one vote" and that this was not an absolute requirement. In other words, whereas India's federal design might reveal an admirable degree of flexibility and capacity for political reinvention, it also can raise important normative concerns.

The chapters in this volume share a common emphasis on constitutional design, a field of emerging importance in comparative constitutional law.²¹ Rather than focusing on interpretive debates or rights-based adjudication, the contributors consider the political context of constitutions and that context's impact on legal norms and institutional design. It is our hope that each theme explored will contribute to a larger comparative discussion. Battles for provisional autonomy and ethnic regionalism in Pakistan, the Indian experience with accommodative federalism, and the constitutional-reform debate

¹⁹ For a study of these concerns, see Madhav Khosla, *The Indian Constitution* (New Delhi: Oxford University Press, 2012), 44–86.

²⁰ *R. C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324.

²¹ For a recent collection of essays, see Tom Ginsburg (ed.), *Comparative Constitutional Design* (New York: Cambridge University Press, 2012).

in Nepal and Sri Lanka, for example, all share important similarities with an emerging comparative understanding of federalism as a tool to manage conflict, preserve certain communities, and ensure territorial integrity rather than as a tool for efficiency and accountability.²² Constitutional actors recognize these similarities. A recent study on federalism in India and Nepal shows how both proponents and opponents of identity-based federalism in Nepal's ongoing debate draw on the Indian constitutional experience.²³ All three countries move beyond the standard account of federalism as a contract between sovereign units and embrace a far more malleable concept. Other chapters similarly enrich our understanding of standard debates. The constitutional recognition of democratic norms remains a matter of growing comparative importance, and caretaker governments in Bangladesh present a novel addition to the study of the law of democracy and electoral practices. At a time of growing interest in how judiciaries expand and sustain their powers, the chapters on judicial power in India and Pakistan emphasize how this power develops through engagement with other political institutions and in the crucible of democratic chaos, on the one hand, and through the peculiar techniques of courts and judges on the other. The case of Pakistan is instructive for the pressures it has witnessed, most notably by the military, on parliamentary legitimacy – a form of tension that shares similarities with Nepal, where the constitution-making process has stalled in part because of disagreements over the location of sovereignty. The other notable feature of Nepal's constitution-making process has been its failure to enlist commitment across interest groups; its continually evolving list of constitutional proposals makes it one of the most important case studies on constitution-making processes today. In addition to the lessons that might be drawn from these varied experiences, we hope that the idea of unstable constitutionalism will sharpen our understanding of the complex interactions by which constitutional systems endure and collapse.²⁴ South Asia is a site of remarkable constitutional experimentation – one that presents unexpected ways in which constitutional stability might be threatened and novel techniques through which it might be sustained. Furthermore, the distinction between the forms and sources

²² See Sujit Choudhry and Nathan Hume, "Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism," in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011).

²³ See Sara Schneiderman and Louise Tillin (2015), "Restructuring States, Restructuring Ethnicity: Looking across Disciplinary Boundaries at Federal Futures in India and Nepal," *Modern Asian Studies* 49 (1): 1–39.

²⁴ On constitutional endurance, see Zachary Elkins et al., *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009).

of instability and the reactions and responses to it merits further discussion. Certain responses to instability, for instance, might engender their own forms of instability, pacifying some tensions only to provoke others. Together, these chapters highlight only some aspects of constitutionalism in South Asia. However, given the relative absence of these countries in comparative constitutional law, our goal is that this volume will confirm that the constitutional tensions that define South Asia indeed have global significance.

We thank the South Asia Institute of Harvard University, the International Legal Studies Program and the Islamic Legal Studies Program at Harvard Law School, and Richard Tuck for their support of this project.

How to Do Constitutional Law and Politics in South Asia

*Sujit Choudhry**

INTRODUCTION

The study of South Asia has been neglected in the vast and growing field of comparative constitutional law and politics. Along which dimensions has this neglect occurred? In the simplest terms, South Asian jurisdictions have been largely absent from important debates in the field. To consider just one example, in the past decade, an important point of comparative investigation has been the application of bills of rights to private actors (i.e., horizontal effect) and the related issues that this raises for the institutional allocation of responsibility among apex courts (i.e., Constitutional Courts and Supreme Courts), lower courts with jurisdiction over ordinary law, and legislatures. This work blends doctrinal analysis with institutionalist approaches to public law and courts. Like bills of rights in other jurisdictions, some of the Fundamental Rights in [Part III](#) of the Indian Constitution have a horizontal effect. Moreover, the writ jurisdiction of the High Courts and the original jurisdiction of the Supreme Court of India over [Part III](#) have fueled the horizontal seepage of [Part III](#), in turn shaping patterns of legal mobilization and altering the powers and status of the High Court and the Supreme Court in India's judicial hierarchy. Nevertheless, India has been “missing in action” in this scholarly conversation. Moreover, when South Asian jurisdictions have been included in comparative studies, the intellectual agenda has been set by the systems around which comparative constitutional law and politics have been framed – that is, the liberal democracies of the North Atlantic, South Africa,

* I presented earlier versions of this chapter at the South Asia Without Borders Symposium at Harvard University and at a workshop at Yale University. I benefited from helpful comments from Madhav Khosla, Alec Stone Sweet, and Mark Tushnet, as well as the participants at those sessions. Alec Webley provided superb research assistance. Any remaining errors are mine.

and Israel. For example, the study of Indian secularism in Jacobsohn's *The Wheel of Law* was motivated by debates about the constitutional architecture of religion–state relations in the United States and in Israel. Furthermore, the examination of socioeconomic-rights litigation in India in the 1980s in Fredman's *Human Rights Transformed* (2008) was informed by the constitutional debates launched by the South African constitutional transition a decade later.¹ The engagement with South Asia has been narrow and selective, approached through the lens of constitutional law and politics in constitutional systems implicitly understood as paradigm or central cases.

These axes of intellectual disengagement are mutually reinforcing and to respond to them requires an integrated scholarly strategy. At its foundation is the claim that we must study South Asia on its own terms. To come to grips with South Asian constitutional law and politics requires that we develop our research agendas around the actual practice of constitutional actors in South Asia. Although religion–state relations and socioeconomic rights have been important to constitutional practice, they have not been the only or, indeed, the central topics of concern. For example, as I have written elsewhere, across South Asia, the constitutional politics of official language status has been the principal driver of the reconfiguration of political space in the late-colonial and postcolonial periods.² Orienting the study of South Asian constitutionalism around the problems that have preoccupied constitutional actors opens the door to an alternative strategy of comparative case studies that shifts the field beyond the narrow set of jurisdictions that command central concern. The constitutional politics of official language policy, for example, links South Asia with Turkey and Spain, where a major axis of cleavage for substate nationalist mobilization has been language.

However, in addition to the questions of substantive focus and case selection, the study of South Asia has suffered from other methodological shortcomings. In this chapter, I focus on the disjuncture between the study of South Asian constitutional development and constitutional law in their examination of constitutional jurisprudence. Scholars of constitutional development have developed a literature on the politics surrounding the adoption and amendment of South Asia's various constitutions, especially the Indian Constitution, as well as the interinstitutional relationships between legislatures and the courts

¹ Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (New Delhi: Oxford University Press, 2003); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (New York: Oxford University Press, 2008).

² Sujit Choudhry (2009), "Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia," *International Journal of Constitutional Law* 7: 577.

regarding the interpretation of constitution and its enforcement. The judicialization of constitutional politics in South Asia – including the process of constitutional amendment – is pervasive and has been widely noted. However, scholars of South Asian constitutional development – mostly historians and political scientists – have generally offered highly truncated analyses of constitutional jurisprudence. Their institutional focus is constitutional assemblies and legislatures. Conversely, there is a substantial legal literature – produced by legal scholars and commentators – that has analyzed these judgments. This body of work is formalistic and doctrinal, and it is oddly divorced from the broader constitutional politics of which particular constitutional cases are a part – in a sense, the mirror image of work in constitutional development. I suggest that the research strategy for bridging the divide lies in a close reading of judgments. On careful examination, the leading judgments highlight how the broader constitutional politics was presented in terms cognizable under formal legal categories to the courts. Moreover, the courts signaled that they were alert to this broader politics and, at times, attempted to address the substantive concerns at play in lengthy and complex judgments that wrestled – often imaginatively – with the issues at play. What is sorely needed is an analysis of key cases that integrates the constitutional politics, occurring outside the courts, with the details of those judgments. In short, there is a gap between scholarly analysis and primary-source materials. Taking seriously those materials offers a promising platform for reimagining what the study of South Asian constitutional law and politics could look like.

In this chapter, I illustrate what the study of South Asian constitutional law and politics could look like if we addressed this cluster of methodological concerns in parallel. I do so through two vignettes, relying mostly on Indian constitutional materials. The first is the basic-structure doctrine, whereby the Supreme Court of India imposed substantive restraints on the power of constitutional amendment. The second vignette is India's system of reservations, or preferential hiring and admissions on the basis of caste. These two issues are central to constitutional politics in India.

THE BASIC-STRUCTURE DOCTRINE

The rise of the basic-structure doctrine is well known, so I present it only in outline. Article 368 of the Indian Constitution provides a mechanism for constitutional amendment. The constitutional text imposes procedural but not substantive constraints on the power of constitutional amendment, which on its face is otherwise unlimited. The basic-structure doctrine was developed

by the Supreme Court of India and imposes a set of substantive constraints on the power of constitutional amendment.

The Supreme Court of India developed the doctrine in the context of a lengthy legal–political saga concerning land redistribution, which was a dominant theme in Indian constitutional jurisprudence in the 1950s and 1960s. The national Parliament of India attempted to enact land-reform legislation that, crudely stated, sought to abolish the pre-independence system of tenure (i.e., the *zamindari* system) and redistribute land to peasants. The Supreme Court responded by striking down these laws on the basis that they breached the constitutional obligation to compensate landowners for deprivations of property.³ In response, Parliament amended the constitution to withdraw estates held under the *zamindari* system from the right to compensation and then to make the amount of compensation non-justiciable.⁴ It also enacted the Ninth Schedule to the Constitution, which listed an ever-increasing number of laws rendered entirely immune from constitutional challenge on the grounds that they infringed a Fundamental Right in Part III. The Supreme Court responded in *Golak Nath* by treating constitutional amendments as ordinary laws that were subject to the Fundamental Rights in the Indian Constitution, including the right to property.⁵ Parliament, in turn, responded through a set of constitutional amendments that asserted, *inter alia*, the plenary nature of the power of constitutional amendment.⁶ The Supreme Court famously responded in *Kesavananda Bharati*, which asserted the Court’s power to review the substance of constitutional amendments for compliance with the Constitution’s basic structure. This included the power of the courts to ensure that the amount of compensation paid for property compulsorily acquired by the state was not arbitrary.⁷

The doctrine has been in place since 1973 and continues to be used, albeit sparingly. It turns on a distinction between those amendments that amend a constitution (which are permitted) and those that damage or destroy it (which are prohibited). The content of the basic structure remains contested.

³ *The State of Bihar v. Maharajahdiraja Sir Kameshwar Singh of Darbhanga and Others* (1952) 1 SCR 889, AIR 1975 SC 1083; and *Karimil Kunhikoman v. State of Kerala* (1962) Supp 1 SCR 829.

⁴ These were the Constitution’s First (1951), Fourth (1955), and Seventeenth (1964) Amendment Acts.

⁵ *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

⁶ The Constitution’s Twenty-Fourth (1971), Twenty-Fifth (1971), Twenty-Sixth (1971), and Twenty-Ninth (1972) Amendments Acts.

⁷ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1469.

However, at a minimum, it includes constitutional supremacy, a republican and democratic form of government, secularism, separation of powers, judicial independence, and federalism. What is encompassed by each element of the basic structure is, in turn, a matter of ongoing dispute, in both the courts and constitutional politics more broadly.

The basic-structure doctrine has generated a substantial scholarly literature that, broadly speaking, falls into two intellectual traditions. One body of work is firmly anchored in legal scholarship and has been produced by constitutional scholars. It is squarely focused on the Court's judgments, which it examines from a number of angles. The first generation of scholars, influenced by emerging American constitutional scholarship on the counter-majoritarian dilemma spawned by *Brown v. Board of Education* and the Warren Court, was generally critical of the doctrine. The essence of the claim was that the Indian Constitution sets out a clear institutional division of labor between the courts and Parliament, whereby the former interprets and enforces the Constitution and the latter retains the ultimate power of constitutional amendment. In the face of textual clarity, the doctrine is a judicial usurpation of constituent power. P. K. Tripathi, a leading Indian constitutional scholar at the time, offered a devastating account of *Kesavananda Bharati's* internal inconsistencies and failures in reasoning.⁸ Tripathi had previously presented an equally vigorous attack against *Golak Nath*,⁹ and his essay on *Kesavananda Bharati* encouraged much debate over the Court's exact ratio.¹⁰ Rajeev Dhavan's book, *The Supreme Court of India and Parliamentary Sovereignty*, similarly explored the character of the decision, focusing on ideas of implied limitations, constituent power, legal and political sovereignty, and particular orientations of different judges.¹¹ The disagreement among the judges about the elements of the basic structure buttresses this view. These critiques of judicial activism were combined with a critique about the theory of political economy that appears to underlie the doctrine.¹² On this view, the "struggle between parliament and the court for supremacy in interpreting the constitution pitted proponents of the

⁸ P. K. Tripathi (1974), "Kesavananda Bharati v. State of Kerala: Who Wins?," *Supreme Court Cases (Journal)* 3.

⁹ P. K. Tripathi, *Some Insights into Fundamental Rights* (Bombay: University of Bombay, 1972), 1-44.

¹⁰ See Upendra Baxi (1974), "The Constitutional Quicksands of *Kesavananda Bharati* and the Twenty-Fifth Amendment," *Supreme Court Cases (Journal)* 45.

¹¹ Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty* (New Delhi: Sterling Publishers, 1976).

¹² L. I. Rudolph and S. H. Rudolph (1981), "Judicial Review versus Parliamentary Sovereignty: The Struggle over Stateness in India," 19 *Commonwealth & Comparative Politics* 19: 231.

oppressed, many without property, against the privileged few with property.”¹³ The Court’s jurisprudence on property rights was widely attacked in tones reminiscent of the attack on the *Lochner v. New York* jurisprudence of the U.S. Supreme Court a few generations earlier. These themes continue to be central in legal scholarship about the doctrine, although they have abated as the constitutional conflict over property rights and land reform recedes in policy relevance.

In recent years, however, legal scholars have come to accept the doctrine as a given and have shifted their focus to clarifying the doctrine’s boundaries. At the heart of this research agenda – set by Sudhir Krishnaswamy’s *Democracy and Constitutionalism in India*¹⁴ – is the idea that the basic structure is not merely a doctrine that limits constituent power but also applies to all exercises of public power. To a large extent, this shift in scholarly analysis tracks the trajectory of the jurisprudence, which has moved on from disputes over property rights to the role of the basic-structure doctrine in constraining exercises of executive power in other areas. For example, the doctrine was invoked to check the power of the President’s rule under Article 356 (which allows the central government to dismiss state governments) to require that exercises of that power comply with secularism. Another issue is whether the doctrine applies to legislative powers and, by implication, to the exercise of grants of statutory authority to the executive. Yet another question is whether the doctrine operates as a canon of constitutional interpretation. Krishnaswamy also explored the standard of review entailed by the “damage or destroy” test. As the range of public decisions to which the doctrine extends grows, the question of the standard of review ties the basic-structure-doctrine literature to broader debates about judicial deference that arise under other grounds of constitutional review.

Unlike some scholarship at the time (e.g., the works by Tripathi, Baxi, and Dhavan), the current legal literature on the basic-structure doctrine is largely devoid of an analysis of the political contexts that give rise to the underlying political disputes, the political constituencies that supported bringing those claims to the Court, how those political agendas were refracted through legal arguments, the relationship between the Court’s judgments and those broader political agendas, and how each decision provided political resources and/or created constraints that shaped subsequent litigation. In addition, the impact of the fragmentation of the Indian political-party system on the exercise of the power of constitutional amendment, how this has shaped the docket of

¹³ *Ibid.*, 236.

¹⁴ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (New Delhi: Oxford University Press, 2011).

basic-structure challenges, and what bearing this may have had on the relationship created by the doctrine between the Supreme Court and Parliament has attracted little commentary from legal scholars.

Other scholarly traditions have developed in different ways. Political theorists, such as Pratap Bhanu Mehta, considered the theoretical implications of limiting the amendment power and the conditions under which a basic-structure doctrine might be defensible.¹⁵ Such contributions have been few and far between, however, and the major non-legalistic intellectual tradition that developed has focused much less on the Court and its judgments, as well as on the current contours of the doctrine, and much more on the political disputes that came before the courts and gave rise to the doctrine. The major piece of scholarship is Austin's *Working a Democratic Constitution*, which charts the back and forth between Parliament and the Court. Methodologically, Austin sets out a grand historical narrative centered around key ideas, interests, individuals, and events. The broader intellectual project is not the doctrine itself but rather the consolidation of India's democracy. The lens through which Austin examines the question is the commitment of political actors to live under the Indian Constitution. Austin emphasizes that assessing fidelity to constitutionalism is not an abstract exercise; rather, he presupposes the distinctive character of the Indian Constitution as an instrument of "social revolution." The cases under the basic-structure doctrine are prominent elements in the story but are not the story itself, which begins with the disputes over property rights and (as discussed later) turns to the rise of Indira Gandhi, the Emergency, the 1977 election that voted Gandhi and the Congress Party out of power, and Gandhi's return to power until her assassination.

Austin does not give careful attention to the legal justification for the doctrine offered by the Court and the controversies it has generated among legal scholars. He approves of the Court's role and sets out a theory that justifies the basic-structure doctrine. For Austin, the Indian Constitution is a "seamless web" that instantiates underlying commitments to national unity and integrity, democracy (which includes the Fundamental Rights), and social revolution. At its adoption, the Indian Constitution reflected a degree of harmony or balance among the different strands of the seamless web. However, constitutional amendments distorted and threatened to destroy it, and these distortions fell into two categories. First, some amendments narrowed the scope of the right to property to permit redistribution, which upset the balance between

¹⁵ Pratap Bhanu Mehta, "The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure," in Zoya Hasan et al. (eds.), *India's Living Constitution* (New Delhi: Permanent Black, 2002).

democracy and social revolution. Second, other amendments put legislation entirely beyond the scope of Fundamental Rights review, which fundamentally changed the separation of powers by subordinating the judiciary to the Congress Party–dominated Executive and Parliament. The basic-structure doctrine was justified as a judicial measure to redress these distortions in the seamless web. However, Austin does not trace this theory through the details of the lengthy judgments, which in turn disables him from developing it into a full-blown theory of constitutional interpretation that provides the basis for wrestling with the legal dilemmas created by the doctrine because it contradicts the constitutional text.

The contrast between and the limitations of these two genres of scholarship are brought into focus by their treatments of the *Indira Gandhi* election case.¹⁶ Austin provides the following backdrop to the case. In 1975, Indira Gandhi was found guilty of committing electoral fraud arising from the 1971 election. Had it stood, the conviction would have stripped Gandhi of her seat in Parliament and barred her from seeking election to Parliament for six years. The judgment threatened to end Gandhi's political career. Gandhi's first response was to declare a state of emergency within weeks of the handing down of the judgment. Under emergency powers, the government detained approximately thirteen thousand individuals linked to opposition political parties and banned organizations. By presidential order, these detentions were immunized from judicial review. Freedom of the press was sharply curtailed. As Austin stated, "[W]ith the sweep of her hand, Mrs. Gandhi had snuffed out democracy."¹⁷ Firmly in control of the political process – indeed, with many opposition politicians in detention – Gandhi then introduced a series of constitutional amendments to immunize the exercise of emergency powers from judicial review and to protect her from being removed from office.

The constitutional amendment at issue in the *Indira Gandhi* election case was the Thirty-Ninth Amendment, which has two key features. Prior to the amendment, electoral disputes were adjudicated by the courts, which had the power to determine the validity of elections to Parliament. The amendment withdrew the jurisdiction of the courts over the conduct of elections of the Prime Minister and the Speaker of the Lok Sabha, authorized Parliament to enact a law to vest authority over electoral disputes with respect to these two individuals in another body, and immunized that law from constitutional challenge. The second feature of the law provided that no law made before the

¹⁶ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

¹⁷ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi: Oxford University Press, 1999), 309.

adoption of the Thirty-Ninth Amendment applied to the election of the Prime Minister and the Speaker, and any court order declaring such an election void was itself void and of no effect.

The Court struck down the amendment on the basis that democracy was an essential feature of the basic structure of the Constitution and the amendment jeopardized free and fair elections (although it also overturned Gandhi's conviction). Although the judgment is 696 paragraphs long, Austin's description covers a mere two paragraphs. Krishnaswamy, by contrast, engages in a doctrinal analysis of a number of issues raised by the judgment but largely fails to integrate the broader constitutional politics into his analysis. What is striking is that the arguments before the Court foregrounded the political context. Justice Beg candidly described the gist of the claim, that the power of constitutional amendment "has been really abused by a majority in Parliament for the purposes of serving majority party and personal ends which were constitutionally unauthorized."¹⁸ This was an argument that impugned the amendment on the basis that it had been enacted for a constitutionally impermissible purpose. Justice Beg stated that the amendment "was done, wholly and solely . . . with the object of validating the Prime Minister's election."¹⁹ Moreover, in addition to advancing Gandhi's personal agenda, the amendment was tainted by partisanship because the dispute over Gandhi's election was "really between a majority party and the numerically minority groups or parties," and the effect of the amendment was for the "majority party . . . to virtually act as the Judge in an election dispute between itself and minority parties whose cause . . . the election petitioner represents."²⁰

However, Justice Beg stood alone among the justices for impugning the Thirty-Ninth Amendment on this basis (although he saved it by construing it to not have these effects). Three other Justices (Chief Justice Raj, Justice Matthew, and Justice Khanna) also impugned the amendment for abrogating democracy, but for different reasons. One line of analysis held that the principle of free and fair elections required the judicial resolution of electoral disputes, which the amendment contravened. Another line of analysis posited that the amendment was unconstitutional because it declared Gandhi the victor in her election while at the same time repealing the law pursuant to such an election could have occurred. This raised the question of the electoral norms according to which the Thirty-Ninth Amendment could have declared her the victor. The argument was that in the absence of an electoral law for

¹⁸ *Raj Narain*, note 15, para. 390.

¹⁹ *Raj Narain*, note 15, para. 512.

²⁰ *Raj Narain*, note 15, paras. 512 and 623.

Parliament to apply to the election, the amendment was formally deficient. Because a basic feature of law is its generality, the narrow applicability of the Thirty-Ninth Amendment likewise was a formal deficiency.

Thus, the interesting question that arises is *not* why four judges on the Court judged the Thirty-Ninth Amendment to abrogate from democracy (I set aside Judge Chandrachud's concurrence, which reached the same result on different grounds). Rather, it lies in the different implications drawn from that abstract idea by Justice Beg and his colleagues and the choices made by each judge among those different implications. Because the formal and procedural conceptions of democracy did not require the Court to impugn the motives underlying the constitutional amendment, they arguably lowered the heat of the constitutional confrontation between the Court and Prime Minister Gandhi. At the time the reasons were presented, Gandhi enjoyed nearly unlimited authority, and a frontal confrontation by the Court might have triggered an attack on the Court itself. Indeed, in the 1971 election, she had run against the Court and secured a large Parliamentary majority that enabled her to enact the Thirty-Ninth Amendment, so this fear was real. By contrast, Justice Beg's argument was premised on the claim that the amending power had been abused for partisan and personal ends and, therefore, put the motives of the Prime Minister directly at issue. This way of explaining the choice of formal and procedural notions of democracy is distinct from but consistent with Baxi's analysis of the judgment. In *Courage, Craft, and Contention*, Baxi argued that "the Court was on the defensive" and that judgment "worked out a masterly strategy of accommodation, so that neither the regime nor the opposition could say that the Court failed them" because the Court struck down the constitutional amendment while dismissing the charges against Gandhi.²¹ In parallel fashion, one could argue that the formal and procedural notions of democracy offered a narrower and politically safer basis for the Court's ruling on the constitutionality of the amendment.

However, on closer examination, it is apparent that the procedural and formal arguments were motivated by the same concerns that lie at the root of Justice Beg's analysis. The stripping of the Court's jurisdiction to resolve electoral disputes was problematic because it left those questions in the hands of institutions that, as a result of party politics, were likely to fall prey to the risk of partisan abuse by the majority party, led by Gandhi. The formal deficiency of the amendment likewise suggested that the decision to declare Gandhi the victor of the election was nothing more than an exercise of "an

²¹ Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (Bombay: N. M. Tripathi, 1985), 77.

irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency.”²² Likewise, the amendment’s narrowness was inexplicable except by reference to partisan motives. Therefore, if the same concerns underlie all of the judgments, the question is how the judges wrestled with the institutional dilemma to present them directly or indirectly and what flowed from this choice. Was there a cost to not calling by name the constitutional danger posed by the Thirty-Ninth Amendment? Did avoiding a direct confrontation with Gandhi preserve the institutional capital of the Court but at the cost of establishing a direct link between the ways in which the constitutional harms of the Thirty-Ninth Amendment were understood in the broader constitutional politics? Were the alternative grounds for judgment sufficiently strong to police future abuses of the amending power?

In summary, a close reading of the *Indira Gandhi* election case illustrates that the Court was alert to this broader politics and attempted to address the substantive concerns in lengthy and complex judgments that wrestled, often imaginatively, with the issues at play. What the existing literature lacks is an analysis of the case that integrates the constitutional politics occurring outside the courts with the details of those judgments themselves, highlighting instead the choices and institutional dilemmas that the judges confronted.

Moreover, wrestling with these questions at this level of detail does not condemn the literature to being anything more than a mass of particular stories without an overarching analytic narrative. The basic-structure doctrine arose in the context of the domination of the Indian Parliament by the Congress Party, which alone and with its allies controlled the process of constitutional amendment. The course of the doctrine holds lessons for how one Supreme Court managed to check the power of a dominant political party through constitutional adjudication. In this account of the doctrine, the most important jurisprudential development is its extension beyond the property-rights context to the political process in the *Indira Gandhi* election case.

In this respect, the study of the case is part of a broader, global constitutional conversation about the ways that apex courts have confronted the abuse by a political party of its dominant position to preserve, enhance, and entrench its power through formally constitutional and democratic means. The problem of partisan entrenchment in democratic states is a widely noted phenomenon that occurs across regions and subtypes of democratic regimes. There is a sub-literature that focuses on the character of this problem in new democracies because of the frequent presence of dominant political parties. In these countries, the problem of partisan entrenchment thus becomes the problem of

²² *Raj Narain*, note 15, para. 327 (per Justice Matthew).

dominant-party entrenchment and is an element of the larger problem of democratic transitions and consolidation. In postauthoritarian states, this danger has been termed *authoritarian backsliding*. This topic is of growing interest, driven by contemporary constitutional developments in cases as diverse as Colombia, Hungary, and South Africa.²³ In this emerging transnational literature, the Indian cases figure as early examples of a court to protect a basic, procedural understanding of democracy – built around the ideas of political competition and alternation of power – from being subverted through democratic means from within. Why the Congress Party had not simply captured the Court is an issue that requires further research. Perhaps the practice of elevating High Court justices drawn from a legal profession that until that point had been largely separate and apart from Congress Party networks contributed to the insulation of the Supreme Court appointments process at that time. Although India is a postcolonial rather than a postauthoritarian case, it is nonetheless possible to read the *Indira Gandhi* election through this lens that links India to a different set of jurisdictions that lie outside the paradigm or central cases of comparative constitutional law and politics.

RESERVATIONS

Reservations on the basis of caste have been a central theme in Indian political life and in Indian constitutional politics in the post-independence period. The extensive jurisprudence on the constitutionality of reservations provides another platform to reimagine the study of constitutional law and politics in South Asia. The constitutional centrality of reservations is a product of the pervasiveness and role of the caste system. Hindus, who account for 85 percent of Indians, belong to *jatis*, groups that are linked historically to a traditional occupation in which membership is hereditary and that are endogamous. Traditionally, social life, ritual observance, and cultural practices are distinctive for each *jati*. *Jatis* are part of a highly structured, hierarchical division of occupational labor that served historically as the basis for the distribution of economic, political, social, and cultural power. The exact number of *jatis* is unknown, and this uncertainty is a source of constitutional controversy. *Jatis*, in turn, often are grouped into four *varnas* – Brahmins, Kshatriyas, Vaishyas, and Sudras – that sometimes are described as castes, with the *jatis* as subcastes.

²³ See Sujit Choudhry (2009), “‘He Had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy,” *Constitutional Court Review* 2: 1; Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, forthcoming 2015).

Beneath the four varnas are the Untouchables, which in legal terms are known as the Scheduled Castes.

One of the primary goals of the Indian Constitution was to launch a social revolution that would attack economic and social hierarchies, and the caste system was one of the principal targets. The most relevant provisions are Articles 15 and 16. Article 15(1) prohibits the State from discriminating on the basis of caste and Article 16(2) specifically prohibits discrimination on the basis of caste in public-sector employment. However, the Indian Constitution also contains numerous provisions that operate as exceptions to these prohibitions on caste discrimination. When the Indian Constitution was adopted, there was a single exception – Article 16(4) – which permitted reservations for “any backward class of citizens that, in the opinion of the State, is not adequately represented in the services under the State.”

The Constitution does not refer to *Other Backward Classes*, a term that was introduced into Indian political discourse by Prime Minister Nehru during the Constituent Assembly debates over the adoption of India’s Constitution. Rather, the only legal term is *backward classes*. As Galanter explained, at the time of Indian independence, “backward classes” was in use but had multiple meanings.²⁴ In one definition, it encompassed tribals – referred to in the Constitution as Scheduled Tribes (STs) – Scheduled Castes (SCs), and all other castes below Brahmins, Kshatriyas, and Vaishyas; in another view, the term excluded the STs and SCs. Another key point is the use of the term *classes* instead of *castes*, which has generated legal debates over the relationship between caste and class. In the Constituent Assembly, these different issues were raised but no resolution was reached. The Constitution does not define backward classes; rather, in effect, it delegated the definition to the central and state governments, subject to judicial oversight. For the central government, the Constitution created an institutional mechanism for the determination of what constituted a backward class by authorizing the president to appoint a Commission on Backward Classes.

Through administrative and political practice, the term *Other Backward Class* (OBC) has come to refer to those backward classes that are neither SCs nor STs; in essence, it defines OBCs as a residual category. As Jayal argued, as a residual category, OBCs are a heterogeneous group that lacks “any sociological basis,” whose meaning is elastic and has varied.²⁵ This lack

²⁴ Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (New Delhi: Oxford University Press, 1984).

²⁵ Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge, MA: Harvard University Press, 2013), 229–71.

of precision has allowed the definition to vary on a state-by-state basis and in central institutions. Indeed, the elastic nature of the term, coupled with the lack of precise census data, makes it difficult to state the percentage of India's population that falls into the OBC category – although it currently is believed to be a majority. Moreover, the lack of a clear definition has served as the basis for political mobilization to claim OBC status and its material and political benefits. As explained later, this consists of claims by specific jatis for recognition as OBCs.

In the area of public-sector employment, there are two sets of reservations that differ in terms of beneficiaries. The first set targets the SC/ST and was implemented soon after independence. Positions were reserved for members of these groups in proportion to their share of the population. For many years, these quotas were filled only in the lower and not the higher ranks of the bureaucracy. As Jaffrelot argued, the pattern of SC employment in the central administration tracked the caste hierarchy more generally.²⁶ In recent years, this pattern has begun to shift. However, overall, SC/ST reservations have never been politically controversial for two reasons: (1) the SC/STs were a minority that did not pose a challenge to the established distribution of political power; and (2) there was widespread consensus that SC/STs had a history of discrimination that called for radical measures such as reservations.

The second set is reservations for OBCs, which have politically mobilized around them for nearly all of India's postcolonial history. Two key events were the reports of two Backward Classes Commissions, the first in 1955 and the second in 1980. The main issue before the First Backward Classes Commission was the relationship between a caste and a class. As Galanter explained, in principle, caste was relevant in two senses: (1) it could be used as the unit of analysis to identify which groups could be potential beneficiaries of OBCs; and (2) it could be used as a measure of backwardness. The First Backward Classes Commission relied on caste in both senses, producing a list of OBCs that encompassed 32 percent of the population (i.e., 2,399 castes). It recommended the reservation of 25 to 40 percent of open positions in the central public sector. At a national level, however, caste was not the sole criterion for determining backwardness. Nonetheless, the Chair of the Commission and several members dissented on the grounds that the report gave too much weight to caste in assessing backwardness, which they believed should be measured directly by social and economic indicators. The report was rejected by the Congress Party-led government on a number of grounds

²⁶ Christopher Jaffrelot, *India's Silent Revolution: The Rise of the Lower Castes in North India* (New York: Columbia University Press, 2003).

familiar to scholars of affirmative action in other jurisdictions: the fear that reservations would impede the efficiency of public administration; the concern that reservations were a departure from equality of opportunity and the merit principle; and the institutionalization of caste would generate social division and contradicted a basic project of the Indian Constitution, which was to produce a casteless society.

The rejection of the First Backward Classes Commission report shifted the politics of OBC reservations from the center to the states. Several states, especially those in the South, had adopted OBC reservations before independence as part of broader policies of social reform. After the First Backward Classes Commission was rejected, demands for OBC reservations were initially successful in those states where they were already in place. States responded by establishing state-level Backward Classes Commissions, which recommended OBC reservations that subsequently were adopted. State-level commissions relied more heavily on caste than the First Backward Classes Commission. Moreover, castes excluded from the initial lists produced by state commissions often lobbied state governments to designate them as OBCs (sometimes through the creation of a new commission). Indeed, in two states, Karnataka and Tamil Nadu, reservations exceeded 50 percent.

However, the deeper impact of the shift in the politics of OBC reservations to the states was to fuel the reconfiguration of state-level politics. Caste-based political appeals around OBC reservations became central to the political mobilization of OBC voters. OBC political mobilization occurred at the same time as the reorganization of Indian states along linguistic lines. Together, they fueled the rise of regional OBC-led parties at the state level, which campaigned on increased OBC reservations. State-level politics, as Jaffrelot stated, became “quota politics.”²⁷ These parties challenged the dominance of the Congress Party at the state level and later served as the basis for a new electoral coalition at the national level led by the OBC-dominated Janata Dal Party, which returned OBC reservations to the national political agenda.

The Janata Dal Party prevailed over the Congress Party in the 1977 national elections and quickly moved to appoint the Second Backward Classes Commission in 1978 (known as the Mandal Commission). When the Second Backward Classes Commission reported in 1980, its analysis differed materially from that of the First Backward Classes Commission in several respects. First, the Second Commission gave greater weight to caste in assessing backwardness. Arguably, the First Commission relied on caste as a proxy for social and economic backwardness, whereas the Second Commission diagnosed caste as

²⁷ *Ibid.*

the principal cause of social and economic backwardness. Second, the Second Commission relied on findings of the state-level commissions, which had relied largely on caste. Third, the Second Commission determined that OBCs encompassed to 52 percent of the population (i.e., 3,747 castes) – a majority that already had been politically mobilized on this basis. By the time the Second Commission delivered its report, the Janata Dal Party had lost power and been replaced by the Congress Party, which again declined to adopt OBC reservations.

However, the fragmentation of the Indian political-party system and the rise of regional OBC parties continued, with the result that the Janata Dal Party returned to power in 1989 at the head of a coalition government. It had campaigned on a platform of OBC reservations, which thrust them onto the national political agenda. The Janata Dal Party proceeded to implement the recommendations of the Mandal Commission in the form of an executive order (i.e., an Office Memorandum) instead of legislation. The decision provoked intense controversy and mass demonstrations by members of the upper castes who feared the loss of opportunities as a consequence of the expansion of OBC reservations. The decision to implement the Mandal Commission report was vigorously opposed by the Congress Party and the Bharatiya Janata Party in Parliament. It was constitutionally challenged in the *Indira Sawhney* case, which is discussed later in this chapter.²⁸

The second instance of OBC reservations at the national level took place in 2006. This time, the reservations were proposed by the Congress Party–led coalition government, which had come to support OBC reservations. The main consideration was political, because the Congress Party had become dependent on regional political parties that drew heavily on OBC voters for support in state-level elections as well as nationally to form governments. The focus of this round of reservations was access to institutions of higher education, which were dominated by the upper castes. In the wake of economic liberalization in the early 1990s, there was a dramatic expansion in economic opportunities available in the private sector, to which university-based education was a pathway. Reservations were extended to both publicly and privately funded institutions (the latter required a constitutional amendment). Unlike the first round of OBC reservations, these were introduced in Parliament, attracted broad cross-party support, and passed by an overwhelming majority. This change reflected the impact of OBC political mobilization and the necessity for major parties to rely on regional parties as coalition partners. As Jayal stated, “a once residual category has been decisively reinvented as a political

²⁸ *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

majority.”²⁹ This second instance of reservations also came before the Court in the *Ashoka Thakur* case.³⁰

There is an extensive literature on OBC reservation policies. One body of work in constitutional law has engaged in a careful doctrinal analysis of the Supreme Court of India’s jurisprudence on OBC reservations. The Court has handed down a plethora of cases on reservations. Drawing on the debates over reservations in the Constituent Assembly, legal scholars tend to conceptualize OBC reservations as policies to promote material well-being by redistributing economic opportunity to redress historic, deeply rooted injustices that were a product of the caste system. Reservations were forms of compensatory discrimination, in Galanter’s famous formulation.

A second body of work in political science analyzes the rise of political mobilization by OBCs and the role of reservations in that process. Drawing on the discourse of political actors, political scientists have characterized the goals of OBC-reservations policies as political, in two senses: (1) as power-sharing devices to force upper castes to share the agenda-setting power of bureaucracies with OBCs; and (2) more broadly, as tools for political mobilization. The literature exists in disciplinary “silos.” Legal scholars have not integrated the political goals of reservations policies into their analyses of constitutional jurisprudence. Conversely, political scientists have not given careful attention to the detailed reasoning of the Supreme Court in the vast jurisprudence in this area.

However, what is striking is that the political context surrounding the adoption of OBC-reservation policies and their political functions were placed squarely before the Supreme Court as being of legal relevance in the two leading decisions, *Indira Sawhney* and *Ashoka Thakur*. These two cases warrant attention because they concern challenges to the two main OBC-reservation policies at the national level, and they provide the fullest discussion of the Court’s understanding of the constitutional framework for OBC reservations. Indeed, the divisions within the Court and the evolution in the Court’s position on OBC reservations arguably reflect an acceptance of the political function of these policies as well as an awareness of the potential abuses of them from the standpoint of democratic politics.

Indira Sawhney was a constitutional challenge to the Office Memorandum whereby the Janata Dal government of V.P. Singh sought to implement the recommendations of the Mandal Commission. The Court divided on the key issues of the overarching theory of OBC reservations,

²⁹ Jaffrelot, note 24, 252.

³⁰ *A. K. Thakur v. Union of India*, (2008) 6 SCC 1.

which reflected and mapped onto corresponding divisions in constitutional politics in Parliament during the debate over the government's decision. The majority judgments expressly adopted a political theory of OBC reservations. This theory was rooted in an explicit account of the redistribution of political power on the basis of caste. It explained that this shift was the product of political cleavages on the basis of caste as well as the electoral success of caste-based political appeals, which produced a shift in control over the political executive. For the majority, however, the administrative (i.e., non-elected) Executive was also a source of political power and, at the time of the judgment, was still under the control of the upper castes. The implication was that an upper-caste-dominated administrative machinery was not sympathetic to OBC issues and, indeed, had been "ruinous" for OBCs.³¹ Control over the political Executive also is insufficient because governments come and go, whereas the bureaucracy remains in place. If the goal of OBC reservations is the sharing of political power, the majority reasoned, then this required OBC reservations in public-sector employment. What is striking is that the material justification for OBC reservations is entirely absent in this account. Indeed, the Court's reasoning closely tracked the justification for OBC reservations given by Prime Minister V.P. Singh in Parliament, who emphasized their role as power-sharing devices and diminished their material impact.

The dissenting judges, by contrast, offered a material theory of OBC reservations based on an earlier constitutional understanding of the rationale and limited purpose of reservations, in service of compensatory discrimination. The only constitutionally permissible goal for such policies was that they address prior discrimination inherent in the caste system, which had produced structural discrimination – even if the state had not created it. Similarly, and again in contrast to the majority, the dissent required that the means be narrowly tailored – that is, they could not be over-inclusive and must be time-limited. These restrictions on ends and means were rooted in misgivings of the risks posed by OBC reservations that the restrictions were designed to mitigate. OBC reservations could be motivated by nothing more than "expediency"³² or "extraneous purposes"³³ – that is, they would be little more than the product of electoral strength and the spoils of political power that were not based on any broader public purpose. This was a frontal challenge by the dissenting judges to the political theory of OBC reservations. As discussed later in this chapter for *Ashoka Thakur*, a unanimous Court took on board a version of

³¹ *Sawhney*, note 27, para. 403 (per Justice Sawant).

³² *Sawhney*, note 27, paras. 312 and 313 (per Justice Thomas).

³³ *Sawhney*, note 27, para. 560 (per Justice Sahai).

these concerns to check the political abuse of OBC reservations for political patronage.

These differences on the underlying theory of the permissible constitutional scope for OBC reservations translated into a disagreement over OBC identification. The dispute was centered on the use of class and caste as the basis for identifying the “backward classes” in Article 16. This choice was relevant to two analytical issues: the unit of analysis and the measure of backwardness. These issues often are combined but they are distinct. For the most part, and for ease of administration, it has been accepted that caste is the unit of analysis. In reality, the caste-versus-class debate is about the role of caste in measuring backwardness. Before *Indira Sawhney*, it had been held that caste could be a factor but should not be the *only* factor in identifying backwardness. This led to debate over two issues: (1) whether caste was simply correlated with class or the cause of it; or (2) whether caste should be supplemented by a direct assessment of social and economic backwardness. If caste were a cause of backwardness, then there was less pressure to engage in an independent assessment of backwardness.

The challengers attacked the list of OBCs in the Mandal Commission as multiply flawed: as being based on infirm evidence, as arising from a procedurally deficient process, as increasing in the number of OBCs from the central government’s First Backward Classes Commission without any explanation, and for relying on the pre-independence 1931 census.³⁴ These were serious allegations – so much so that one judge would have given the list only interim effect and remanded it to a new commission. The majority responded to these flaws by distancing the government’s list of OBCs from those contained in the Mandal Commission. According to the majority, the central government developed its list on the basis of a review of the lists generated by the Mandal Commission and numerous state-level commissions, thereby rendering any alleged errors in the Mandal Commission’s list irrelevant.³⁵ The reality is that the majority did not have good responses to these concerns. This is not surprising because the political-power theory of reservations does not yield any obvious criteria for excluding program beneficiaries, if the ultimate goal is to shift political power. The lack of any criteria in the majority judgment to assess the fit between means and ends – except for the “creamy-layer exclusion” discussed later in the chapter – is arguably traceable to the same conceptual root.

³⁴ *Sawhney*, note 27, para. 735 (per Justice Jeevan Reddy).

³⁵ For example, *Sawhney*, note 27, paras. 851(a) and 857 (per Justice Sawant).

The dissent engaged with the majority on three grounds. The first objected that the central government did not properly apply its mind to the listing of OBCs in the Office Memorandum and did not provide an analysis of its reasoning³⁶; the second reiterated the alleged procedural flaws in the method of the Mandal Commission³⁷; and the third underlined the lack of any clear evidence to justify the list of OBCs.³⁸ These rationales are different but nonetheless are united by the suggestion that the underlying motive for the particular list of OBCs was purely political. The failure of the central government to apply its mind to the listing of the OBCs is tantamount to saying that no thought was given to the issue – that is, that no plausible explanation could be given about the rationale behind the list that could be imputed to the central government. In other words, the rationale was political. The failure to follow correct procedures likewise is suggestive of a pretext. Justice Sahal was most explicit, stating that the requirement for evidence to support the listing of OBCs was to “smoke out” a motive that was “suspect.”³⁹

Ashoka Thakur represents a sharp departure from *Indira Sawhney*. The Supreme Court was unanimous in upholding the constitutionality of the OBC reservations extension. The unanimity on the Court mirrored the debate in Parliament. The implementation of the Mandal Commission report was a divisive issue in Parliament, with the Congress Party outspoken in opposition. However, as Dhavan noted, subsequent extensions of OBC reservations were passed with ever-larger Parliamentary majorities and with diminishing rounds of debate.⁴⁰ The explanation for this emerging political consensus was the electoral power of caste-based political parties, which had contributed to the fragmentation of Parliament and the rise of coalition governments, in which they were indispensable partners. In the face of this political consensus, and coupled with its own precedent in *Indira Sawhney*, it is arguable that the Court had less room to maneuver in *Ashoka Thakur* and therefore simply deferred.

However, closer examination of the judgment paints a very different picture. The core issue was the so-called creamy-layer exclusion. The “creamy layer” represents the most advantaged group among the OBCs. A differently constituted majority in *Indira Sawhney* held that the exclusion of the creamy layer was constitutionally mandated because, without it, OBC reservations would

³⁶ *Sawhney*, note 27, para. 325 (per Justice Thomas).

³⁷ *Sawhney*, note 27, paras. 497–500 (per Justice Kuldeep Singh).

³⁸ Justice Sahal made this argument.

³⁹ *Sawhney*, note 27, para. 560 (per Justice Sahal).

⁴⁰ Rajeev Dhavan, *Reserved! How Parliament Debated Reservations 1995–2007* (New Delhi: Rupa and Co., 2008).

not benefit only those who were truly backward. However, on that occasion, the Court did not offer a fully worked-out theory of the creamy-layer exclusion. The composition of this majority further complicated matters. Those judges who had conceptualized the OBC reservations as instruments of compensatory discrimination could argue easily that this theory required the exclusion of advantaged members of OBCs.⁴¹ However, the judges who also had conceptualized OBC reservations as power-sharing devices could not do so as easily.⁴² Just as the political-power rationale for OBC reservations that was offered yielded no criteria for deciding which OBCs to include and exclude, by implication, it could not yield a rationale for the exclusion of the creamy layer within those OBCs that were included. Furthermore, no such explanation was provided. Therefore, how the creamy-layer exclusion fit within the principal majority's theory of OBC reservations remained unsettled.

Ashoka Thakur provided the occasion to revisit this question. The OBC reservations had generated controversy as the measures progressed through Parliament. Ultimately, the Hindi version of the bill excluded the creamy layer but the English version did not. At the time, there was a United Progressive Alliance coalition government led by Congress. The regional, caste-based parties in the governing coalition strongly opposed the exclusion of the creamy layer. As Hasan explained, the reason is that the core constituency for the party leadership for these caste-based parties consisted of political elites among the OBCs who perceived themselves as potential beneficiaries of the OBC reservations.⁴³

The Supreme Court unanimously held that the creamy-layer exclusion was required, with a majority deeming the exclusion to exist by construing the policy to impliedly include this constitutionally mandated exclusion. This doctrinal strategy allowed the Court to formally grant the government a victory by upholding the extension of OBC reservations but, in substance, impose an important check.⁴⁴ What warrants careful examination is the Court's justification of the creamy-layer exclusion in light of the incoherence of *Indira Sawhney*. *Asoka Thakur* assumed the power-sharing theory of OBC reservations as a given and developed a justification for the creamy-layer exclusion

⁴¹ For example, *Sawhney*, note 27, para. 520 (per Justice Kuldip Singh).

⁴² For example, *Sawhney*, note 27, paras. 790, 792, and 793 (per Justice Jeevan Reddy).

⁴³ Zoya Hasan, *Politics of Inclusion: Caste, Minority and Representation in India* (Delhi: Oxford University Press, 2009).

⁴⁴ All judges supported creamy-layer exclusion for OBCs. The question of creamy-layer exclusion for SCs and STs also was raised. Chief Justice Balakrishnan held that the creamy-layer doctrine was inapplicable to SCs and STs. The other judges left this question open, given that it was not at issue before the Court.

that flowed from it. Justice Pasayat offered the most sustained explanation. He began by observing that the trajectory of OBC reservations was always to add new castes and that there had not been a single case of exclusion. For him, this “raises a doubt about the real concern to remove inequality,” suggesting that the true motive was something else.⁴⁵ Justice Pasayat did not directly state what that motive was; however, his reasons reproduced such explanations provided by the challengers that he impliedly approved. The true answer was in the political dynamic underlying this phenomenon: that is, OBC reservations functioned less as instruments to redress inequality than as the basis of politically motivated, targeted appeals to OBC voters as part of a “vote-bank politics.”⁴⁶ Justice Pasayat reproduced and impliedly endorsed scattered observations in earlier cases by judges who expressed apprehension about the growth of reservations at the state level as a form of “state patronage,”⁴⁷ as well as resulting from claims “overplayed extravagantly in a democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time . . . but wish to bear the ‘weaker section’ label as a means to score over their near equals formally categorized as the upper brackets.”⁴⁸

However, Justice Pasayat then took this analysis one step further. Perhaps the most striking element in his reasons is the following lengthy quotation from an earlier Supreme Court decision, *Balaji*,⁴⁹ that had endorsed class over caste as the basis for measuring backwardness and that was superseded by *Indira Sawhney*. The Court in *Balaji* – commenting on the growth of OBC reservations in the South – was prescient about the future of national politics:⁵⁰

. . . take a caste in a State which is numerically the largest therein. It may be that, though a majority of the people in the caste are social and educationally backward, an effective minority may be socially and educationally far more advanced than other sub-caste the total number of which is far less than the said minority . . . the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it . . .

This passage implies that the principal beneficiaries of OBC reservations may be political elites within OBCs, who mobilize OBC vote banks not only for electoral gain but also to reap the direct benefits of OBC reservations.

⁴⁵ *Ashoka Thakur*, supra note 29, para. 278.

⁴⁶ *Ashoka Thakur*, supra note 29, para. 245.

⁴⁷ *Ashoka Thakur*, supra note 29, para. 289, citing *Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714.

⁴⁸ *Ashoka Thakur*, supra note 29, para. 288, quoting from an obiter in *N. M. Thomas v. State of Kerala*, 1976 2 SCC 310.

⁴⁹ *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649.

⁵⁰ *Ashoka Thakur*, supra note 29, para 348, quoting para. 20 in *Balaji*.

OBC reservations are a form of self-dealing. Justice Pasayat, by implication, levels the same charge at the caste-based, regional parties in the governing coalition that opposed the exclusion of the creamy layer. Justice Bandhari's concurrence made this point even more sharply, observing that the failure to exclude the creamy layer would mean that "the OBC Minister's daughter," in principle, would be eligible to benefit from an OBC reservation – a perverse result.⁵¹

My analysis of *Ashoka Thakur* is at odds with the simplistic picture of a Supreme Court rendered inert in the face of a political consensus across party lines in favor of the expansion of OBC reservations. Moreover, the Court's reasoning was clearly alert to the broader political dynamics of vote-bank politics, and it took this on board to develop an account of the creamy-layer justification nested within the power-sharing theory of OBC reservations. *Ashoka Thakur* reflects a judicial awareness of the potential abuses of these policies from the standpoint of democratic politics. An important point often raised about the creamy-layer doctrine is that it shows the weak conceptual underpinnings of India's reservation policies. If caste is the marker of discrimination and the identifier of special treatment, then one's caste will not change regardless of one's material advancement. Furthermore, if the creamy-layer doctrine makes sense – because it seems to emphasize the importance of the link between special treatment and a backward status – then one could ask why caste is used to identify beneficiaries in the first place.⁵² This point is a crucial one, of course, but my analysis also provides something else to consider.

Although I cannot develop the point here, I think there is a link between this account of the creamy-layer exclusion and another doctrine – that is, that the total proportion of positions allocated to reservations of all categories (i.e., SC, ST, and OBC) presumptively must not exceed 50 percent. The intuition here seems to be to check the risk of a spoils system in which broad electoral coalitions labeling themselves as OBCs take power, capture the state, and direct the benefits disproportionately to themselves. The 50 percent cap allows other considerations (e.g., merit and efficiency) to govern public-sector hiring decisions; it also may exert pressure on the capacity of rent-seeking coalitions to coalesce politically. I defer the details of this argument to another day.

As a matter of method, this close reading of *Ashoka Thakur* raises questions that existing scholarship does not answer. What accounted for the shift between *Indira Sawhney* and *Ashoka Thakur*? Was it the Supreme Court's

⁵¹ *Ashoka Thakur*, supra note 29, para. 388.

⁵² Madhav Khosla, *The Indian Constitution* (New Delhi: Oxford University Press, 2012), 94–106.

awareness of the political dynamics of the OBC debate? If so, will this lead the Court to revisit the power-sharing rationale and move back to a notion of compensatory discrimination? Will the Court apply this approach to state-level OBC policies, which are at least as expansive as those at the national level? Are there other types of political abuse that the Court will identify and translate into constitutional doctrine? Will the Court build on its ruling on the creamy-layer exclusion to exercise more oversight of the inclusion of OBCs themselves, addressing procedural concerns and the lack of evidence? What has been the response of political parties to *Ashoka Thakur*?

The Indian case has broader comparative significance. India is one of a number of polities in which the beneficiaries of affirmative action are not ascriptive minorities but rather majorities. In these polities, ascriptive differences have become a major axis of political cleavage, and political mobilization occurs on that basis. These polities are a subset of a broader set of political communities that in previous work I termed *divided societies*.⁵³ In these polities, ascriptive majorities are also political majorities. Moreover, these majorities historically have been denied power through a combination of colonial rule and subordination to politically powerful minorities that differ from them on ascriptive criteria. Once these majorities have acquired power, they adopt affirmative-action policies to benefit themselves. Moreover, they invoke as justification the need to redress historic, institutionalized forms of discrimination that they experienced when they lacked political power – that is, when they were political minorities.

Framed in this way, the study of reservations situates India among jurisdictions in which affirmative-action policies are adopted as parts of larger processes of democratization, especially in postcolonial contexts such as Sri Lanka and Malaysia. What unites these examples is the postcolonial context in which these policies arose. Two types of shifts in power unite postcolonial politics in these countries. First, the end of colonialism marked the shift from imperial rule to national sovereignty. Second, the democratic empowerment of a newly enfranchised majority provided the democratic platform for the contestation of political and economic power within those states, between small elites that had wielded power under colonial rule and continued to do so in the early years of independence, and a large majority that had historically been excluded from power. This comparative context, in turn, provides critical leverage in the Indian case and vice versa. This is a comparative investigation that has yet to happen.

⁵³ Sujit Choudhry, ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (New York: Oxford University Press, 2008).

CONCLUSION

The study of South Asian constitutional law and politics remains at the margins in comparative constitutional law. Through a study of two topics in Indian constitutional law – constitutional amendment and affirmative action – this chapter shows how a research agenda on constitutional law and politics in South Asia might be set. I conclude, however, by putting the two topics explored to somewhat different use, considering them in light of this volume's overall theme of unstable constitutionalism. This theme, as the diverse contributions demonstrate, unpacks constitutional orders with deep forms of instability. Different South Asian nations have responded to the phenomenon of constitutional instability in their own ways, some more successfully than others.

The basic-structure doctrine and reservations capture the idea of unstable constitutionalism in important respects. The former can be interpreted as a doctrinal innovation that sought, *inter alia*, to make the politics surrounding constitutional amendments more stable. It was a response to the instability generated by repeated constitutional amendments and the conflict between the Parliament and the Supreme Court – an instability that, the Court argued, posed a grave threat to the overall constitutional and democratic order. Similarly, the political developments and jurisprudence surrounding reservations is also a type of response to constitutional instability. Here, the Indian Constitution has been used as a tool to respond to conflicts among different groups. Insofar as India's constitutional order has not imploded, the response has been successful in political terms. Conversely, India's jurisprudence on reservations has embodied a high degree of instability, if one pays attention to the fact that the jurisprudence evolved from preferential treatment for backward groups toward power-sharing among different groups and that it has moved from the ideal of transcending caste toward sharing power among different castes. Most of all, the examples of formal constitutional change and reservations both highlight the complex dynamic between law and politics and the inadequacy of any analysis that privileges one over the other. Indeed, it is this very sentiment that lies at the heart of the idea of unstable constitutionalism.

PART II

Forms and Sources of Instability

3

The Locus of Sovereign Authority in Nepal

*Mara Malagodi**

This chapter investigates in historical perspective the articulation of the concept of internal state sovereignty in modern Nepal's constitutional domain by juxtaposing an analysis of the country's various constitutional forms with a reading of the physical architectural structures hosting the main central-state institutions (i.e., the capitol) in Kathmandu. The chapter deploys the concept of 'articulation' as elaborated in cultural studies (Hall 1980a and b, 1986; Grossberg 1992; Slack 2005). By emphasizing the internal notion of state sovereignty with a focus on the formation of the modern nation-state, the chapter illuminates the tensions underlying the transformation of the relationship between the state and the people in Nepal, as well as the repeated failure to respond adequately to democratic aspirations and demands for inclusion throughout the country's various constitutional configurations. Six historical periods are analysed: the Shah period (1769–1846), the autocratic Rana era (1846–1951), the first democratic interlude (1951–1960), the Panchayat monarchical autocracy decades (1960–1990), the years after the redemocratisation of 1990 (1990–2007), and the postconflict period under the currently in-force Interim Constitution (post-2007).

By combining the approach of historical institutionalism with a cultural study of both constitutional law and architectural forms, the chapter unearths the historical stratification of the constitutional structures that express the powers and identity of the Nepali people. It argues that the construction, refurbishment, and shifts in the use and function of Kathmandu's capitol buildings are coterminous with transformations in the enunciation of state sovereignty

* The author is grateful to volume editors Mark Tushnet and Madhav Khosla, Martin Loughlin and Igor Stramignoni at LSE Law, Bryony Whitmarsh at the University of Portsmouth, and Katherine Adeny at the University of Nottingham for their helpful comments.

throughout Nepal's constitutions. In short, Kathmandu's capitol structures articulate in physical form the country's constitutional framing of the concept of state sovereignty through various historical periods. Four main sites corresponding to the three branches of government (i.e., Executive, Legislative, and Judiciary) are examined to illustrate the relationships among political modernisation, constitutional architecture, and 'the people' in Nepal. First is the office of the Head of State, from the old Royal Palace in Basantapur (1769–1896) to the new Royal Palace of Narayaniti (1896–2008; completely renovated in the early 1960s), and now the Residence of the President of the Republic in the Shital Niwas Darbar (since 2008). Second is the Office of the Prime Minister in the Singha Darbar compound (since 1906). Third is the seat of the Legislature, from the Parliament Building or Gallery Baithak (1959–2008) and Rashtra Sabha Bhawan (1991–2007) in the Singha Darbar compound to the 1993 Chinese-built International Convention Centre, which hosted the Constituent Assembly (2008–2012). Fourth is the Supreme Court Building (since 1963).

The core argument is that the instability and repeated failures of Nepal's various constitutional settlements derive from the country's historical difficulties in secularising political authority and entrenching the doctrine of popular sovereignty at the constitutional level due to the country's modalities of state formation and nation-building. These failures result from the motives and influences of both Nepali and foreign political actors and have directly affected Nepal's constitutional arrangements over the years in two distinct but complementary ways.

First, the constitutional drafting modalities, form of state, and frame of government formally adopted and/or informally developed in Nepal over the years relegated the directly representative element of government (i.e., the Legislature representing 'the people') to an inferior position – a particularly pernicious outcome in a country that has adopted a parliamentary system of government since the early 1950s. This inferior position is reflected in the buildings used to house the Legislature. Over time, a high degree of Executive dominance and unaccountability to Parliament, by both the monarch and the Cabinet, has been progressively entrenched in Nepal. The 'constitutionalisation' of the Shah monarchy was defective in both the drafting and actualisation of the 1951, 1959, and 1990 Constitutions, which were expected to institutionalise a democratic form of government. The British constitutional principles of 'the king reigns but does not rule' and the sovereign owes his position not only to hereditary right but also to the consent of Parliament, and that his position could be taken away if he misgoverned (Bogdanor 1995: 1–8), never fully took root in Nepal. Moreover, even during democratic periods, the Executive branch of government often escaped the accountability mechanism of Cabinet and

ministerial responsibility to Parliament – often because no Legislature was in place (1951–1959, 2002–2006, May 2012–November 2013) but also at times when a directly elected legislative body was operational (1959–1960, 1991–2002).

Second, a monolithic, top-down version of the Nepali nation revolving around historically hegemonic Parbatiya high-caste Hindu narratives was entrenched in Nepal's constitutional texts, which used unequivocal ethno-cultural terms revolving around the historical prominence of the Pahari Hindu Shah monarchy, thereby excluding the majority of the Nepali people. As a result, the various bouts of institutionalisation of Nepal's frequent regime changes failed to respond adequately to both the democratic aspirations and the demands for nondiscrimination and/or recognition of an ever-increasing number of individuals and groups within Nepali society, thereby leading to demands for radical state restructuring yet again through constitutional change. These relations of dominance and subordination are reflected in Kathmandu's institutional architecture as well.

Juxtaposing the analysis of Nepal's constitutional edifice with a reading of the architecture of Kathmandu's capitol documents the historical sedimentation of autochthonous institutional arrangements characterised by path-dependent continuities rather than sudden changes at critical junctures institutionalised by a 'constitutional moment' (Ackerman 1993). This approach also reveals the emergence of a distinctively Nepali constitutional praxis over time anchored in a specifically Nepali version of the state, the organisation of government, and the articulation of sovereign authority. Although modern sovereignty 'is vested neither in the ruler, nor the office of government, nor in the people' but rather is expressed in a relationship, it establishes the *rightful* authority of government by political right and, through the operations of political right, the unlimited competence to govern by way of positive law (Loughlin 2010: 186). The key issues that this chapter illuminates are the historical tensions in Nepal between political actors over what constitutes 'rightful' political authority in the public sphere and the institutional articulation of such authority in specific constitutional forms. Thus, the shifts in the organisation and meaning of Kathmandu's capitol – a form of cultural production – are integral to the pursuit, reproduction, and contestation of power in Nepal (Duncan 2005: 3) and its articulation in constitutional form.

THE NATION-STATE, MODERN SOVEREIGNTY, AND SECULARISATION

According to Loughlin (2004; 2010), sovereignty is a facet of the modern nation-state and a foundational concept of public law. The term *sovereignty* was used in medieval times, but it was understood as 'suzerainty' and identified only the

feudal powers of lordship and patrimonial rights of monarchs (Loughlin 2004: 74). The modern concept instead designates the relationship between the state and the people (Loughlin 2004: 84), originating with political modernisation in Europe and the formation of nation-states. The concept of ‘public law’ is a ‘Western invention’, whose origins can be traced back to the attempts of medieval jurists to grapple with the question of the authority of the governing power (Loughlin 2010: 6). I discuss elsewhere how the model of the nation-state travelled to Nepal beginning in the early nineteenth century with the imposition of a fixed linear border delimiting mutually exclusive state sovereignty by the British colonial power following Nepal’s military defeat (Malagodi 2013: 33–4). Similarly, modern constitutionalism entered Nepal in the twilight of the Indian anticolonial struggle. After India’s independence, the work of the Indian Constituent Assembly (1946–1949) propelled demands for constitutional guarantees in Nepal. This resulted in the drafting of the 1948 Rana Constitution that, however, was never implemented. Nepal’s experiments with constitutional democracy effectively began only with the overthrowing of the Rana autocracy in 1951.

Distinctions should be drawn among the key terms: *state*, *government*, *sovereignty*, and *the people*, and their relationship to one another. First, the state is the institutional entity distinct and autonomous from the sovereign (i.e., the ruler), and consists of territory, people, and institutional form (Loughlin 2010: 208).¹ Second, modern government identifies the depersonalised office of the sovereign exercising sovereign powers of rule. The office of the sovereign can be divided into separate branches, as illustrated by the institutional organisation of constitutional bodies in conformity with the doctrine of the separation of powers according to their Executive, Legislative, and Judicial functions (i.e., the frame of government). Hobbes defines government as the ‘representative of the person of the state’; in this respect, Loughlin (2004: 59) describes it as *constituted power*.² The institutionalisation of the office of the sovereign is well attested to by the British institutional devices of King-in-Parliament, King-in-Council, and the like, by which various branches of the government exercise power on behalf of the state; they do so legitimately through the mechanism

¹ ‘The state does not exist at all before its representative [the sovereign] is set in place . . . it is entirely created by the act of representation. The state is not created as a result of the operation of law since the state and its representative [the sovereign] are instituted precisely for the purpose of creating law. The state stands alone as a fictitious person’ (Loughlin 2004: 59).

² ‘The sovereign holds an office impressed with public responsibilities and for the realisation of which he is vested with absolute sovereign authority. This authority is exercised mainly through the power of law-making. And although these laws are enacted by the sovereign, the sovereign is a representative acting in the name of the state’ (Loughlin 2004: 59).

of political representation of the people. Third, the concept of sovereignty has both legal and political connotations. On the one hand, it indicates the absolute *legal* authority of the ruling power over the governed within a given territory – that is, the modern nation-state – and such authority cannot be divided. The legal connotation of sovereignty can be described as ‘legislative competence’ (i.e., supreme law-making authority within a given state territory) and is illustrated by the British doctrine of parliamentary sovereignty (Loughlin 2004: 66). On the other hand, the *political* connotation of sovereignty is well attested to by Schmitt’s famous statement: ‘sovereign is he who decides on the exception’; this indicates the notion of ‘political capacity’ – that is, *constituent power*.³ Fourth, the concept of ‘the people’ indicates ‘the governed’. The term *nation* also is used frequently and interchangeably to signify ‘the people’ (Yack 2001: 520), but Yack argues persuasively that the terms illustrate two distinct ways of representing the imagined political community that inhabits the territory of the state. The people and the nation contribute to legitimate political authority, although in different ways. (This distinction is discussed in the following section.)

Nepal’s political modernisation occurred differently than other South Asian jurisdictions because Nepal was never colonised. State-formation preceded the process of nation-building, which was essentially a state-framed phenomenon (Brubaker 1999: 98). For two reasons, the analysis in this chapter deploys the notion of sovereignty as a prism through which to investigate the nature of the relationship between the state and the people to explain Nepal’s constitutional instability. First, modern state formation in Nepal began in the late eighteenth century under the aegis of an autochthonous political force – that is, the Shah Hindu monarchy – which was pivotal to the institutional organisation of the Nepali state. The monarchy was central to the country’s frame of government and instrumental to its nation-building process. Significantly, the Shah Kings remained continuously in power from the late eighteenth century until 2008. Second, Nepal’s military defeat at the hand of the British East India Company in 1816 resulted in the imposition of a modern linear state border, which ignited the process of modern external state formation by introducing the Himalayan kingdom to the notion of mutually exclusive state sovereignty, understood as ‘external state sovereignty’ under Public International Law (Malanczuk 2003: 17). The Anglo–Nepali War, however, did not result in Nepal’s subjugation

³ ‘Sovereign authority does not rest in any particular locus; it is the product of the relationship between the people and the state. Political power is a complex phenomenon: it is rooted in the division between governors and governed, it rests on the principle of representation, and it underpins the concept of sovereignty’ Loughlin (2004: 63).

by a European colonial power. In fact, Nepal's complete independence from Britain was recognised by way of a treaty in 1923. In this regard, Nepal represents an important case study for analysing both the modalities of political modernisation in a South Asian country that was never colonised and the exercise of state-building through various attempts to establish and maintain a stable constitutional form.

European political modernisation took place through the four processes of institutionalisation, internal differentiation, corporatisation, and secularisation of the office of the sovereign within the nation-state (Loughlin 2010: 184–5); it is argued that Nepal underwent a similar process. First, the idealisation of the King's office entailed that the King's image was magnified so that kingship could take on the character of an ideal office. With the onset of the Rana regime in the mid-nineteenth century, the Shah Kings were stripped of effective power, but the Hindu Shah monarchy was retained as the living symbol of the unity of the Nepali state. Second, the process of internal differentiation of governmental functions meant that sovereign powers of government no longer were inherent directly in the person of the monarch but rather were exercised in his name by the Rana Prime Minister. Third, through the process of corporatisation of the office of the sovereign, sovereignty came to mean the absolute legal authority of the ruling power in its corporate capacity. It is not surprising that in 1854, Jang Bahadur Rana promulgated the Muluki Ain (i.e., 'Country Code') – a legal document aimed at codifying traditional social conditions and imposing the Parbatiya Hindu caste rules on the various ethno-linguistic groups living in the territory of the Nepali state. In this respect, historian M. C. Regmi (1975: 110) argued that the Country Code had a constitutional value because it imposed homogeneous sociolegal norms on the entire population under Nepali sovereignty, thereby introducing a degree of legal uniformity within the state territory through positivist law. As a result, the Country Code was pivotal to the processes of state- and nation-building under the Ranas. Fourth, the process of secularisation entails accepting that the sovereign right is not bestowed from above by God but rather is conferred from below by the people. Significantly, Nepal did not become constitutionally secular until 2007 with the promulgation of the Interim Constitution. The democratic 1990 Constitution – in force until 2007 – featured instead a Preamble in which the King 'promulgates and enforces' the Constitution while recognising that the people (*janatā*) are the source of state power (*rājyashakti*), in line with Article 3, which vested state sovereignty (*sārvabhāumsattā*) in the people (*janatā*). The 1990 Constitution also defined both the state (*adhirājya*) and the King (*rājā*) as Hindu. On a symbolical level, it is only with the promulgation of the 2007 Constitution that the Preamble begins (similar to the American and Indian

traditions of popular sovereignty) with the expression ‘We, the People of Nepal, in exercise of the sovereign powers and state authority inherent in us’ (*hāmī sārvabhaumsattā ra rājkīyasattā samṇanna nepālī janatā*), and any explicit reference to Hinduism is removed from the constitutional text.

The core argument here is that the instability and repeated failures of Nepal’s constitutional configurations derive from the difficulty in accomplishing the fourth step in modernisation (i.e., the secularisation of political authority). The difficulties in achieving secularisation led to tensions among various political actors about the basis of *rightful* political authority in the country – that is, the divine top-down authority of the monarchy or the democratic bottom-up authority of the people. The process of secularisation is sanctioned by the virtual device of the social contract made by ‘the people’, which underpins the establishment of modern constitutional forms. Thus, the difficulties in constitutionalism taking root in Nepal are explained in light of the country’s repeated failures to embrace in its various constitutional forms one of the doctrine’s core tenets – popular sovereignty – and its corollaries of political representation, legitimate government, and democratic accountability.

CONSTITUTIONAL IDENTITY, POPULAR SOVEREIGNTY, AND ‘THE PEOPLE’

The articulation of the relationship between the state and the people in any constitutional form explains the configuration of a country’s constitutional identity in two significant ways. First, the investigation of the concept of sovereignty deployed in a constitutional system sheds light on the nature and workings of the form of government adopted. Second, the focus on sovereignty as a relational concept linking the state to the people illuminates the way in which a constitution defines the people and connects this definition to the institutionalised constitutional representation of the nation. I adopt the approach of historical institutionalism – with a focus on history and institutions structuring political outcomes (Steinmo 2008: 118) – to analyse Nepal’s constitutional identity as both the factor requiring an explanation (i.e., the dependent variable) and the factor explaining Nepal’s constitutional instability (i.e., the independent variable).

The expression *constitutional identity* encompasses both dimensions of power articulated by modern constitutionalism: *constituted power* and *constituent power*. Jacobsohn (2006: 361) defines *constitutional identity* as ‘the body of textual and historical materials from which [fundamental constitutional] norms are to be extracted and by which their application is to be guided . . . representing a mix of aspirations and commitments expressive of

a nation's past, constitutional identity also evolves in ongoing political and interpretive activities occurring in courts, legislatures, and other public and private domains'. Therefore, by adopting the historical institutionalist concept of path-dependence, we can analyse Nepal's constitutional identity for each historical period in which a particular regime is institutionalised by a specific constitutional settlement, while bearing in mind that the outcomes in each period are the product of outcomes during previous periods (Lieberman 2001: 1014). These self-reinforcing mechanisms of persistence are pivotal to the explanation of *both* the institutional continuities throughout regime changes *and* the historical difficulties in establishing constitutional controls over arbitrary executive power, in constitutionalising Nepal's national monarchy, and in framing an inclusive constitutional definition of the nation. Ultimately, the investigation into the articulation of state sovereignty throughout Nepali constitutional history aims to explore the modalities and limitations of 'the conferral of authority and legitimacy on modern governmental ordering' in Nepal throughout its constitutional history (Loughlin 2010: 1).

The doctrine of popular sovereignty places the notion of 'the people' at the core of modern constitutionalism. The constitutional understanding of 'the people' is polysemic: 'the people' are *both* the source of legitimate political authority mediated by representation, which reflects the political sovereignty of the people encapsulating the democratic principle, *and* the object of constitutionally limited political authority, which is expressed by the legal connotation of sovereignty. Constitutions vest sovereignty in 'the people', whereas the government (i.e., the sovereign) exercises sovereign powers in the name of the people within a given territory: the nation-state. Thus, the modern conceptualisation of the 'people' is the central interface of the so-called paradox of constituent power in which the essentially political notion of the people's unlimited and absolute constituent power is reconciled with the notion of a rule-bound legal constitutional order through the exercise of representative politics (Loughlin and Walker 2007: 1). Thus, if modern sovereignty is characterised as the absolute legal authority of the ruling power over the governed – whose basis of political legitimacy is located in the people – and modern constitutions give institutional form to the relationship between the state and the people expressed in terms of sovereignty, it follows that modern constitutions also define and institutionalise the very notion of 'the people' within a nation-state.⁴ This understanding of constitutionalism as political right reveals

⁴ 'With the adoption of modern republican constitutions, constitutions that initially presented themselves as contracts amongst a prior existing group of people to establish a framework of government expand to fill the entire political space. The constitution ends up constructing "the people" in whose name the established governmental authority acts' (Loughlin 2010: 285).

that public law functions as ‘a power-generating phenomenon’ through constitutional checks and balances. In Nepal, the relegation of the people to a subordinate position within the organisation of the country’s frame of government, as well as the conflation of the concept of ‘the Nepali people’ with an exclusionary ethno-cultural definition of ‘the Nepali nation’, ultimately undermined the legitimacy of political authority in the country and destabilised its constitutional edifice. These two processes are analysed next.

First, investigating the articulation of sovereignty within a constitutional system sheds light on the form of government adopted and its operation. In Nepal, repeated attempts have been made since the 1950s to institutionalise a constitutional monarchy and a parliamentary form of government. The concept of sovereignty is a useful prism through which the structures of ‘constituted power’ and the effectiveness of constitutional limitations on arbitrary executive power can be assessed because doing so reveals the position of the people in the country’s constitutional architecture – not solely in a metaphorical manner. The modern notion of popular sovereignty, which is based on the principle of political representation of the people, replaced the traditional ancient Greek concept of direct popular rule within the *polis* (Yack 2001: 519). This transition to modern ‘indirect sovereignty’ of the people is not necessarily linked with democratisation: ‘popular sovereignty arguments . . . have lent legitimacy to constitutional monarchies and even dictatorships in which leaders or parties claim to embody the people’s deep but unspoken will’ (ibid.: 519). Therefore, it is of paramount importance to investigate the institutionalisation and operationalisation of the mechanism of political representation within the constitutional edifice to understand the nature and effectiveness of the checks and balances imposed on Executive power.

In Nepal, the investigation of the historical articulation of sovereignty through the relationship between the Crown and the people, on the other hand, and the position of the Legislature vis-à-vis the Executive on the other reveals the constitutional positioning of ‘the people’ over time. As late as 1990, the type of democracy that the new constitution sought to establish was defined in Nepali as *prajātantra* (Article 4). The term *prajā* (people) retains a sense of subject-hood: there cannot be a *prajā* unless there is a *rājā* (King). Therefore, the 1990 Constitution, although establishing Fundamental Rights for all Nepali citizens and formally vesting sovereignty in the people, still implicitly made them the King’s subjects. Similarly, Article 4 also used the term *adhirājya* to define the kingdom; this term also is linked etymologically with *rājā* and it is used to define the state. Hence, as with *prajātantra*, it is difficult to conceive of an *adhirājya* without a *rājā*. The *rājā* is a Hindu ruler whose authority stems from the traditional notion of Hindu kingship. It follows that political authority in Nepal maintained a ‘legitimation from above’ as late as

2007. The behaviour of both King Birendra Shah and King Gyanendra Shah between 1990 and 2007 demonstrates that constitutional checks on monarchical power were ineffective at best. Moreover, the directly elected Lower House of Parliament (*pratinidhi sabha*) has been perceived and treated over time as an expendable institution since the 1950s. In 1994, 1999, and 2002, different Prime Ministers dissolved the Lower House as a way of keeping in check rebellious factions within their own parties and the opposition.⁵ Unconstitutional monarchical behaviour and unaccountable executive dominance plunged the country into deeper political instability amid a violent civil war (1996–2006). In fact, between 2002 and 2006, Nepal was ruled by a string of Cabinets without a Lower House in place and often under the direct rule of the King. In these circumstances, Cabinet members were not appointed on the basis of direct universal elections but instead were appointed either directly by the King or on the basis of intra- or inter-political compromises completely outside of the legislative forum.⁶ Most important, these Cabinets – devoid of a legislative basis – have been unburdened by the pressure of retaining parliamentary confidence through responsible good governance. Moreover, since the dissolution of the first Constituent Assembly in May 2012, Nepal yet again was ruled by a government while no Legislature was in place until the elections of the second Constituent Assembly in November 2013. As a result, the country has been bereft of its only directly representative constitutional body, which is deputed to embody the foundation of legitimate constitutional government in a parliamentary frame of government.

Second, the focus on sovereignty as a relational concept illuminates the way in which a constitutional system articulates the relationship between the notion of the people and the representation of the nation institutionalised at the constitutional level. In this regard, the political understanding of sovereignty as ‘constituent power’ also draws attention to the ancient aspect of constitutionalism by which the constitution is antecedent to government and the political constituting act takes place when a people constitutes as a state (Loughlin 2004: 120–1).⁷ As Lee pointed out, the notion of sovereignty is not relevant to

⁵ *Hari Prasad Nepal v. Prime Minister*, NKP 2052/1994 Vol. 37, No. 1, p. 88; *Ravi Raj Bhandari v. Prime Minister*, SAB 2052/1995 Vol. 4, No. 1 Bhadra p. 16; *House Dissolution (N:3) Case SAB 2055/1998* Vol. 6, No.1 Māgh p. 16; Supreme Court’s judgement on 2002 dissolution of the House of Representatives rendered on August 6, 2002 (6 Saūn 2059 B.S.).

⁶ On a similar note, no local elections have been held in Nepal since 1997.

⁷ ‘Once the constitution has established general authority, “the people” that provided the source of the legitimacy of government become a concept constructed within the same political space. Governments act in the name of and for the benefit of the people, and a variety of institutional devices are established to ensure that governments act in “the public interest”. But since the

the concept of 'the people' if 'the people' are understood in a Hobbesian sense as 'the multitude' but only if the people are conceptualised in a Rousseauian way as 'a unity out of a plurality'.⁸ The latter notion of 'the governed' as a political community is at the heart of modern constitutionalism. As illustrated by Rousseau (1762/1994: 54), 'the multitude' transforms into 'the people' only after entering into the social contract, which is based on the fictional concept of the unified 'general will of the people'. The act of association by individuals transforms them into a collective body characterised by its unity, common self-life, and will.⁹

With the rise of the modern nation-state, the notion of the people often has been conflated with that of the nation, but these terms indicate different ways of imagining the political community that inhabits the territory of the state. Yack (2001: 520–1) drew the following distinction: 'the people' present an image of community *over space* by portraying all individuals within the given boundaries of the state as members of a community from which the state derives legitimate authority; 'the nation' presents an image of community *over time* through a shared heritage passed from one generation to another. As a result, whereas the two terms are indeed distinct, their conflation has been identified as crucial to the rise of nationalism (Yack 2001: 519–20, 524):

Since popular sovereignty . . . is indirect or mediated sovereignty, something other than the structure of political institutions or the exercise of ruling and being ruled must define the people who exercise it. For if the people precede the establishment and survive the dissolution of political authority, then they must share something beyond a relationship to that authority . . . For the nation provides precisely that what is lacking in the concept of the people: a sense of where to look for the prepolitical basis of political community.

government establishes its authority through its ability to control and manage the people, this concept of "the people" is increasingly shaped by these very same institutional arrangements' (Loughlin 2010: 285).

⁸ Daniel Lee, 'Delegating Sovereignty: Jean Bodin on *Imperium, Iurisdictio* and the Right of Magistracy'. Seminar held at the London School of Economics and Political Science, March 13, 2013.

⁹ Rousseau (1762/1994: 56) explained the modern transformation of the relationship between the governors and the governed in these terms: 'the public person that is formed in this way by the union of all the others once bore the name city, and now bears that of republic or body politic; its members call it the state when it is passive, the sovereign when it is active, and a power when comparing it to its like. As regards to associates they collectively take the name of people, and are individually called citizens as being participants in the sovereign authority, and subjects as being bound by the laws of the state'.

In Nepal, the equation of the people with the nation at the constitutional level has been particularly problematic because the civic egalitarian notion of ‘the Nepali people’ – understood as both ‘the governed’ and ‘the citizenry’ – is in fact significantly broader and more inclusive than the ethno-cultural notion of ‘the Nepali nation’. The image of the Nepali nation has been manufactured over the centuries around the ethno-cultural narratives of Hinduism, the Shah monarchy, and the Nepali language of the dominant *Parbatiya* Hindu castes. Such national narratives exclude or – at least place in a subordinate position – by virtue of social, cultural, linguistic, religious, caste, and gender connotations a significant number of Nepali social groups and/or single individuals that instead form part of the people by virtue of their equal political affiliation to the Nepali state.

Nepal’s failure to fully embrace – even after the redemocratisation of 1990 – the concept of ‘sovereignty from below’ through effective mechanisms of political representation and checks on Executive power translated not only into constitutional drafting modalities, form of state, and a frame of government that did not respond adequately to the democratic aspirations of many Nepalis but also into a monolithic, top-down, hegemonic institutionalisation of the Nepali nation in ethno-cultural terms, which excluded the majority of Nepali society (Malagodi 2013). It is not surprisingly that only six years after the promulgation of the 1990 Constitution, an armed Maoist insurgency was launched in the name of the people – that is, the People’s War, or *Jan Yuddha* – against Kathmandu’s central government. Key Maoist demands since the outset of the conflict (1996–2006) were the abrogation of the 1990 Constitution and the promulgation of a new one drafted by an elected Constituent Assembly, and invoked themes of identity politics that were reflected in the constitutional settlement of 1990: demands for secularism, a republic, the removal of caste-based discrimination, the equal treatment of all of the many languages spoken in Nepal; and equal property rights of women. In fact, the notion of ‘the people’ has been pivotal to Nepal’s demands for state restructuring and recognition by constitutional means since the country’s first democratisation in the early 1950s.

NEPAL’S ARCHITECTURE OF POWER, CONSTITUTIONALISM, AND IDENTITY FORMATION

The constitutional positioning of the people and the representation of the nation are investigated here within the physical architectural structures hosting Nepal’s main state institutions and the country’s various constitutional texts. Whereas the relationship between architecture and national identity

has been examined extensively in academic writing (e.g., Vale 1992; Wang and Heath 2008; Goodstein 2009; Huang 2011; Quek 2012), the connection between the physical architecture of the capitol and constitutional identity has remained virtually unexplored. The theory and method of articulation are deployed to create such a connection (Slack 2005: 115). Recent academic works, however, concentrate on the manner in which the architectural design and structure of courthouses express, construct, reproduce, and disseminate key principles of the legal system, including due process (Mulcahy 2011) and justice in democratic societies (Resnik and Curtis 2011), indirectly addressing fundamental tenets of constitutionalism. This chapter seeks to render manifest the connection between the architectural structures of central-state institutions in Kathmandu, Nepal's capital, and the way in which the relationship between the Nepali state and the Nepali people has been articulated in different historical periods in the country's various constitutional configurations and in Kathmandu's government buildings. The analysis builds on the architectural metaphor, which has been deployed over the centuries by many scholars – from Bodin to Hobbes, from Descartes to Bagehot – to provide a visual representation of the structure and functioning of public law. It is helpful to remember that although there is no single standard constitutional template, governmental arrangements indeed reflect the historical stratification of earlier regimes (Loughlin 2010: 101–102).

In this respect, the analysis suggests that the historical modalities in which Kathmandu's physical 'architecture of power' was constructed, transformed, and reappropriated reflect *both* Nepal's processes of state-formation and nation-building *and* the country's engagement with discourses of modernity and constitutionalism over the centuries. Nepal's political architectural production is investigated by deploying Vale's elaboration of the concept of the *capitol*: '... commonly confused with *capital* – meaning a city housing the administration of state or national government – *capitol* with an *o* usually refers to the building that houses the government's lawmakers' (Vale 1992: 11). Both the *capital* and the *capitol* are of paramount symbolic importance because they are designed and promoted as emblematic centres of political authority; they not only mirror dynamics of constitutional working and identity construction, they also are constitutive of such processes. In a manner akin to Geertz's analysis of the Balinese precolonial state in his monograph *Negara: The Theatre State in Nineteenth-Century Bali* (Geertz 1981), I contend that Kathmandu's architecture of power is constitutive of Nepal's theatre state and of the performance of constitutional politics. In this regard, the architecture of the *capitol* is not unlike theatrical scenography: they are both ways to create and orchestrate a performance environment that is an integral part of any theatrical act. For

instance, any given production of Verdi's *La Traviata* is characterised as much by the performance of the soprano as by the director's choices pertaining to the opera's settings and costumes. Similarly, in the political domain, ceremonial rituals and the spaces in which they are performed also are constitutive of the substance, connotations, and articulation of political power. Articulation is deployed in this analysis to create a connection between capitol architecture and constitutional politics, as well as to foreground the structure and play of power entailed in relationships of dominance and subordination in Nepal (Slack 2005: 113). With specific reference to constitutional workings, Bagehot (1867/2001: 5–9) distinguished between the 'dignified' and 'efficient' parts of the British Constitution. The dignified part invests the symbolic capacity of the Crown with its theatrical connotations: an exciting and mystical display of power designed to elicit both admiration and obedience – key functions of a constitutional settlement. Thus, a detailed analysis of the ceremonial aspects of the state and the spatial organisation of its 'stage' as constitutive of political power illuminates the ways in which political authority is conceptualised, legitimised, and exercised; it also furthers the understanding of the manner in which constitutions are designed and how their 'efficient' parts operate. Vale (1992: 275) perceptively summarised the endeavour of juxtaposing political with architectural analysis: 'to judge a public building, one must understand something about the public as well as the building'.

The analysis of Nepal's physical architecture of power reveals a complex interplay of tradition and modernity in the construction of architectural structures and, indirectly, in the manufacturing of the collective political identities represented by capitol buildings. This material process features a startling resemblance with the process of engineering the country's constitutional framework and its representation of the nation's past. In this regard, it is important to problematise the long-standing taxonomies deployed to classify typologies of architectural production (Blier 2006: 231). Such approaches categorise forms of architectural production on a generally complex spectrum ranging from, at one end, 'vernacular architecture' – which identifies autochthonous, grassroot, subaltern forms – to, at the opposite end, 'modern architecture' – which identifies imported, Western, colonial, elite forms. Architectural production, however, is far more nuanced with its array of visual registers, and complex multifactorial explanations are better placed to provide credible accounts of the meaning of architectural structures and their transformations over time.

Unveiling the essentially politicised nature of this binary search for the 'authenticity' of traditional elements and for the 'alienation' brought by modern components within the processes of *both* architectural production

and constitutional design sheds light on the complex interaction between the pursuit of internationally recognised standards and the quest for identifiably ‘national’ symbols. Starting from the construction of postcolonial capitol complexes, the ultimate goal is ‘to find a balance between cultural self-determination and international modernity’ (Vale 1992: 53). Designers of postcolonial capitol buildings, expected to symbolise a country to both the world and itself, negotiate their architectural choices on a spectrum ranging from an ultra-internationalist to an infralocal position: ‘in confronting the twin pull of the international and the local, each architect looks first at one and then back to the other’ (Vale 1992: 272–3). However, the dichotomies of traditional/modern, local/international have been transcended through architectural ‘cross-pollination’ produced by cultural flows, the internationalisation of markets, political transformations, and the movements of people across the border of the nation-state – in a manner not dissimilar to patterns of ‘constitutional migrations’. These considerations illuminate the rationale behind the construction of the capitol and the design of constitutions because both architectural and legal structures play a pivotal role in organising the government, legitimising political authority, and constructing a common identity of the people. On the one hand, ‘government buildings . . . are an attempt to build governments and to support specific regimes. More than mere homes for government leaders, they serve as symbols of the state’ (Vale 1992: 3). On the other hand, ‘constitutions are not merely expected to establish the institutional structure of government and regulate the balance of power. Constitutions also play a foundational role by expressing the common identity and norms of the nation. Constitutions serve as the state’s charter of identity. By delineating the commonly held core societal norms and aspirations of the people, constitutions provide the citizenry with a sense of ownership and authorship, a sense that “We the People” includes me’ (Lerner 2010: 69).

The connection between capitol architecture and constitutional politics in Nepal rests on three key considerations. First, at the moment of architectural production, different ‘meanings’ and ‘intentions’ are inscribed within the same architectural form; the messages about the state, the government, and the people that politicians want to encode in the new buildings hosting key state institutions are translated, more or less accurately, by the vision and professional identity of the architects commissioned to design such buildings, together with limitations of resources, time, and space at the time of construction (Vale 1992: 52). In fact, ‘capitol complexes are produced by ascendant groups who wish to give evidence of ascendant political institutions’ (Vale 1992: 274). Second, the question of the use of capitol buildings also should account for the fact that often such buildings undertake more or less radical

permutations after a regime change; their functions and meaning are redefined by political transformation. As a result, the way in which buildings are either left unchanged or have been adapted, abandoned, or destroyed becomes a component of their symbolism over time and contributes to (or detracts from) the perceived legitimacy of the government or even of the state overall. Third, the issue of ‘consumption of the building’ has a two-dimensional element of relativity, which generates a plurality of meanings. On the one hand, the meaning of the capitol depends on the position within the sociopolitical hierarchy of the person ‘using’ the building – that is, the King, the Prime Minister, a judge, a civil servant, a defendant in criminal proceedings, a mere visitor, a foreign statesman, or a spectator who is not granted access. This focus on the ‘positionality’ of the observer points to the inherent power structures and hierarchies that capitol buildings embody, reconstruct, and perpetuate. On the other hand, there is also a temporal element of relativity attached to the process of encoding and decoding. The meaning of buildings changes over time through their continuous unaltered use, partial modification, or outright subversion while still being shaped by meanings assigned or created in previous periods – in line with the understanding of periodisation of institutional outcomes in historical institutionalist scholarship. For instance, encoding and decoding the meaning of today’s Narayanhiti Palace – that is, the previous residence of the Shah King transformed in 2008 into a national museum – would be a completely different exercise from 2005, at a peak of monarchical autocracy. Moreover, it is an exercise that, of course, is conditional on the point of view of the observer at a given time.

In this perspective, ‘material culture can be viewed as the raw material for the creation of narratives, re-contextualised and redeployed as agents continuously change their use of material culture in the creation of narrative expressions of identity’ (Buchli 2006: 186). Thus, a key concern is to preserve and illuminate the centrality of human agency in the construction, deconstruction, and reconstruction of the multiplicity of meanings within a given text – whether architectural or constitutional – without falling down the postmodern ‘rabbit hole’ of the ‘impossibility of meaning’ or ‘complete openness of meaning’. This analysis maintains that there exists a range of multiple meanings but that this interpretative range is constrained by the underlying structures of the text.¹⁰ This is the key methodological premise necessary to undertake a study of the articulation of internal state sovereignty in Nepal by juxtaposing

¹⁰ Lez Moran, ‘Whose Biography? The Challenge of Researching the Judicial Image’. Paper presented at the conference ‘Legal Biography: A National Training Day’, Institute of Advanced Legal Studies, University of London, May 15, 2013.

the country's various constitutional documents with the buildings that have formed Kathmandu's capitol over the centuries.

SHAH PERIOD (1769–1846)

Modern Nepal, as the state entity known today, was created by the military campaigns launched in 1744 by King Prithvi Narayan Shah of Gorkha – a small kingdom in the hills west of the Kathmandu Valley – in the name of building a true Hindu kingdom (*asli hindusthān*) by claiming Rajput origins and distinguishing it from India termed as 'Mughlana', at the time under a Muslim ruler. The Gorkhali expansion led to the annexation of many small principalities in the central Himalayan range. In the early nineteenth century, the Gorkhali kingdom extended from the Kangra Valley in the west to Sikkim in the east; however, its territorial extension was reduced with the defeat in the Anglo–Nepalese War (1814–1816). The Treaty of Sagauli in 1816 fixed the Gorkhali southern border with the territories of the East India Company approximately as it is today. This process had a crucial influence on the political modernisation of the Nepali state with regard to the formation of its territorial structure and the development of mutually exclusive external state sovereignty (Burghart 1996: 227). Amid internal instability and factional politics, the Shah Kings remained at the helm of the Nepali government until 1846. Significantly, during the Shah period, the key coordinates of Nepal's processes of state-formation and nation-building were established (Malagodi 2013: 66–74).

The symbolic centrality of the Kathmandu Valley in Nepali statecraft is well attested to by the fact that the history of modern Nepal conventionally is set to start at the time of the Valley's subjugation by the Gorkhalis and by the fact that Prithvi Narayan Shah moved the capital of his kingdom from Gorkha to Kathmandu as early as 1769. As highlighted by Joshi and Rose (1966: 485), 'the transfer added emphasis to the nationwide scope of the new political system'. Kathmandu fits the category of 'evolved capitals' elaborated by Vale (1992: 17) – like London, Paris, Vienna, and Berlin. These are capital cities with long, complex histories for which no simple model of spatial organisation is likely to be usefully descriptive. It is possible to identify and trace the locus of government, but it is difficult to explain the relationship of the capitol to the larger city. This type of capital is polycentric, with a great multiformity of nodes, both sacred and secular (Vale 1992: 17). In fact, since the sixth century A.D., the Kathmandu Valley was described as *Nepālmandala*, a term that indicates a cosmological representation of the realm as a sacred space delimited by religious structures at the cardinal points of the Valley and embodying the

cosmic all-encompassing sovereignty of the King (Slusser 1988). ‘Magnetized by the presence of a monarch or a religious institution, the *capital* container grew around this *capitol* center, designed for ritual and devoted to ceremony’ (Vale 1992: 13).

Prithvi Narayan assimilated the non-Brahmanic elements of the cult of the Newar–Malla Kings of the Valley, whom he had militarily defeated. The most relevant example is that of the *Kumari*: ‘Gorkha forces entered Kathmandu whilst the inhabitants were celebrating the festival of *Indra Jatra*, during which the king received *tilak* from the *Kumari Devi*, or “Living Goddess”, who was regarded as earthly embodiment of *Taleju*, the *isthadevata* [personal deity] of the Newar monarchs. Prithvi Narayan at once ascended the platform erected for the ceremony in the Malla Royal Palace of Basantapur and received the *Kumari*’s recognition, whilst the defeated ruler, Jay Prakash Malla, was in flight to the neighbouring city of Patan’ (Whelpton 1991: 8). Thus, it was crucial for all of the new rulers of the Valley – since the time of Prithvi Narayan Shah – to secure a sense of continuity with the past to conjure a religious and dynastic aura of legitimation of the newly established political power and its institutions.

It is not surprising that Prithvi Narayan Shah elected for his residence in Kathmandu the Royal Palace of the Newar–Malla Kings in Basantapur/Hanuman Dhoka (Figure 1), in what is today known as the old part of the city. The Old Palace, however, retained a ceremonial centrality in royal rituals, as exemplified by the fact that the coronations of both King Birendra (1975) and King Gyanendra (2001) took place there. Archaeological excavations confirm that Basantapur had been the site of royal palaces since the Licchavi era (300–800 A.D.). Today, the Old Royal Palace is a heterogeneous complex consisting of nine internal courtyards with quadrangle buildings mounted by towers and a series of temples. It features a stratification of buildings commissioned between the mid-sixteenth and early twentieth centuries (Hutt 1994: 77), the predominant architectural style of which derives from the Newar canon of square brick buildings with elaborate carved-wood inserts and pagoda-style multitiered roofs. This is the architectural style that has been deemed ‘indigenous’ and ‘truly Nepali’ and, as such, worth preserving as a World Heritage Site. All of the Malla and Shah Kings lived with their court in the Hanuman Dhoka palace until 1896, when King Prithvi Bir Bikram Shah relocated to the renovated Rana stucco palace of Narayanhiti outside of the old city.

Joshi and Rose (1966: 485) described the political system under Shah and Rana rule as ‘traditional’ because the unification of more than sixty independent small principalities into a single political entity did not bring about a radical transformation of the internal organisation of the Nepali state:



FIGURE 1 The Newar–Malla Royal Palace in Basantapur, Old City, Kathmandu. Source: Mara Malagodi, 2015 ©.

‘the political system, like the social system at large, continued to be a highly segmented, pyramidal structure dominated by a handful of families belonging primarily to two castes – the Brahmins and the Kshatriyas’. Instead, this chapter contends that the seeds of the political modernisation of Nepali state structures already were sown during the early years of the Rana regime.

RANA PERIOD (1846–1951)

In 1846, a young aristocrat, Jang Bahadur Kunwar, put an end to the period of political instability that followed the death of Prithvi Narayan Shah in 1775. He staged a coup, neutralised the power of the Shah King and the aristocratic elites by making the office of Prime Minister hereditary within his family, and progressively assumed absolute powers. However, the institution of the Shah monarchy was retained – albeit divested of effective power – as the living symbol of the unity of the Nepali state vis-à-vis the internal diversity of the people under Gorkhali sovereignty. This arrangement lasted until 1951. Most capitol buildings of contemporary Nepal were erected as private palaces of the Rana aristocracy during the Rana period and later converted into public buildings. It is significant that because Rana palaces are considered mere

copies of European architectural structures, they have not been preserved as national monuments and today are in an overall state of disrepair. However, they represent the Nepali version of European architectural production and an important cultural legacy of a crucial period of Nepal's history that is worth analysing (Hutt 1994: 61–3).

Jang Bahadur Rana, as he came to be known by tracing his lineage to Rajput aristocracy to elevate his caste status and open the way to marriages with the Shah royal family, realised that an alliance with the British East India Company was crucial – both internally for his survival as supreme political leader and externally for the preservation of Nepal's independence. In 1850, he undertook a journey to England and France as the ambassador of the King. The power and wealth of the European countries made a lasting impression on him, and he brought back from Europe a printing press and the instruments of legal codification. In 1854, Jang Bahadur promulgated the Muluki Ain (i.e., the Country Code) – a legal document that aimed to codify traditional social conditions, subsume the various ethnic groups within the Parbatiya Hindu caste hierarchy, and impose on them its rules. According to Höfer (1979: 41), the sources of the first Nepalese legal code were the *dharmashāstra* (i.e., the traditional Hindu legal texts), the *Arthashāstra*, Mughal legislation, and possibly Anglo-Indian law. The provisions of the Muluki Ain generally were limited to the fields of personal and administrative law (Höfer 1979: 40). However, the scope of the Muluki Ain went beyond the attempt to simply impose homogeneous sociolegal norms on the entire population under Gorkhali sovereignty; this codification had a political rationale. It was an attempt to legitimise the identity of the Gorkhali polity by depicting it as culturally distinct and to motivate the solidarity of the population towards the state. It was a way to reinforce traditional autochthonous loyalties, hegemonies, and hierarchies by modern institutional means.

In this regard, Liechty (1997: 6) suggested that 'from the late Malla period, through the period of state consolidation, to the Rana era, Nepali elites experimented with a policy of *selective exclusion* whereby they sought to harness the shifting and volatile powers of foreignness, while attempting to keep those powers out of the hands (and minds) of their political subordinates'. A salient feature of the century under Rana rule, along with legal codification, was the construction of a vast number of neoclassical white-stucco European-style palaces across Kathmandu Valley. As Liechty stated:

The Ranas were not simply imitating North Indian 'native' elites, but had actually elevated their ostentation to another level . . . the Rana elites adhered strictly to a 'pure' European neoclassical style. I am inclined to agree with Joel

Isaacson who suggests that Rana insistence on a 'pure' neoclassicism was a way of distancing the 'Rana Raj' from both the Princely States and the British Government in India itself. By this line of reasoning, just as Jang Bahadur had sought to bypass the British Viceroy by going directly to Buckingham Palace, the continuing tradition of Rana neoclassicism (and slavish consumption of English distinctive goods) was a way for the Nepali elites to at least imagine a *direct* link (noble to noble and therefore superior) with the 'real' imperial power (Isaacson 1990: 73), a link that would distinguish them from their 'native' brethren in India (Liechty 1997: 46).

Sabina Tandukar reflects on the imposing nature and symbolism of Rana stucco palaces: "The palaces maintained axial configurations and scale which dominated the human proportions, and stood almost at the centre of the vast expanse of the landscaped areas, adding to much of its grandeur and monumentality. These palaces, unanimously known as "white elephants", have given visual dominance over the medieval architecture of the valley. This might be the intentional character given by those builders to flaunt their superiority among the commoners or please their British counterparts".¹¹

Significantly, Rana stucco palaces have not been considered by either Nepalis or foreigners as examples of 'vernacular architecture' worth preserving. As Liechty (1997: 6) astutely concluded, 'stories of Nepal's relationship with foreign goods and cultural practices before 1951 have been – like the Rana palaces and the foreign objects themselves – at best neglected as irrelevant, and at worst actively reviled as instances of cultural contamination'. The reason for such an aversion to Rana cultural and architectural productions among Nepalis is found in the meaning assigned to European-style architecture during the Rana regime. The Rana elites appropriated, displayed, and deployed foreign goods and aesthetics as the visual manifestation of their social and political hegemony – to the point that they restricted the usage and consumption of 'foreign-ness' by law. "The Ranas spent staggering amounts of money and man power on imported luxury goods and monumental architecture. They further guaranteed their privilege through a variety of sumptuary laws . . . no one but the Rana elites were permitted to ride in motorized vehicles or wear European dress (Leuchtag 1958: 63). Only with special permission could one build a stucco house or erect a tile roof (Isaacson 1990: 68). Foreigners who made it into the valley during this period repeatedly echo Morris's observation that "The court and the people are two entirely different entities" (1963: 26)' (Liechty 1997: 41).

¹¹ Source: Available at <http://spacesnepal.com/2013D10.php> (accessed May 21, 2013).

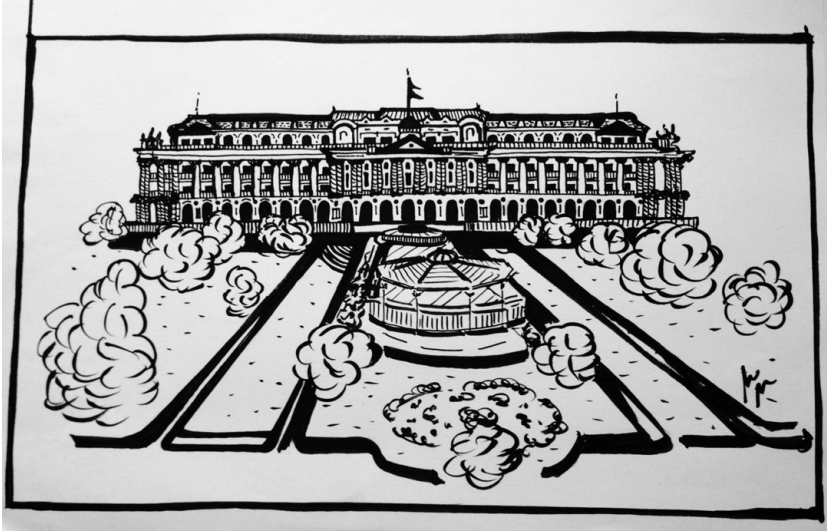


FIGURE 2 Singha Darbar complex (built in 1903). Source: Mara Malagodi, 2015 ©.

In 1886, Prime Minister Bir Shamsheer Rana had his predecessor's private palace at Narayanhiti completely demolished and employed architect Jogleal Sthapit, also known as Bhajuman, to construct a new palace in that very location on the outskirts of the old city. After completion in 1896, the Shah royal family moved out of the old Newar–Malla Palace in Basantapur and Narayanhiti Darbar became the official residence of the then-King Prithivi Bir Bikram Shah. The reason for the Prime Minister's decision to relocate the royal family remains unclear.¹²

In 1901, Chandra Shamsheer Rana became the Prime Minister of Nepal and remained in power until 1929. In 1903, Chandra Shamsheer commissioned architects Kumar Narsingh Rana and Kishore Narsingh Rana for the construction of the monumental complex of Singha Darbar, literally the 'Lion's Palace' (Figure 2), that on completion became his private residence. Built in only three years on 50 hectares of land and featuring 1,700 rooms, 7 courtyards, and a

¹² As reported in *Spaces Magazine*, 'Narayanhiti palace underwent a lot of transformation in the latter period of its construction. The trend of regularly renovating the palace with flashy interiors and extravagant exterior elements was quite popular among the rulers then. After the 1934 earthquake, King Tribhuvan employed engineer Surya Jung Thapa to add a huge bifurcated staircase in the main portico. This addition on the southern side of the palace, which was also the front façade, added a remarkable order of grandeur to the building as a whole'. Available at http://spacesnepal.com/archives/nov_dec09/2009KL2.php (accessed May 20, 2013).

private theatre (i.e., 'Gallery Baithak', which became the Parliament building in 1959) at a cost of five million Nepali rupees, the Palace was regarded as one of the most luxurious in Asia (Gutschow 2011: 858). Weiler (2009: 129–30) described the Palace this way: 'It was accessible through a neoclassical gate. Its magnificent four-storey façade, a veneer of arcades on the ground-floor level and colonnades that soar over the first and second floor – in each case set in front of the windows – gives an exquisite sense of space. The protruding central portico is carried by double Corinthian colonnades with twisted column shafts. Its interior decoration exhibited Italian Carrara-marble, European furniture reflecting Victorian taste, European chandeliers, Venetian mirrors and an elevator imported from Scotland'.

After living in Singha Darbar for a few years, Chandra Shamsher sold it to the Nepali state for twenty million Nepali rupees and declared it the official residence of all Prime Ministers of Nepal after him. With the profit made from the sale, he then built nine more palaces in Kathmandu Valley for his sons. Singha Darbar remained occupied by successive Rana Prime Ministers until 1951.¹³ The Singha Darbar complex, however, had not been commissioned and constructed with the intention to serve as a public building and an emblem of the Nepali state. It was not a structure built in the name of the people to house the people's representatives; rather, it was the symbol of the autocratic rule of an unrepresentative elite and an extractive state, the political authority of which was legitimised on the basis of both traditionalist blood ties with the 'national' Shah Hindu monarchy *and* claims of a political and cultural hegemony manifested through modern foreign aesthetics and instruments.

The political, institutional, and ideological structures established under Jang Bahadur's reign (1846–1877) led to the consolidation of the Rana regime and, until its displacement in 1951, few changes within the Nepali political system occurred. The British departure from the subcontinent in 1947 and the emergence of India as an independent democracy marked a watershed in Nepal's political history. The rhetoric used by the Nepali state also changed significantly: the ideas of equality and democracy made persuasive by the Indian anticolonial struggle could no longer be ignored in Nepal if the Rana elites were to retain political power in the country. Prime Minister Padma Shamsher Rana understood this and on April 1, 1948, he announced Nepal's first constitution. The 1948 Constitution, however, was never implemented because Padma Shamsher resigned from office shortly after it was drafted. However, the 1948 document marked the entry of debates about modern constitutionalism and democracy into Nepal's official political discourse.

¹³ Available at <http://spacesnepal.com/2013D10.php> (accessed May 21, 2013).

FIRST DEMOCRATIC EXPERIMENT (1951–1960)

Between 1950 and 1951, an alliance between King Tribhuvan and the newly created Nepali political parties succeeded in toppling the Rana regime with the support of independent India. In 1951, an agreement known as the ‘Delhi compromise’ led to the establishment of a Rana–Congress government to transition Nepal to democracy. The years until the first general elections of 1959 were characterised by transitional politics and great instability, exacerbated by tensions between the political parties and the monarchy, bitter interparty disputes, and the succession of a long string of Cabinets alternating with periods of direct monarchical rule.

In his Royal Proclamation of February 18, 1951, King Tribhuvan declared: ‘hereafter our subjects shall be governed in accordance with a democratic constitution to be framed by the Constituent Assembly elected by the people’ (Tripathi 2003: 25). On April 11, 1951, the King promulgated the Interim Government of Nepal Act 1951, the first constitution ever enforced in the Himalayan kingdom – a provisional document to govern the country until a definitive constitution was drafted. The Interim Constitution introduced a parliamentary system with the Shah King as the head of state. Political parties operating on a mass scale were to be legitimate vehicles for political action. The text made no explicit reference to Hinduism and left the issue of the place of Hinduism to the permanent constitution. Executive powers were vested in the King and the Council of Ministers, an Advisory Assembly General enjoyed limited Legislative functions, and an independent Judiciary was established. Article 17 defined the Fundamental Principles of Law guaranteeing basic Fundamental Rights to all Nepali citizens, with the notable exception of freedom of worship. Fundamental Rights were not given a separate section but rather were incorporated into the part concerning the Directive Principles of State Policy, making them non-justiciable (Tripathi 2003: 28).

The death of King Tribhuvan in 1955 and the coronation of his son Mahendra led to a more active role of the Shah monarchy in the conduct of Nepal’s turbulent political affairs. According to one analysis, King Mahendra ‘aspired to exercise an active leadership in accordance with Hindu traditions and these aspirations were manifested by his refusal to hold elections for a Constituent Assembly, and the desire to write the constitution himself with no sovereignty being vested in the people’ (Dhungel et al. 1998: 24). In March 1958 – ignoring continued demands for the creation of a Constituent Assembly after general elections had been postponed twice – King Mahendra invited the British constitutional expert Sir Ivor Jennings to guide the impending constitution-making process and he independently appointed a commission to draft the

new constitution. Jennings was convinced that a modified Westminster model could be transplanted in Nepal and therefore engineered a document the identity of which was centred on the Crown as he willingly marginalised the representative element of government (Malagodi 2015). On February 12, 1959, the King promulgated the new constitution, which established a democratically elected parliamentary system under a nominally constitutional monarchy while the King retained ultimate sovereignty, as stated in the Preamble.¹⁴ The monarch enjoyed wide discretionary powers and was granted residuary and emergency powers. Executive powers also were vested in the King, although the constitution created a Cabinet responsible to Parliament to aid His Majesty in performing Executive functions. The section on Fundamental Rights featured the right to equality before the law without discrimination on the grounds of religion, sex, race, caste, or tribe in Article 4, and the right to religion in Article 5. However, the right to religion – for the first time in Nepali history – was limited, defining religion ‘as handed down from ancient times’, implicitly referring to Hinduism. It also ‘provided that no person shall be entitled to convert another person to his religion’. Nepali history and traditions acquired a paramount position in the 1959 Constitution. The Preamble defined His Majesty, for the first time, as ‘a descendant of the illustrious King Prithvi Narayan Shah, adherent of the Aryan Culture and Hindu religion’ and stated that the sovereign powers of the Kingdom of Nepal were vested in the King ‘in accordance with the traditions and customs of our country and which devolved on Us from Our August and Respected Forefathers’.

In February 1959, only a week after the promulgation of the new constitution, the Nepali Congress won the country’s first general elections, and its leader, Bishweshwar Prasad Koirala, was installed as Prime Minister. Gallery Hall – the former Rana-built private theatre within the Singha Darbar complex (Figure 3) – was converted into Nepal’s first Parliament Building to host the 109-member Lower House (i.e., ‘Pratinidhi Sabha’, or the House of Representatives).¹⁵ It remains unclear, however, where the thirty-six-member Senate (i.e., Maha Sabha) met.

A pragmatic argument certainly can be made with regard to the decision of converting Gallery Baithak into the seat of the newly created Parliament in terms of both its proximity to the offices of the Prime Minister and Cabinet

¹⁴ ‘I, King Mahendra Bir Bikram Shah Dev in the exercise of the sovereign powers of the Kingdom of Nepal’, Preamble, Constitution of Nepal, 1959.

¹⁵ Parliament’s Lower House was elected through a ‘first-past-the-post’ electoral system in single-member constituencies with tenure of five years. The Election Commission set up in 1951 completed the delimitation of the country into 109 constituencies in May 1958 (Joshi and Rose 1996: 283).



FIGURE 3 Parliament Building (Gallery Baithak) in the Singha Darbar compound (built 1903). Source: Mara Malagodi, 2015 ©.

and the fact that it was readily available for occupancy and cost-free. Nonetheless, the argument is persuasive only in explaining the immediate aftermath of the promulgation of the 1959 Constitution. In my view, it remains of highly symbolic significance that Nepal's first directly elected Legislature – the constitutional body deputed to represent the Nepali people – was hosted in what once was Chandra Shamsher Rana's neoclassical private theatre located in the Singha Darbar compound, the historical seat of Nepal's de facto Executive government. Moreover, emphasising the fact that the first proposal for a new purpose-built Parliament Building was made in Nepal as late as 2001¹⁶ does not aim to recount 'the history of an absence', as it has been suggested,¹⁷ but instead to highlight the marginal position of Nepal's Legislature vis-à-vis the other branches of government in both architectural and constitutional terms.

A significant example of the marginalisation of Nepal's legislature is found in the provisions of the 1959 Constitution concerning royal assent to make Parliament's bills into legislation: whereas the British Crown's royal prerogative power of assenting to bills was preserved and codified into the Nepali

¹⁶ Available at <http://nepalitimes.com/news.php?id=13211> (accessed August 19, 2013).

¹⁷ Pratyoush Onta, Martin Chautari, Kathmandu, July 14, 2013.

document, the eighteenth-century constitutional convention by which the monarch shall not withhold assent under any circumstances was obliterated entirely.¹⁸ The British principle of parliamentary sovereignty understood as unfettered legislative competence was subverted; the elected representatives of the people were not sovereign but rather subjected to the authority of the unrepresentative hereditary element of the executive, the monarch. In this regard, the 1959 Constitution granted the monarch extensive discretionary and emergency powers, disregarding the landscape of constitutional conventions that developed in Britain because the Nepali King was empowered to reject the Prime Minister's recommendations under Article 26 and retained exclusive control over the Army under Article 64. As a result, Nepal's government was placed in the difficult position of having to please two masters at the same time – the electorate and the Crown; of the two, the Crown held final authority under the 1959 Constitution (Joshi and Rose 2004: 312).

In Britain, constitutional developments emerged from the tensions between the monarchy and Parliament; whereas in Nepal, the protagonists in the struggle over state sovereignty are the monarchy and the Prime Minister. This is exemplified by the effective administrative diarchy between the Palace Secretariat in Narayanhiti and the Central Secretariat in Singha Darbar created by the various bouts of direct monarchical rule in the 1950s (Joshi and Rose 2004: 376). The fault line of political authority in Kathmandu runs along the axis of the Royal Palace in Narayanhiti and the office of the Prime Minister in Singha Darbar. In this regard, after the 1951 revolution, the main building of the Rana palace of Singha Darbar was retained as the seat of offices of both the Prime Minister and the Cabinet. The symbolic importance of this decision is twofold: (1) Nepal's democratic forces entered and appropriated the central locus of Rana's political authority in the name of the Nepali people; and (2) the permanence of Singha Darbar as a key centre of power in Kathmandu highlights the many continuities with the previous regime as many members of the Rana family retained key governmental and institutional posts in the Nepali state machinery. Finally, with the creation of an independent Judiciary under the 1951 Interim Constitution and the corollary Legislature, in 1955, engineer Gouri Nath Rimal was instructed to prepare the detailed plan of a new building for the Supreme Court on Ramshahpath – on the Eastern margin of the Singha Darbar compound – and the foundation stone was laid

¹⁸ 1959 Constitution, Article 42: (1) When a Bill is submitted for the assent of His Majesty in accordance with Article 41 His Majesty shall declare either that He assents to the Bill or that He withholds His assent there from. (2) His Majesty may consult the Council of State as to whether He should assent to a Bill . . .

on March 10, 1957. The building was not inaugurated until the Panchayat period.¹⁹

Nepal's first experiment with constitutional democracy, however, was short-lived. In December 1960, the Nepali Congress government was dismissed by King Mahendra and its leaders were either detained or driven into exile in India. The King assumed absolute powers, claiming that Nepal's fragile democratic process failed to deliver political stability, thereby endangering national sovereignty.

PANCHAYAT REGIME (1960–1990)

In 1960, King Mahendra staged a 'royal coup' by assuming emergency powers, banning all political parties, and suspending the short-lived 1959 Constitution. He claimed that Nepal was unprepared to function according to the rules of Western-style parliamentary democracy. Instead, after holding absolute power for two years, the King sought to engineer through the promulgation of another constitution on December 16, 1962, an essentially brand-new political system called the 'Panchayat system.' This system was nominally based on Nepal's traditions as the country's alternative route to modernisation and development (Burghart 1993: 1).

The Panchayat Constitution resulted from the research of a four-member committee under the chairmanship of Minister Rishikesh Shaha. The committee had been appointed by the King to study the constitutional frameworks of Yugoslavia, Egypt, Pakistan, and Indonesia. The final outcome was an ingenious combination of various features of the constitutions of these countries, adapted to devise a specifically Nepali text (Joshi and Rose 1966: 396). The 1962 Constitution vested state sovereignty exclusively in the King and established his involvement in every branch of government, making the principle of separation of powers enshrined in the constitution entirely meaningless (Dhungel et al. 1998: 30). The active leadership of the King in the Panchayat system entailed a complete absence of political opposition, ensured by the outlawing of political parties. The plan was to 'reestablish' the relationship between the King and his people, unmediated by any political actor.

The 1962 Constitution created a central unicameral legislative body, the National (Rashtriya) Panchayat, which enjoyed only advisory powers; its membership was partly directly nominated by the King and partly indirectly elected. The Panchayat system encompassed four tiers of representative institutions

¹⁹ Personal communication with Nahakul Subedi, Registrar of the Supreme Court of Nepal (May 12, 2013).

elected at different levels. Direct popular elections with universal adult suffrage took place only at village (*gaum*) and town (*nagar*) levels. The elected representatives of these assemblies voted for members of the seventy-five assemblies at the district (*jilla*) level, who then elected members of the fourteen assemblies at the zone (*anchal*) level, who finally voted for the elected representatives in the National Panchayat (Rose and Fisher 1970: 53). The system was a pyramidal structure in which only the lowest level was elected directly by the people, whereas members of the higher assemblies were selected by and from among the representatives on the level immediately below. Gallery Baithak was retained as the seat of Nepal's central Legislature; the marginal position of the Rashtriya Panchayat and its subordination to the monarchy in both the government apparatus and symbolism of the Nepali state during the Panchayat regime did not require the investment of public funds for construction of a public building hosting Nepal's Parliament.

The Panchayat Constitution also was Nepal's first constitutional document to define precisely and institutionalise the connotations of the country's national identity. Article 2 stated that 'the Nepalese People, irrespective of religion, race, caste or tribe, collectively constitute the Nation' and Article 3 declared Nepal as 'an independent, indivisible and sovereign monarchical Hindu state'. The Preamble vested state sovereignty and powers in the King, as a sort of royal prerogative defined 'in accordance to the constitutional law, custom and usage of Our country as handed down to Us by Our August and Revered Forefathers'. For the first time, the 1962 Constitution legally made Nepal a Hindu kingdom. However, the Constitution contained an extensive section on Fundamental Rights and Duties. Article 10 guaranteed equality before the law and Article 14 the right to religion, although this was limited – as in the previous 1959 Constitution – to 'religion as handed down from ancient times' and to its practice 'with regard to traditions' and the ban on conversion was reiterated. The emphasis on 'Nepali traditions' became part of the propagandistic rhetoric of the Panchayat system. The 1962 Constitution also was imbued with the spirit of modern nation-building, which was, King Mahendra believed, the ideal strategy to tighten his hold on power and create favourable circumstances for Nepal's socioeconomic development and modernisation. The new constitution fixed the coordinates for the construction of a Nepali nationalistic discourse: Hinduism, the Shah monarchy, and the Nepali language became the 'triumvirate of official Nepali national culture' (Onta 1996: 214).

The notion of the Panchayat system was created to legitimise the central and preponderant role of the Shah monarchy in Nepal's constitutional edifice; the term *Panchayat* first featured in the Royal Proclamation that accompanied



FIGURE 4 The New Narayani Palace, Darbar Marg (rebuilt in the early 1960s). Source: Mara Malagodi, 2015 ©.

the promulgation of the 1962 Constitution. King Mahendra then commissioned American architect Benjamin Polk to design the new Royal Palace for him; ‘the reason behind employing a foreign architect was probably because he wanted a new definition for his palace. He had to transcend the conventional character of architecture that the previous rulers had borrowed from the Western world. He also wanted a new vocabulary to delineate his Kingship for addressing a modern Nepal’.²⁰ The old Rana palace in Narayanhiti was razed and construction of the new Narayanhiti Palace began in 1963; the complex was completed in 1969 and inaugurated in 1970 with the wedding of the then-Crown Prince Birendra.

The Narayanhiti Palace within the Narayanhiti compound (Figure 4) is a syncretic structure: the modernist three-storey compact base features essentialist and simple horizontal lines. On this base, a central vertical block is superimposed, covered by a pagoda-style roof reminiscent of the Newar canon, which hosts the throne room (i.e., Gaddi Baithak). Access to the Palace is granted through a central marble staircase at the front of the building that leads to the main reception hall (i.e., Kaski). Located on the left side of the throne room block is an even taller and leaner modernist-looking white tower that Polk (1993: 9) referred to as the ‘Hindu temple tower’.

²⁰ Available at http://spacesnepal.com/archives/nov_dec09/2009KL2.php (accessed March 8, 2013).

King Mahendra had commissioned Polk (1993: 7–9) to design a building that reflected his vision of the Nepali state by combining tradition and modernity: ‘there was the tradition of the mighty Himalayas in slate and native marble, in carved wood and brass, in ornamental grilles and gilded finials, and the Palace was to be the first focus for the pride and culture of modern Nepal . . . a symbol by and for the people of Nepal . . . the Narayanhiti Palace in Kathmandu constitutes a “royal village” with its various purposes, and His Majesty immediately perceived in it the national symbolisms for Nepal’s central government’. As Vale (1992: 275) highlighted, ‘capitol complexes must be judged together with the institutions they house . . . and their political pedigree is made manifest in the choice of site, in the relationship between capitol and capital, and in the often partisan iconography of the architectural form’. The new Narayanhiti Palace is both reflective and constitutive of Nepal’s Panchayat state-framed nationalism constructed around the Shah Hindu monarchy. Both the 1962 Constitution and the new Royal Palace articulate the *raison d’être* of the Panchayat regime: a modern political endeavour cloaked in a traditionalist guise. Narayanhiti Darbar was the new fulcrum of political authority in Nepal and the central element of Kathmandu’s capitol. As such, any trace of the Rana legacy had to be erased from its grounds, the renovation of which was the physical manifestation of the new era ushered in by King Mahendra. It is interesting to note the parallel with the construction of Pakistan’s new Islamic capital of Islamabad in Punjab between 1959 and 1963 under General Ayub Khan’s regime (1958–1969) and the promulgation in the same period of a new constitution in 1962. It is significant that in Ayub’s Islamabad – as in Panchayat-era Kathmandu – the fulcrum of the capitol and of political authority was the seat of the Head of State – the Presidential Palace and the Royal Palace, respectively, in both architectural and constitutional terms.

On February 1, 1963, King Mahendra also inaugurated the Supreme Court Building on Ramshahpath (Figure 5), an inconspicuous modernist linear three-storey structure to which three protruding units are superimposed at the centre and extremities. The middle structure is taller than the rest of the building and features a long vertical opening covered by a carved-wood window. The Supreme Court Building’s architectural style is essentially modern but draws from the local Newar–Malla register in a manner similar to the new Narayanhiti Palace. However, with the promulgation of the 1962 Constitution, the independence of the Nepali Judiciary was severely compromised because the King was empowered to appoint and remove judges, who were accountable to him. Similarly, the power of judicial review was taken away from the Supreme Court (Bhattarai 2006: 20). As a result, the Supreme Court Building during

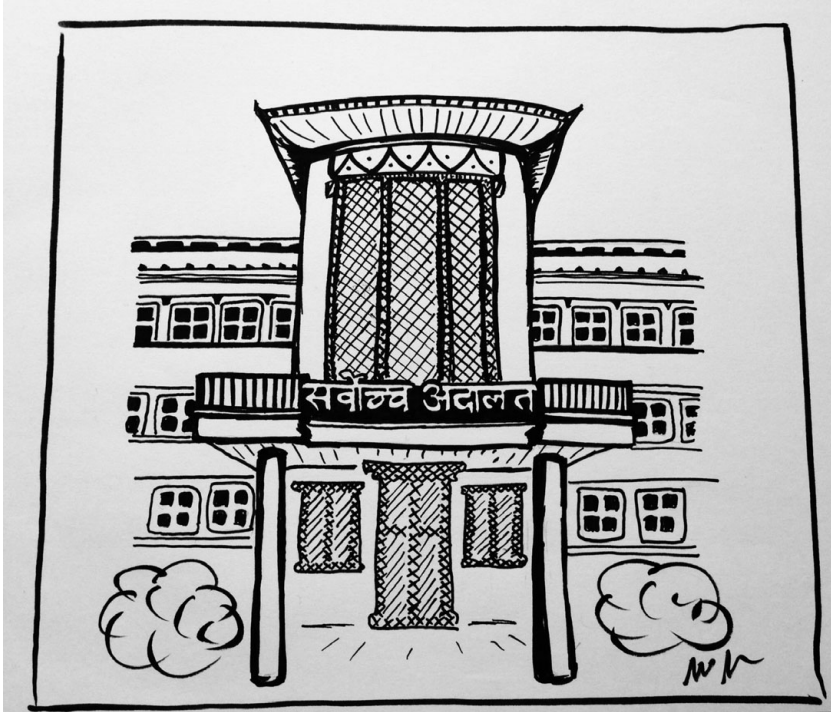


FIGURE 5 The Supreme Court Building, Ramshahpath (built 1957–1963). *Source:* Mara Malagodi, 2015 ©.

the Panchayat period also retained a peripheral position in Kathmandu's capitol centred on the Royal Palace. In fact, in 1963, King Mahendra drove the initiative of legislative reform and approved the enactment of a new Muluki Ain, which is still in force today.

Throughout the 1970s and 1980s, the Panchayat system became progressively delegitimised. Moreover, with the death of King Mahendra in 1973, his son Birendra ascended to the throne and introduced a modicum of reforms; however, they were insufficient to preserve the downfall of the system.

SECOND DEMOCRATISATION (1990–2006)

In early 1990, the underground political parties launched a pro-democracy movement and succeeded in toppling the Panchayat regime in April. In May, the process of preparing a new constitution – Nepal's fifth – began; however, the drafting was not carried out by an elected Constituent Assembly but instead by a small commission, whose ten members were handpicked

by the King, the Nepali Congress, and the United Left Front, finalised by a committee formed by three Ministers of the Interim Cabinet, and then promulgated by King Birendra on November 9, 1990 (Malagodi 2013: 112–27). The 1990 Constitution aimed to establish a constitutional monarchy and parliamentary democracy with an independent judiciary empowered to exercise its powers of judicial review and entertain Public Interest Litigation petitions. Sovereignty was vested in the people in Article 3, but the Preamble stated that it was the King who would promulgate the constitution ‘by virtue of the state authority exercised by Us’. In this regard, it is interesting to note the different way in which the terms *adhirājya* and *rājya* were used in the 1990 Constitution. Both terms can be translated as ‘state’, although *adhirājya* refers specifically to the notion of kingdom with an explicit association to the institution of the monarchy, and it alone is used in the definition of the Nepali state in Article 4 and in the Preamble. In the sections on Fundamental Rights and Directive Principles of State Policy, the more neutral term *rājya* is used. It seems that the term *adhirājya* retains a connection with Nepal’s historical process of state-formation in which the Shah monarchy played a central role. Conversely, the term *rājya* presents more neutral connotations and, in fact, it is used to refer to the state as the institutional apparatus and legal entity without much emphasis on its historically defined salient cultural features. In this regard, the 1990 Constitution was disseminated with ethno-cultural nationalist references to Nepali history as constructed around the Shah monarchy: the state again was defined as Hindu in Article 4; the King was defined as a descendant of King Prithvi Narayan Shah and an adherent of Aryan culture and Hindu religion in Article 27; the right to religion was limited to protecting religion ‘as handed down from ancient times’ and having due regard for traditions and the ban on conversion was reiterated in Article 19; and Nepali remained the only national and official language in Article 6. The triumvirate of official Panchayat nationalism had been preserved virtually intact in the 1990 document.

Nepal’s second general elections in 1991 resulted in a Nepali Congress victory and marked the beginning of constitutional politics in the country. Two sets of difficulties led to growing political instability: on the one hand, there were tensions between the King and the elected government over the use of extensive prerogative powers of the monarch as illustrated by the ambassador-appointment case²¹; on the other hand, there were tensions between the Lower

²¹ *Adv. Radheshyam Adhikari v. Council of Ministers*, NKP 2048/1992, Vol. 33, No. 12, p. 810.

House of Parliament and various Prime Ministers who made a habit of dissolving Parliament for short-term political gain.²² Post-1990, the role and activism of Nepal's Supreme Court grew exponentially, leading to the Judiciary becoming an effective counterbalance to the Executive. However, the Supreme Court Building remained marginal within Kathmandu's capitol. Speaking of Washington, DC, Vale (1992: 62) argued: 'In retrospect, it is understandable why the Supreme Court, as a new institution possessing neither a distinguished history nor a large bureaucracy to legitimate a need for architectural largesse, did not gain a position of immediate urban privilege. All the same, ever since the controversial decision in *Marbury v. Madison* (1803) established the principle of judicial review by declaring an Act of Congress unconstitutional, the United States Supreme Court has periodically played a more powerful role in constitutional government than even its contemporary urban (as opposed to architectural) presence would suggest'. In fact, the Court did not move to the new building until 1935. This argument illustrates well the Nepali case.

Nepali politics became progressively more unstable with the 1994 midterm elections producing a hung Parliament and a string of coalition governments. The inability of the Nepali state to deliver either democratic inclusive participation or economic development led to a growing resentment across the country. Political and constitutional instability eventually led to the launching of the Maoist armed insurgency – 'the People's War' – in 1996 in midwestern districts. It is significant that one of the Maoists' core demands was the abrogation of the 1990 Constitution and the promulgation of a new document 'drafted by the people's elected representatives'. The government, however, ignored the demands and dismissed the People's War as a slow-burning insurgency confined to impoverished peripheral areas. Local elections – the last to this date – were then held in 1997. The focus of Nepali politics remained Kathmandu-centric, and it is significant that the first proposal for a purpose-built Parliament Building in Nepali history was presented as late as 2001 (Figure 6).

'The new building is hemispherical in shape and echoes the designs of pagoda-style temples [and *stupas*]. There are six planned blocks: the House of Representatives, the National Assembly, libraries, offices of the various parties, offices of the secretariat, and other sections. The total capacity of the House of Representatives would be 1,500 people with the National Assembly 1,000';

²² *Hari Prasad Nepal v. Prime Minister*, NKP 2052/1994, Vol. 37, No. 1, p. 88; *Ravi Raj Bhandari v. Prime Minister*, SAB 2052/1995, Vol. 4, No. 1 Bhadra, p. 16; *House Dissolution (N.3) Case*, SAB 2055/1998, Vol. 6, No. 1 Māgh, p. 16; Supreme Court's judgement on 2002 dissolution of the House of Representatives rendered on August 6, 2002 (6 Sañin 2059 B.S.

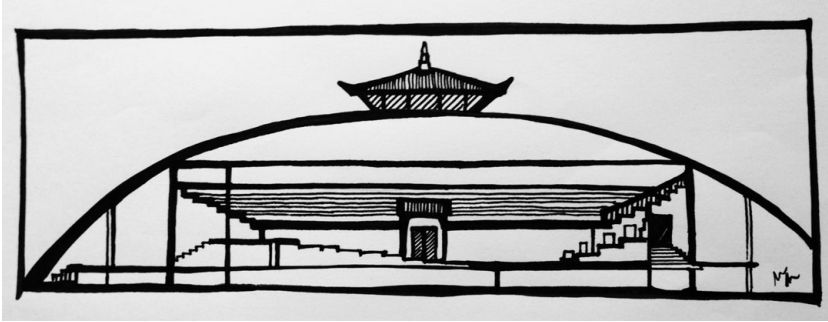


FIGURE 6 Plan for the New Parliament Building (2001). *Source:* Mara Malagodi, 2015 ©.

nothing ever came of the project due to budgetary constraints and mounting political instability.²³

Following the Royal Massacre in 2001 and the intensification of the Maoist insurgency with the deployment of the army in the battlefield and different bouts of emergency rule, state resources were diverted to military initiatives. The House of Representatives elected in 1999 was dissolved in 2002, and Nepal was governed without a Parliament until the end of the civil war. The peripheral position of the representative element of government in Nepal was as evident in Nepal's constitutional politics as in the architecture of Kathmandu's capitol. At the same time, the succession of King Gyanendra to the throne entailed a more active role of the Shah monarchy in Nepal's political affairs as the King twice assumed direct powers in both 2002 and 2005. The 1990 Constitution and its guarantees had become effectively defunct.

POSTCONFLICT PERIOD (POST-2006)

King Gyanendra's second bout of autocratic rule in February 2005 rendered him increasingly politically isolated; a few months later, the Maoists and the mainstream political parties reached an antimonarchical agreement in India. In April 2006, they launched a pro-democracy movement and succeeded in having the House of Representatives reinstated. It was the beginning of

²³ 'A proposal for a new parliament building near Singha Darbar's Putali Bagaicha has been on the cards since 2001. At the request of the government the Singha Darbar Secretariat Reconstruction Committee submitted the proposal, complete with blueprints, and assessed a budget of Rs 2.15 billion for the project. The same year, the government allotted 7.5 hectares (150 ropanis) of land for the complex'. Available at <http://nepalitimes.com/news.php?id=13211> (accessed August 23, 2013).

the peace process, which entailed two essential components: the integration of the Maoist combatants in the Nepal Army and a radical programme of constitutional change inspired by the *mantra* of building a new, inclusive Nepal through state restructuring.

The reinstated House of Representatives unanimously endorsed a proposal to hold elections for a Constituent Assembly with a mandate to draft a new constitution. In May 2006, the House issued a proclamation declaring Nepal a secular state, which curtailed the powers of the King and concentrated legislative powers in the Lower House; the Upper House became defunct. Nepal's Parliament continued to meet in the Gallery Baithak; however, with the effective removal of the King from constitutional politics, important symbolic instruments of the principle of 'King in Parliament' (e.g., the Royal Chair and the Royal Sceptre) fell into disuse. At the same time, the number of representatives grew exponentially: '... there were only 109 seats when it was turned into a parliament building in 1959. Strength went up to 265 in 1990. We have now added 135 to seat additional numbers through the interim phase'.²⁴ The building, however, was in a state of disrepair and became entirely inadequate to host the country's Legislature.²⁵

Between June and December 2006, a small fifteen-member commission consisting of delegates from both the Maoists and the mainstream political parties drafted the Interim Constitution – Nepal's sixth and still in force at the time of this writing – which was then promulgated in January 2007 to lead the country to the Constituent Assembly elections. Significantly, the Interim Constitution remained silent on the monarchy; toned down the rhetoric of 'constitutional nationalism'; and deployed the expression *Nepāl rājya*, omitting the term *adhirājya* entirely. For the first time in Nepali history, the Preamble began with the American-style expression, 'We the People of Nepal', and state sovereignty was vested entirely in the people. The Constituent Assembly elections were held in April 2008 and the Assembly's first meeting, which took place in the rented premises of the 1993 Chinese-built International Convention Centre in Naya Baneshwar on May 28, 2008, declared Nepal a republic. This led to the transformation of Narayanhiti Palace into a national museum

²⁴ Damaru Lal Bhandari and Rekha Shrestha (2006). 'Royal Chair in Parliament Going to Rack and Ruin' in *Himalayan Times*, published on November 20, 2006. Available at http://ipcs.org/pdf_file/news_archive/nov_06_sanepal.pdf (accessed May 21, 2013).

²⁵ 'The hall is icy in the winter and a cauldron in the summer, and damp year-round, due to leaks all over the building. The Royal Gallery of the current building is now used as a special wing for the special guests, foreign diplomats, and dignitaries. Unfortunately, the gallery proved to be anything but comfortable for the guests. It is served by a makeshift bucket toilet'. Available at <http://nepalitimes.com/news.php?id=13211> (accessed August 23, 2013).



FIGURE 7 The Narayanhiti Palace Museum, Darbar Marg (inaugurated in 2008).
Source: Mara Malagodi, 2015 ©.

(Figure 7), significantly altering the epicentre of Kathmandu's capitol. The Constituent Assembly, however, was dissolved in May 2012 without completing the new constitution. Nepal remained without a Legislature in place for over a year and was governed by a Cabinet headed by the Chief Justice only on temporary leave from his judicial post until the second Constituent Assembly was elected in November 2013.

CONCLUSION

Capital cities contain capitol complexes the architectural structures of which, in turn, host central government institutions. As such, capitol buildings are meaningful artefacts of culture that symbolise the government's authority and articulate the relationships of power within the polity. These public structures express in material form the country's constitutional identity in two fundamental ways: (1) they physically represent the relationships among the various branches of the government and the relationship between the state and the people; and (2) they promote a discrete sense of national identity (Vale 1992: 15). Similarly, constitutions are texts that encode a range of cultural meanings pertaining to the nature and institutional organisation of political power in a given context. Thus, both public law and the architecture of public buildings can be regarded as signifying practices that create shared cultural meanings

about the public political sphere. Although constitutional law and the architecture of the capitol are different ‘languages’, through their own specific registers, they both articulate the same cultural understanding of the nature and organisation of political power in the public domain. By simultaneously interrogating both constitutional praxis and capitol structures as practices constitutive of a particular political culture, this chapter illustrates in a historical perspective the tensions among various Nepali political actors about the basis of *rightful* political authority in the country – and the impact of such tensions on political and constitutional stability in the country.

Nepal’s architecture of power, in its constitutional and architectural forms, provides a fitting metaphor for the articulation of state sovereignty understood as the relationship between the Nepali state and the Nepali people. First, with regard to the frame of government within Nepal’s modified Westminster model, the representative element of politics embodied by the Legislature has been consistently thwarted. In fact, historically, the locus of sovereign authority has oscillated – in both constitutional and architectural terms – between the two arms of the executive, the Royal Palace and the office of the Prime Minister. This relegates Parliament to a peripheral position vis-à-vis Nepal’s dominant executive, whether in its hereditary or its representative form. It remains to be seen whether Nepal’s recent transformation into a republic and the growing influence of the Nepali Supreme Court could alter these dynamics in which the democratic principle of popular sovereignty historically has been undermined and subverted. As a result, the institution deputed to give voice to ‘the people’ often has been silenced, sidelined, or even suspended in the name of short-term political expediency, thereby frequently depriving the country’s political process of both constitutional legitimacy and popular mandate. Because modern sovereignty articulates the constitutional relationship between the state and the people, the people should be an active part of that dynamic for Nepal’s political system to operate in a legitimate, constitutional, and democratic manner.

Second, the high degree of sociocultural diversity of Nepali society has not been adequately respected in the country’s various constitutional configurations. In fact, Nepali constitutional praxis has privileged over the years an exclusionary definition of the nation anchored in the ethno-cultural narrative of the hegemonic Pahari upper-caste Hindu groups: Hinduism, the Shah Hindu monarchy, and the Nepali language. This approach has resulted in the institutionalisation of a hierarchical and exclusionary notion of ‘the Nepali nation’ constructed on the basis of history (i.e., over time), which is at odds with the broader, horizontal, and inclusionary notion of ‘the Nepali people’ understood as the political community inhabiting the territory within the

country's borders (i.e., over space). Indeed, Kathmandu's capitol buildings are representative of the primacy of these narratives as clearly seen in both the nationalist architecture of the Narayanhiti Royal Palace and the sumptuous, ivory-tower-like style of former Rana palaces. The message that these buildings express (with the exception of the Supreme Court) is that the capitol does not belong to 'the people' and that the idea of the Nepali nation creates a hierarchy of belonging to Nepal. This discrepancy between 'the nation' and 'the people' within both the constitution and the capitol constitutes a source of deep constitutional instability in Nepal. Over the centuries, the ethno-cultural definition of the nation has legitimised social hierarchies within the polity and cemented relationships of inequality, which in turn have led to conflict, disaffection, and mistrust in public institutions and actors. The analysis of Nepali constitutional praxis also testifies to the 'selective exclusion' of and among the Nepali people. As a result, Nepal's historical tensions over what constitutes the 'rightful' political authority in the country and the institutional articulation of such authority in constitutional and architectural form have contributed significantly to Nepal's unstable constitutionalism.

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4

Competing Nationhood and Constitutional Instability

Representation, Regime, and Resistance in Nepal

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INTRODUCTION

Nepal – the oldest state in South Asia – is still grappling with writing a new constitution. Although it has been in existence for almost 250 years, and six formal constitutions (eight, if the two earlier prototype constitutions are included in the count), the country failed to promulgate a new constitution after a four-year-long (2008–2012) first Constituent Assembly (CA). A second CA was elected in November 2013, but it remains to be seen whether it can craft a new constitution that will provide constitutional stability in a culturally and geographically diverse country.

Convening a CA to craft a constitution with the people's direct involvement was a major demand of the Maoists. It is ironic that it was dissolved not because of disagreements about class issues, with which the Maoists are identified and why they had launched their armed rebellion, but rather because of the CA's inability to settle contestations over the recognition of identities and autonomy to multiple ethnic groups. The dissolution indicates that identity politics had become the most contentious issue in Nepal. For that reason, this chapter – although historicizing the ethnicization of the state to trace the roots of current contestations – focuses on the contemporary constitutional instability due to identity politics.

¹ For comments and feedback on this chapter, I thank Mark Tushnet, Madhav Khosla, and participants at the South Asia Initiative Conference at Harvard University (April 26, 2013), the Constitutionalism in South Asia Conference in New Delhi (May 25, 2013), the Annual South Asia Conference in Madison, Wisconsin (October 19, 2013), the Himalayan Studies Conference at Yale University (March 14, 2014), and the Annual Nepal and the Himalaya Conference, Kathmandu (July 23, 2014) where different versions were presented. This chapter draws material from Lawoti (2007a, 2010d, and 2012a and c) to provide background information to non-Nepal specialist readers.

Similar to other culturally diverse societies, crafting constitutions to deepen democracy has emerged as a major challenge in Nepal due to different worldviews, culture, norms, and the concepts of nationhood and public good among the numerous ethnic, linguistic, caste, regional identity, and religious groups (hereinafter termed *identity groups*). Although Hindus constitute approximately 81 percent of the population in Nepal, they are divided not only as numerous castes and subcastes but also as hill and Madhesi Hindus, who share cultural traditions with North Indian society. Based on some level of collective self-identification and collective mobilization to redress their common problems and demand respectful recognition, as well as historical and contemporary attitudes of the state toward the groups, the 123 different language-speaking groups and 125 ethnic and caste groups that follow about a dozen religions can be divided into five broad categories: (1) caste hill Hindu elite (CHHE), the ruling group consisting of Bahun (or hill Brahmin), Chhetri (or hill Kshetriya), Thakuri, and Sanyasi, with approximately 31 percent of the population; (2) Dalit (“untouchables” according to traditional Hindu practices) with approximately 13 percent of the population (both hill and Tarai Dalit); (3) about six dozen indigenous nationalities groups with 36 percent of the population; (4) Madhesi caste groups with 19 percent (including the Tarai Dalit) of the population; and (5) Muslims, who are often identified as Madhesi because 97 percent of them live in the Tarai, with approximately 4 percent of the population.² The overlap of identities, such that (Hagen and Lawoti 2012) the Dalit and indigenous nationalities from the Tarai can be considered and counted as both Dalit or Madhesi and as indigenous nationalities or Madhesi, respectively, and Muslims as either a separate group or part of the Madhesi in different contexts and time, add challenges to analysts (Dastider 2012; Sijapati 2012). However, these challenges could become assets in conflict management because shared issues and commonalities across groups enable different social and political actors to mobilize the groups along different attributes, preventing rigid polarization (Chandra 2005). Likewise, the existence of numerous groups could produce complexity in the analysis but also could contribute to preventing violent conflict. Studies have found that dual polarity and/or majority-group domination often exacerbate conflict into violent ethnic strife, whereas multipolarity is conducive for conflict management (Bangura 2006; Bates 2000). Geographic diversity – the country is divided into the snow-capped Himalayas, high mountains, hills, Inner Tarai valleys, and the Tarai or the plains – and migration – groups like the CHHE and Dalit are spread

² These population percentages are from the 2011 census. The marginalized groups contest the census figures and allege that the state has used the census to undercount their groups.

from the West to the East and numerous people from the mountain and hills have moved to the South – contributes to further complexity.

The demands for recognition of identity, federalism, and autonomy are not new, however. These demands initially were made during the 1950s when the polity opened up for the first time. They were made again during the process of drafting the fifth constitution (1990) but were largely ignored because the actors making them had not yet become influential players. The demands gained more traction when the sixth formal constitution was promulgated – that is, the 2007 Interim Constitution – when the marginalized groups were able to pressure the leadership of major political parties to address many identity-based sociopolitical inequalities.

During the drafting process of the seventh formal constitution, the issue of identity – in the form of recognition of identities and autonomy through federalism – became the most contested subject, ultimately leading to the dissolution of the CA. Marginalized groups with support of more than two thirds of the CA membership demanded and petitioned for a federal model that would give them autonomy. However, key leaders of the major parties, who belonged to the dominant ethnic group, denied it by not calling a meeting of the full house in order to avoid voting on the issue until the CA expired.

As the basic laws of the land, democratic constitutions and the institutions they create are supposed to promote peace, stability, and the rule of law. Constitutions can affect people governed by them in different ways – by advantaging or disadvantaging certain groups and their culture and issues and by generating different incentives, hindrances, restrictions, or opportunities – directly or indirectly – by structuring politics (Elkins, Ginsburg, and Melton 2009; Lutz 2006; Tushnet 2010). Many people expect a constitution, especially a democratic one, to protect Fundamental Rights and to ensure, facilitate, or promote equality based on justice and fairness toward individuals and groups. As such, constitutions can and do contribute to the construction of a nation – a self-identified, cultural–political community.

Needless to say, constitutions also are affected by people (i.e., rulers and the ruled) through their actions or inactions, such as decisions to support, follow, accept, ignore, or even resist or rebel to undermine and/or eliminate them. Constitutional instability in Nepal is due to frequent challenges of earlier constitutions, which had been imposed by rulers who tried to consolidate power, by people seeking more political space through and in the constitutions. The first two proto-constitutions (1774 and 1854) were promulgated to consolidate the power of the conquering or reigning rulers. The instability under the first five formal constitutions (1948, 1951, 1959, 1962, and 1990), however, resulted primarily from the struggle between authoritarian and democratic

forces. With the country nearing a decade of “transition” after settlement of the armed Maoist rebellion in 2006, the current impasse and instability are also part of the democratization process but of an advanced nature. It is a struggle between those attempting to further expand the democratic and political space by extending equal rights to more identity groups and citizens in the polity versus those resisting the expansion. The difference is that the earlier democratic movements were for transitioning to minimalist democracy whereas the current struggle is for deepening democracy. The current contestation, therefore, is about redefining the nationhood of the country. It involves the movement for restructuring the state, with the marginalized groups seeking federalism to attain autonomy and to institutionalize a multination-state, which recognizes the right to self-governance by multiple nations within a state, and the dominant group trying to retain the nation-state, which imposes one culture, values, and language and effectively rejects nondominant groups’ self-governance rights.

After the advent and spread of the nation-state in Europe in the seventeenth century, similar nation-state–building attempts elsewhere were based on the underlying principle that a nation is to self-govern (Gellner 1983; Smith 1998). However, attempts were made to build nation-states even in diverse societies by promoting “common” symbols and culture, often sponsoring the language, religion, culture, and values of the ruling group. This generated conflicts in many societies when excluded groups protested or even rebelled. The same principle of nationalism that calls for a nation to have its own state (or at least autonomy) to self-govern could inspire challenges, including violence, by minority nations in diverse societies who demand the right to self-govern and challenge the imposition of nationhood based on the dominant group’s culture, language, and values. As a result, many scholars criticized the nation-state model as inappropriate for culturally diverse societies (Connor 1994; Stepan, Linz, and Yadav 2011). Others argued that depoliticization of ethnicity, if carried over a long period, could lead to successful nation-building (Gellner 1983; Wimmer 2013); France is one of the oft-cited examples. Such people, however, overlook that with multiple constitutions, France was an epitome of constitutional instability.

Not all diverse societies attempted to develop a nation-state, however; some accommodated multinations within a state (Kymlicka 1995; Lijphart 1977). They organized the states accordingly, most often through constitutions, institutions, and other policies that promote power sharing among different groups. The mechanisms include granting autonomy through federalism, more or less proportionate distribution of resources, representation in influential decision-making bodies, and protection of minority rights. Many scholars

labeled the outcome of these arrangements as a *multination-state* whereas a few called them a *state-nation* (Gagnon and Tully 2001; Stepan, Linz, and Yadav 2011). The former term recognizes that a state has multiple nations whereas the latter emphasizes that multicultural constitutions and state policies create a nation from diverse cultural groups.

The Nepali state has followed the first route of nation-building for more than two centuries. The CHHE rulers attempted to create a nation-state by imposing their language (*Khas-kura*, or Nepali), religion (hill Hindu), and culture (“upper-caste” hill Hindu tradition, dress, and symbols) on the rest of the population through (1) a Hindu monarchy that promoted and imposed hill Hindu language, culture, and symbols; (2) a unitary state structure that denied or eroded the autonomy of the marginalized groups; (3) over-representation of members of the elite families from the dominant group in the top positions of the state; (4) strengthening control over land and other resources through displacement of native peoples or colonization and nationalization of the resources; and (5) formulation and enforcement of citizenship laws based on caste and ethnic hierarchy and non-recognition of equal rights of many marginalized identity groups. The nation-state was largely and “successfully” imposed and promoted by the autocratic regimes when the cost of repression was relatively low.

The 2007 Interim Constitution appears to depart from that model in significant ways, and Nepal seems to be moving toward constitutional multinationalism. This chapter examines the elements of nationalism including language, hill Hindu religion and culture, and hill Hindu monarchy to discern whether Nepal is transforming into a multination-state and why and how this transformation is taking place. The changes have resulted from democracy, under which the marginalized groups increased their mobilization to demand equality and civil and political rights, including self-government. The high cost of repression for a democratic regime and the lower cost of dissent for the activists facilitated the increase in mobilization of marginalized groups. The examination of contestation over nationhood can inform us about the underlying causes of ongoing constitutional instability as well as help Nepal to avoid past mistakes as it endeavors to attain stable constitutionalism.

This chapter investigates constitutional instability caused by contestations over nationhood between the elites and marginalized ethnic groups. It does so by examining constitutional provisions regarding recognition, rights, and resources and the competing groups’ actions and reactions to them and the other’s maneuverings. The chapter also analyzes intervening variables including regime types that either facilitated or denied representation and political space for people to mobilize, such as the social-justice movements of

marginalized groups and the Maoist rebellion. The aim is to account for interactions between the constitutional articles, institutions, and political actors (i.e., the leaders and the common people) and the sociopolitical context. The chapter then traces the consequences of the interactions on constitutional development in the country.

The first part assesses the different forms of nationhood that the constitutions adopted over the years and the emerging transformation by describing the treatment of diversity in the multiple constitutions before the 2007 Interim Constitution. The two proto-constitutions – (1) the Prithvi Narayan (PN) Shah's *Dibya Upadesh* (Divine Counsel), which guides principles on governance, nationalism, and foreign policy, of circa 1774; and (2) the Jang Bahadur's Country Code of 1854, as well as the six formal constitutions (i.e., 1948, 1951, 1959, 1962, 1990, and 2007) are examined along with the institutions and policies adopted or promoted by the constitutions to facilitate nation-state-building or multination-state-building. The imposition of the nation-state for most of Nepal's history and the recent emergence of the early phase of a constitutional multination-state also are described in the first part of the chapter.

The emergence of the multination-state resulted from resistance and mobilization by the marginalized groups, but its completion is being resisted by the elite-ethnic group's subtle and sophisticated maneuverings, aided by its domination of different political and societal agencies and sectors. Whereas the marginalized groups pushed for reforms because the nation-state excluded and oppressed them, the status quo forces are resisting the reforms to retain privilege and power. This is the basic reason for the current contestations and instability.

The second part of the chapter analyzes the factors that contribute to the establishment of a different nationhood and the ongoing instability. The composition of the state (domination of the CHHE and the power-concentrating political structures) and the long history of autocratic regimes explain the imposition and sustenance of the nation-state. Why the nation-state was challenged and how the multination-state emerged also are analyzed. I argue that the attempt to build a nation-state led to marginalization of multiple identity groups and their cultures and that the marginalization incited protest, mobilization, and rebellion, including challenges to the nation-state—embodying constitutions. The latter section discusses how resistance declined during autocratic regimes, whereas mobilization expanded significantly with the introduction of democracy. It also discusses how the emergence of the Maoist rebellion, during the democratic epoch as well, highlighted the issues of marginalized groups and heightened their mobilization. The increasing mobilization and

higher participation of different groups in the polity, including during the constitution-writing process, were possible because of democracy. I argue that democratic regimes provided political space to the marginalized groups to become aware and informed and to dissent, organize, and mobilize for demanding change. The chapter concludes by discussing whether the second CA will be able to craft a new constitution and, if so, whether it will be able to foster constitutional stability in Nepal.

CONSTITUTIONAL INSTABILITY: FROM A NATION-STATE TO A MULTINATION-STATE?

The ongoing constitutional instability is the consequence of forming a nation-state, which denied adequate recognition, representation, and resources to multiple groups in a culturally diverse society. This section shows how the nation-state was established, how it excluded multiple groups, and how it began to transform to a multination state with the 2007 Interim Constitution. The increased mobilization of the marginalized groups for recognition and rights eroded the nation-state but has not been able to institutionalize a multination state because the ruling elite ethnic group is resisting the most fundamental reform to grant self-governance rights to multiple groups – hence the delay in promulgating a new constitution and subsequent uncertainty and instability.

Establishment of a Nation-State

Beginning about 250 years ago, a state conquered and dominated by the CHHE began to define a Nepali nation based on the ruling group's language and culture: Nepali/*khas-kura* (i.e., the *Khas* language), “upper”-caste hill Hindu culture and symbols (e.g., public holidays and state-declared national heroes), hill Hindu religion, and Hindu monarchy (Lawoti 2005; Onta 1996; Sharma 1992). Some scholars argue that a full-fledged Nepali nationalism along the nation-state framework was promoted only during the Panchayat regime (Malagodi 2008).³ However, as clarified in the following discussion, the major nation-state elements were established after the conquest more than two centuries ago (Lawoti 2010d). The Panchayat regime packaged the nation-state framework attractively in a development and modernization paradigm and then aggressively and effectively spread it across the country by expanding the media, school system, and bureaucracy. This section describes the imposition of a monoethnic nation-state through various constitutions. The argument

³ In a later work, Malagodi (2013) traces the markers of Nepali nationalism in earlier constitutions.

is not that the constitutions initiated all of the elements of the nation-state afresh but rather that they often institutionalized what the ruling society and ethnic elites practiced, preferred, and followed. Once codified, however, the constitutions promoted or made them mandatory for the rest of the population. For example, once the constitution declared the state as Hindu, it facilitated the further imposition, reinforcement, reproduction, and expansion of Hindu culture and norms through legal sanctions and support.

Hill Hindu King and Hill-Variant Hinduization through Constitutions

One of the major pillars of the Nepali nation-state was the Hindu religion of the hill variant. Kathmandu Valley was ruled by Hindu kings, but the conquest brought to it an orthodox and intolerant variant of Hinduism from Western Nepal (Toffin 2006) and eventually to the rest of the country. It is important to state that a large number of Madhesi Hindus living in the southern plains of Nepal are not part of the ruling group. In fact, as discussed subsequently, the Madhesi were discriminated against and treated unequally by the state and the hill society.

The *Dibya Upadesh* (i.e., the first proto-constitution considered) of PN Shah, the conqueror, declared that he wanted to transform his recently conquered territory as an “asali Hindustan,” or a pure Hinduland. Subsequent laws and policies furthered his goal. Ran Bahadur Shah (who reigned from 1777 to 1799) banned the killing of cows, the Hindu deity, in 1805 when he ruled as regent of his young son, for whom he had abdicated the throne (Michaels 1997: 86). Many beef-eating communities (e.g., the Tamang and the Limbu) subsequently fled to Sikkim and other parts of India to avoid persecution (Hamilton 1971; Pradhan 1991). The increasing adoption of orthodox and intolerant hill Hinduism in statecraft meant that non-Hindus, including indigenous nationalities, Buddhists, Muslims, Christians, and “lower”-caste Hindus, subsequently faced discrimination and exclusion.

A halt to the expansion of the House of Gorkha after the Anglo–Gorkha War (1814–1816) and the Sugauli Treaty with the East India Company in 1816 turned the attention of rulers to the penetration of the periphery. Bhimsen Thapa (1775–1839) began strengthening central control as well as hardening the caste system after the Sugauli Treaty. Hinduization was further boosted during the Rana regime (1846–1951). Even though the Hindu monarchy was politically neutralized by the Rana family,⁴ Jang Bahadur Rana introduced the first formal Country Code (*Muluki Ain*), the second proto-constitution of the

⁴ The political and administrative leadership was restricted to the upper-caste hill families until it became further restricted within the hill Hindu Rana family.

country, which contributed significantly to institutionalizing the polity and society along Hindu caste norms and values, according to which the Thakuri and the Kshetriya were destined to rule. The 1854 *Muluki Ain* placed people of different sociocultural orientations and ethnicities under Gorkhali Hindu rule as lower-caste subjects. Hindu *Dharmasastra* (i.e., religious texts) and common laws practiced by the ruling ethnic group influenced the Country Code, which deepened and formalized caste-based inequality (Hofer 2004; Malagodi 2008; Michaels 1997). The Code discriminated among different castes and groups; for example, non-Hindus and low-ranking Hindu groups could be enslaved for a crime, whereas higher-ranking caste members received a lighter punishment for the same crime (e.g., a downgrade in caste) (Levine 1987).

Caste positions became critical after the introduction of the Country Code. Earlier, when the state was still weak and central control of the periphery was tenuous at best, customary traditions (e.g., eating beef) were tolerated at the country's margins. As the center began to penetrate the periphery, customary traditions that conflicted with hill Hindu values were actively discouraged or even banned, depending on the state's reach and ability. Stiller (1976: 166) explained the approach and policy of the Hindu state: "Where conformity could be achieved without the loss of peace, it would be pursued. Wherever the effort to introduce conformity endangered the fabric of peace within society, conformity must be sacrificed."

The influence of Hinduism continued and, in fact, became entrenched constitutionally after the end of the Rana regime and the introduction of democracy in 1951. The centrality of the hill Hindu monarchy was reestablished not only because of King Mahendra's maneuverings but also because of severe factionalism among the political parties and frequent government changes in the 1950s. With the dissolution of the elected government and fledgling democracy by the King in 1960, the hill Hindu monarchy ruled directly for thirty years in the name of the partyless Panchayat regime (1960–1990). Proselytizing was banned in the 1959 Constitution and thereafter in the 1962 and 1990 Constitutions. This effectively meant that non-Hindu religious people and organizations were not allowed to convert Hindus, whereas the Hindus claimed and counted many non-Hindus, such as indigenous groups, as Hindus, including in and through the census.

The hill Hindu monarchy was a major pillar of the hill Hinduization process. Among the Hindus, its symbolic and legitimizing value was so strong that the hereditary autocratic Ranas retained the figurehead monarchy to legitimize their rule despite the fact that a resurgent monarchy could threaten their own hereditary rule. The King was projected as savior of the country and

its people as well as the basis of national unity. Different kings were declared national heroes by the state, and textbooks were used to sing paeans of the royals and to project their extraordinary heroic images.

The 1962 Constitution declared Nepal a Hindu kingdom, a statement also contained in the democratic 1990 Constitution. The constitutions of 1959, 1962, and 1990 declared that the King must be an adherent of Aryan culture and Hindu religion. The concentration of power in the Hindu King further entrenched hill Hindu values in state institutions, public policies, and the “modernizing” society. A national identity constructed on the basis of the dominant culture and religion projected aspects of marginalized groups’ culture as deviant and undesirable. Attempts at preserving and reviving minority languages and cultures were considered communal and antinational, and minority language, religion, and culture activists often were prosecuted during the autocratic regimes (Gaenszle 2013; Hangen 2010; Lawoti 2005).

Making *Khas-Kura* “Nepali” and the Only Official Language

Khas-kura or *Gorkha bhasa*, the language that ultimately became known as Nepali (hereinafter *Khas-Nepali*),⁵ gained prominence in Kathmandu Valley and the Nepali Court with the rise of Gorkhalis because the new rulers spoke their language and promoted it. As the language of the rulers, people with business in the Court were compelled to learn it. Ambitious people foresaw better material and political prospects by learning the rulers’ language (Laitin 2007), and *Khas-Nepali* slowly gained wider usage through state imposition as well as motivated people’s choice to adopt it.

A brief chronology demonstrates that the status of the language strengthened in time. In 1905, Chandra Shamsher Rana declared it the language of the government, which no longer recognized documents written in other languages. The language policy was further strengthened in 1913 with the establishment of the Gorkha Bhasa Prakashan Samiti (Gorkha Language Publishing Committee) to promote it (Tamang 2000). The state’s promotion and expansion of the language does not mean that other actors and factors did not play a role; Nepalis outside of Nepal also contributed to the development of the language (Onta 1996).

⁵ It is interesting that the House of Gorkha eventually changed the name of the country to Nepal and the name of its language (known as *Khas-kura*, *Parbate kura*, or *Gorkha bhasa* in different periods) to Nepali whether the names were popularized by outsiders to designate the country (i.e., East India Company) or the language (i.e., the Nepali diaspora in India). This approach likely contributed to easing the acceptance of their rule and language.

Ironically, the domination of *Khas-Nepali* was further strengthened in the 1950s after democracy was introduced. The open environment and modernization thrust of the post-Rana period led to major changes, such as opening many more schools. The dominant group in control of the state furthered its notion of nationhood through the schools. For example, the state formulated an education policy that promoted “Nepalization” at the cost of other native languages. The report of the National Education Planning Commission, formed in 1954, titled “Education in Nepal” (1956) explicitly promoted *Khas-Nepali* as the only language of instruction in schools. The report even posited that the disappearance of minority languages was desirable (Gaige 1975; Onta 1996).

The state continued to reinforce the position of *Khas-Nepali*: it was designated as the language of deliberation in the Parliament by the 1948 Constitution and it was declared as the language of nation (*Rastra bhasa*) for the first time in the 1959 Constitution (Article 70). The policy of promoting *Khas-Nepali* gained momentum during the Panchayat period (Gaige 1975; Onta 1996). News broadcasts in other native languages were discontinued. The educational system was standardized and the policy of *Khas-Nepali* as the medium of instruction was pursued aggressively (Ragsdale 1989).

The “language of nation” provision, along with the official-language designation, continued in the 1962 and 1990 Constitutions. In response to the increasing clamor by activists for recognition of all native languages of the country, the 1990 Constitution declared other native languages as national (*Rastriya*) languages; however, the state continued to reinforce the position of the Nepali language in the 1990s. The Supreme Court ruled in the early 1990s that the public-service examination could not be held in other non-*Khas-Nepali* languages; in 1999, it ruled that local native languages could not be considered additional languages by local governments. With the benefit for social mobility (e.g., government employment and teaching positions) as a result of widespread state patronage, many more non-native speakers are learning the language, thereby further spreading it.

Hill Hindu Culture and Hill Nationalism

The constitutional hill Hinduization and Nepalization promoted hill upper-caste culture in society and, accordingly, defined Nepali nationalism, which did not recognize and respect marginalized groups’ culture, traditions, and lifestyle. The hill-based nationalism suspected the loyalty of the Madhesi for the Nepali nation and state because of their cultural similarities with North Indians. The new Country Code of 1963 made it difficult for the Madhesi to

acquire citizenship certificates, which were necessary for seeking employment, purchasing land, obtaining a passport, and so forth. A government commission in the mid-1990s calculated that 3.4 million Nepali adults did not have citizenship certificates. Likewise, only people who spoke Nepali (and not other native languages) could be naturalized as Nepali citizens (Lawoti 2005).

During the Panchayat regime, the *daura suruwal* and *topi* (i.e., a typical hill cap), the dress of the rulers, was promoted as the official national dress. State organizations, particularly the army and the police force, practiced and reproduced hill Hindu rituals in their operations and functions. Dashain, the hill Hindu festival, became the national holiday with week-long public holidays, widespread state celebrations, and even an extra month's salary given as a bonus to employees during the festival. Most of the public holidays until the 1990s were declared on hill Hindu festivals and most of the state-declared national heroes were upper-caste hill Hindus. The national anthem, the national color (crimson), the national animal (cow), and the national flag reflected Hindu symbolism (Malagodi 2008).

The unitary structure of the state allowed the central state to impose its policies uniformly across the diverse country even though acceptance of different policies and symbols varied across the regions as a result of attachments to different local traditions and culture. However, it is likely that most people were affected to some extent by the central policy and symbolism. The remnant of one form of autonomy, the *Kipat* system among the Kiratis in the East, was finally abolished in 1964 during the Panchayat regime after being attacked and undermined by various public policies for hundreds of years (Caplan 2000). This action probably signified the legal pinnacle of the nation-state framework in Nepal.

Emerging Multination-State?

The nation-state paradigm, as mentioned previously, has declined in important respects in the 2007 Interim Constitution. Although the 1990 Constitution continued with the Hindu state, Hindu Kingdom, and hegemonic domination of the Nepali language, minor changes had been introduced, such as the Kingdom being considered as “multi-ethnic [and] multi-lingual” (Article 4.1). The 1990 Constitution extended recognition of non-Nepali native languages to some extent but not as equally to the Nepali language, which was still called the only language of the nation and declared as the only government language. Although the state extended little support, teaching of the non-Nepali language up to the primary level was allowed. News broadcasts in several native languages were resumed in the early 1990s and expanded thereafter. Despite

introducing an apparent level of recognition for multiculturalism, however, the status of the nation-state was not questioned by the 1990 Constitution.

Erosion of the constitutional framework of the nation-state in the 2007 Interim Constitution becomes obvious when examining the status of the pillars of traditional Nepali nationalism. The constitutional provision of the Hindu state a major pillar of the Nepali nation-state – was replaced with a secular state after the regime change in 2006. The King, who had usurped political power in 2002, was pushed out by a popular movement led by the parliamentary parties, the Maoists, and civil-society groups, including associations of marginalized groups. The first session of the first CA also ended the Hindu monarchy – another pillar of the nation-state paradigm in Nepal – by declaring the country to be a republic. The national anthem that glorified the Hindu King was replaced by the post-2006 government with a new anthem that recognizes the cultural and geographic diversity of the country. The third pillar of the nation-state, the *Khas-Nepali* language, also is losing its constitutional hegemony. The 2007 Interim Constitution defined all native languages as national languages instead of giving Nepali a separate designation as in prior constitutions – even though it is still the only official government language. Yet, even this was challenged. The proponents of the *Khas-Nepali* language were unable to insert it as the only language of the government in the draft proposed by the CA's thematic committee, which agreed to settle the issue later. Furthermore, with the likelihood of regional languages being declared as additional official languages in provinces after federalism becomes operationalized, the status of provincial languages is likely to improve, which could lead to a corresponding reduction in the monopoly of *Khas-Nepali*.

Constitutional and legal provisions were introduced to increase representation of the marginalized groups in the state organs. Reservation (i.e., quota) policies introduced in 2003 concerning the Dalit, indigenous nationalities, and women were revised to include the Madhesi and were expanded in scope to bring more state agencies within purview. The proportional-representative (PR) electoral method for nearly 60 percent of the CA seats increased representation of the marginalized groups not only by enabling small identity-oriented political parties to elect representatives but also by the provision that the large parties must proportionally distribute seats allocated under PR among the Dalit, indigenous nationalities, Madhesi, women, and representatives from backward regions. The commitment to federalism, inserted in the 2007 Interim Constitution by the Madhesi movement, will end the unitary state through which the dominant group, as the largest ethnic group, administered the entire country. Federalism could weaken the political hegemony of the CHHE slightly or considerably, depending on the type of federal model that Nepal adopts (Lawoti 2014).

Although the domination of the CHHE culture continues, the culture of marginalized groups has gained more recognition and attention since the 1990s, with more changes after the regime change in 2006. Public holidays have been declared during the festivals of the indigenous nationalities, Madhesi, Buddhists, Christians, and Muslims. The state has declared several national heroes hailing from the indigenous nationalities. Dress other than the traditional *daura suruwal* now can be worn during official events. Textbooks, newspapers, and magazines in non-*Khas-Nepali* languages have been published; however, there are circulation and sustainability issues due in part to minimal state support. Ethnic outfits and jewelry are no longer seen as parochial and, in fact, are gaining popularity – at least during festivals, public programs, and ceremonies such as marriage. The practice of giving or garlanding with *Khada* to welcome guests and dignitaries, a high-Himalayan Sherpa culture, has become widespread, whereas the hegemonic domination of the upper-caste hill customs and culture has eroded to some extent.

The hill-centric Khas-nationalism also has weakened, largely due to the Madhesi movements of 2007 and 2008. Citizenship provisions have been relaxed and approximately 2.5 million Nepalis – mostly Madhesis but others as well – received citizenship certificates in 2007 after decades-long demands, petitions, and movements by the Madhesi organizations (Lawoti 2010c). These changes increased the recognition of other groups and their culture and contributed to moving Nepal toward a multination-state (Lawoti 2012b).

To a significant degree, these transformations affected what Lutz called the general cultural elements of constitutionalism, which consists of “cultural mores and values that are still the fundamental grounding for human social organization” (Lutz 2006: 16–17). The identities, rights, cultures, and traditions of the marginalized groups have been recognized to some extent, especially the assertive groups. The justice element (i.e., the second constitutional element), which is about limiting the use of power, is undergoing less transformation. If abuse of power is limited, marginalized groups may benefit in principle; however, the role of the state might be important to provide justice to the historically marginalized groups, and the plan for achieving that is less clear. The power element of constitutionalism (i.e., the institutions for decision making) has not been sufficiently reformed and established by the 2007 Interim Constitution to facilitate power sharing among different groups. Without recognition and autonomy awarding federalism, various marginalized groups will not be able to self-govern; therefore, the country will not transform into a full-fledged multination-state in the absence of it.

With the success of more traditional and status quo-favoring forces and the decline in representation of change-seeking groups and parties like the Dalit, indigenous nationalities, the Madhesi, and the Maoists in the second

CA elected in November 2013, further reforms to strengthen the multinational-state model may not come through the formal political process. The reforms may even be slowed down or diluted, but they likely will not be reversed significantly because major parties, even though reluctantly, have accepted republicanism, secularism, reservation, and some form of federalism (Lawoti 2014).

WHY AND HOW DID THE NATION-STATE EMERGE?

Under-Representation, Constitutionalism, and the Nation-State

Most of the constitutions (and proto-constitutions) in Nepal were promulgated by the kings or hereditary prime ministers belonging to the high-caste hill Hindus. Even the later democratic constitutions were largely promulgated by the CHHE leaders, as described in this section. The ruling ethnic elites promoted the concept of nation-state through the constitutions and laws to strengthen their family and groups' hold on power and to legitimize their rule. Because the Nepali polity was dominated by the CHHE throughout its history since its formation – although weakened slightly in some sectors after the regime change in 2006 – the CHHE was successful in imposing what it preferred in the country for most of the time.

The two proto-constitutions and the 1959 and 1962 Constitutions were promulgated by the hereditary kings; in an attempt to salvage the regime, the 1948 Constitution was awarded by the hereditary Rana prime minister at the end of the Rana rule (1846–1951). The proto-constitutions and earlier constitutions imposed the language, religion, culture, traditions, values, and worldviews of the ruling ethnic and caste groups, laying the foundation of a nation-state. Because of the influence of earlier constitutions through path dependency, which makes it easier to continue the previous paradigm, as well as the preference of the polity heavily dominated by the CHHE, the 1990 Constitution continued to promote a nation-state despite demands for secularism, federalism, and inclusion by marginalized groups (Hachhethu 1994; Lawoti 2007b).

The first proto-constitution supposedly was dictated around 1774 as a governance policy from PN Shah, a hill upper-caste ruler, before his death. As a person who was trying to legitimize, safeguard, and consolidate his recent conquest – more so among his contemporaries and rivals in central Nepal – he projected himself as a Hindu King of the Thakuri (i.e., ruling) caste. Although he mobilized various caste and ethnic groups from Gorkha and the surrounding region during the conquest, it is ironic that he went on to lay the

foundation for a more aggressive and intolerant Hindu version (compared to Kathmandu Valley) found in Western Nepal (Lawoti 2010d; Toffin 2006) – most likely because he perceived and calculated that it would legitimize and consolidate his rule.

The second proto-constitution, also known as the Country Code, was promulgated by another hill upper-caste ruler, Jang Bahadur, who upgraded his caste to become a Thakuri (i.e., ruling Chhetri). He cemented that upgrade by arranging multiple marriages of his family members into the hill Hindu royal family. The Country Code was prepared with assistance of Bahun advisors and influenced by Hindu religious texts, but it was used politically to give the hill rulers higher position. For instance, even the Tarai Brahmins were positioned below the Thakuri in the caste hierarchy, which was against the traditional Hindu norms that consider all Brahmins to be higher than the Chhetri and the Thakuri. The Country Code not only codified the caste hierarchy into law but also positioned non-Hindu indigenous nationalities as middle- and lower-caste Hindus; eliminated many customary traditions of non-Hindus that had been recognized earlier; and established the basis for formal and systematic subordination and exclusion of the Dalit, indigenous nationalities, Madhesis, Muslims, and women.

The 1948 Constitution was promulgated by Padma Shamshere Rana, a hill upper caste and descendent of Janga Bahadur, to assuage the increasing challenge to the autocratic regime by the nascent democratic movement inside and outside of the country. It was largely a one-sided document prepared for salvaging and reforming the Rana regime but only incrementally. Furthermore, because the democracy movement was led mostly by male Bahuns, it is questionable whether demands for self-rule and representation of the marginalized groups – which had emerged considerably at least in the eastern regions (Banstola 2053 v. s. (1996); Koirala 2055 v. s. (1998); Whelpton 2013) – would have been accommodated. This limited reform attempt by an autocratic leader was sabotaged by the more conservative Ranas, who succeeded in forcing Padma Shamsher not only to give up the reform but also to abdicate the position of hereditary prime minister.

The 1951 Interim Constitution, Nepal's second formal constitution, was prepared by Indian advisors after the tripartite Delhi agreement among the Ranas, King Tribhuvan, and the Nepali Congress, which reluctantly accepted it under pressure from India. It was more democratic than not only the Government of Nepal Act of 1948 but also the subsequent democratic 1959 Constitution. It was a compromise document among the politically divided CHHE, and hence did not accommodate and address ethnic, caste, and gender issues. Yet, Article 15.1 stated that “Government shall not discriminate against any citizen

on grounds only of religion, race, caste, sex and place of birth” (Chaturvedi 1993). The caste-based Country Code continued to regulate society, however, and, as discussed previously, *Khas-Nepali* was imposed as the only language of instruction in schools in the period that the 1951 Interim Constitution was operational.

King Tribhuvan, who gained power after the fall of the Ranas, had promised to elect a CA to write a new constitution; however, King Mahendra, his heir, maneuvered to craft a constitution by a committee rather than a CA. The marginalized groups again were not represented and the 1959 Constitution did not address their issues despite the fact that demands for federalism and linguistic, ethnic, caste, and religious equality had emerged during the 1950s. Prepared at the initiation of the *Khas-Nepali*-speaking upper-caste Hindu King, the constitution declared Nepali as the only “language of nation,” prohibited proselytizing, adopted the unitary state that did not grant autonomy to multiple ethnic groups, and declared the King the “adherent of Aryan culture and Hindu religion.”

The authoritarian 1962 Constitution, prepared by a committee composed of upper-caste Hindus at the behest of the Hindu King, was regressive in terms of not only democracy but also identity issues and rights of marginalized groups. For the first time, it constitutionally declared Nepal a “monarchical Hindu state.” The cow, a Hindu deity, was declared the national animal in the period governed by the 1962 Constitution, and Nepali continued to be promoted as the only language of nation. The new Country Code ended caste-based laws but did not define the practice of untouchability as a crime. The monoethnic nation-state was promoted most aggressively and successfully during this period, aided by textbooks prescribed for the mushrooming number of schools; the expanding bureaucracy that was penetrating the corners of the country; and the modern state-controlled print and radio media, circulation and reach to which was ever-widening.

The 1990 Constitution was prepared by a committee that represented democratic political parties and the Hindu King, and it was revised and endorsed formally by the Cabinet. The entire constitution drafting, negotiating, and approving process was dominated overwhelmingly by CHHE. Although strong demands for multicultural policies, such as the declaration of a secular state, linguistic equality, and federalism, emerged during the drafting of the constitution, they were largely ignored. As discussed previously, minor issues were accommodated, such as the formal acceptance of the society as multiethnic, but without effective equality among identity groups. The 1990 Constitution continued the nation-state paradigm defined by the hill Hindu state;

hill Hindu kingdom; and other elements of hill Hindu culture, norms, and traditions (Hachhethu 1994; Hutt 1994; Lawoti 2007b).

Autocratic Regime and Imposition of Nation-State

Most elements of the nation-state were initiated, imposed, and cemented during the autocratic regimes. The PN Shah declaring his newly conquered territory as pure Hindu land, Jang Bahadur imposing a hill Hindu caste-based code, the Nepali language being promoted as the only language of government during the autocratic Rana regime, and declaring the state as Hindu by a formal constitution during King Mahendra's rule all occurred during autocratic regimes. As discussed previously, the autocratic Panchayat system methodically pursued the nation-state model in the name of modernization and development through the "modern" school system and the media as well as bureaucracy and development initiatives. Not only did this systematically promote the Nepali language, Hindu religion, and upper-caste hill Hindu culture, it also persecuted linguistic and religious activists during the period (Hangen 2010), as the Rana regime had done previously.

The authoritarian regimes were able to pursue the nation-state model more effectively because the cost of repression by the state was less compared to democratic regimes; expectations about citizens' political rights and civil liberties are lower or nonexistent in such a regime. Opposition to the state and rulers was severely repressed under the autocratic regimes, especially during the Rana rule. The increased cost of dissent for the marginalized groups meant that the intensity and frequency of activism to protect and promote their culture and group rights declined during autocratic regimes. In fact, many people doing business with the government adopted the tradition and culture of the ruling group to decrease operating costs and improve opportunities (Bista 1971; Laitin 2007; Pfaff-Czarnecka 1997). As discussed previously, lower participation of the marginalized groups in leadership positions prevented intra-leadership deliberations and contestations on those issues. The Panchayat regime co-opted some Dalit, Madhesi, and indigenous leaders, including some identity activists of the 1950s, but its purpose was to undermine the minority cultural issues. The co-opted members either willingly supported the cultural objectives of the regime or were not in a position to challenge them, even if they wanted to, because they were insecure minorities or lacked a critical level of representation.

The early democratic regime continued many of the nation-state provisions. Beyond introducing basic democratic rights, there were at least four

reasons why they continued the nation-state model inherited when democracy was introduced. First, the democratic interregna of the 1950s and the 1990s were heavily dominated by the CHHE, and the nation-state model protected and promoted the interests of the top leadership of the political parties and the monarchy, which still wielded considerable power. Resistance to the autonomy-granting federal model during the first CA suggests that they preferred a nation-state because it promoted their ethnic and individual interests. Second, as argued in the path-dependency theory (Levi 1997; Pierson 2004), it is easier and less costly to continue the path that has been established. For the CHHE, continuation of the nation-state and its manifestations did not harm or disadvantage their groups. Therefore, there was no need to weaken or eliminate it, even though the transition to democracy could have been a critical juncture for accommodating various identity groups. Furthermore, Nepalis had been socialized into the nation-state paradigm during the autocratic regimes and that effect influenced the adoption of the nation-state during the early transition to the democracy stage. Third, although representation of some of the marginalized groups had increased slightly during the first two democratic epochs, they were still heavily under-represented in influential positions. As a result, even if they had wanted to, they were not in a position to affect major changes. Fourth, as is clarified later, the marginalized groups did not have sufficient time to be informed, organize, and mobilize to generate pressure against the nation-state framework.

Opposition to elements of the nation-state framework emerged in both the 1950s and the 1990s, but the movements were unable to succeed in part because the majoritarian democracy of the period facilitated the domination of the polity by the CHHE. Although the CHHE comprised only a large plurality in terms of ethnicity, the majoritarian structures facilitated their transformation into artificial majorities. The “First Past the Post” electoral method often transforms a plurality group into a majority, and the unitary structure facilitates the implementation and imposition of policies created by such an artificial majority at the center to around the country over all cultural groups. Furthermore, whereas other marginal groups were a permanent minority in at least one particular sociocultural realm, the CHHE domination was possible because it formed majority coalitions in all important realms: an overwhelming Hindu majority with Madhesi Hindus and the Dalit; an overwhelming non-Dalit upper-caste majority with indigenous nationalities and non-Dalit Madhesi; an overwhelming hill-nationalist majority with hill Dalit and indigenous nationalities; and a near majority (i.e., in terms of speakers) in the case of native Nepali speakers (with hill Dalit) (Lawoti 2012b).

WHY AND HOW DID THE MULTINATION-STATE EMERGE?

The underlying reason for the emergence of challenges to the nation-state in Nepal was its attempt to form a nation based on ethnic hierarchy and inequality characterized by a superordinate position of the dominant ethnic group with its language, religion, and culture as the markers of Nepali nationhood. This not only deprived equal recognition and rights of numerous groups living in the country but also led to marginalization and exclusion of subordinated groups from state and societal resources. When groups of people are treated unequally, they are not likely to accept such conditions for long. Constitutions that do not ensure equality will not be legitimate as perceived by those facing inequality and exclusion. When opportunities become available, the excluded group may resist and rebel, as has occurred in Nepal.

Marginalization of Minorities

The various constitutional articles and provisions embodying, producing, promoting, and reinforcing the nation-state, as well as the laws and policies derived from or influenced by them, discriminated against and marginalized the Dalit, indigenous nationalities, Madhesi, and minority religious groups including Buddhists, Muslims, Kiratis, and Christians. The argument is not that constitutional provisions were solely responsible for the discrimination, marginalization, and exclusion but rather that they contributed significantly, either directly or indirectly, and to different extents. The marginalization of various groups has been extensively documented, discussed, and analyzed elsewhere (Bhattachan 1999, 2003; Caplan 1967, 2000; Gaige 1975; Guneratne 2002; Hangen 2010; Hofer 2004; Holmberg 2006; Holmberg, March, and Tamang 1999; Lawoti 2005, 2008, 2010d; Levine 1987; Tiwari 2010). Here, I briefly summarize the various spheres of exclusion and argue that the nation-state paradigm was the cause of marginalization, dissatisfaction, and alienation of numerous identity groups. They eventually led to the mobilization of the marginalized groups against the nation-state paradigm and its eventual erosion in Nepal.

The non-ruling groups were excluded and marginalized in cultural, social, political, and social spheres. Language, religion, tradition, practices, customs, and ways of life of different non-upper-caste hill Hindu groups faced marginalization, erosion, disappearance, and even extinction. Different groups faced unequal treatment as citizens, including being labeled “untouchables” or “low caste”; many were denied or faced difficulties in obtaining citizenship certificates, which were necessary to obtain the rights as and of citizens, such as

buying and selling property and obtaining government jobs. Discrimination resulted in unequal participation in polity and society, with serious underrepresentation in influential positions of various realms of the state and society including executive, parliamentary, judiciary, bureaucratic, security, media, academia, and civil-society organizations. The non-ruling groups also faced economic and social marginalization, as demonstrated by consistently lower educational opportunities, health outcomes and economic status.

An example related to alienation of land – which not only provides sustenance to the majority in an agricultural society but also is the basis for economic and political power, social status, and identity for indigenous groups – will demonstrate the marginalization of non-ruling groups directly and indirectly. The military-land complex that PN Shah introduced to mobilize an army in conquering the country promised land to the land-hungry peasant soldiers and thus began the process of taking land away from the conquered people. As the state strengthened, the ruling elites began to consolidate their land holdings – again at the cost of common citizens and indigenous groups. The land alienation continued even after democracy was introduced in 1951 but was accomplished under a different guise. Nationalization of the forests in the mid-1950s took land away from various indigenous communities. Much of the land has been leased back to community forestry groups, but the indigenous groups are not the primary beneficiaries. The state promoted migration from the hills to the Tarai by eradicating malaria in the 1950s. The Madhesi and indigenous communities, including the Tharu and the Dhimal, have since lost land to the hill settlers, who were given land grants or benefited from their network with the hill-dominated administration in acquiring land by fair or foul means. The land reform of 1964 eliminated the *Kipat* of the Kiratis and terminated the last remaining community rights over land, which aggravated both economic marginalization and identity crises.

Mobilization and Resistance

The conquest of Nepal and the subsequent project of nation-state-building that marginalized multiple groups generated overt and covert protests and resistance in different periods. Detailed studies of earlier resistances are few, but the available evidence indicates that the initial resistances and rebellions were more frequent and of higher intensity than those that occurred later, except in recent decades. For instance, in the last thirty years of the eighteenth century, six armed resistances and rebellions are known to have occurred, whereas during the entire nineteenth century, only six resistances of lower intensity occurred (for details, see Lawoti 2007a). In the

beginning, some of the rebellions were led by recently defeated or incorporated groups.

When the state consolidated under the autocratic regime, the number of intensive resistances and rebellions appears to have declined. The ability of the autocratic state to brutally repress and the higher cost of resistance were likely factors for it. Nevertheless, the state continued to face a certain level of resistance. For example, after not being able to conquer the Limbus of East Nepal, the Gorkhals incorporated them in the Kingdom by granting political, economic, and judicial autonomy under the *Kipat* system. However, when the Gorkhali state later began to undermine Limbu autonomy, the Limbus resisted the state actions and policies in various instances (Caplan 2000). Likewise, organizations and individuals belonging to groups such as the Newar and the Limbu began to promote language, culture, and script in the first half of the twentieth century; however, again they were repressed (Gaenzle 2013; Uprety 1992). Similarly, Madhesi activists claim that the Madhesi were involved in political movements before the recorded democratic activism in Kathmandu Valley (Dubey 2014).

During the democratic movement of 1950–1951, ex-servicemen and others in Eastern Nepal, mostly from Limbu and Rai communities, mobilized against the autocratic Rana regime and demanded self-rule. In fact, the movement led by the Rais based in Bhojpur took control of many eastern hill districts (Whelpton 2013).

The organization and mobilization of identity groups increased and expanded during the democratic years, more so as time elapsed. The Limbu movement for self-rule was more stringent and the violence that ensued – even after the success of the democratic movement in 1951 – led to the death of approximately thirty Limbus (Banstola 2053 v. s. [1996]). Despite the state's and ruling groups' attempts to strengthen the nation-state framework, the organization and mobilization of the Dalit, the indigenous nationalities, and the Madhesi for protecting their culture and improving conditions of their caste and ethnic groups increased during the decade-long democratic epoch of the 1950s. The Nepal Tarai Congress (NTC) of the Madhesi was established, demanding federalism and other rights for the Madhesi. The NTC also launched a year-long protest in the mid-1950s against the imposition of *Khas-Nepali* as the only language of instruction in schools. In addition to establishing various organizations and different activities against untouchability, the Dalit launched a successful movement in the mid-1950s to enter the Pashupatinath Temple, most likely the holiest Hindu shrine in Nepal (Kisan 2005). Various indigenous groups formed associations to protect and promote their culture and group interests and also began to establish an intergroup

network. The violence associated with the Tamang resistance in 1959–1960 gave King Mahendra a pretext to dissolve the popularly elected government, which he did in December 1960.

Repression continued after 1960 under the royal regime and activists were imprisoned and killed, but the situation was likely less severe than before 1951. Indigenous nationalities and the Madhesi were not allowed to organize and mobilize during the autocratic-regime years, when even political parties were banned. The Dalit were allowed limited space to organize as a sister organization of the regime. With the partial opening up of the polity after the 1979 student movement for political freedom and the referendum in 1980 – the purpose of which was to choose between the reformed partyless Panchayat System and a multiparty system, where the former was declared the winner – the marginalized groups began to organize and mobilize as social associations (Baral 1983). Gajendra Narayan Singh started the Nepal Goodwill Council in 1983 to work for the rights of the Madhesi people (Lal 2013).

Violence by the state against ethnic groups and against the state by ethnic groups occurred during the Panchayat regime. Several leaders of the Madhesi Liberation Front were killed by the state during the 1960s (Goait 2007). The Chhintang and the Piskar massacres occurred during this period, in which members of indigenous nationalities were killed by state security forces on the suspicion of engaging in activities against the state (Gaenzle 2013; Shneiderman 2009). In 1985, the Parliament Building, Royal Palace, and property owned by the royals were bombed by an organization that was led by a republican Madhesi, Ramraja Prasad Singh.⁶

The collective mobilization of identity groups rapidly increased after 1990. People began articulating their problems, needs, and aspirations and to organize and make demands on the state. Although ethnic conflict occurred throughout Nepal's history, the identity movements of the indigenous nationalities, Dalit, Madhesi, and minority religious groups for the equal recognition of their language, religion, and culture as well as for equal opportunities in the polity, economy, and society gained momentum and more visibility after 1990.

Recent activities of these identity organizations indicate that they have expanded in more sectors, grown in size and influence, and become more aggressive. First, ethnic organizations and associations have matured and increased their influence, such as successfully pressuring members of the

⁶ Riots between social groups, particularly between Muslims and Hindus and between the Madhesi and the hill people, also occurred during the Panchayat years and after 1990 (Lawoti 2007a).

CA to support the indigenous cause. They also have become more aggressive and relied on *bandhs*, the obstructionist form of protest that shut down highways, markets, and educational institutions more frequently in the past decade. This demonstrates the increased capacity of the groups as well as their aggressiveness in pressing for concessions from the state. Not only ethnic parties but also ethnic associations and organizations have called *bandhs*, which rarely were used to organize as recently as the 1990s. During and after 2007, week-long *bandhs*, some extending to several weeks, were called by the Madhesi, the Tharus, and the Limbus, individually as well as in association with other groups. Shorter *bandhs* were called by organizations and fronts of many other groups including the Rai/Khambu, the Tamang, the Newars, and the Dalit.

Second, frustrated by the state's and major political parties' ignorance of their major issues, marginalized groups have begun to establish their own identity-oriented political parties. The Nepal Tarai Congress was established in the 1950s, a few indigenous-group political parties emerged in the early 1990s, and a Dalit political party was established in the late 1990s; however, the number of identity-oriented parties of the marginalized groups has mushroomed in the past decade. Thirteen identity-oriented political parties of the Dalit, indigenous nationalities, and Madhesi contested the 2008 election; thirty-three parties did so in 2013. Even though the parties won fewer seats in 2013 compared to 2008, they have continued to expand their support base, receiving 16 percent of the popular vote in the 2013 election compared to 14 percent in 2008, 5 percent in the 1990s, and 2.1 percent in 1959 (Lawoti 2013).⁷

Third, the past fifteen years have witnessed the emergence and proliferation of armed ethnic groups. The Kirat Workers Party (KWP) launched an armed rebellion in 1997. Many armed groups of the Madhesi and indigenous nationalities proliferated after the turn of the century. Whereas the main faction of the KWP merged with the Maoists, some individuals (e.g., Goit, Jwala Singh, and Sambhu Prasad Yadav) broke away from the Maoists to form armed groups in the Tarai (Mishra 2008). In June 2011, the government claimed that only 26 armed groups were active, down from 108 in 2009 (Giri 2011) – but still a significant number.

Fourth, certain ethnic organizations of marginalized groups raised the banner of secession after the turn of the century. The Tarai People's Liberation

⁷ One and five Hindu parties in 2008 and 2013, respectively, and one and five regional parties (often led and dominated by hill Hindus) competed in 2008 and 2013, respectively (Khanal 2013).

Front factions headed by Goit and Jwala Singh are fighting for secession of the Madhesh. A Limbu outfit, the Pallo Kirat Limbuwan Rastriya Manch (i.e., Pallo Kirat Limbuwan National Forum), declared the independence of Limbuwan in 2008. Dr. C.K. Raut led the Alliance for Independent Madhesh, which released its manifesto in May 2011, has demanded the right of Madhesh to secede if the group's problems are not addressed. Because the separatist groups are new, their influence and support base are limited; however, their emergence indicates the depth of alienation among some sections of marginalized groups and activists, as well as the extent to which they are ready to struggle. This is a major break from the past even for armed groups; the KWP had interpreted self-determination rights as autonomy only in the late 1990s.

The heightened political activities of the marginalized groups contributed to the most recent iteration of constitutional instability. They contributed indirectly in ending the 1990 Constitution by greater participation in the armed Maoist rebellion. Their role, however, became more significant in the streets after the regime change in 2006 and in the 2008 CA, when they demanded rights that would transform the country from a nation-state to a multination-state. The three-day countrywide shutdown called by the indigenous nationalities in May 2012, which demanded identity-based federalism, likely was responsible for preventing the CHHE leadership from seriously contemplating the imposition of a federal model that does not grant autonomy and recognize identities.

Increased Representation: Erosion of the Nation-State But Failure to Embrace the Multination-State

The increase in political awareness, organization, and mobilization led to a slight increase in representation, which enabled the marginalized groups to insert their issues in the political agenda of the country. The 2007 Interim Constitution which was prepared to institutionalize the peace agreements, establish rules of governance during the transition, and set the framework for electing the CA and the process for writing the constitution. It was drafted by representatives of the parliamentary parties and the Maoists, who had relatively higher representation of the marginalized groups in the leadership even though it was led by upper-caste hill Hindus (Lawoti 2010a, 2010b).

The 2007 Interim Constitution incorporated the declaration of a secular state and other inclusive articles but initially did not include federalism (but claimed that it would end the unitary system). These articles were inserted in the constitution after the Madhesi movement of 2007. Likewise, the republic and mixed electoral method was included later as a result of public

protests and pressure from the Maoists and marginalized groups. The amended document was more progressive and initiated the constitutional path toward a multination-state.

The expanded capacity due to more new social and political organizations and increased mobilization (discussed in the next section), recent successful movements (i.e., two Madhesi movements, several week-long street protests by indigenous nationalities, and public protest activities by the Dalit), coupled with electoral reform (i.e., the delineation of electoral constituencies to reduce the under-representation of the populous Tarai region and a mixed electoral method) resulted in greater political representation and facilitated a more active role of the marginalized groups in the first CA. The dramatic increase in representation of the marginalized groups in the first CA (2008–2012), combined with their social movements through ethnic and caste associations and non-governmental organizations (NGOs), street activism, and representation via the Maoists, gave them considerable voice and power in the first CA than compared to previous parliaments. The Madhesi parties, which elected 83 of 575 seats (excluding 26 nominated seats) in the 2008 CA, obtained disproportionate leverage during the making and unmaking of governments in the “hung” parliament and the drafting of the constitution. The caucus of indigenous nationalities actively advocated, canvassed for, and sought support for its agenda, and it mobilized members and supporters to incorporate their rights in various CA committee reports.

Although earlier constitutions with the nation-state framework were promulgated or heavily influenced by the CHHE leadership because it overwhelmingly dominated the constitution-crafting process, the highly representative CA elected in 2008 still failed to produce a constitution that institutionalized a multination-state through recognition of identities and establishment of autonomy-granting federalism because male Bahuns still led the major parties and controlled the constitution-making processes inside and outside of the CA. The inability to settle the autonomy issue led to the dissolution of the CA and predicated the ongoing constitutional uncertainty and instability.

The Madhesi and indigenous nationalities demanded a federal model for ten to fourteen provinces, which would have recognized identity and provided autonomy for approximately thirty marginal groups at the provincial (i.e., eight marginal groups and the dominant group in several provinces) or subprovincial level (i.e., twenty-two smaller population groups). The dominant group rejected that demand and pushed for a federal model for five to seven provinces, arguing that the country could not afford too many provinces (Lecours 2013) – regardless of the fact that 67 percent of federal countries in the world have nine or more provinces. The marginalized groups rejected the

five-to-seven model, arguing that it would enable the CHHE to become the majority or the plurality in all or most of the provinces, as well as in the center, and would effectively facilitate continuation of their domination through monoethnic federalism (Lawoti 2014).

The demand for autonomy, unlike in previous constitution-making processes, was a serious agenda item and the most contested issue during the first CA as a result of the increased representation of marginalized groups and their extensive outside mobilization. The irony of the entire process was that the CA did not adopt an identity-based federal model – despite its passage through repeated democratic processes. The CA’s thematic committee recommended fourteen provinces based on principles of identity and viability by a majority vote. The top leadership formed the State Restructuring Commission (CRC) to counter and undermine the CA committee’s recommendation. However, to their dismay the CRC also adopted, with a two-thirds majority, the eleven-province model based on the same principles of identity and viability. Despite the repeated endorsement of the identity-based federal model through democratic processes agreed to and promulgated in the 2007 Interim Constitution, the top political leaders of the three largest parties refused to accept these proposals. The mostly male Bahun (i.e., hill Brahmin) top leaders attempted to settle the issue outside of the CA by agreeing among themselves to the autonomy- and identity-rejecting federal model that would have made the CHHE the majority in all or most provinces. This attempt was thwarted by the marginalized groups’ maneuvering, protests, and threats. Suspecting foul play, more than two thirds of the CA membership signed a petition that demanded an identity-based federal model and the speaker to call a session of the full assembly to vote on the issue. However, when the top Bahun leaders realized the likely adoption of the identity-based federal model if the issue were taken to a full-house vote, they derailed the process by having the speaker not call the session; this led to the dissolution of the CA without producing a constitution (Lawoti 2014).

The top Bahun leaders were able to sabotage the process that would have granted an identity-based federalism and a constitution because Nepal’s polity and the party system is patrimonial and non-democratic – most of the time, the top leaders can do whatever they want. The major political parties led mostly by Bahun males controlled the general political agenda and the CA. Members of the ruling ethnic elite in the civil society, media, intelligentsia, and administration, which they dominate overwhelmingly, aided the top political leadership in defaming and undermining the autonomy agenda (Lawoti 2014). Many also supported and defended derailment of the democratic process or subsequently kept their silence.

The non-adoption of the autonomy-granting federal model should not preclude discussion of two important departures from the past. First, the first CA clearly and repeatedly showed overwhelming support for the autonomy-granting federal model. Second, even though the CHHE derailed the constitutional process to prevent adoption of the identity-recognizing and autonomy-granting federal model, unlike in the past, it was unable to impose its preferred constitution with its favored federal model. Third, the inability of the ruling ethnic group to impose its preferences was due to the growth of the marginalized groups' movement.

The proximate cause for the ongoing constitutional instability appears to be the marginalized groups' demand for recognition and autonomy. However, if democratic processes had been followed, Nepal would have a constitution that could promote stability. It was the CHHE leadership or the ruling ethnic elites that refused to accept the legitimate outcome of democratic processes outlined in the 2007 Interim Constitution, and their reluctance to recognize other groups as equal is responsible for the current and likely future instability.

Maoist Rebellion and Identity Issues

The armed Maoist rebellion contributed to the increase in social and political awareness, organization and network formation, mobilization, and empowerment of marginalized groups. During the early 1990s, even the competition for votes among the political forces did not result in the issues and demands of marginalized groups receiving reasonable attention that would be expected in an electoral democracy. The three competitive forces (i.e., the Royal Palace and the two major political parties) were dominated by the CHHE and had a common interest in avoiding issues of marginalized groups as much as possible. Political parties of the marginalized groups had not expanded enough to appear as competitive to attract voters. The Maoists, a fringe party until it launched an armed rebellion in 1996, clearly understood that they needed to mobilize the marginalized community to expand the party base and emerge as a competitive political force. Accordingly, they began to raise the issue of exploitation and marginalization of the Dalit, indigenous nationalities, Madhesi, and women to attract them to the rebellion.

Many marginalized group members joined the rebellion because the Maoists appeared more sincere: they were more vocal than the mainstream parliamentary parties in raising issues of the marginalized groups, and they were a rebel force whose cadres were risking their lives to end class and ethnic inequalities (Hutt 2004; Lawoti and Pahari 2010; Thapa and Sijapati 2003). The Maoists created ethnic fronts for the various marginalized groups. Their

aim may have been to recruit and mobilize the groups for the rebellion, but the process also expanded political awareness, led to the establishment of organizations, and provided the marginalized groups with political experience and networking opportunities. These fronts worked with various ethnic, caste, and community organizations and associations to promote and address the shared problems and interests of the groups.

In some cases, the objectives of the Maoists and marginalized groups overlapped. For example, the Maoists wanted to end the Hindu monarchy, which they considered a feudal enemy, whereas the indigenous nationalities considered it the fountainhead of their problems and the Madhesi considered the hill king responsible for their plight as second-class citizens. These common agendas had a greater chance of fulfilment with multiple forces advocating, supporting, pressuring, and working to attain them.

With the Maoists advocating many of the agendas of the marginalized groups that they had borrowed from the ethnic associations, scholars, and activists, including the right to self-determination and ethnic autonomy, the issues caught national and international attention and many entered the national political agenda. The rapid growth of the Maoists also had a demonstration effect among the marginalized groups. Many activists perceived that dedication, mobilization, and perseverance would bear results. Finally, by acting as a catalyst in the 2006 regime change, the Maoist party contributed to the instability that created conditions for major inclusive transformation to be realized.

Democratic Space, Mobilization and Representation, and Deepening of Democracy

The underlying reasons for the challenge to the nation-state framework and emergence of a multination-state were exclusion and marginalization; however, they were not sufficient for the transformation. Marginalization occurred during most of Nepal's history but, for a long time, it did not lead to effective challenges to the nation-state and subsequent changes. An increase in mobilization and representation in decision-making bodies were necessary to affect the changes. Representation and resistance gained enough strength by 2006–2007 when the 2007 Interim Constitution was written as well as during 2008–2012 to recommend repeatedly the multination-state federal model through democratic processes in the CA. The mobilization and representation gained sufficient strength only during the democratic years. Here, it should be reiterated that the violent Maoist movement that was instrumental in heralding the transformation also grew and expanded during democracy.

The facilitating role of democracy becomes more obvious when contrasted with the trajectory of activities under autocracy. Although the marginalized groups had organized to protect their language, culture, and land even during the autocratic regimes, their actions were less frequent and effective. Similarly, representation of the marginalized groups, like resistance, had declined from the autocratic regimes of PN Shah to the Ranas. Formal representation of marginalized groups was slightly better, even though still heavily under-represented, during the Panchayat years, but it was not vibrant compared to the democratic years due to its co-opted nature. As a result, the state and ruling elites were able to consolidate the nation-state paradigm during the autocratic-regime years.

The heightened mobilization of marginalized groups, and the Maoists, that eventually eroded the nation-state framework was facilitated by the political space provided by democracy for two related reasons. First, whereas the cost of repression was low during the autocratic regimes, it became too high for the democratic regime that promised to guarantee political rights, civil liberties, and freedom of expression. As a result, even if the political leaders and administrators did not like the activities of the marginalized groups, they often were unable to violently repress the peaceful mobilizations. Second, because the cost of dissent decreased compared to the autocratic-regime years, marginalized-group activists began to organize and mobilize to protect their culture and group interests and to make demands for equality and justice. This eventually led to an increase in both formal representation in the parliament and indirect representation of demands and aspirations through public activism of ethnic, caste, and community organizations.

The majoritarian democracies of the 1950s and the 1990s did not provide marginalized groups with substantive sociocultural and political rights and meaningful representation. However, the available fundamental political rights and civil liberties provided political space and opportunities to celebrate their festivals more vigorously while rejecting many elements of Hinduized traditions and practices; to work toward constructing cohesive identities; to articulate and refine their aspirations and demands; to spread political consciousness among the broader society; to lobby the political leadership and the state to fulfill their demands; and to mobilize their members for public protests, including armed rebellion in the case of some organizations (Lawoti 2014).

Ethnic associations and NGOs working for the welfare of caste and other identity groups were established. Their formation and expansion also compelled “mainstream” political parties to form ethnic, caste, and regional identity-based sister organizations, thereby further expanding the movement.

Even political parties with the objective of promoting the interests of marginalized groups were established. With the passage of time, cultural and political awareness increased among more members; federations and networks were established and expanded; mobilization became more aggressive and effective; and marginalized groups gained more access to decision-making bodies and developed the capacity to launch sustained and effective movements to effectively challenge the nation-state paradigm.

The challenge to the nation-state and subsequent constitutional instability may suggest that the underlying cause of the current instability is democracy, which facilitated activism and mobilization. What is observed in Nepal, however, is that constitutional instability ironically facilitated the deepening of democracy. Formal and minimalist majoritarian democracy of the 1990s addressed only minor issues; if it had remained, the major reforms that provided some extent of recognition, rights, and resources to the marginalized groups may not have been attained.

The state and the top political leadership as well as many in society did not have a positive perception of the activities and movements. Being socialized into the nation-state paradigm, many people may have had a genuine fear that these activities would weaken the country, invite violent ethnic conflict and disorder, and even disintegrate the country. However, it has become clear that those who resisted the movements of marginalized groups did so because they feared that their privileges, superior status, and monopoly over opportunities would be undermined by the success of the movements.

The rise of activism under democracy that promoted equality and justice toward marginalized groups demonstrates that the identity-based activism promoted democracy, as Rudolph (1965) demonstrated in India. This is not unusual; in fact, this path often is taken by many new democracies that consolidate. The initial transition to democracy provided political rights and civil liberties that created conditions for mobilization to demand equal rights by the previously marginalized groups. Democracies that progressively extend rights and recognition to more groups of people may avoid major instabilities and consolidate and deepen democracy. The process of extending equality, justice, and rights to more citizens and groups due to the pressure generated by the struggle of marginalized groups has resulted in a deepening of democracy in Nepal as well.

CONCLUSION: PROSPECT FOR STABILITY

The actors behind the constitutional instability in Nepal are the ruling ethnic elites. The history of successive constitutions recounted in this chapter

demonstrates how the CHHE leadership either repeatedly adopted exclusionary autocratic constitutions or those that promoted a nation-state in a culturally diverse society. They were promulgated to protect the interest of the ruling ethnic elites and, as has become clear retrospectively, eventually would have been challenged because they did not accommodate the minority groups, who collectively constitute more than two thirds of the population.

The promotion of Nepal as a nation-state appeared to be working to some extent during authoritarian regimes because marginalized groups were deprived of the rights to express, dissent, and organize protests. However, after democracy was introduced, leaders and members of marginalized groups began to challenge the concept of a nation-state, which did not recognize their cultures and identities, thereby disadvantaging and discriminating against them. The marginalized groups may continue to question and challenge if the notion of a nation-state is reimposed. A comparative study of every constitution from 1789 to 2005 found that inclusiveness was an important factor for constitutional endurance because a “constitution will be maintained only if it makes sense to those who live under its dictates” (Elkins, Ginsburg, and Melton 2009: 7). Hence, unless identities of different groups are recognized constitutionally and the autonomy demanded by different groups is provided, constitutional stability may continue to elude Nepal.

The 1990 Constitution promulgated after its drafting by a committee representing the Hindu monarch and the upper-caste political leaders of the major political parties introduced many democratic rights but continued the nation-state framework. It did not address demands of the marginalized groups, including a secular state, federalism, and cultural equality. It also contained majoritarian features that facilitated CHHE domination. The 2007 Interim Constitution significantly eroded the nation-state framework by ending Hindu monarchy, declaring secularism and making a commitment for federalism, and recognizing the rights of marginalized groups considerably. However, unless identity groups obtain the right to self-govern, Nepal may not attain the status of a multination-state. The discussion in this chapter demonstrates that the Nepali polity has become more inclusive and that Nepali nationalism is transforming from monoethnic to multiethnic. The question that remains is whether this achievement can be protected, institutionalized, maintained, and further advanced to attain a multination-state. With the formation of the CA in 2008, there was considerable optimism that a people-oriented constitution would be framed unlike the earlier ones, which were crafted by the ruling ethnic elite that largely privileged their groups and protected their interests. The first CA moved in that direction but was unable to attain it due to the machinations of the dominant-group leaders. With its dissolution, those hopes

have been dashed, and the road ahead does not look smooth. The second CA is less representative than the first, with less representation of the Dalit, indigenous nationalities, Madhesi, and women and with greater representation of the CHHE. In 2013, the status-quo-favoring and regressive political parties emerged victorious with a decline in representation of change-seeking parties, including the Maoists and the Madhesi.

Adopting federalism that recognizes diverse identities and awards autonomy to multiple groups through the formal process appears to be less likely. If the indigenous and Madhesi groups do not achieve recognition and autonomy, there is less likelihood of long-term constitutional stability in the country. Recognition and autonomy, which may be essential for political stability (Gurr 1993; Hannum 1990), however, could still be attained through the following three routes.

First, the political leadership may realize that without granting recognition and autonomy, Nepal may not attain political stability. They could be pressured to accommodate the issue of recognition and autonomy to some extent by street protests and international pressure. At present, however, recognition of identity of marginalized groups and their autonomy appear unlikely from a CHHE-led Nepali Congress and CPN-UML that conspired to deny autonomy-granting federalism in the First CA, when more than two thirds of the membership supported it. This is true even more so because the two parties are currently headed by leaders who had either showed dissatisfaction or publicly spoken against the political reforms. The mainstream media and the administration, dominated by the CHHE, also created overt and covert pressure against the autonomy-granting and identity-recognizing federal model.

Second, autonomy may be attained through a sustained street movement against a new constitution that does not grant it. Such a movement had forced the provision of federalism in the 2007 Interim Constitution. India provides a similar example. Nehru, who led the Indian National Congress that had 74.44 percent representation in the 1952–1957 Parliament (Shankar and Rodrigues 2011), strongly opposed linguistic federalism; it was cited as backward-looking but was forced to concede due to a linguistic movement in South India (Guha 2007). Today, India's scholars generally agree that federalism was responsible for keeping the country united and maintaining its democracy (Manor 1998; Stepan, Linz, and Yadav 2011). The passage of a new constitution even by a two-thirds majority may not legitimize it as perceived by the autonomy-seeking groups because of the precedent established by the CHHE leadership, which did not accept the two-thirds majority support for the autonomy-embodiment federal model in the first CA. A street movement is more likely, especially if recognition and autonomy are denied to both the indigenous nationalities and

the Madhesi.⁸ This would create an environment for the two groups to come together to launch a sustained movement that could force the state to grant autonomy.

Third, if a movement does not emerge or is unable to force the state to award autonomy, an administrative federalism with five to seven provinces likely would be adopted and operative for the time being. This model, however, would continue CHHE domination. The autonomy-seeking groups and their organizations, therefore, may continue to organize and mobilize for autonomy. New or old organizations could launch violent movements for autonomy or separatism. The movement may gain momentum in subsequent years if it can broaden the support base once the exclusionary nature of the federal model becomes apparent. Hence, Nepal may not attain constitutional stability in the near future. It can attain constitutional stability only if recognition and autonomy are provided to multiple identity groups.

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⁸ The formal seven-province federal model proposal put forward by the Nepali Congress and supported by the CPN-UML in the Second CA appears to provide some level of autonomy to the Madhesi even though the demarcation is being contested by the Madhesi parties that the model does not recognize the group's identity. The model neither recognizes identity of indigenous nationalities nor awards autonomy to them.

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5

Constitutionalism and Extra-Constitutionalism in Pakistan

Mohammad Waseem

INTRODUCTION

This chapter discusses the way that constitutionalism in Pakistan has experienced formidable challenges from various contenders for power who sought to reshape it according to their own interests and ideologies. The constitution of Pakistan, as elsewhere, provides a framework of laws and institutions that operates as a mechanism for resolution of actual or potential conflicts. However, this chapter argues that the potential for law to perform the function of conflict resolution has been constrained by various institutional, ideological, and political developments that often serve opposite ends. In Pakistan, the juridical problem of power often has drawn on political competition from outside the legal text. In this sense, the study in this chapter analyzes constitutionalism as it progressed under the shadow of extra-constitutional developments. It addresses this issue in the context of three broad aspects of constitution making. First, the long-drawn-out struggle of the parliament for sovereignty involved a legal battle with extra-parliamentary forces led initially by the bureaucracy and later by the army. In this process, higher courts were given the unenviable role of adjudicating the issue of parliamentary sovereignty from a weak and increasingly vulnerable position vis-à-vis the state apparatus. This study brings out the pattern of successive constitution-making moves that seek to either secure or alternatively trim down the strong executive. The higher courts first agitated for the constitution and then upheld the executive's position above the parliament, ultimately putting the state over and above the constitution. In this process, the doctrine of state necessity and the tacit acceptance of the military's constitutional engineering often led diarchic arrangements for sharing power in the form of "presidentializing" the parliamentary system.¹

¹ Mohammad Waseem, "Constitutionalism in Pakistan: The Changing Patterns of Diarchy," in Gills Tarabout and Ranabir Smaddar (eds.), *Conflict, Power and the Landscape of Constitutionalism* (London: Routledge, 2008), 223-4.

Second, the institutional framework of lawful authority has been critiqued by the ethno-regional forces in the backdrop of the perceived Punjabization of the state. In this context, provincial autonomy emerged as the leading demand for rechartering the constitutional path that provided the juridical basis for the 2010 Eighteenth Amendment. However, although this amendment empowered the majority communities in the four provinces by accommodating their ethnic identities through provincial autonomy, it also created an anomalous situation in the form of the popular demand for the creation of new provinces by minority communities within those provinces. The unwillingness of the political class to devolve power even further to the district level – by establishing and empowering local government institutions – combined with constitutional bottlenecks in creating new provinces to accommodate the subprovincial groups has resulted in large communities being unrepresented in the state.

Third, Islamic ideology has provided an ever-expanding supraconstitutional source of legitimacy in the process of constitution making. The politics of Islam moved from the 1949 Objectives Resolution to incremental growth in the religious content of legal and constitutional provisions. The process divested the ongoing political conflict of the constitutional rules of the game by bringing in new pressures for *Shariatization* of the state and *jihad* against the declared infidels inside and outside of the country. First the military government of General Zia (1977–1985), then a spate of judicial cases, and finally the political parties belonging to the Islamic Right pushed the agenda of Islamization of laws and struggled to resist any attempts to delete or reform those already in operation (e.g., the Blasphemy Laws). The research in this chapter examines the way that extra-constitutional forces complicated the structural and operational dynamics of the constitution and led to at least partial erosion of the historical and regional tradition of constitutionalism.

The complex relationship between constitutional uncertainty and political conflict in Pakistan draws on both law and politics, which continue to be inextricably linked for defining the ends and means of the political contest. Pakistan can be located on the constitutional matrix of the contemporary world as a typical postcolonial state deeply immersed in its European heritage of legal and political philosophy. However, it differs from Western democracies in terms of its distinct ideological framework and power dynamics. Therefore, it is necessary to investigate the meaning of constitutionalism in the context of the power struggle on the ground. Whereas the nation is in its seventh decade since independence, the broad contours of its constitutional edifice are still being shaped, and the future remains uncertain in this regard. Pakistan reflects an inherent contradiction between the external and internal sources of jurisprudence, represented by the colonial legacy, on the one hand, and the

local, historical, and traditional – in summary, “national” – wellspring of legal norms and practices on the other. Similarly, the country exhibits a pattern of change in the focus of the political discourse from citizen to community defined in ethnic, religious, or sectarian terms, as well as a transition from a rights-based discourse that addresses equal protection of law to an identity-based projection of legal and political agendas. My aim is to discuss the unfinished task of constitution making in Pakistan in a way that reflects the incompatible pressures and strategies of multiple actors on the political stage.

Constitutionalism has operated as both an independent and a dependent variable vis-à-vis the power dynamics. As an independent variable, it provided the foundational structure of the new state in the form of the 1935 India Act, as amended by the 1947 Independence of India Act. The internally differentiated legal–institutional matrix of the Act meant that all meaningful power was to be exercised by public officeholders and the administrative hierarchy. The sanctity of the black-letter law had been cultivated as a matter of common belief for a hundred years after the British conquest of the northwestern parts of India in the middle of the nineteenth century. Muslim nationalism in pursuit of Pakistan a century later represented an ideological input into what was a purportedly secular ruling setup of British India. The separatist project of carving a state out of India, a two-thousand-year-old continuous civilizational entity, involved a task of gigantic proportions in terms of defining Pakistan, mobilizing a vast number of people in pursuit of the cause for a Muslim homeland – in millions of cases, away from their homes and hearths – and negotiating accordingly with the British government. Compared to this “seceding” state, India operated as a successor state, with its political center continuing to be located at Delhi and its institutional apparatus remaining largely intact. Its nationalism was defined more by default – with reference to territory, history, tradition, and (most recently) administrative unity under the British – than by design, as in the case of Pakistan. Partition did not end in 1947. Although Pakistan got out of India, India did not get out of Pakistan. The new country embarked on a long journey of cultural partitioning through Islamization that brought about significant changes in the constitutional framework, thereby adding multiple rights and policy directives that cut across others that already were part of the constitution.

The power-wielding bureaucratic apparatus first ruled the country under the constitutional “cover” for a decade but then gradually lost the initiative to the army at the top of the state’s decision-making framework. The army leadership, in turn, took up an ambitious project of constitutional engineering through the 1962 Constitution, the 1985 Eighth Amendment, and the 2003 Seventeenth Amendment, essentially centralizing power and presidentializing the form of

government. Correspondingly, the elected political leadership retaliated in the form of the 1973 Constitution, the 1997 Thirteenth Amendment, and the 2010 Eighteenth Amendment in an effort to restore parliamentarianism and expand the mechanism for exercise of state authority by the provinces. However, some constitutional innovations introduced by military rulers, especially in the realm of Islam, have continued to be on the statute book, thwarting all attempts of the civilian rulers to bring about even procedural changes. Although the army abrogated or suspended the constitutions four times and sought to change them to suit its preferred model of government, it had to deal with the Judiciary each time for validating its takeover. That rendered the role of higher courts controversial inasmuch as they often earned the opprobrium of the articulate sections of the public for bestowing legitimacy on Bonapartist generals.

In this process, two power centers emerged in the country. One center consisted of the non-parliamentary forces – that is, the state apparatuses of army, bureaucracy, and judiciary that drew on their institutional development in British India for their current location at the state's center. It is obvious that they shared their worldview and political vision with their large recruitment base in the urban middle classes. They functioned as the *de facto* repository of state authority through its regulatory mechanisms. The other power center included parliamentary forces operating through the platform of mainstream, ethnic, and Islamic parties. It drew largely on the mass mandate as a constitutional source of legitimacy. The 1973 Constitution declared abrogation or subversion of the constitution to be high treason (Article 6). Apart from this bipolar structure of power, the prevalent institutional–constitutional conundrum of legitimate authority often was criticized by ethnic forces for centralizing all power in the hands of the federal government. They often demanded maximum provincial autonomy on the basis of the 1940 Lahore Resolution. The 2010 Eighteenth Amendment transferred forty of forty-seven subjects from the concurrent list to the residuary category controlled by the provinces, and it remains a milestone on the path to the constitution's federalization. However, Sindhi and Baloch nationalists continue to show not only their dissatisfaction with the Amendment for not going far enough toward devolution of power but also their frustration with distortions in the process of its implementation.

The basic argument of this chapter is that constitutionalism in Pakistan cannot be grasped fully unless the policies and actions of the major players – such as the army, Islamic groups, political parties, and ethnic forces – are considered as proponents of parallel legal and institutional perspectives. Pakistan is passing through a longer-term, low-intensity constitutional crisis that underscores the civil-military, religio-sectarian, and ethno-nationalist

conflicts. This chapter analyzes the complex and multidimensional currents of constitutional thought and practice in the country. The power dynamics have operated through the process of legislation on the floor of elected assemblies, through case law in terms of the courts' lawmaking potential, through street demonstrations against the prevalent constitutional edifice (e.g., against the 1962 Constitution in 1968–1969 and the Musharraf government in 2007–2008), and through the widely acknowledged potential of the relatively amorphous “Islamic establishment” to disallow any move to eliminate or substantially reform the religious laws enacted by General Zia.

The following sections discuss constitutionalism in Pakistan in the three broad areas of power struggle outlined previously: parliamentary sovereignty, federalism, and Islamism. Accordingly, extra-parliamentary forces, the federating units, and Islamic parties and groups have challenged and shaped the constitutional edifice and elicited responses from their competitors. Pakistan continues to be mired in controversy about the three major areas of conflict relating to the division of power among (1) parliament and extra-parliamentary forces, (2) the Centre and provinces, and (3) the modernists and traditionalists supporting and resisting the Islamization project. Power dynamics impinge on the substance and style of constitutionalism by halting the inflow of Western jurisprudential thinking, thereby putting the constitutional edifice at the risk of slow erosion of credibility in the face of the mounting challenge of the alternative Islamic discourse about statehood. This includes challenging the “secular” law of the Islamic Republic of Pakistan by constitutionalizing religion and placing the state on a pedestal higher than the constitution. There also have been constitutional-engineering efforts under military governments to undermine the parliamentary system, to counter or weaken the federalization project, and to control the judiciary. Above all, what has occurred is the circumvention of the process of legal socialization of people through an increasingly intense Islamic ideological socialization, thereby hampering the project of citizen formation and decreasing the potential of meaningful societal input into constitutional development.

Parliamentarianism as the Pivot of Constitutionalism

How to measure the operational effectiveness and institutional autonomy of the parliament in Pakistan? One way is to examine the way the emerging jurisprudential thinking attributed a superior position to the state and the constitution over and above the parliament. The legal philosophy of the new country stood on these two pillars, rooted in the institutional dynamics of the civil bureaucracy, army, and judiciary. The odds have been heavy against

the parliament throughout the political history of Pakistan. It is necessary to discuss the way that these powerful forces shaped legislation in the parliament while operating from the outside and took a supraparliamentary position in terms of directing the legal course of the state authority.

STATE AND CONSTITUTION: POLITICAL LANDSCAPE FOR PARLIAMENTARIANISM

It is generally argued that a constitution is the embodiment of the way the state seeks to resolve conflicts and that it constitutes the relations of power in the society.² However, this view is not amenable to straightforward application in the postcolonial world where, traditionally, the rule of law was exercised by a colonial government that was only remotely “covered” by acts of parliament in London. In other words, the exercise of power by the state apparatuses of the army and the bureaucracy did not correspond to the constitution’s formal provisions.³ The colonial government was a bureaucracy *par excellence*.⁴ The constitutional source of legitimacy in the form of rule of public representatives emerged in a real sense only on the eve of independence. This came at the end of a long process of transition from semi-representative to representative to semi-responsible (i.e., diarchy) to fully responsible governments corresponding to the establishment of limited self-rule in the locality, district, province, and dominion. Constitutionally speaking, state formation passed through two processes: (1) the 1946 elections for provincial assemblies that, in turn, elected the Constituent Assembly of Pakistan; and (2) the transfer of sovereign power to the Constituent Assembly, legally and formally. It was almost guaranteed that this constitutional process would shape the contours of the emerging framework of the ruling setup in the new dominion of Pakistan along the parliamentary form of government. However, the parallel and initially stronger structure of bureaucratic power operated with relative impunity, thereby leaving a strong imprint on the way constitutionalism was conceived and operationalized in later years.

The state in Pakistan often opted for reform, suspension, abrogation, or reformulation of the constitution according to priorities of the changing dynamics of the ruling dispensations. India is an exception that proves the rule that

² Rannabir Smaddar, “Introduction,” in Gilles Tarabout and Rannabir Smaddar (eds.), *Conflict, Power and the Landscape* (2008), 5.

³ Hamza Alavi, “Constitutional Changes and the Dynamics of Political Development in Pakistan,” seminar paper, Institute of Commonwealth Studies, University of London, Collection of Seminar Papers on Constitutional Changes in the Commonwealth Countries, 1973, 65–6.

⁴ Keith Callard, *Pakistan: A Political Study* (London: Allen & Unwin, 1958), 285.

postcoloniality typically – if not in every case – puts the newly founded state above the constitution. Deification of the state in the Third World has been ascribed to the ruling elite’s perceived existential threat to its security.⁵ The idea is that, ultimately, law is dispensable whereas the state is not. As discussed later in this chapter, the verdicts in court cases dealing with the dissolution of elected assemblies at the hands of the bureaucratic, political, and military leaderships often relied on the doctrine of state necessity that justified the violation of the constitution ostensibly for a short time and for limited purposes. The jurisprudential upgrading of the state above the constitution in this context, combined with an increasing level of tension within the constitution between the British Common Law and Islamic provisions, was bound to dilute the binding character of the black-letter law in the emerging statecraft in Pakistan. After all, constitutions are inert on their own unless they are operationalized in their specific ways by those at the helm of affairs.⁶

The Indian Constitution has been described as a “seamless web” with contradictory strands such as democracy and social revolution, as well as national integration through secularism and preservation of the identity-based, minority–majority conundrum of public policy.⁷ In Pakistan, the web was characterized even more strongly by contradictory strands as the emerging religious-constitutional provisions undercut various other provisions concerning equality between genders and religious communities. It is not surprising that an endless process of interpretation and counterinterpretation of the constitution characterizes the legal history of Pakistan. This phenomenon defined the debate between the ritualistic and civilizational approaches to Islam based on the rule of Sharia and Muslim identity, respectively. At the institutional level, this debate served to define the conflict between the judiciary and the executive. For years, the executive had an upper hand because it controlled the judiciary through its power of appointment and transfer of higher-courts judges; however, the Supreme Court’s verdict in the Al-jihad Trust Case (1996) gave the judiciary primacy over those tasks. Under Chief Justice Sajjad Ali Shah (1993–1997) and Chief Justice Iftikhar Chaudhry (2007–2013), the judiciary rebounded with renewed vigor (see [Chapter 6](#)). The 2010 Eighteenth and Nineteenth Amendments, which streamlined the appointment of

⁵ Mohammad Ayoob, “The Security Predicament of the Third World State: Reflections on State Making in a Comparative Perspective,” in Brian L. Job (ed.), *The Insecurity Dilemma: National Security of Third World States* (Boulder, CO: Lynne Rienner, 1992), 64–6.

⁶ Granville Austin, “The Expected and the Unintended in Working a Democratic Constitution,” in Zoya Hasan, E. Sridharan, and R. Sudarshan (eds.), *India’s Living Constitution: Ideas, Practices, Controversies* (Delhi: Permanent Black, 2002), 320.

⁷ *Ibid.*, 320–5, 329.

judges by the Judicial Commission of Pakistan, virtually eliminated the role of the parliamentary committee and effectively required that President Zardari appoint judges recommended by the Chief Justice. This tension remained unsettled as the Chaudhry Court, which had achieved preeminence on the issue of independence of the judiciary in 2007, succumbed to deep controversy in 2012–2013.⁸ The Chaudhry Court was criticized for issuing too many *suo motu* notices, for harassment of the bureaucracy, for dismissing Prime Minister Gilani, and for taking only half-measures against ISI (Inter-Services Intelligence) for allocating election funds to the Pakistan Muslim League (Nawaz) (PML-N) leader Nawaz Sharif, among others, in the famous Asghar Khan case.

PARLIAMENTARY SOVEREIGNTY: BY FIAT OF LEGISLATION

It can be argued that after independence, authority in Pakistan was “bi-focal” with the parliamentary (i.e., political) and extra-parliamentary (i.e., bureaucratic and judicial) forces operating in an atmosphere of mutual distrust. The story of constitutionalism in Pakistan in the past sixty-five years is one of struggle between the political leadership and extra-parliamentary forces led by the army to make the written law conform to their respective preferences and priorities. The central issue of this conflict revolved around the question of parliamentary sovereignty. As a visible symbol of shift in power to the Constituent Assembly, Section 8 (C) of the 1947 Independence of India Act sought to eliminate the extraordinary powers of the Governor General provided under the 1935 India Act. However, unlike in India, the Governor General continued to be the chief executive in Pakistan. The difference between the two countries in this matter can be partially attributed to the fact that the father of the nation, Jinnah, became Governor General and absorbed all meaningful power in that office, whereas the father of the nation in India, Gandhi, was not even part of the government. In addition, Nehru’s charisma as prime minister empowered the parliament whereas Governor General Mountbatten was merely a symbol of a dying imperialism rather than of an ascendant independent statehood.

The Governor General in Pakistan had the power of key appointments ranging from cabinet ministers, governors, law officers, and higher-court judges to supreme military positions. The 1952 Basic Principles Committee Report recommended that the cabinet ministers and other public officeholders should hold office at the pleasure of the Governor General. Choudhary described this

⁸ Mohammad Waseem (2012), “Judging Democracy in Pakistan: Conflict between the Executive and Judiciary,” *Contemporary South Asia* 20 (1): 19–31.

pattern of the exercise of power as a viceregal system operating on top of the parliamentary system.⁹ In 1954, the Constituent Assembly amended Sections 9, 10, 10-A, and 10-B of the 1947 Act to eliminate the Governor General's power to dismiss the Council of Ministers. This so-called constitutional coup turned out to be costly because it was countered by a "civilian coup" in the form of dissolution of the Constituent Assembly by Governor General Ghulam Mohammad.

Partially complying with the Federal Court's verdict in the 1955 Special Reference case (discussed later in this chapter), the Governor General called for a Constituent Convention to be held on May 10, 1955, to validate the Emergency Powers Ordinance No. 9 issued by him under the 1935 India Act (Section 42). The Court disapproved of the idea of a Constituent Convention and ordered him to have the Constituent Assembly reelected under Section 8 of the Act. The second Constituent Assembly then passed the 1956 Constitution, which provided a significant role for the president, mainly as a compromise between the proponents of parliamentary sovereignty and the defenders of the viceregal system. Yet, the real power continued to be in the hands of the extra-parliamentary powers led by two successive bureaucrat Governor Generals/Presidents who together dismissed six prime ministers. In the first decade after partition, the conflict between the head of state and head of government arose and continued to cast a shadow on the country's politics for decades. At the same time, it became clear that constitutionalism defined the state because bureaucrats could not rule in their own name – a fact that guaranteed a space for parliament even though its sovereignty was circumscribed in both letter and spirit.

The 1962 Constitution took the matter of presidential domination of the state authority still further, whereby the president shared the legislative authority at the highest level with the National Assembly (Article 19).¹⁰ He had emergency powers to dissolve the National Assembly, a provision that led to the reenactment of similar legislation in the following years at the hands of successive military presidents. Parliamentary sovereignty was rendered a figment of politicians' imagination. Indeed, the provision for impeachment of the president was tantamount to harassment of legislators: if the sponsors of an impeachment resolution failed to win a simple majority of the National Assembly, they would be removed as members. Not only was parliament divested of its output

⁹ G. W. Choudhary, *Constitutional Development in Pakistan* (Karachi: Ideal Book House, 1995), 36–42.

¹⁰ For a discussion, see Mushtaq Ahmed, *Government and Politics in Pakistan* (Karachi, Royal Book Company, 1970), 211.

function by way of legislation, but the input function of citizens in the form of an adult franchise to elect the parliament also was dispensed with. President Ayub devised an ingenious method for election of an electoral college consisting of local councilors at the Union level – the Basic Democrats – who then voted for the national and provincial assemblies and the president (Article 165). In this way, neither the parliament nor the president was directly representative of the initial voters.¹¹ The 1968–1969 anti-Ayub movement that toppled the government finally buried the presidential form of government. However, its adherents from outside of the political class continue to support it, and the subsequent militant rulers subordinated the parliament to the president within the juridical framework of parliamentary democracy.

The 1973 Constitution restored parliamentarianism in post-Bangladesh Pakistan, with the prime minister as a powerful chief executive. The president was a ceremonial head of state, with no influence over the selection of the prime minister or legislation. He had to abide by the prime minister's advice in all matters. Provisions such as naming a successor in a no-confidence move against the prime minister purportedly aimed at creating political stability. Critics of Z. A. Bhutto perceived the provisions giving the prime minister such prominence as a model of self-serving parliamentary sovereignty. The constitution was altered substantially by the 1985 Eighth and 2003 Seventeenth Amendments, along with incorporation of several ordinances issued by the military governments of General Zia (1977–1985) and General Musharraf (1999–2002), respectively. Unlike the 1956 and 1962 Constitutions, which were abrogated, the 1973 Constitution was suspended only by the coup makers in 1977 and 1999. This happened ostensibly because of Article 6, which heavily sanctioned abrogation or suspension of the constitution as treason. Also, there was the fear that without the 1973 Constitution, the only consensus-based constitution in the history of Pakistan – a real feat of performance of public representatives – the nation might never again achieve agreement on any constitutional formula. After the 1985 elections were held on the way to civilianization of Zia's military regime, the project of keeping political power and policy initiatives outside of the parliament was couched in the discourse about restoring the balance of power between the president and the prime minister.¹²

¹¹ George M. Platt, "Basic Democracies: The Experiment in Local Government," in S. H. Hashmi (ed.), *The Governing Process in Pakistan 1958–69* (Lahore: Aziz Publishers, 1987), 230–8.

¹² Charles H. Kennedy, "Presidential–Prime Ministerial Relations: The Role of the Superior Courts," in Charles H. Kennedy and Rasul Bakhsh Rais (eds.), *Pakistan 1995* (Boulder, CO: Westview Press, 1995), 19–27.

The Eighth Amendment, passed on December 30, 1985, before the lifting of martial law and largely based on the Restoration of Constitution Order issued earlier by the military President Zia, provided for presidential power to dissolve the National Assembly by introducing Article 58 (2) (b). The president could now “dissolve the National Assembly in his discretion” after a vote of no confidence against the prime minister is passed or if a situation arises whereby the “government of the federation cannot be carried on in accordance with the provisions of the Constitution.” Also, it provided that validity of anything done by the president at his discretion shall not be called into question on any ground whatsoever. The president could appoint a prime minister at his discretion for the next five years. Article 90 (2) prevented the parliament “from conferring by law functions on authorities other than the President” and thus tied the hands of the national legislature in the matter of redistributing state authority either horizontally or vertically. The most far-reaching and substantive aspect of the Eighth Amendment related to the indemnification clause (Article 270-A), whereby all orders, ordinances, and martial-law regulations, as well as the presidential referendum of December 19, 1984, were validated as part of the statute book. Parliament was deemed to have passed all of these laws spread over eight years of martial law. Ingeniously, the parliament was renamed *Majlis-e-Shoora* (i.e., Advisory Council), transforming its role from a lawmaking body to a mere advisory body that had typically served the *Amir* (ruler) in early Islamic history. In this way, the Eighth Amendment transformed the state into a semi-presidential system.

The Eighth Amendment played havoc with the nation because in less than a decade, four elected governments were dismissed consequent to dissolution of the National Assembly at the hands of Presidents Zia (1988), Ishaq (1990, 1993), and Leghari (1996).¹³ Soon after the election of Nawaz Sharif as prime minister in 1997, the parliament passed the Thirteenth Amendment, which deleted Article 58 (2) (b) and its counterpart for the provinces, Article 112 (2) (b). However, the Nawaz Sharif government was toppled in a military coup in 1999. Following the 2002 elections, as required under the court order in the 2000 Zafar Ali Shah case, President Musharraf succeeded in getting the Seventeenth Amendment passed by the parliament in 2003, which restored Article 58 (2) (b). The new civilian government of the Pakistan Peoples Party (PPP) elected in 2008 initiated a comprehensive process of constitutional reform that once

¹³ Osama Siddique (2006), “The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents,” *Arizona Journal of International and Comparative Law* 23 (3): 32–72.

again deleted Article 58 (2) (b) in an effort to restore parliamentary sovereignty through the 2010 Eighteenth Amendment. The president once again was denied the power of a chief executive. He was supposed to act on the binding advice of the prime minister for appointments of armed-services chiefs and higher-court judges, among other requirements, even as the real power in the matter of judicial appointment now shifted to the Judicial Commission of Pakistan. The configuration of the power elite ruling the country after the 2013 elections was based on a consensus on the issue of parliamentary sovereignty. Stakeholders in this matter were the two mainstream parties, the PPP and the PML-N, and the leading ethnic parties of Khyber Pakhtunkhwa (i.e., the Awami National Party [ANP]), Balochistan, and Sindh (i.e., the Baloch and Sindhi nationalist parties in general).

PARLIAMENTARY SOVEREIGNTY: BY FIAT OF CASE LAW

Newberg argues that Pakistan has been characterized by incomplete constitution making that, in turn, put the burden of interpretation of the constitution on various institutions, including the bureaucracy and the army, whereby the courts along with lawyers reconstituted the state in legal terms.¹⁴ This reconstruction essentially reflected the *de facto* situation of the power dynamics on the ground rather than the *de jure* situation couched in the provisions of the constitution. It acknowledged the perceived superior authority of civil or military executives as compared to the parliament, thereby underscoring the rule of the elite without societal input.¹⁵ The issue was far from clear, however, because individual judges continued to vacillate between the two positions of executive and legislative preeminence. For present purposes, parliamentary sovereignty is understood as a symbol of supremacy of the lawmaking body both operationally – in the form of an unhindered process of legislation – and structurally, by way of safely completing its tenure. In the first major case of dissolution of the Constituent Assembly in 1954, the Chief Court of Sindh refused to entertain the official argument that Section 223–A of the 1935 India Act, which was the basis of the writ petition, did not receive the Governor General’s assent per Section 6 (3) of the 1947 Independence of India Act and therefore was not law. In reviewing that decision, the Federal Court reversed it and agreed with the government’s view that the Governor General’s assent was

¹⁴ Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995), 2.

¹⁵ *Ibid.*, 7, 13.

necessary for making Section 223-A a proper law, thereby rendering forty-six Acts invalid and creating a huge constitutional vacuum.¹⁶

As a result, the Governor General was obliged to issue the Emergency Powers Ordinance No. 9 to give his assent retrospectively to all of the forty-six Acts. In turn, that Ordinance was invalidated,¹⁷ and the Governor General filed a Reference in the Federal Court to extricate himself from the legal mess for which he was responsible in the first place. The Federal Court viewed the political consequences of the legal void and justified the dissolution of the Constituent Assembly on the basis of “the common law [of] civil or state necessity.” However, it denied the Governor General the right to “give” a constitution because that was the prerogative of the Constituent Assembly. The judiciary emerged as the custodian of constitutionality of the political system at this stage, a role that it persistently – although often controversially – played for six decades after 1954. It is interesting that the government all along had deferred to the judiciary in an ultimate sense – even as it often manipulated it for its own purposes, despite the judiciary’s critical and (at times) condemnatory attitude toward the political leadership. This attitude can be attributed to an “insider” perception about the higher courts as part of the state apparatus, which consisted of selected (not elected) judicial officers, whose top judicial hierarchy initially belonged to the prestigious Indian Civil Service. In an ultimate sense, the courts bestowed legitimacy on the state, which enormously benefited from this “judicial largesse.”¹⁸

In the famous 1958 Dosso Case concerning the first military coup, the Supreme Court observed that the new Law Continuance in Force Order was “a law-creating organ,” with reference to Kelsen’s theory of legitimation of a successful revolution through its own volition.¹⁹ By default, the judicial thinking took long strides toward declaring the rule of law in a super-session of the rule of public representatives, through both the “necessity” approach in 1955 and the revolutionary self-legitimation approach in 1958. Whereas the 1954 coup represented a commissarial dictatorship, the 1958 coup pointed to a constituent dictatorship.²⁰ When the Supreme Court issued its verdict in the 1972 Asma Jilani Case against General Yahya’s takeover in March 1969, Z. A. Bhutto’s civilian government was already in place, and the reality on

¹⁶ *Tamizuddin Khan Case*, PLD 1955 Federal Court 240.

¹⁷ *Yusaf Patel vs. The Crown*, PLD 1955 Federal Court 387.

¹⁸ Newberg, *Judging the State*, 13.

¹⁹ *The State vs. Dosso Case*, PLD 1958 Supreme Court (Pakistan) 533.

²⁰ Dieter Conrad, “In Defence of the Continuity of Law: Pakistan’s Courts in Crises of State,” in W. P. Zingel and S. Zingel Ave Lallament (eds.), *Pakistan in the 1980s: Law and Constitution* (Lahore: Vanguard, 1985), 125.

the ground was no longer in favor of the coup maker. The Court declared the coup an act of usurpation. Curiously, it also deliberated on the Supreme Court's legitimation of the 1958 coup on the basis of Kelsen's theory, which, in the Court's opinion, was not universally accepted as either a source of modern jurisprudence or an extension of recognition of state sovereignty in international law to legitimacy of a regime at home – the latter of which could take place only through the municipal laws of the state under consideration.²¹ The 1977 Begum Nusrat Bhutto Case was fought between the 1958 Dosso Case and the 1972 Asma Jilani Case, focusing on the acknowledgment of the tenacity and legitimacy of the new legal order – that is, the new *grundnorm* as a meta-legal fact – and the usurpation of constitutional authority by extra-constitutional means, respectively. The Supreme Court, while partially transcending both positions, harkened back to the 1955 Special Reference Case and justified martial law as a constitutional deviation following the doctrine of necessity. As Wolf-Phillips paraphrased, Pakistan moved along several jurisprudential positions: “the safety of the state is the supreme law” (1955); “nothing succeeds like success” (1958); “usurpers, beware” (1972); and “constitutional deviation dictated by necessity” (1977).²²

Dissolution of the National Assembly by the president in 1988, 1990, 1993, and 1997 elicited court verdicts that generally confirmed the unworkability of the existing structure and the need to resort to a fresh public mandate under Article 58 (2) (b). Each time, judicial review actually brought about regime change through elections from Junejo to Benazir Bhutto (1988), to Nawaz Sharif (1990), again to Benazir Bhutto (1990), and then to Nawaz Sharif (1997). The Supreme Court's judgment in the Zafar Ali Shah Case after the overthrow of Nawaz Sharif's government by General Musharraf in 1999 validated the coup on the basis of state necessity in line with the 1955, 1977, 1988, 1990, and 1997 cases, following the principle of *salus populi suprema lex*, as maintained in the Begum Nusrat Bhutto Case.²³ In a spirit of blatant extra-constitutional mode of thinking, the Supreme Court gave the new Chief Executive Musharraf powers to amend the constitution, as in the 1977 Begum Nusrat Bhutto Case. Indeed, Musharraf was deemed to be holding a constitutional office.²⁴

²¹ *Asma Jilani Case*, PLD 1972 Supreme Court 139.

²² Leslie Wolfe-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity* (London: Third World Foundation, 1980), Monograph 6: 8, 11, 17, 22.

²³ Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford: Oxford University Press, 2001), 936.

²⁴ *Ibid.*, 937.

As described in [Chapter 6](#), in recent years, Pakistan experienced a strong current of judicialization of politics that had a significant impact on the prevalent interpretation of the constitution, especially through public-interest litigation. Chief Justice Iftikhar Chaudhry essentially drew on the immense mass popularity that made him an icon of justice in the country. In that capacity, he was able to override the parliament's role as a sovereign body in the debate about the basic structure of the constitution, which largely reflected the Indian debate about this issue from the 1973 Kesavananda Bharati Case onward. The potential of this controversy to discredit the concept of parliamentary sovereignty, as opposed to the supremacy of the constitution, was real in view of the traditional weakness of the legislature in Pakistan. Constitutionalism emerged as the moral preserve of judiciary over and above the parliament and thus became a function of the prevalent institutional design. The Supreme Court's dismissal of Prime Minister Gilani in June 2012 in a contempt-of-court case relating to non-implementation of its order to pursue a corruption case against President Zardari in the Swiss Court – even as Gilani enjoyed the majority's support in the National Assembly – made the parliament a “lame-duck” institution. The cause of parliamentary sovereignty that previously suffered at the hands of Bonapartist generals now faced a strident judiciary that was widely criticized for encroachment on the domain of the executive and legislature.

In summary, it has been shown that constitutionalism in Pakistan reflects – more than the power structure of the society – the development of a body of laws and an apparatus for exercise of legal authority over time by the colonial bureaucracy that put in place a somewhat autonomous institutional framework.²⁵ There are two power centers in Pakistan. One functions as a repository of state authority and is represented by the legal–institutional framework. The other is composed of the political class that seeks to enter the state on the strength of the constitutional source of legitimacy based on mass mandate. Whereas military presidents took away parliamentary sovereignty whenever they moved to civilianize their regime (i.e., in 1962, 1985, and 2002), the civilian governments restored sovereignty in 1973, 1997, and 2010. The judiciary's intervention arose because of the conflict between the supporters of parliament and extra-parliamentary forces. By and large, the judiciary shared the perspective of the state elite as opposed to the political elite, especially in terms of upholding “statism” over constitutionalism by frequently approving dissolution of the National Assembly as an act of state necessity. In the long run, the courts preserved the idea of constitutionality of the state for legitimacy

²⁵ Mohammad Waseem, *Politics and the State in Pakistan* (Islamabad: National Institute of Historical and Cultural Research, 2007), 448–9.

purposes. This fact was brought out at times by the minority opinion in court verdicts (i.e., 1954, 1955, 1990, and 1993) and at times by the Supreme Court's order to reelect the Constituent Assembly as the only organ of the state legally authorized to make a constitution (i.e., 1955) and to restore the prime minister (i.e., 1993) because he was accountable to the National Assembly and not to the president. The power dynamics of the country, as reflected through both the personal and institutional roles of judges, clearly defined the expanded parameters of the currently operative jurisprudential thinking. Ultimately, the Supreme Court's award of the power of amendment in the constitution to two military dictators, General Zia and General Musharraf, was tantamount to de-acknowledging the role of the parliament as the supreme political institution that enjoys monopoly over lawmaking at the federal level.

Ethnic Federalism and Provincial Autonomy

A major problem for constitution making in Pakistan has been the issue of devising a mechanism for power distribution between the Centre and the federating units. Whereas the 1935 India Act was federal in nature, there was enough room to maneuver in the 1947 Independence of India Act for centralizing power in the capital of the new state, first in Karachi and later in Islamabad. Institutional pluralism provides the undercurrent of all federal thinking in Pakistan, as in India, whereby ethnically defined provinces represent historical entities and identities. However, unlike India, Pakistan faced the problem of an unwieldy federalist arrangement in the form of demographic preponderance of one province – that is, East Bengal Pakistan at 55 percent of the national population (1947–1971) followed by Punjab at 56 percent after the emergence of Bangladesh.²⁶ It took nine years for Pakistan to make the first constitution essentially – but not exclusively – because of a lack of consensus among the political elite on the form and substance of different federalist formulas. Indeed, the first major move toward developing the foundation of a federal constitution was the negation of federalism at the level of West Pakistan, where the four provinces and several princely states were merged into one megaprovince called One Unit. The 1956 and 1962 Constitutions were based on the principle of parity between the East and West wings of Pakistan. The National Assembly was elected on the basis of an equal number of legislators from the two wings: 75 and 150 in the 1956 and 1962 Constitutions, respectively.

²⁶ Mohammad Waseem (2011), "A Majority-Constraining Federalism," *India Quarterly* 67(3): 216–18.

The national project of the state managers focused on presidentialism as a symbol of unity of command, especially as the new country – or at least its Western wing, which provided the territorial base of the country after 1971 – enjoyed neither a compact historical identity nor a continuing political entity as a whole. Still, all demands on the basis of ethnicity together were considered to be a principle that might lead to the nation’s disintegration. The “steam-roller” of One Unit, which was merged all of the provinces of West Pakistan and the overall centralization of power in the hands of the federal capital, led to a backlash in the form of ethnic nationalism of Sindhis, Pakhtuns, and the Baloch, as well as Bengalis.²⁷ The Centre enjoyed and gradually expanded constitutional powers under Section 102 to declare an emergency in a province and legislate for it. Tax revenues meant for provinces, especially income tax and sales tax, were appropriated by the Centre after 1947. The Centre was further empowered to impose certain duties and responsibilities on provinces (Sections 122, 124–2). Section 126 extended the powers of the Centre to direct the executive authority of a province in certain matters of economic importance. Section 92-A gave the Centre the power to impose the governor’s rule over a province. These powers were exercised most controversially and disturbingly nine times in eleven years. The federation’s powers were underscored by a centralist bureaucracy after the establishment of a unified system of Central Superior Services in 1948, which eliminated the system of provincial cadres used in the Indian Civil Service. This left little space for the provinces to maneuver.

THE FEDERALIZATION PROJECT

Centralization of power led to a pattern of resistance from various provinces that eventually contributed to the formation of the ANP from the “left” of the political spectrum in 1957. As opposed to the vision of the ruling elite for an administrative, territorial, and symmetrical federalism that envisaged deconcentration of power along vertical lines, provincial leaderships pursued the ideal of an ethnic federalism whereby historical, traditional, and linguistic identities would comprise the basis of stable units of government. As the movement to undo the One Unit gained momentum – after passage of a resolution to that effect by the new West Pakistan Assembly in 1957 – the bureaucrat-turned-President Iskandar Mirza and General Ayub clamped down on the system in 1958 and, for at least another decade, sealed the fate of the

²⁷ For a discussion of the One Unit, see Rafiq Afzal, *Political Parties in Pakistan: 1947–58* (Islamabad, National Institute of Historical and Cultural Research, 1998), 238–42.

agenda for restoring the four provinces on the way to an expanded federalist project. An alternative constitutional framework began to emerge and appeal to the restive elements in the minority provinces and East Pakistan. Ironically, inasmuch as it had outlined a separate Muslim homeland, the reference point for this parallel federalist thinking was the 1940 Lahore Resolution, which was passed by the All India Muslim League and canonized as the *raison d'être* for Pakistan after partition.

The other much-forgotten dimension of the 1940 Lahore Resolution is related to its federalist provisions for maximum provincial autonomy. This dimension was rooted in two developments in contemporary India. First, the province emerged as the heart of British constitutional thinking, fully reflected in the provisions for provincial autonomy within the federal scheme for India.²⁸ Second, because the prospects of a Hindu-dominated federation looked imminent and therefore daunting, the Muslim League's political thinking gravitated toward a loose federation with safeguarding autonomy for the Muslim-majority provinces. The Lahore Resolution demanded that the Muslim-majority provinces of northwest and northeast India "should be grouped to constitute Independent States in which the constituent units shall be autonomous and sovereign."²⁹ The Lahore Resolution raised more questions than answers. Would there be one or more groupings? What was the meaning of independent sovereign units? How many states were visualized for Muslims? The current imperial thinking feared losing the political initiative to the center and instead grappled with the question of provinces joining or opting out of a dominion of their choice. It thus shifted the current federalist thinking in the direction of what was, until recently, an amorphous constitutional entity.³⁰

In the ensuing years, the Muslim League leadership moved from a federalist to a "separatist" mode of thinking that put the issue of provincial autonomy on hold. Accordingly, the 1946 resolution passed by the All India Muslim League's legislators asked for an independent Pakistan. Since partition, the "separatist" message of the 1940 Lahore Resolution is celebrated each year on March 23 as the constitutional foundation of the state, whereas the "federalist"

²⁸ Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (Cambridge: Cambridge University Press, 1985), 111–12.

²⁹ Text of the Lahore Resolution, in S. Sharifuddin Pirzada (ed.), *Foundations of Pakistan: All India Muslim League Documents 1906–1947* (Karachi: National Publishing House, 1970), Volume 11, 341.

³⁰ Mohammad Waseem, "Pakistan Resolution and Ethnonationalist Movements," in Kaniz Yusuf, Saleem Akhtar, and Razi Wasti (eds.), *Pakistan Resolution Revisited* (Islamabad: National Institute of Historical and Cultural Research, 1990), 516–20.

message is considered anathema by the mainstream political thinking. The United Front in East Bengal presented a 21-point agenda for elections for the provincial assembly in 1954 and included a demand for a federation on the basis of the 1940 Lahore Resolution. In 1966, Sheikh Mujiburrehman, the Awami League leader from East Pakistan, presented his Six Points formula for the federation. He compared the 1940 Lahore Resolution to the Magna Carta for contemporary Pakistan because of its autonomist provisions. He pleaded for a two-subject Centre drawing on the three-subject Centre envisaged by the 1940 Lahore Resolution. He also demanded two separate reserve banks for the two wings based on a two-economy thesis, transfer of taxation and revenue collection from the Centre to the provinces, the right of provinces to establish direct trade relations with other countries, and the creation of paramilitary forces for East Pakistan.³¹ After winning the 1970 elections, Mujiburrehman negotiated with the military President Yahya to form the next constitution for Pakistan on the basis of the Six Points. The breakdown of negotiations led to civil war and the emergence of Bangladesh in 1971.

The 1973 Constitution can be considered the first genuine federalization project, not least because the ghost of Bengali separatism hovered around the thinking of the new state managers. The province of Sindh represented “politics in a non-institutionalized state.”³² It had been seething with negativity toward the federation for two decades on such issues as migration and settlement of millions of refugees from India after partition, separation of Karachi from Sindh, and a merger of Sindh in the One Unit. Balochistan had passed through various phases of ethno-nationalist agitation against the Centre on issues such as its annexation with Pakistan, the persistent demand for provincial autonomy, and successive military operations. The new federalist arrangement sought to constrain Punjab as the majority province through bicameralism, whereby each of the three minority provinces would have representation in the Senate equal to Punjab. The *demos*-controlling role of the upper chamber was an innovation.³³ However, the Senate’s lack of control over financial bills reduced its policy scope. The proportional-representation system of electing the Senate through an electoral college composed mainly of the Members of Provincial Assemblies (MPAs) diluted its representative character as compared to the directly elected National Assembly, which turned the

³¹ *Bangladesh Papers* (Lahore: n. p., n. d.), 25–8.

³² Vali Nasr, “The Negotiable State: Borders and Power Struggles in Pakistan,” in Brendan O’Leary, Ian S. Lustik, and Thomas Callaghy (eds.), *Right-Sizing the State: The Politics of Moving Borders* (Oxford: Oxford University Press, 2001), 190.

³³ Alfred Stepan (1999), “Federalism and Democracy: Beyond the US Model,” *Journal of Democracy* 10 (4): 22–3

former into a mere extension of the latter. Instead of enhancing the quality of representation of smaller provinces in the state, the Senate sank into an effete institution and became a pawn in the hands of the president in his conflict with the majority-wielding prime minister belonging to the National Assembly.³⁴

The idea of federalism potentially seeks to stabilize the system by providing space for those regions, communities, and groups that are under-represented in the central state. The 1973 Constitution provided for only two lists of subjects, federal and concurrent, with no provincial list except that subjects not covered by the two lists would fall in the residual category controlled by provinces. Conversely, fiscal federalism started to take off. The Council of Common Interests (CCI), created pursuant to Article 153, emerged as a mechanism for resolution of conflicts among and between the provinces and the Centre. Similarly, Article 160 (1) provided for the National Finance Commission (NFC) as a mechanism for resource transfer from the Centre – and raised more than 90 percent of the national revenue – to the provinces, which raised as little as 7 to 8 percent. The 1996 NFC Award raised the provincial share of the divisible pool of revenue from 28 to 45 percent. The 2009 NFC Award further took the ratio to 57.5 percent for the following years. Moreover, it brought down the share of Punjab to 51.74 percent and doubled the share of Balochistan to 9.09 percent.³⁵ Thus, both the vertical and the horizontal redistribution of resources strengthened fiscal federalism before and after the turn of the twenty-first century.

Under President Zia's military regime, Sindhis were grossly alienated because of the execution of Z. A. Bhutto in 1979. Their anger found expression during the 1983 Movement for Restoration of Democracy agitation. In 1985, Sindhi politicians and the intelligentsia in exile, combined with the Baloch and Pakhtun politicians, founded the Sindhi Baloch Pashtun Front (SBPF). The SBPF invoked the 1940 Lahore Resolution to demand autonomy and sovereignty for the constituent units of Pakistan. It claimed that the Muslim League had confirmed in its correspondence with the Cabinet Mission in 1946 the right of provinces to opt out of their designated zones. It thereby essentially interpreted the 1940 Lahore Resolution as a confederal formula based on the equality of all four nationalities and their voluntary association with the Union that would control only four subjects. Under Musharraf, the Baloch ethnic movement entered its fifth phase in 2006. The PPP leader Benazir Bhutto, who hailed from Sindh, was assassinated in 2007, and Pakhtun nationalists were grossly alienated by the pro-Taliban Muttahida Majlis Amal government

³⁴ Mohammad Waseem, *Pakistan: A Majority-Constraining Federalism*, 218.

³⁵ *Ibid.*, 220.

in Khyber Pakhtunkhwa (2002–2007). Benazir's husband Asif Zardari was elected president in September 2008 by an overwhelming majority drawing on the three smaller provinces. It is not surprising that the formation of the Parliamentary Committee for Constitutional Reform (PCCR) reflected a credible representation of nine ethnic parties from the smaller provinces out of thirteen parties present on the floor of the parliament. Both the composition and resolve of the PCCR, with its overwhelming anti-Punjab and anti-Centre sentiment, promised to expand the frontiers of ethnic space in law through the 2010 Eighteenth Amendment in favor of provinces within the framework of devolutionary federalism. Most significant, the concurrent list of subjects was deleted from the constitution and most of those subjects were transferred to the provinces, including the right of prior consultation for hydroelectric projects, raising loans at home and abroad, joint ownership of mineral wealth, and issuing guarantees on the provincial consolidated fund.

THE EIGHTEENTH AMENDMENT

Among 102 articles of the constitution amended by the Eighteenth Amendment, many were related to parliamentary sovereignty. The president now could issue only one ordinance at a time when the National Assembly or the Senate was not in session. This measure was expected to restrain the executive on whose advice the president issued an ordinance in a situation in which the prime minister carried real power. It is significant that the Sixth Schedule, which required prior consent of the president for amendment in thirty-five laws, was deleted, removing constraints on parliament's lawmaking authority. Similarly deleted was the Seventh Schedule, which included eight laws that could be amended only through a procedure prescribed for a constitutional amendment that required a two-thirds majority vote. Although the parliament was acutely conscious of the loss of power over time, its pursuit of accumulation of power relied – most naturally – on changes in the black-letter law. Conversely, the task of implementing legal provisions remained in the hands of a civil bureaucracy that was centrally recruited, trained, posted, transferred, and promoted. With no provincial cadres, the bureaucracy ultimately operated at the pleasure of the federal government, even when it was placed in the service of a provincial government. The progress of the country toward devolution of power per the Eighteenth Amendment has been slow and only partially implemented, facing controversy within the bureaucracy and the army.

Whereas the state apparatus at the federal level has been far from keen in devolving power to the provinces – the strongholds of the political class – the latter, in turn, are uninterested in further devolution of power to the district

level. Successive military governments sought to empower the local government institutions with the express purpose of undermining the constituency-level workers and cadres of political parties. During the transition from military to civilian rule in 1971, 1988, and 2008, the newly elected provincial governments pushed the agenda for keeping local elections lower in the hierarchy of issues. The Eighteenth Amendment required the provincial governments to enact local government laws for the devolution of power to the district and lower levels and to hold local elections (Article 140-A). After the 2013 elections, several parties that were signatories of the PCCR report preparatory to the Eighteenth Amendment now occupied the government office: the PPP in Karachi; the PML-N in Lahore; and the Pakhtunkhwa Milli Awami Party (PkMAP), the National Party (NP), and the Balochistan National Party (BNP) in Quetta. In view of its obvious lack of enthusiasm for local government, the Supreme Court asked the parties to hold local elections by September 15, 2013. Several issues emerged as impediments to the elections, including the short time for passing laws, the re-demarcation of electoral constituencies, and arranging for the printing of millions of ballot papers. The Election Commission of Pakistan agreed with the stance of political parties that there was too little time for holding elections and pleaded for delay. The local elections in Balochistan were held on December 7, 2013, but were postponed elsewhere to January 2014 and later. A parallel concern was whether local elections should be held on a party basis, which was an old controversy because non-party elections had always been held at this level. The Sindh government announced party-based elections because of the dichotomy between the two leading ethnic communities of mohajirs (i.e., Urdu-speaking migrants) and Sindhis, who were expected to cater essentially to their respective constituencies. The agenda for non-party elections in Punjab was challenged in the Lahore High Court, which ruled in favor of party-based elections. All four provincial assemblies passed local laws, which bypassed the devolution of effective power to district and subdistrict levels, which was previously exercised per the Devolution Plan of 2001.

The dynamics of provincial power that pushed for the Eighteenth Amendment, however, was constrained by the country's power structure enshrined in the institutional apparatus of the state dominated by the arch-centralist province of Punjab. Punjab exerted its influence through the process of implementation of the Eighteenth Amendment by halting the transfer of certain departments from the Centre to the provinces and by dividing others, creating new divisions, and committees, and then keeping them in the hands of the Centre – generally delaying the entire process. There was a spurt of demands for the creation of new provinces because the Eighteenth Amendment lent power, privilege, influence, and identity to the majority

communities of Sindhis in Sindh, Punjabis in Punjab, Pakhtuns in Khyber Pakhtunkhwa, and the Baloch in Balochistan. This was instrumental in creating a backlash among the minority communities within these provinces, mohajirs in Sindh, Sirai-ki-speaking people in Punjab, Hindko-speaking people of Hazara in Khyber Pakhtunkhwa, and Pakhtuns in Balochistan.³⁶ The creation of new provinces remains problematic because the constitution requires a two-thirds majority vote in the National Assembly and the concerned provincial assembly. Furthermore, this is an issue currently submerged in the larger currents of macro-politics. For example, the fear of a potentially militant reaction of Sindhi nationalists against any prospects of division of their province has kept the mohajir nationalist party, the Muttahida Qaumi Movement (MQM), from pressing for it. People in the Sirai-ki region are divided between the Bahawalpur-centered and Multan-centered movements, between Sirai-ki speakers belonging to the area and Punjabi settlers, and between the PML-N and PPP strongholds. The Hazara region in Khyber Pakhtunkhwa is too small an entity – contemptuously described as a mere district and a half by the opposition – to merit the status of a full-fledged province. The Pakhtuns in Balochistan are dominant in the capital city of Quetta in commerce and in political influence – especially along the border with Iran and Afghanistan and the upper coastline – and therefore are not keen to pursue a separate entity.

Thus, it can be seen that a majority-constraining federalist arrangement represented by the 1973 Constitution, with additional input from the 2010 Eighteenth Amendment, remains problematic in view of the powerful centralist framework of the bureaucracy, along with the army that traditionally has operated as a centralist, antipolitical, and antidemocratic force. The pattern of constitutional uncertainty is defined by a persistent tension between the two models of government: (1) the supraparliamentary presidential rule as a symbol of unity as envisaged by extra-parliamentary forces; and (2) parliamentarianism, especially in its federalist reincarnation as an expression of institutional pluralism. The federalist agenda has survived through ethno-regional forces, especially in regard to the 1940 Lahore Resolution that promised autonomous federating units in the future pertaining to the context of constitution making. Bicameralism has gained strength in view of empowerment of the Senate by the Eighteenth Amendment, but it ultimately falls short of safeguarding the interests of smaller provinces. This is true because the National Assembly

³⁶ Maryam S. Khan (2014), "Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity and Group Conflict," 30 *Harvard Journal on Racial and Ethnic Justice* 77.

continues to be sensitive to the demographic preponderance of the majority province of Punjab, and there is a differential in the policy scope of the two houses of parliament. The Eighteenth Amendment is considered the latest expression of legal and institutional demands of the federalist forces that sought to attain maximum provincial autonomy during a half-century. The thrust of political pressure for rechartering the federalist arrangement has been offset qualitatively by the resilient centralist forces operating from outside of the parliament, as well as from the province of Punjab as the power base of Pakistan. The expansion of the federation by creating new provinces continues to be problematic in the face of formidable constitutional bottlenecks, underscored by the need of mainstream and leading ethnic parties to maintain the status quo on this issue for different purposes.

Islam and Constitutionalism: Power of Discourse

The colonial legacy of an essentially secular framework of law that drew on British Common Law, combined with the new ideological force of Islamic jurisprudence, charted the new constitutional path in Pakistan. The independence generation of the relatively “secular” and cosmopolitan Muslim League leadership gave way to increasingly religious and “indigenous” generations in ideological terms. The founding fathers – who actually grew up in the secular legal environment of both England and British India – cautiously, even reluctantly, put in place the Islamic principles of state policy from the 1949 Objectives Resolution onward, thereby paving the way to define the potential and scope of the subsequent constitution-making initiatives. Later generations did not share the quantum or direction of legal socialization with their predecessors. Instead, they drew largely on the nationalist framework of thought, which embraced an all-encompassing Islamism rooted in the perceived requirements of state building. They felt obliged to resist the major currents of constitutional ideas, norms, and behavior patterns that had flowed into British India for two hundred years.

The British legacy covered three main areas of legal and institutional activity. First, the political economy of colonialism required political stability, as well as protection of property and contractual security by the courts, to create wealth that was conceived as production in the framework of a broad utilitarian philosophy. Second, the British introduced a uniform codified law that led to transition from the use of force to the rule of legitimate authority and from the inchoate masses to a “public” infused with rights to legal protection. Ultimately, law served as an instrument of self-legitimation of the state. Third, the

new administrative hierarchy was characterized by structural differentiation, a rational–legal organizational ethos, and a government by policy rather than patronage.³⁷

European principles took deep root in the alien land of India and future Pakistan. However, the flow of these principles potentially was cut off at the time of independence. The nation now looked for constitutional progress toward the coveted goal of reshaping laws and institutions on the basis of Islamic jurisprudence. Several leading thinkers, ranging from the orthodox and conservative religious scholars to modernists of various degrees, offered their theses about constitutionalizing Islam, now that the Muslims of British India had a country of their own. Continuation of the colonial legacy of laws and institutions was considered the abject negation of the very idea of independence. In opposition to this, the state managers typically adopted a strategy of defense against the perceived religious encroachment of the British constitutional legacy.

CONSTITUTIONALIZING ISLAM

The process of Islamization of laws and the legal process were a direct result of the ideological input into the body politic that was extraneous to the tradition of constitutional law in British India. As the foundation of the new state, religion forcefully impinged on the first major expression of intent for formulation of the constitution. The 1949 Objectives Resolution declared that “sovereignty over the entire universe belongs to God Almighty alone” and that He has delegated authority to the state of Pakistan “for being exercised within the limits prescribed by Him.” The Objectives Resolution situated Islam in the legal–institutional order of the state by way of a supraconstitutional source of legitimacy. Over time, the Objectives Resolution created an ideological framework distinct from the current constitutional edifice for demanding obedience from citizens-at-large, public officeholders, and state functionaries. The “universal” import of the Islamic message transcended the contours of state-specific constitutionalism typical of the contemporary world. Going forward, Pakistan was a constitutional state in retreat from an increasingly powerful Islamic discourse. Although the main body of the constitution’s text remained intact and operated as a reference point for litigation, it now had to contend with Sharia, an elaborate religious system of rules and regulations. This fact forces scholars to use the term *political Islam* because the state is directed to

³⁷ Waseem, *Politics and the State*, 30–7, 43–4, 48–51.

implement Islamic laws thus conceived and promulgated.³⁸ The real dilemma of the state is that it is obliged to draw legitimacy from what is understood to be its greatest rival: Islamic constitutional provisions that have been penetrating its judicial and jurisdictional space.

All of this discussion highlights an increasing tension between democracy and constitutionalism. The transcendental vision incrementally superseded popular sovereignty through judicial review. The examples of Turkey and Iran illustrate the role of “guardians” as the non-elected and institutionally non-accountable forums operating from outside of the elected parliament for protecting the constitution’s basic features. This role is operationalized through the ideological goals enshrined in the preambles of the two constitutions – Islam in Iran and secularism in Turkey – and the instrumentality of courts to translate these goals into constraints over what is considered to be otherwise unbridled legislation. In Iran, individual piety acts as a factor for accountability of rulers to the person of *faqih* (i.e., Imam Khamenai) and the institution of the Guardian Council.³⁹ The Turkish model holds that the state should co-opt religion. In recent decades, it has considered religion as an instrument to be used against class-based or ethno-nationalist forces threatening political stability.⁴⁰ The experience of Pakistan has drawn on these models of “dual sovereignty” based on an amorphous and extra-constitutional entity outside of the parliament on the one hand – different in this respect from Iran and Turkey – and the properly institutionalized forum of the parliament on the other.

From the beginning, the political leadership felt obliged to accommodate Islam’s role in the constitution as the *raison d’être* for the state of Pakistan by a show of intent and the transformation of this intent into specific constitutional provisions. There followed a series of attempts at resistance against Islamic legislation and its implementation, often involving litigation. The voices in favor of separation between politics and religion grew weaker over time. The 1949 Objectives Resolution created a controversy about several issues – for example, the locus of sovereignty with God, people, parliament, and the state

³⁸ For example, see Olivier Roy, *The Failure of Political Islam* (London: I. B. Tauris, 1994); Graham Fuller, *The Future of Political Islam* (New York: Palgrave Macmillan, 2003); Frederic Grare, *Political Islam in the Indian Subcontinent* (Delhi: Manohar, 2001); Khalid Bin Sayeed, *Western Dominance and Political Islam: Challenge and Response* (Albany: State University of New York Press, 1995).

³⁹ Gunes Murat TeZeur, “Constitutionalism, Judiciary and Democracy in Islamic Societies,” *Polity* 39 (4): 480–5.

⁴⁰ *Ibid.*, 489–90.

in different contexts⁴¹; the principles of state policy for enabling Muslims to live according to Sharia; and the mode of delegation of divine authority to the state, which was closely identified with its founder, Jinnah. In Rehman's words, the 1956 and subsequent constitutions represented an "Islamic fetish" in the form of a mechanical application of Islamic idiom.⁴² Article 25 (2) – the enabling clause of the constitution from outside of the 1949 Objectives Resolution – remained unenforceable as a directive of state policy.

Beyond the constitution's text as well as court cases and parliamentary legislation based on that text, the cumulative effect of the demand for removing un-Islamic laws from the statute book and establishing laws on the basis of Sharia set the stage for an ever-expanding agenda for the Islamization of laws. From a "matter of conscience" for the Muslim League leadership on the eve of independence, Islam emerged as a matter of public policy.⁴³ The "repugnancy clause" (Article 1981) of the 1956 Constitution, which forbade enactment of un-Islamic laws, was deemed a victory of modernists over *ulema* (i.e., religious scholars) because the former did not succumb to the latter's demand to draw the constitution entirely on the basis of Sharia.⁴⁴ The interregnum of the 1962 Constitution kept the status quo in religious matters, except for the deviation from the name Islamic Republic of Pakistan to Republic of Pakistan and then back again. From 1956 to 1973, Islamic discourse took long strides, especially during the 1970 elections, when the army supported and sponsored Islamic parties and groups against a strident "socialist" movement in West Pakistan led by the PPP and a potentially separatist Bengali nationalist movement in East Pakistan led by the Awami League. Because the Muslim League enjoyed a highly legitimate position as a creator of the state supported by its institutional history spread over a half-century, it was able to withstand the pressure of the *ulema* to Islamize laws in the 1950s. Conversely, the PPP as sponsor of the 1973 Constitution had ascended to power from an outsider's position barely four years after its emergence in 1967. The PPP operated from a numerically strong parliamentary position but had a politically vulnerable status in the face of opposition from powerful forces, such as the army, the bureaucracy, the landed elite, the business community, and the *ulema*.⁴⁵ It is not surprising

⁴¹ Leonard Binder, *Religion and Politics in Pakistan* (Oakland: University of California Press, 1961), 149.

⁴² Fazlur Rehman (1970), "Islam and the Constitutional Problem of Pakistan," *Studia Islamica* 32 (4): 285.

⁴³ Fazlur Rehman (1985), "Islam in Pakistan," *Journal of South Asian and Middle Eastern Studies* 8 (4): 35.

⁴⁴ *Ibid.*, 40–1.

⁴⁵ Waseem, *Politics and the State*, 290–1.

that Z. A. Bhutto heavily compromised on constitutionalizing religion in the interest of developing a consensus, thereby conceding to the Islamic Right on this issue.

The concept of repugnance to Islam provided a major undercurrent of Islamic jurisprudence in the past sixty years. Article 198 (1) of the 1956 Constitution provided that repugnance to injunctions of Islam – the word *Sharia* was avoided – was to be interpreted by the relevant Muslim sects for legislation purposes. The constitution mentions delegation of authority to people – but not specifically to Muslims – at this early stage of constitutionalism.⁴⁶ The 1956 Constitution sought and established compromise rather than consensus because that would have made it mandatory to accommodate the dissident Islamist voices on the floor of the parliament. The idea was that Islam was a matter of policy, rather than law, for the parliament.⁴⁷ The 1962 Constitution reiterated the principle of repugnancy (Article 1). It also took the first step toward institutionalization of Islamic influence. It established the Advisory Council of Islamic Ideology (CII) (Article 6-1), the first of a series of state institutions to provide advice or Islamic interpretation of the legislative agenda. These institutions gradually took on a life of their own, often producing edicts that challenged existing law. Article 198 of the 1956 Constitution for the establishment of *Quran* and *Sunna* was enforceable but not in the 1962 Constitution. This again showed that Islamization of laws inside and outside of the parliament did not move along a linear path. Instead, the process was characterized by a “tug-of-war” between modernists and traditionalists that remains inconclusive today – even as both substantive and procedural laws have been incrementally Islamized.

As statutory bodies (per Articles 199 and 207, respectively), the CII and its sister institution, the Islamic Research Institute, were limited to giving advice. The 1973 Constitution further provided that Islam would be the state religion (Article 2); the prime minister as well as the president would be Muslims; and the new oath for public officeholders would confirm belief in the finality of the prophethood with Islam. The new repugnancy clause (Article 29) changed sect to school of law as the source of differences in jurisprudence, thereby opening space for innovation (*ijtihad*). The 1973 Constitution also provided for the CII. However, its impact on Islamic legislation generally remained minimal and thus became a source of frustration for Islamists. The martial-law ordinances relating to Islamic legislation were a major source of extra-parliamentary input

⁴⁶ Afzal Iqbal, *Islamization of Pakistan* (Lahore: Vanguard, 1986), 67–8.

⁴⁷ Rubiya Mehdi, *The Islamization of the Law in Pakistan* (Richmond, VA: Curzon Press, 1994), 85–6.

in the process of constitution making. Ayub's 1961 Family Ordinance sought to address the issue of subordination of women in family matters relating to divorce, polygamy, and inheritance, which continues to invite the wrath of the *ulema*. They consider it un-Islamic per the provisions of Sharia and therefore demand its annulment, most often from the pulpit of the mosque. However, the most controversial series of Islamic ordinances was issued by President Zia's martial-law government, ranging from the 1979 Hudood Ordinances, the 1984 Evidence Act, and the 1990 Qisas and Diyet Ordinance to amendments in the Blasphemy Law providing a death sentence for several offenses related to desecration of the exalted personalities of Islam and the Holy Scriptures. The Hudood Ordinances have been criticized regularly by liberal opinion inside of the country. It is interesting that a critique of these Ordinances emerged from within the heartland of the Islamic establishment inside the state. The CII claimed that the definition of *Hadd* in the Ordinance was neither derived from the Quran and Sunna nor in agreement with the definition of classical Islamic jurists.⁴⁸

The parliament was obliged to incorporate Islamic laws in the process of indemnification of martial-law regulations and ordinances in the Eighth Amendment. The 1949 Objectives Resolution was made a substantive part of the constitution, thereby rendering its Islamic injunctions justiciable. It now had the potential to increase the jurisdiction of the Shariat judicial system enshrined in the 1973 Constitution. Amendments to Articles 62 and 63 expanded the scope of qualification and disqualification of membership in the parliament, including requirements for abiding by the injunctions of Islam, having adequate knowledge of religious obligations, not opposing the ideology of Pakistan, and – most controversially – being “sagacious, righteous and non-profligate, honest and *ameen*.” These “constitutional irritants” could only hamper the harmonious development of law and potentially served as a directly manipulative and controlling mechanism that was meant to exclude people from politics at will.⁴⁹ No elected government had passed any Islamic laws on this scale before or after, with the possible exception of the First Amendment (1974) that declared Ahmedis outside of the pale of Islam. Nawaz Sharif's first government (1990–1993) obtained passage of the Fifteenth Amendment – popularly known as the Sharia Act – by the National Assembly, which did not become law because it did not pass the Senate. Islamic laws further deepened

⁴⁸ The Council of Islamic Ideology, *Hudood Ordinance 1979: A Critical Report*, CII (Islamabad, 2007), 2.

⁴⁹ Faqir Hussain, “Electoral Reforms: A Legal Perspective,” in Mohammad Waseem (ed.), *Electoral Reform in Pakistan* (Islamabad: Friedrich Ebert Stiftung, 2002), 39.

the controversy as the “liberals” and “conservatives” fought pitched battles on various fronts, including scholarly debates, the media’s projection of rival positions, critical reports on textbook material for schools and colleges, and various civil-society forums in general.

SHARIA JUDICIAL SYSTEM

Article 203-B (c) of the constitution provides for the establishment of a Federal Sharia Court (FSC) that represents a parallel judicial system. However, its jurisdiction did not extend to constitutional law, Muslim personal law, or procedural as well as fiscal law for ten years after 1985 (Article 203-B). The case law indicates that the Sharia judicial system was obliged to address an Islamic legal perspective that was at variance with the traditional interpretation of the constitution.⁵⁰ The verdict in a case about implementation of the 1991 Enforcement of Sharia Act, which addressed the plea that Sharia should be the supreme law of Pakistan, rendered Section 3 (2) of that Act invalid “insofar as it relates to the curtailment of the jurisdiction of Federal Shariat Court.”⁵¹ However, more typically, the FSC declined jurisdiction on the matters of adjudicating the supremacy of Sharia over the constitution – partially or fully – and examining the substantive parts of the constitution.⁵² The court verdict acknowledged lack of potential of Article 203-B to supersede all other provisions of the constitution, thereby confirming FSC’s limited jurisdiction in the context of Shariatization of the judicial system as enjoined by Article 2-A. The issue of the purported supremacy of Islamic law over all other constitutional provisions continued to appear in various petitions against official measures allegedly involving repugnance to Islam: appropriation of *waqf* (i.e., reserved properties of shrines and other religious places); restriction of trade-union activities; and Justice Kaikus’s quest for an injunction from the Punjab High Court under Article 199 to declare the entire legal system under the constitution un-Islamic and its adherents – ranging from the president to Members of the National Assembly (MNAs) and MPAs – as non-Muslims. It is obvious that the Sharia judicial system assumed a tremendous moral potential that sought to ask Muslims to be faithful to Islam over and above the constitution, the Islamic character of which at best was open to question in court.⁵³

⁵⁰ For a detailed study, see Jeffrey A. Redding (2004), “Constitutionalizing Islam: Theory and Pakistan,” *Virginia Journal of International Law*, 44: 784–8.

⁵¹ *Mohammad Ismail Qureshy Case*, PLD 1992 Federal Shariat Court 445.

⁵² *Hammad Saifullah Case*, PLD 1992 Federal Shariat Court 376.

⁵³ For a discussion, see Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden, The Netherlands: Martinus Nijhoff, 2005), 32–4.

It is instructive to note the legislative moves toward passing the Ninth Amendment in 1986 in favor of the supraconstitutional character of Sharia and its implementation through the courts. General Zia's "swan song" in this context, the 1988 Enforcement of the Sharia Ordinance, purportedly sought to formally meet both demands – but obviously not to the satisfaction of Islamists. Similarly, the 1990 Sharia Act was more a formal than a substantive move in this direction. The court petitions in favor of Islamization incessantly relied on Article 2-A, for example, to deliver on the issue of eliminating interest-based banking, the court fees that allegedly restricted access to justice only to the rich, and the perceived un-Islamic provisions of the 1961 Family Ordinance.⁵⁴ Similarly, the Sharia Courts took up the issue of repugnance to Islam relating to the 1913 Punjab Preemption Act that would have denied thousands of landless tenants the right to purchase land.⁵⁵ Indeed, the high tide of judicial Islamism in the early 1990s was symbolized by a court verdict that lower courts were not obliged to follow the Supreme Court if that court transgressed Islamic laws.⁵⁶ In this way, the repugnancy clause(s) played a major role in reshaping constitutional discourse covering both legislative and judicial activity. If the two periods before and after the 1985 Eighth Amendment are compared, the legal landscape of Pakistan in the second period appears to be constitutionally far more opaque than the first period. The situation was complicated further by the introduction of Islamic jurisprudence as an authoritative reference point in cases in which no legal guidance was available within the framework of the nation's constitutional law. Here, Islam emerged as residual law whenever there was no recourse available to the codified law. In British India, the formula of "justice, equity, and good conscience" operated to fill the legal vacuum (if any), usually with English Law, except in cases of personal law. In Pakistan, and occasionally in India, a legal lacuna in some cases pushed the courts to Islamic jurisprudence as a residual step, although this practice remains unlikely to become a legal principle *per se*.⁵⁷

In this context, a militant version of the extra-constitutional input must be highlighted. During the early 1990s, a millenarian movement called Tehrik-e-Nifaz-e-Shariat-e-Mohammadi led by Sufi Mohammad, became active in Swat and other districts of the Malakand division and sought to establish Islamic law in that region. It represented two new approaches: (1) demand

⁵⁴ Charles Kennedy, *Islamization of Laws and Economy: Case Studies on Pakistan* (Islamabad: Institute of Policy Studies, The Islamic Foundation, 1996), 98–9.

⁵⁵ Lau, *The Role of Islam*, 189.

⁵⁶ *Ibid.*, 196.

⁵⁷ *Ibid.*, 35, 39–41.

for Sharia within a bounded space – a region that comprised princely states until 1970; and (2) militant action from outside of the parliament in pursuit of constitutional change. The Nawaz Sharif government felt obliged to issue the 1994 Nizam-e-Shariat Regulation to meet this demand; it was followed by the 1999 Sharia Nizam-e-Adl Regulations. Liberal opinion interpreted these responses as adopting Islamic law at gunpoint. In 2009, in the wake of the Taliban’s incursion into Swat led by Sufi Mohammad’s son-in-law Fazlullah – who became leader of the Tehrik Taliban Pakistan in October 2013 after Hakeemullah Mehsud was assassinated in a U.S. drone attack – President Zardari signed the Sharia Nizam-e-Adl Regulations to establish the Islamic Judicial System in Malakand Division. Article 247 (3) served as the constitutional point of departure for this move. It provided that no Act of the national or provincial assemblies will have jurisdiction on their adjoining FATA (Federally Administered Tribal Areas) or PATA (Provincially Administered Tribal Areas), respectively, unless the president or governor – at the behest of the president – so directs. Article 247 (4) opened the window for the governor, with the prior approval of the president, to make regulations for the peace and good government for PATA or any part thereof. The 2009 Regulations provided for a three-tier court system for “the said area” with local, district, and the final appellate court Dar-ul-Dar-ul-Qaza – the PATA equivalent of the Supreme Court. The local judicial officer (i.e., Ilaqa Qazi) would be duly trained in Sharia through a recognized institution such as the Sharia Academy of International Islamic University in Islamabad. All laws repugnant to Islam would cease to exist. It is curious that the 2009 Regulations included a list of ninety-four Acts currently in force that “shall apply to the said area” as before.⁵⁸

This was the classical example of the state retreating in the face of an extra-constitutional movement seeking a constitutional change for a specific area, while at the same time struggling to safeguard as much of the legal status quo as possible. The government reserved the right to select officials for the new setup and kept a significant part of the current legal space from encroachment by the Taliban and proto-Taliban groups. In October 2013, when the issue of negotiations with the Taliban arose following a resolution of the National Assembly in this regard, the mainstream political forces insisted that they should be conducted within the constitution. However, the Taliban already had termed the electoral process, judiciary, army, parliament, and other structures and processes of the government un-Islamic. Liberal elements within and outside of the state wondered how far could they go to accommodate the Taliban’s extra-constitutional demands. What was clear was the mounting

⁵⁸ For the text of the Sharia Nizam-e-Adl Regulations, see *The Daily Times*, April 15, 2009.

challenge from the Islamic legal, economic, political, judicial, and educational discourse that left a crucial impact on the conception and application of state authority. The May 2013 elections marginalized the “liberal” parties (i.e., the PPP, ANP, and MQM) and returned the “rightist” parties (i.e., the PML-N and PTI) to power at the Centre and in the two provinces of Punjab and Khyber Pakhtunkhwa. Whether the public commitment of new rulers to negotiate with the Taliban could lead to a deviation from the constitution in any meaningful way remained a remote possibility, if at all. However, constitutionalism per se – as an activity pursued within the legal, judicial, and legislative circles – gradually took a beating in terms of a loss of the ultimate moral authority in favor of Islamic ideology in a supralegal sense.

Therefore, it can be seen that the sources of jurisprudence in Pakistan have been shifting away from the European legal philosophy and institutional practice in the direction of Islamic law. Islamization in Pakistan has emerged from the quest of the new state for legitimacy, civil–military relations, and generational transition. It has been intermittent and sporadic in nature, corresponding to the power struggle on the ground. A “tug-of-war” appears to exist between modernists and traditionalists in the context of formulation and interpretation of Islamic law; the latter made significant gains over time but the turf is still in the hands of the former. The presence of two parallel judicial systems based on the mainstream constitutional tradition, on the one hand, and the FSC operating after the 1985 Eighth Amendment, on the other, has created two rival patterns of jurisprudential thought and practice, one adhering to its superordinate legal position and the other seeking to demolish it. As a result of pressure from outside of the political community in the form of street agitation and the takeover of local governmental offices by Islamic militants, the Islamic Sharia courts in the region of Malakand division have been promulgated.

CONCLUSION

The observations in this chapter highlight the fact that successive governments faced the demand for constitutional reform. Ethnic leadership of Bengalis, Sindhis, Pakhtuns, and the Baloch demanded provincial autonomy. Islamic groups sought to bring about the rule of Sharia. The emergent civil-society groups struggled for citizens’ rights, free and fair elections, and basic freedoms. As the government suppressed opposition, the victims took judiciary recourse for relief. The legal and institutional structures, ranging from *habeas corpus* to an elaborate system of magistracy, served as a safeguard against oppressive policies and practices of governments, especially the military regimes. In this process, the opposition ultimately raised the public profile of judiciary as a

bulwark against state oppression. In opposition, the executive implemented various initiatives pursuant to its own definition of the requisite constitutional provisions to establish its writ. This led to arguments of interpretation of the constitution between the treasury and opposition benches, between the executive and the judiciary, and even between the bar and the bench (e.g., under Chief Justice Iftikhar Chaudhry [2009–2013]). It can be argued that constitutionalism in Pakistan is the epitome of an unresolved conflict among rival contenders for power.

This conflict often exceeded the domain of law because the prevalent constitutional framework was unable to mediate between the competing forces struggling for influence and privilege. In other words, legal transformation of the society by way of jurisprudential definition of the claims to power remained incomplete in both pre-independence India and post-independence Pakistan. The state in British India was a limited instrumentality. The eventual withdrawal of the British can be defined in terms of the inability of the current constitutional setup to meet the demands of a rapidly expanding mobilized public seeking further expansion in the available political and legal space. Law remains underdeveloped in Pakistan in terms of its capacity to integrate the society, a role that had been successful in the historical West.⁵⁹ Constitutionalism in Pakistan moved halfway to defining the mechanism for distribution of power among institutions, departments, and offices. It followed a top-down approach while delineating the hierarchy of state authority, whereby the society at large remained on the receiving end. Throughout, legal socialization of citizens of the new state remained minimal in terms of both instruction through textbooks and rule-based behavior patterns in the family, locality, and community. The law of the land, after all, was transplanted from a different continent in a different era in a different context, written in English for a non-English-speaking society; it is now considered a colonial residue that gradually and incrementally lost moral and religious authority. The societal input into constitutionalism typically has been expressed through the challenge from the Islamic lobby and partial accommodation of its agenda. Constitutional law has a diminishing value in the face of the strident Islamism that has penetrated the constitution and found an institutional expression through the FSC, the CII, and the training format in the Judicial Academy. It can be argued that ideologization of social and political life gradually weakened if not severed the “umbilical cord” between legality and legitimacy. In this way, the project of legal organization of the Pakistan society has taken a back seat.

⁵⁹ Ran Hirschl (2004), “The Political Origins of the New Constitutionalism,” *Indiana Journal of Global Legal Studies* 11 (1): 75.

It is curious that the law of the land is still the most authoritative source of the state's writ. In that capacity, it provides the supreme source of legitimacy for argumentation and decision making in the courts; for operational dynamics of the bureaucracy; and for electoral democracy including party activity, public mobilization, and legislation in the parliament. Thus, whereas the power dynamics moved toward supplanting the existing body of laws to an ideological source of legitimacy, governments typically sought power and privilege, change in the rules of the game, and sanctions against political adversaries from within the prevalent constitutional framework. This pattern points to "the political origins of constitutional reforms."⁶⁰ Judicial review indirectly indulged in constitution making by "rebuilding the ship at sea"⁶¹ in the context of constitutional uncertainty, especially in situations of transition from military to civilian rule. Although the constitution is at the center of the power struggle among rival social and political forces, it increasingly lacks the potential to resolve the conflict within its jurisprudential limits. In the absence of a continuing tradition of legal socialization of the rulers and the ruled, the rival patterns of ideological socialization have contributed to the erosion of crucial space for discourse on constitutionalism.

⁶⁰ *Ibid.*, 84.

⁶¹ *Ibid.*, 89–90.

6

The Judicialization of Politics in Pakistan

The Supreme Court after the Lawyers' Movement

Osama Siddique*

INTRODUCTION

Contemporary literature on the judicialization of politics highlights its global expansion across a vast range of legal jurisdictions. It traces the “spread of legal discourse, jargon, rules and procedures into the political sphere and policy-making fora and processes” as well as “the expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review, judicial redrawing of bureaucratic boundaries between state organs, and ‘ordinary’ rights jurisprudence.”¹ At the same time, the literature underscores the emergence of a third and interrelated class of judicialization of politics, the “reliance on courts and judges for dealing with what we might call ‘mega-politics’: core political controversies that define (and often divide) whole polities.”² Pakistan’s contemporary constitutional jurisprudence provides a significant case study for the sustained escalation of this latest and most controversial brand of judicialization of politics. This chapter analyzes the background reasons for and the distinctive nature of the contemporary engagement of Pakistani judges in mega-politics as well as that engagement’s complex implications for democratic politics and the institutional balance of power. It also endeavors to explore the essential links between this judicialization and the persistence of unstable constitutionalism in the country.

* The author thanks Maryam Shahid Khan and Bilal Hasan Minto for their valuable comments, and Muhammad Imran for his assistance with identifying relevant case law. This chapter also was used as a teaching material by the author for the workshop stream “Thought and Method” at the Harvard Law School’s Institute for Global Law & Policy (IGLP) Workshop held in Doha, Qatar, January 2–11, 2015.

¹ See Ran Hirschl, “The Judicialization of Politics,” in Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), 121.

² *Ibid.*, 123.

Extant scholarship attributes the global growth in the judicialization of politics to multiple institutional, political, and judicial behavioral factors. The existence of tangible rights, an enabling constitutional framework, and an independent judiciary with an activist outlook are widely accepted as vital prerequisites for judicial involvement in the political domain – whether as a consequence of political actors promoting their policy preferences through courts rather than through “majoritarian decision-making arenas” or as the outcome of legal mobilization by public and community groups to seek social change through constitutional litigation.³ Simultaneously, the level of receptivity of the political domain to any judicial overtures and excursions has a crucial bearing on the pace and scope of the judicialization of politics. Political tolerance of and, indeed, even support for judicialization may be driven by the imperatives of efficient monitoring of the expanding administrative state through the judiciary; the robustness and internal coordination of various players in a jurisdiction committed to rights-advocacy litigation in society; and the strategic use of the courts by politicians motivated by a range of reasons (e.g., to avoid responsibility and transfer politically contentious matters to the courts, to harass and obstruct opponents, or to seek exposure or legitimacy).⁴ In important ways, the evolution and growth of the judicialization of politics in Pakistan can be attributed at several levels and through different periods to these institutional and political factors.

Yet, this is not the entire explanation. The ideologies, behavior, tendencies, inclinations, and foibles of powerful individuals also seem to be unavoidable contributing factors. Existing scholarship recognizes the rise of “philosopher–king courts” and the keenness of certain judges to delve into public policy making due to a host of institutionally strategic, “turf”-management, and personal power and prestige expansion considerations.⁵ However, although conceding that courts are first and foremost political institutions and that they do not operate in an institutional or ideological vacuum, Hirschl found it misguided to contend that courts and judges – and, indeed, their institutional and individual pursuit of power – can be the main source of the judicialization of politics.⁶ Although emphasizing the necessity of political support for judicialization, this particular perspective highlights instances of political backlash against judicial activism. Hirschl cited episodes of politicians “clipping the wings” of zealous courts, legislative override of controversial rulings,

³ *Ibid.*, 129–30.

⁴ *Ibid.*, 136–7.

⁵ *Ibid.*, 132–4.

⁶ *Ibid.*, 134.

court-packing, and political tinkering with judicial appointments and tenure procedures as illustrating the necessity of a receptive political environment for the growth of the judicialization of politics.⁷ In this scholarly context, this chapter examines the judicialization of politics in Pakistan in the past several years. It suggests that scholars may be underestimating the significance of charismatic, popular, and powerful judges and the pivotal role they may play – individually or as a group – in promoting a particularly aggressive, multifarious, and complex brand of the judicialization of politics. This does not suggest that institutional and political factors have not played a multitiered role in placing the Pakistani judiciary in a position to embark on hyperactivism. Neither does it argue that there has been no political discontent with and consequent backlash against that activism. Nevertheless, this chapter contends that the special circumstances generating the particular variant of the judicialization of politics prevalent in Pakistan – and the strategies, tone and tenor, and qualitative nature of judicial interventions – make it less amenable to being slotted in the currently understood categorization of factors contributing to this phenomenon. Additionally, the Pakistani experience raises important questions about the existing understanding of the relative significance of institutional, political, and judicial behavioral dimensions as contributory factors to the judicialization of politics. Thus, it merits a close look to enrich and possibly recalibrate the current conception of this phenomenon.

The first section of this chapter briefly discusses the broad nature and manifestations of the judicialization of politics in Pakistan during periods of martial law as well as democratic rule. The second section analyzes the particular political and institutional circumstances under General Pervez Musharraf that contributed to the emergence of the current judicial leadership and its distinctive ethos and method of involvement in political and policy spheres. The third section examines the genesis and implications of the Pakistani Lawyers' Movement (hereinafter, the Movement) and its role in the transformation of the Eighteenth Chief Justice of the Supreme Court, Justice Iftikhar Muhammad Chaudhry, from a pliant and relatively obscure judge in his early career to – along with his colleagues – a veritable powerhouse in subsequent years. The fourth section of the chapter studies the background, nature, and political implications of the Supreme Court's highly controversial jurisprudence in the recent half decade or so. The fifth section concludes with observations about the legacy and future of the most activist court in the region's history and the implications of its experience for our understanding of the phenomenon of the judicialization of politics.

⁷ *Ibid.*, 138.

THE EMERGENCE OF THE JUDICIALIZATION OF
POLITICS IN PAKISTAN

A brief overview of Pakistan's past constitutional history contextualizes the nature of the judicialization of politics that the country has witnessed. At the cost of three different constitutional arrangements reached in 1956, 1962, and 1973, the military establishment and its civilian collaborators routinely ushered different generals into power with their stark agendas and eventually aborted plans of political and social engineering. The coup makers required regime legitimization, and most judges were willing to oblige. Judicial legitimization of *coups d'état* was conjured from the sayings of Cicero, "*salus populi supreme lex esto*" (i.e., "let the good of the people be the supreme law"), and Henry de Bracton, "*illud, quod alias licitum non est necessitas facit licitum*" (i.e., "that which is not otherwise lawful, necessity makes lawful").⁸ An Austrian legal positivist was invoked to the rescue of military adventurers as Kelsen discovered to his shock at the Pakistan Supreme Court's interpretation of his "*Allgemeine Staatslehre*" (i.e., "general theory of law and state").⁹ Imam Abu Hanifa's philosophical postulations in the eighth century C.E. on distinctions between an *Imam bil Haq* (de jure ruler) and an *Imam bil Fehl* (de facto ruler) were ascribed a positivist connotation for embracing a *khaki* (military) usurper. The concepts of *halal* (permissible) and *haram* (forbidden) under *Fiqh* (Islamic jurisprudence) that narrowly applied to certain areas of individual necessity were upgraded imaginatively as cogent parameters within the realm of state necessity. All of this occurred while principles belonging to criminal law or strictly applicable during times of war were found to be applicable to constitutional law or times of peace.¹⁰ These interpretive feats were as novel as they were disingenuous. They contributed to sustaining a milieu characterized by a truncated constitutional culture, weak democratic norms and institutions, and an underdeveloped discourse on rights and obligations. Their resulting legacy is that of a highly "unstable constitutionalism."

Regime legitimization through judicial endorsement in the wake of direct martial rule during the 1950s, 1960s, 1970s – and, most recently, in the 1990s – is the most overt example of the judicialization of politics in Pakistan. In the interregnums between martial rule, there have been pale reflections of

⁸ Leslie Wolf-Phillips (1979), "Constitutional Legitimacy: A Study of the Doctrine of Necessity," *Third World Quarterly* 1 (4) (October): 98.

⁹ *Ibid.* See also Tayyab Mahmud (1994), "Jurisprudence of Successful Treason: Coup d'Etat & Common Law," 27 *Cornell International Law Journal* 49 (Winter): 49.

¹⁰ See, for instance, *Begum Nusrat Bhutto v. Chief of the Army Staff*, PLD 1977 SC 657.

democratic rule – often in the limited sense that governments were at least elected. These truncated stints of civilian rule between the long days and nights of the generals were plagued by acute insecurity. They were contested and destabilized by an artificial political class and “Kings’ Parties” imagined and fashioned by the junta. They were characterized by weak governance further exacerbated by entrenched political and economic interests and frantic rent-seeking. The perennial civilian anxiety is unsurprising because no elected Pakistani government completed its tenure and “handed the baton” to the next one until 2013.¹¹ As a consequence, the strategic employment of courts to stabilize power and/or to destabilize political opponents – because politics was fragmented and the judiciary increasingly politicized – has been the norm rather than the exception. With majoritarian politics even more capricious than usual elsewhere, the law of the courts was molded into a potent tool for political perpetuation.

The 1990s presented an indirect and more pernicious mode of military control of politics. Unstable constitutionalism and an undesirable judicialization of politics were its unavoidable outcomes. The military dictator General Zia-ul-Haq amended the constitution, thereby allowing the president – an office that he had usurped – to sit in subjective judgment over the performance and fate of elected governments. Ushering in electoral democracy, albeit a tightly controlled one, had become unavoidable as Zia’s regime eventually lost international and local collaborators. Thus, Article 58(2)(b) allowed the president to dissolve the National Assembly at his “discretion” where, in his “opinion,” “a situation had arisen in which the government of the Federation could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate was necessary.”¹² The adverse ramifications were deep and far reaching. The basic structure of the 1973 Constitution fell into disarray. An essentially parliamentary form of government led by a prime minister and her Cabinet became a disharmonious hybrid with a powerful, unaccountable, and increasingly partisan president.¹³

Between 1988 and 1996, four successive governments were dissolved by three different presidents: the first was Zia himself and the others had close links

¹¹ This was the Pakistan Peoples Party’s (PPP) coalition government, which gave way to its successors as a result of the general elections held in May 2013.

¹² This amendment was introduced through the Constitution (Eighth Amendment) Act, 1985, Section 5 (Pakistan).

¹³ Osama Siddique (2006), “The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents,” 23 *Arizona Journal of International and Comparative Law*: 624–36 [hereinafter “Jurisprudence of Dissolutions”].

with the military establishment and its civilian allies. Each dissolution was taken to the courts, which were confronted with the ultimately political task of interpreting and applying a constitutional amendment that was completely at odds with the Constitution's ethos and overall framework. The dissolutions were invariably *mala fides*, based on controversial facts and overbroad allegations. They took place in settings in which the elected governments were weak, besieged by innumerable problems inherited from the martial-law era and by parochial political opposition, with barely any time to settle down.¹⁴ With the motivations for dissolution being blatantly political, it came as no surprise when the eventual judicial dispensations were equally political. According to one study, not only did the purportedly objective legal and interpretive "test" to gauge the legitimacy of a dissolution change in an ad hoc manner from case to case – with as many as four different "tests" emerging in this short timeframe – but also judges who used one test to gauge the ambit of the presidential power in one particular case did not adhere to the same "test" a few years later. The goal posts shifted remarkably rapidly.¹⁵

This new brand of the judicialization of politics – with constitutionally cloaked indirect control of political governments rather than regime legitimization after direct martial rule – lasted for almost a decade. The decade was characterized by unstable constitutionalism. Article 58(2)(b) was eventually repealed by the government elected after the fourth dissolution. When that government in turn was displaced by General Pervez Musharraf's coup in 1999, Musharraf – who, like Zia, eventually swapped his uniform for presidential robes – resuscitated it. Although repealed again by the government that succeeded Musharraf, the Article spawned a perfidious legacy and several adherents – including judges. They claim that it is an essential "safety valve" that keeps unruly political governments in check by providing a constitutional mechanism to "show them the door," thereby keeping direct martial laws at bay.¹⁶ Recent reflections by certain judges on Article 58(2)(b) reveal a lingering nostalgia for the unprecedented power that the judges had enjoyed in the realm of mega-politics.¹⁷ The exercise of judicial power during those years continues to influence the judiciary's self-perception of its role in politics.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 120–2.

¹⁶ See *Mahmood Khan Achakzai and Others v. Federation of Pakistan and Others*, PLD 1997 SC 426, 446–7; see also *Zafar Ali Shah and Others v. General Pervez Musharraf and Others*, PLD 2000 SC 869, 1218 [hereinafter *Zafar Ali Shah*].

¹⁷ *Ibid.*

THE MUSHARRAF ERA AND THE RISE AND FALL
OF JUSTICE CHAUDHRY

The seeds of the next and most recent phase of the judicialization of politics in Pakistan lie in the years after Musharraf ousted Prime Minister Nawaz Sharif through a bloodless military coup on October 13, 1999. Following in the footsteps of his predecessors, Musharraf first issued a Proclamation of Emergency and then promulgated a Provisional Constitutional Order (PCO)—a standard device for displacing a constitution in whole or in part, whether through outright abrogation or under the thin veil of “holding in abeyance.” Like clockwork, the incumbent judges were required to take an oath under the new dispensation to ensure loyalty and *quid pro quo* legitimization. Several judges declined and were sent packing; others promptly agreed, including Justice Iftikhar Muhammad Chaudhry. At the time, few could have foretold that some of these judges, including Chaudhry, later would be anointed as champions of untainted constitutionalism.

In 2000, a unanimous twelve-member bench of the Supreme Court hearing the *Zafar Ali Shah* case, including Justice Chaudhry, not only fashioned a protective umbrella of justifications for the coup—reemploying the much abused “doctrine of necessity”—but also echoed Musharraf’s disdain for politics and supported his intention and proposed mechanisms for remedying matters. At the same time, without the question having been posed, they further obliged by granting Musharraf *carte blanche* power to amend the constitution.¹⁸ The underlying justification replicated other regime legitimization judgments of the past: “In such matters of extra-constitutional nature, in order to save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people which is of paramount consideration for the Judiciary . . . we have to make every attempt to save what institutional values remained to be saved . . .”¹⁹ In the following years, Musharraf assumed the office of president while retaining the post of Chief of Army Staff; introduced many contentious legal, political, and structural changes; and ensured the backing of a pliant judiciary for his consolidation of power.²⁰

¹⁸ See *Zafar Ali Shah*.

¹⁹ *Ibid.*, 1169–70.

²⁰ Taiyyaba Ahmed Qureshi (2010), “State of Emergency: General Pervez Musharraf’s Executive Assault on Judicial Independence in Pakistan,” 35 *North Carolina Journal of International Law and Commercial Regulation* 485 [hereinafter “Pervez Musharraf’s Executive Assault”]. See also “Jurisprudence of Dissolutions,” 110–20.

In hindsight, we can broadly identify a new era in Pakistan's experience of the judicialization of politics – one that started under the Musharraf regime and continues to date. Under Justice Chaudhry, who was appointed as Chief Justice on June 30, 2005, and retired on December 12, 2013, the Pakistani Supreme Court undertook steps that made its performance and output unprecedented in the indigenous constitutional milieu. It may remain germane to international juristic discourses for a considerable time, particularly for its persistence to arguably “go where no judge has gone before.” It is obvious that not all of the jurisprudence from this period involves the entire bench or larger benches of the Supreme Court, or Justice Chaudhry himself. However, the term “Chaudhry Court” is befitting for two reasons: (1) the most important judgments from this era always involved benches led by Justice Chaudhry and share several common characteristics in terms of ideologies, methods, arguments, and outcomes; and (2) despite the controversial and complex issues involving mega-politics adjudicated by the Court during this period, its judgments are unusual for a near absence of any dissenting notes. On major matters, the Chaudhry Court essentially operated as a monolith.

Because this chapter argues that Justice Chaudhry was central to the special recent strain of judicialization of politics in Pakistan, it is essential to trace his career and evolution as a judge and as Chief Justice. The youngest person ever to be appointed as Chief Justice and also the longest-serving one when he retired, Justice Chaudhry's fairly complex and paradoxical career can be divided into three distinct periods. The first period began when Musharraf usurped power and required appellate court judges, including Justice Chaudhry, to take the oath under the PCO. This was followed by years of acquiescence and justification for the military intervention – all under the dubious rationale that such concessions were necessary to keep the constitutional and legal edifice intact. The judicial pronouncements from this period are no different from the regime legitimization-driven judicialization of politics of the past. The second period began when Justice Chaudhry was appointed Chief Justice in 2005. This period witnessed a vast range of activist interventions that developed the general impression of Justice Chaudhry becoming his own man. The third period involved the dramatic events of Justice Chaudhry's removal by Musharraf, his reinstatement, Musharraf's declaration of emergency and ouster of more than sixty appellate judges, and the subsequent Movement. These events provide the background to Justice Chaudhry and his colleagues' eventual “rehabilitation” in the nation's eyes and their collective self-assertion as the most confident and proactive apex court in the country's history.

The contours of Justice Chaudhry's characteristic judicialization of politics first became visible in the second phase of his career. Justice Chaudhry made

several strategic pro-citizen forays into diverse areas, including construction safety and urban planning²¹; deregulation of price controls²²; privatization of public enterprises²³; illegal detentions and missing persons in the wake of the War in Afghanistan²⁴; and larger constitutional questions, such as the authority for Musharraf's bid for a second term as president during the regime's final years.²⁵ This was an era of increasing economic liberalization coupled with political illiberalism, multiple levels of public discontent, and an expanding electronic media willing to highlight and dramatize judicial challenges to executive authority with intense regularity.²⁶ Some commentators showcase this period as evidence of judicial activism driven by public demand. They argue that the employment of public-interest litigation (PIL) to respond to popular dissatisfaction with failed economic liberalization policies provided the Chaudhry Court with a different mode of gaining power – so that, for a change, judicial ascendancy was not a function of compliance with the existing regime or governmental expectations.²⁷ It is worth noting that whereas traditional political and institutional arguments explain some of the main drivers of judicial activism during this period, the judicial-behavioral dimension also was not insignificant. Justice Chaudhry's proclivity to strategically use available openings and to create new opportunities for expanding judicial power – as well as his own profile – was already on display.²⁸ This aspect became more pronounced in the third period of his career.

²¹ See, for instance, *Saad Mazhar v. Capital Development Authority*, PLD 2005 SCMR 1973. See also *Mouli Iqbal Haider v. Capital Development Authority*, PLD 2006 SC 394.

²² See *Zafar Iqbal Jhagra v. Federation of Pakistan*, PLD 2009 SC 363. See also Feisal Naqvi, "The Economics of Judicial Interventionism," *The Friday Times*, March 19, 2010.

²³ See, for instance, *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697.

²⁴ For various Supreme Court orders relating to illegal detentions and missing persons, see the Supreme Court website, available at http://supremecourt.gov.pk/HR_Cases/1st%20final/1st.htm. See also "Pakistan Denying the Undeniable: Enforced Disappearances in Pakistan," *Amnesty International Report* 2008, available at <http://amnesty.org/en/library/asset/ASA33/018/2008/en/ode43038-57dd-11dd-be62-3f7ba2157024/asa330182008eng.pdf>.

²⁵ See *Jamaat-i-Islami v. Federation of Pakistan*, PLD 2008 SC 30. See also *Wajihuddin Ahmed v. Chief Election Commissioner, Islamabad*, PLD 2008 SC 13.

²⁶ Shoaib A. Ghias, "Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf," in Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (eds.), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge: Cambridge University Press, 2012), 346–53 [hereinafter "Miscarriage of Chief Justice"].

²⁷ *Ibid.*, 371.

²⁸ For a detailed discussion, see Maryam S. Khan (2015), "Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization," 28 *Temple International and Comparative Law Journal*: 284 [hereinafter "Genesis and Evolution of Public Interest Litigation"].

A couple of years of attritional judicial activism, as well as the growing unpredictability of the Chaudhry Court, caused the Musharraf regime to lose patience. On March 9, 2007, Musharraf tried to send Justice Chaudhry on “compulsory leave” for misuse of office. He was intimidated but refused to oblige. Justice Chaudhry and some other judges, along with their families, then were placed under house arrest. On March 13, 2007, instead of taking his official car, Justice Chaudhry decided to walk to the court premises to attend the case hearings against him. The police attempted to prevent him from doing so. Pakistan’s political history contains many insufficiently recorded and inadequately celebrated acts of heroic defiance of dictators; however, Justice Chaudhry had the benefit of being bold in the age of social media and primetime television. There was something strangely thrilling and of disturbing immediacy about television images of a lone judge being surrounded, pushed, and manhandled by regime functionaries. The images caught the nation’s and, eventually, the world’s attention.²⁹ Furthermore, they helped to develop an aura around the man and stimulated his escalating support.³⁰

On July 20, 2007, the Supreme Court unanimously found Justice Chaudhry’s “dismissal” to be unconstitutional. He was back, but not for long. High-stakes pending cases, including one that challenged Musharraf holding simultaneously the dual offices of president and army chief, were up for hearing. Musharraf decided not to take any risk with a potentially oppositional judiciary and a potentially vindictive Justice Chaudhry. On November 3, 2007, he declared a state of emergency in Pakistan. The incumbent judges – charged with a whole host of destabilizing activities, including their uncontrolled judicial activism – were “removed” from office. A new PCO was introduced and, predictably, Musharraf proceeded to pack the courts with more “judicious” judges. The same day, Justice Chaudhry and his colleagues held an emergency meeting to legally bar the imposition of any emergency as well as the new oath taking. The regime responded with brute force, putting them under house arrest and they were to remain both physically and electronically isolated from the rest of the world for quite some time. While the judicial purge was underway, a new cadre of loyalists had queued up and was ushered in to staff the courts. More than sixty ousted appellate court judges were not invited to take the new oath, did not show up, or were neither invited nor intended to show up.³¹

²⁹ Shakeel Anjum, “CJ’s Mishandling Five Years On,” *The News International*, March 13, 2012.

³⁰ Laura King, “For Pakistanis, Fired Justice Is Symbol of Defiance,” *Los Angeles Times*, November 7, 2007.

³¹ See Musharraf’s “Executive Assault.”

THE PAKISTANI LAWYERS' MOVEMENT AND THE
RESURGENCE OF JUSTICE CHAUDHRY

Central to both the eventual restoration of Justice Chaudhry and his colleagues and the creation of circumstances that allowed them to engage in the latest and increasingly controversial phase of judicialization of politics in Pakistan, the Movement merits a closer look. The analysis in this section shows that (1) before the Movement, Justice Chaudhry and his colleagues were not even remotely perceived as the popular champions for “rule of law” that the Movement transformed them into; (2) the Movement was essentially a reaction against Musharraf rather than an action to aid Justice Chaudhry and the other ousted judges; (3) the Movement was not restricted to the legal fraternity with the narrow aim of restoring judges – instead, it was galvanized, sustained, and made successful by political and social actors with broader agendas; (4) the Movement successfully provoked popular sentiment around “rule-of-law” issues that provided Justice Chaudhry and his colleagues a unique opportunity to gain traction and subsequent political leverage – they emerged as its primary beneficiaries; and (5) although the popularity thereby gained by the judges explains the support and acceptance of their judicial activism in the early postrestoration years, much of their aggressive subsequent judicialization of politics – despite escalating political and civil-society opposition and declining popular support – requires further exploration of underlying imperatives and catalysts.

Some assessments of the Movement tend to valorize Justice Chaudhry as a savior from its outset.³² These descriptions overlook the fact that despite his earlier judicial-activist overtures – for instance, his steps to hold concerned authorities accountable for “missing persons” in the wake of the U.S. “War on Terror,” which won him the initial attention of the media and human-rights community as well as a popular following – Justice Chaudhry was by no means the iconic figure that he subsequently became. In fact, the legal fraternity widely perceived him as untrustworthy and pro-establishment.³³ For many reasons, Justice Chaudhry and his colleagues enjoyed greater support only as the Movement progressed. The judiciary carried the baggage of repeated betrayals by pliant and self-serving judges at moments of greatest national need, and the memories of Justice Chaudhry and his colleagues’ abject surrender to

³² See, for instance, Joel A. Mintz (2008), “Introductory Note: A Perspective on Pakistan’s Chief Justice, Judicial Independence, and the Rule of Law,” 15 *International Law Students Association Journal of International and Comparative Law* : 1.

³³ “White Paper on the Role of the Judiciary (Pakistan Bar Council),” June 28, 2003, available at http://pakistanbarcouncil.org/wp-content/uploads/2012/07/White-Paper_Complete.pdf.

Musharraf were still fresh. The years after *Zafar Ali Shah* witnessed lawyers, politicians, and civil society persistently objecting to and protesting against the latest avatar of the military–judiciary alliance. In 2003, the Pakistan Bar Council – the highest elected body of lawyers in the country – issued a White Paper that castigated the judiciary for legitimizing Musharraf and condoning his maneuvers for entrenchment – in return for being allowed to keep their positions, an extension of their retirement age, and additional personal favors. The Council also rebuked them for favoring the regime in important cases, for rampant and widely known corruption, for a breakdown in judicial discipline and violations of its own code of conduct, for delays and inefficiency in deciding cases, and for poor institutional administration and inadequate internal accountability.³⁴

Another event from the time merits attention. In February 2007, Naeem Bokhari, a well-known lawyer and television personality, wrote a highly provocative “Open Letter” to Justice Chaudhry that captured wide attention. He accused Justice Chaudhry of self-promotion, wasting public funds, rude and discriminatory behavior toward lawyers, and seeking inappropriate favors for his son.³⁵ Bokhari was close to Musharraf, and many saw this as a warning at Musharraf’s behest to rein in the increasingly proactive Justice Chaudhry. Yet, despite Musharraf’s palpable unpopularity, there was little public criticism of the letter from the legal community. It was evident that, in private, relatively few disagreed with the allegations.³⁶

Next, a demystification of the populist and transformative potential of “judicial power” and “rule-of-law” slogans is necessary. Commentators have argued that occurring as it did during “a vacuum of popular legitimacy among governmental institutions,” the Movement straddled both conventionally recognized sources of supportive impetus for judicial power – hence, it was galvanized and led not only by those with narrow and partisan interests but it also was held together and boosted by the larger public.³⁷ However, they proceed to suggest: “[I]n short, there is a popular currency to judicial power and the rule of law that, when activated, might prove capable of transforming political

³⁴ *Ibid.*

³⁵ “Naeem Bokhari’s Letter to the Chief Justice,” *The News International*, March 10, 2007.

³⁶ Many of Bokhari’s allegations subsequently appeared in Musharraf’s Charge Sheet against Justice Chaudhry and other judges. However, his initial *cause célèbre* turned into ignominy only after Musharraf removed Justice Chaudhry. He then faced considerable ridicule and harassment by various segments of lawyers for possibly acting as Musharraf’s henchman.

³⁷ See “Note: The Pakistani Lawyers’ Movement and the Popular Currency of Judicial Power,” 123 *Harvard Law Review* 7 (May 2010): 1705–25.

parties, the judiciary, and the people alike.”³⁸ Other commentators cite specific examples to contend that the Chaudhry Court’s strategic influencing of bar politics at crucial junctures, in order to consolidate support for the judiciary, led to a “politics of reciprocity.” This is what caused the legal bars and the larger “legal complex” to rescue the judiciary through a social and political movement when the latter came under attack.³⁹ The centrality ascribed to Justice Chaudhry and the “legal complex,” however, requires reconsideration.⁴⁰ A less personality-fixated perspective would reveal that the impetus and subsequent growth of the Movement had more to do with Musharraf’s regime than with Justice Chaudhry. The latter was primarily a beneficiary – and perhaps at times even a captive – of events much larger than him. The Movement provided a focal point and platform for already significant political and social discontent against a ruler who was weaker and less assured than ever before – a general now lost in his labyrinth. The Movement brought together detractors and critics from across the political and social spectrum that fueled and sustained it. Throughout the Movement, “Go Musharraf Go” and other antiregime slogans were as ubiquitous as any pro-Chaudhry chants. The Movement remained anti-Musharraf throughout; it also became pro-Chaudhry but in a residual, ancillary way at first and, more pointedly, at a later stage when Musharraf declared the emergency and removed the judges en masse. Thereafter, Justice Chaudhry evolved into the most visibly prominent symbol of defiance.

Third, in recent scholarship, some commentators overemphasize the narrow intent of the Movement – that is, the restoration of the deposed judges. In these analyses, the larger transformation of the country’s politics through the restoration of democracy was a byproduct.⁴¹ In this vein, they further contend that no societal actor other than the lawyers presented a serious challenge to the regime during the Movement; hence, the mobilization of the legal community

³⁸ *Ibid.*

³⁹ See “Miscarriage of Chief Justice,” 371.

⁴⁰ In this context, more skeptical analysts point out that the so-called national Movement’s popular appeal essentially was restricted to North-Central Punjab, which unsurprisingly also is the electoral bank for the main political parties supporting the Movement. They also highlight the media’s opportunism to emerge as a power as well as its deliberately eclipsed role of political parties, which – according to them – were the most significant force in the latter part of the Movement. See Haris Gazdar, “One Step Forward, Marching to the Brink,” *Economic and Political Weekly*, April 11, 2009.

⁴¹ Daud Munir, “From Judicial Autonomy to Regime Transformation: The Role of the Lawyers’ Movement in Pakistan,” in Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (eds.), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge: Cambridge University Press, 2012), 378.

also deserves primary credit for establishing the necessary groundwork for the return of democracy.⁴² The Movement was as much (if not more) supported, galvanized, and sustained by the political workers and civil society – in pursuit of democracy, constitutionalism, and civilian supremacy – as it was led by lawyers advocating, *inter alia*, the narrower goal of “judicial independence.”⁴³ To fully understand the milieu in which the Movement is situated, the Charter of Democracy (COD) signed in 2006 between Benazir Bhutto and Nawaz Sharif requires special attention. It has been argued persuasively that the COD set into motion new political processes and normative coalitions that contributed to greater political and constitutional maturity, new antiregime alliances, and an organized and coalesced bipartisan opposition to military rule – a tangible departure from the “dog-eat-dog” politics of the 1990s.⁴⁴

Furthermore, the Movement was not historically unique. Pakistan has a long history of brave, organized, and sustained defiance of dictators.⁴⁵ Nevertheless, the Movement was remarkable for its eventual scale, perseverance, and longevity, as well as for the international attention it garnered. It also provided Justice Chaudhry and his colleagues a spot in the limelight that they never could have imagined. In this context, real-time news media coverage played a vital part in internationalizing the fast-developing events and in boosting Justice Chaudhry’s profile.

Finally, whereas debate continues over the relative importance of the various factors contributing to the Movement, as well as on its essential features and dynamics, much less contested is one of its primary outcomes. Almost two years of sustained and highly publicized mass protests elevated Justice Chaudhry and his colleagues’ status from dubious obscurity to celebrated symbols of resistance against autocratic rule. The eventual restoration of Justice Chaudhry as Chief Justice – a highly protracted affair – took place on March 22, 2009.⁴⁶ The popular and institutional support accumulated by the restored judiciary acted as an important catalyst for its judicial activism in the early postrestoration

⁴² *Ibid.*

⁴³ Anil Kalhan (2013), “‘Gray Zone’ Constitutionalism and the Dilemma of Judicial Independence in Pakistan,” 46 *Vanderbilt Journal of Transnational Law* 1 (January): 11 [hereinafter “‘Gray Zone’ Constitutionalism”].

⁴⁴ *Ibid.*, 46–52.

⁴⁵ Interview with prominent constitutional lawyer, labor unionist, and human rights activist, Abid Hassan Minto, April 10, 2013. See also Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan’s Political Economy of Defence* (Cambridge: Cambridge University Press, 2007).

⁴⁶ Justice Chaudhry was the last of the deposed judges to be reinstated. For an analysis of the various legal and political perspectives, tussles, and contestations that impeded the reinstatement of Justice Chaudhry and other deposed judges, as well as the events and factors that led to their eventual return to the bench, see “‘Gray Zone’ Constitutionalism,” 56–61.

years. It remains the primary reason for the unprecedented judicialization of politics in subsequent years.

POSTRESTORATION: SALIENT CHARACTERISTICS OF THE CHAUDHRY COURT'S JUDICIALIZATION OF POLITICS

The period since the restoration of Justice Chaudhry and his colleagues was astonishing for its range and extent of judicial interventions. “Judicial independence” was one of the resonant mantras of the Movement. Despite being frequently espoused in the postrestoration days to pursue strategic institutional goals of gaining “turf,” popularity, and power, the inherent limitations and potential for obfuscation of judicial independence became all too evident. The newly elected government was perceived as the primary competitor for public accolades by a resurgent judiciary ambitious enough to envision itself as the ultimate and completely autonomous custodian of not only law but also politics. The collateral victims of this institutional contestation were democratic and constitutional stability. As Anil Kalhan recently observed:

[J]udicial independence is neither an all-or-nothing concept nor an end in itself. With the return of civilian rule in Pakistan, a series of clashes between Parliament and the Supreme Court has raised concern that the same judiciary celebrated for challenging the military regime – while invoking exactly the same abstract notion of judicial independence – might now be asserting autonomy from weak civilian institutions in a manner that undermines Pakistan’s fragile efforts to consolidate democracy and constitutionalism.⁴⁷

Given Pakistan’s historical imbalance of power between elected governments and state institutions, the new government would always face challenges. The fate of four elected governments in the period between Zia-ul-Haq’s departure and Musharraf’s arrival (at the cost of a fifth elected government) demonstrated the civil–military establishment’s capacity to control politics from a distance.⁴⁸ Politics and politicians also have been historically the favorite “whipping boys” of the civil–military establishment and the judiciary, and they routinely are characterized as the bane of national progress and

⁴⁷ See “‘Gray Zone’ Constitutionalism,” 2.

⁴⁸ Recent scholarship again has highlighted the legal, political, and institutional steps of the Pakistani military establishment and its civilian allies (i.e., the “deep state”) to ensure preservation of their various interests during periods of civilian rule – a process referred to as “transformative preservation.” The scholarship elaborates on the establishment’s aggressive manipulation of the political process, an effective “colonization” of the state’s administrative process, the creation of a vast economic empire, and considerable influence over the media. These entrenchments were supplemented, justified, and reinforced through an antidemocratic legitimizing discourse

prosperity. At the same time, politics and politicians were stronger than ever before after the Movement. The Movement, after all, marked not only the success of the coalition of lawyers and judges but also, indeed, the triumph of united democratic forces. The trouncing of Musharraf's political allies in the 2008 elections – while he was still president – and, indeed, his eventual ouster from office clearly demonstrated the extent of public support for transition to democratic politics and renewed faith in politicians. However, the restored judiciary soon revealed its aspiration to invade the political space. The underlying judicial calculus is not fully explicable by a conventional explanation of factors that allow the judicial organ to expand its ambit of operations – the expansion was neither the outcome of strategic use of courts by competing political forces nor in response to popular citizen demand. Notwithstanding the existence of enabling factors, the expansion was predominantly a function of unilateral judicial ambition to intervene in mega-politics.

The essentially judge-driven judicialization of politics most prominently manifested in the Chaudhry Court's preoccupation with holding the PPP-led coalition government accountable at several levels – most notably governance, policy making, legislation, regulation, and administration. The principal example was its legal “autopsy” of the National Reconciliation Ordinance (NRO) – a transitional mechanism extending controversial amnesty to politicians from multiple Musharraf-era criminal cases as well as a workable modus for Musharraf's eventual exit from Pakistani politics. It is noteworthy that elections and the transition to civilian rule successfully occurred due to this arguably unavoidable pragmatic deal making to reassure insecure politicians as well as a fading autocrat. It would be naïve to imagine that the process of restoring a derailed democracy would be anything but political or that the transition would involve a clean break with the past and could be achieved without laborious negotiations with Musharraf and his allies as well as U.S. assurances for his future.⁴⁹

Admittedly, the resulting arrangements had several political fallouts, such as adverse ramifications for the ruling party's political and moral credibility as well as strained relations among the political parties that benefited from the NRO and those that did not.⁵⁰ The Chaudhry Court, however, was not content with mere political ramifications. The NRO provided a tremendous

and the military's self-projection as the country's most competent institution – not only in security matters but also in governance and development. See “‘Gray Zone’ Constitutionalism,” 14–23.

⁴⁹ Haris Gazdar, “Judicial Activism vs. Democratic Consolidation in Pakistan,” *Economic and Political Weekly*, August 8, 2009.

⁵⁰ See “‘Gray Zone’ Constitutionalism,” 49–51, 58.

opportunity for stirring populist support, scoring political points, and gaining moral ascendancy. Hence, the NRO was dramatically dismantled – 17 judges and a 287-page judgment was overkill, given that the controversial arrangement could have been struck down on the narrower ground of unconstitutional extension of protection to an arbitrarily defined set of people.⁵¹ Yet, the case generated a rhetoric that aimed to elevate the Chaudhry Court as not only the arbiter of political contestations but also the enunciator of the national interest and the custodian of political morality and integrity. In this regard, it is quite telling that in its judgment, the Chaudhry Court was comfortable using lines of argument, parameters, and rhetoric similar to those used in the past by the military for characterizing politicians as corrupt and emphasizing *its* self-appointed duty to uproot corruption.⁵² Ironically, the Chaudhry Court even “regurgitated” past chronicles of political corruption, benchmarks of uprightness, and personal piety tests from judgments, laws, and frameworks that directly owed their existence to military rule.⁵³

The Chaudhry Court also appeared oblivious to the fact that both the judiciary and the democratic system shared a traumatic past, had grievously suffered under dictators, and were taking uncertain new steps toward a modicum of stability and redemption. Whereas the Movement was conveniently deemed to have washed away the past sins of the restored judges who themselves had once struck an unholy deal with Musharraf, the transgressions of the NRO beneficiaries – who had ultimately ensured the restoration of both the judiciary and democracy – were regarded as unforgivable. At the same time, the Chaudhry Court removed more than seventy judges who had been appointed during Justice Chaudhry’s absence as Chief Justice both before and after the restoration of democracy.⁵⁴ Although anointing themselves as cleansed, the Chaudhry Court’s judges were unwilling to extend ratification to judges who (like them) had opted to take the oath under Musharraf – and even those who were clearly “purer,” having been appointed under the constitution by a civilian president. The effect was to strip the judiciary of many seasoned jurists.⁵⁵

Once the Chaudhry Court assailed the NRO arrangements, it also opened the door for it to demand that the government proceed against the new civilian president of the country – who was also the main leader and co-chair of

⁵¹ *Ibid.*, 64–5.

⁵² See *Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265.

⁵³ “‘Gray Zone’ Constitutionalism,” 65–6.

⁵⁴ See *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

⁵⁵ For further analysis of the rationale and *modus operandi* behind this move, see “‘Gray Zone’ Constitutionalism,” 62–4.

the ruling party – to pursue the trail of money allegedly transferred to Swiss bank accounts. This was despite the absolute presidential immunity under Article 248 of the constitution against any criminal proceedings, as well as the unlikelihood that the Swiss authorities would revive long-stalled proceedings. The Chaudhry Court consistently skirted around the clearcut immunity. The issue provided another opening to dominate the country’s political discourse, to assert itself as the apex moral authority on questions of financial integrity, and to roundly castigate politics and politicians. Although the case was a non-starter, the Chaudhry Court persisted and eventually sent one prime minister packing in 2012 by holding him in contempt for not doing what it thought was required to pursue the case; the Court also came close to bringing down his successor.⁵⁶ Eradicating corruption remained the preoccupation of the Chaudhry Court in a host of additional cases. Day-to-day hearings of high drama and sensational television coverage involved impugned illegal appointments, postings and transfers in various government departments, invalidation of parliamentarians with fake or inadequate degrees, and investigations of corruption in state institutions and projects.⁵⁷

The Chaudhry Court was prominent for its willingness to admit PIL cases as well as the extensive invocation of its *suo motu* powers to take cognizance of issues purely or largely political or falling squarely within the policy, governance, and regulatory frameworks of other state institutions. To its growing band of critics, the Chaudhry Court invariably pursued popularity and aggressively extended the boundaries of judicial review to the extent that there seem to be no boundaries.⁵⁸ For example, the Court assailed a constitutional amendment (discussed later in this chapter) and raised legal questions about

⁵⁶ *Ibid.*, 84–6.

⁵⁷ See, for instance, *Zafar Iqbal Jhagra v. Federation of Pakistan*, 2013 SCMR 352; *Ch. Nisar Ali Khan v. Federation of Pakistan*, PLD 2013 SC 568; *Ashraf Tiwana v. Federation of Pakistan*, 2013 SCMR 836; *Tariq Aziz-ud-din v. Federation of Pakistan*, 2010 SCMR 1301; *Muhammad Yasin v. Federation of Pakistan*, PLD 2012 SC 132; and *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697. See also C.M.A.3470/2013 in C.M.A.1536/2013 in C.A.191-L & 409/2010 (action taken on news clipping dated June 4, 2013, published in *Daily Jang*, against the parliamentarians with fake/bogus degrees). Available at <http://supremecourt.gov.pk/web/page.asp/id-109>. Some critics question why the judiciary always reserves its harshest crucibles for the very political parties that always have been persecuted by the military and other establishment forces, and why it is always political excesses and not military excursions that face the toughest trials. See Asad Jamal and Muhammad Badar Alam, “On Trial,” *The Herald Magazine*, February 16, 2012.

⁵⁸ For a critique of frequent judicial intervention in complex economic matters, see Mirza Nasar Ahmad, “Judiciary’s Gain Is Economy’s Loss,” *The News on Sunday*, December 23, 2012.

the accumulation of rainwater outside of the Supreme Court registry in Lahore after a heavy monsoon downpour.⁵⁹

There is a vast literature on the emergence and evolution of PIL in South Asia, the activist role played by judges, their justification for it, and the various tools and strategies used by them. Despite sharing various points of convergence with India, Pakistan has followed a different trajectory while defining areas of prioritization and desirable levels of PIL. Recent scholarship has explored the political roots of judicial activism in Pakistan by examining the development and expansion of the PIL movement in the 1990s. It maintains that Pakistani judicial activism was a manifestation of the larger crisis of governance and democratization in the country after the departure of Zia's military government. The literature persuasively argues that it was motivated by various political agendas and considerations of the appellate courts. It highlights the judge-led creation of novel jurisprudential tools selectively borrowed from India, as well as the hierarchical institutional structure of the Supreme Court of Pakistan and the vast discretionary powers of its Chief Justice.⁶⁰ Carrying on in the same tradition but raising it to unprecedented levels, the Chaudhry Court's PIL jurisprudence increasingly blurred the lines between law and politics at several levels.

Suo motu notices, for example, have been issued and proceedings held over increases in utility, fuel, and commodity prices (raising questions about legally insurmountable dynamics of market forces, economic variables, and policy choices); imposition of taxes (raising questions about how a government is expected to run without taxation); a popular kite-flying festival and large wedding banquets (provoking queries about whether social regulation, public awareness, and appropriate legislation based on public choices should have prevailed instead); media regulation (attracting the criticism that media should be allowed to self-regulate and/or negotiate with the national media regulator instead); power outages, electricity breakdowns, and delayed airline flights (involving issues of optimal administration, policy making, and institutional management in technical areas routinely left to governments and domain experts); specific episodes of crimes against women and extrajudicial killings (drawing condemnation to certain heinous actions but neither providing systemic and long-range solutions nor empowering the lower judiciary to

⁵⁹ See "SC Takes Notice of Poor City Sewerage," *The News International*, August 16, 2013.

⁶⁰ Maryam S. Khan (2011), "The Politics of Public Interest Litigation in Pakistan in the 1990s," *Social Science & Policy Bulletin*, 2 (4) (Spring) [hereinafter "Politics of Public Interest Litigation"].

address institutionally these crimes); sale of national assets (often raising complex economic, financial, political, governance, and policy issues unsuitable for purely legal prescriptions); unauthorized diversion of flood waters (with neither floods nor their supervision conceivably manageable by the courts); and deteriorating law and order situations in Karachi and the province of Baluchistan (given the complexity of politics and governance involved, the predictable outcome has been nothing more than the summoning and chastising of various high officials accompanied by ineffectual directions).⁶¹

In this context, the Chaudhry Court has been criticized further for often glossing over how individual cases precisely met the constitutional requirement that the cases raise a “question of public importance with reference to the enforcement of any of the Fundamental Rights.” Additionally, an increasingly voiced concern is that to fit in all types of cases under the Article 184(3) original jurisdiction, judges routinely interpreted the Fundamental Rights so broadly – a trend that started in the 1990s – that they risk losing any specific legal form and meaning.⁶² Additionally disquieting was the occasional practice of underplaying doctrine, precedent, and statute in favor of frequent quotations from English, Urdu, and Persian verse and citations from sufis, saints, and stoics when adjudicating matters relating to law and public policy. A progressively obscure jurisprudence was confounded further by historical parables, poetic endeavors, allegories, diatribes, self-righteous *obiter* observations, and moralistic condemnation.⁶³ The fact that the *suo motu* powers are centrally vested with the Chief Justice, and that there are no established and publicly known parameters and filtering mechanisms regulating its use, make them completely ad hoc and fundamentally vulnerable to misapplication. Recently, the International Commission of Jurists recommended that “The Supreme Court also ought to identify criteria for the decision to take up cases *suo motu*. These rules may be somewhat more flexible than those governing the allocation of cases to Chambers” and that “As far as the substance of

⁶¹ See, generally, “Genesis and Evolution of Public Interest Litigation.” For a rigorous discussion of the Supreme Court’s ventures in the areas of human rights, policy reforms, environmental and land-use regulations, and legislative override – in turn, leading to a judicialization of pure politics – see also Maryam S. Khan, *Judicialization of Politics and the Supreme Court in Pakistan: A New Paradigm of Judicial Power* (manuscript on file with and available from the author). Many of these cases resulted in interim orders, and the final judgments are pending or as-yet unreported. These orders are available on the Supreme Court of Pakistan website at <http://supremecourt.gov.pk>.

⁶² See “Politics of Public Interest Litigation.”

⁶³ Osama Siddique, “A Society without Meaningful Dissent,” *Express Tribune*, August 19, 2013 [hereinafter “A Society without Meaningful Dissent”].

these latter rules is concerned, they should take into account that *suo motu* procedures must be and remain an exceptional exercise of powers.”⁶⁴

An illustration of the Chaudhry Court’s penchant for taking cognizance of issues without convincingly meeting the requirements of maintainability and frequently evading any limits on judicial powers set by the doctrines of political question and separation of powers is what has come to be known as the “Memo” case, or “Memogate.” For several months, Memogate consumed precious judicial time and sensationalized the nation. For as-yet inexplicable reasons, Mansoor Ijaz – an American of Pakistani ancestry and commentator for U.S. mainstream television – alleged that a confidential memorandum had been written by the then-Pakistani ambassador to the United States to the then-head of the U.S. Armed Services at the behest of the Pakistani president. The memorandum ostensibly sought U.S. assistance against an apprehended military coup and support for the civilian takeover of key military assets.⁶⁵ The Chaudhry Court admitted a petition under Article 184 (3) declaring it both a matter of “public importance” (which *prima facie* it was) and “violative of Fundamental Rights under the Constitution” (which was fairly tenuous). Maintainability was key and strongly contested but the nine-member bench found that a *prima facie* case for the enforcement of Articles 9, 14, and 19 (A) of the constitution existed because:

The attempt/act of threatening to the dignity of the people, collectively or individually, concerning the independence, sovereignty and security of their country, *prima facie*, raises a serious question tagged/linked with their fundamental rights. The existence of Memo dated 10th May, 2011, may have effects of not only compromising national sovereignty but also its dignity. The loyal citizens have shown great concern, to live in the comity of nations with dignity and honour, as according to expanded meanings of “life,” the citizens have a right to ask the State to provide safety to their lives from internal as well as external threats.⁶⁶

Regarding the argument that the matter involved was purely political, the Court summarized it as follows:

⁶⁴ “Report on the ICJ Mission to Pakistan (Autumn 2011),” available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Pakistan-ICJ-mission-fact-finding-mission-report-2012.pdf>.

⁶⁵ Mansoor Ijaz, “Time to Take on Pakistan’s Jihadist Spies,” *Financial Times*, October 10, 2011.

⁶⁶ See *Watan Party and Others v. Federation of Pakistan and Others*, PLD 2012 SC 292 (i.e., Constitution Petition under Article 184(3) of the Constitution regarding alleged Memorandum to Admiral Mike Mullen by Mr. Husain Haqqani, former Ambassador of Pakistan to the United States of America), 43. Available at http://supremecourt.gov.pk/web/user_files/File/Const.P.77-78-79%20%5BMemogate%5DDetailedOrder.pdf.

This “political question doctrine” is based on the respect for the Constitutional provisions relating to separation of powers among the organs of the State. But where in a case the Court has jurisdiction to exercise power of judicial review, the fact that it involves political question, cannot compel the Court to refuse its determination. In view of the above discussion it is held that this Court enjoys jurisdiction to proceed in all those matters which are justiciable. However, if there is an issue, which is alleged to be non-justiciable, it would be the duty of the Court to examine each case in view of its facts and circumstances, and then to come to the conclusion whether it is non-justiciable or otherwise.⁶⁷

Critics vociferously rejected this circular reasoning. They pointed out that the controversy had a direct nexus with structural issues relating to civil–military relations and required a political rather than a judicial resolution. They further stressed that the ill-defined and military-centric notion of “national security” allegedly at stake because of the memorandum did not remotely fall within the ambit of the Fundamental Rights cryptically mentioned by the Supreme Court.⁶⁸ They added, “The fact that the Court did not even deign to raise the issue of maintainability of the memo issue when it first came to the Court indicates how trigger-happy our judges have become in encroaching upon the representative branches of government.”⁶⁹ Political commentators wondered whether the entire “drama” around imperiled national security was orchestrated to destabilize democracy and to divert attention from the embarrassed military establishment in the wake of the U.S. operation against Osama bin Laden.⁷⁰ Others voiced dismay over the waste of time and resources that could have been used to address thousands of pending cases.⁷¹ Some drew attention to the fact that if Ijaz were to be believed, then his more damaging assertions that the Pakistani security services were contemplating a coup also needed to be recognized – the two claims stood or fell together – and yet they were not.⁷² Other commentators exhorted against the dubious authenticity of the memorandum and argued that its existence

⁶⁷ *Ibid.*, 59–60.

⁶⁸ Maryam S. Khan, “Legal Solution to a Political Question,” *The News on Sunday*, January 8, 2012.

⁶⁹ *Ibid.*

⁷⁰ Ayaz Amir, “Death Wish of the Pakistani Political Class,” *The News International*, December 16, 2011.

⁷¹ Amina Jilani, “Lingering but Futile,” *Express Tribune*, February 8, 2013.

⁷² Kamran Shafi, “Open Letter to My Lord the Chief Justice,” *Express Tribune*, December 15, 2011. See also Omar Waraich, “Pakistan’s ‘Memogate’: Was There Ever Going to Be a Coup?,” *The Independent*, December 15, 2011.

was unlikely because a government as weak as the incumbent could never envision and undertake what it allegedly suggested.⁷³

What followed was a media circus; attempts at summoning Ambassador Haqqani (which eventually worked, although he then left and refused to return) as well as Mansoor Ijaz (which failed, making those who took him seriously indignant)⁷⁴; exhortations by the parliament to leave a purely political matter to the politicians; appointment of a judicial commission composed of three provincial chief justices to determine the “origin, authenticity, and purpose” of the memorandum even though a parliamentary commission already had been set up for that task; frequent judicial outbursts at lack of headway; and belated forays by the main opposition party and the military to capitalize on the scandal to destabilize an already tottering government. The fact that neither strategic moves by political players nor public demand had provoked this intrusion became evident when the opposition party and the military quickly disassociated from the ruckus. Meanwhile, toward the end of 2011, Ambassador Haqqani tendered his resignation, while steadfastly maintaining that he had no role in writing or delivering the memo, and his resignation was accepted by the prime minister.⁷⁵ The Memo Commission eventually submitted a report to the Supreme Court on June 11, 2012, in sealed envelopes in which it asserted, as it transpired during the court hearings, that Ambassador Haqqani had actually authored the memo and that it was meant to assure the United States that the civilian government in Pakistan was its ally.⁷⁶ It further stated that being an ambassador, it did not “suit” him to extend such assurances to a foreign country.⁷⁷ Nothing further has since been heard from the Memo Commission. In a textbook case of “burnt fingers,” the judiciary was left wondering whether the intervention was worth making in the first place. A new government eventually replaced the one besieged by this artificial crisis. Everyone but the Chaudhry Court seemed to have moved on.

Memogate remains a quintessential example of the divisive and resource-draining judicialization of politics that the Chaudhry Court has pursued since its restoration. Additional tribulations for a struggling elected government, a brief window of opportunity for possible military adventurism, and the consequent unstable constitutionalism have been its various negative externalities.

⁷³ Zafar Hilaly, “Politics and Memogate,” *Express Tribune*, December 12, 2011.

⁷⁴ Saroop Ijaz, “Moving On,” *Express Tribune*, January 28, 2012.

⁷⁵ “Husain Haqqani resigns as Pakistan’s Ambassador to US,” *Express Tribune*, November 22, 2011.

⁷⁶ Sidrah Moiz Khan, “Memogate: Commission’s Report Says Haqqani Authored Memo,” *Express Tribune*, June 12, 2012.

⁷⁷ *Ibid.*

It also is worth noting how judicialization of politics under the Chaudhry Court has been consistently propped up and justified through an embellished narrative of the Movement that underscores the judiciary's exalted significance and its centrality to the order of things. Consider the following statement:

[L]et us say that some of our greatest national problems will be relieved if only we realize the momentousness of what has transpired in this country since 2007 through the blood, sweat, tears and toil of our people. Those of us who continue to ignore the turnaround, do so only through denial of history.⁷⁸

On another occasion, the Chaudhry Court observed: “[T]he past three years in the history of Pakistan have been momentous, and can be accorded the same historical significance as the events of 1947 when the country was created and those of 1971 when it was dismembered.”⁷⁹

Additional attempts to build a popular public profile are instructive. The Supreme Court Web site announced the establishment of a Supreme Court museum that, *inter alia*, promised displays including a “panorama [of] struggle of lawyers and judges for the restoration of independent judiciary” and the “thematic presentation of Supreme Court’s achievements for the country and society through its judgments,” as well as “personal belongings” of various former judges.⁸⁰ Segments of electronic media regularly contributed to this hagiography. The Court’s official Web site has a link titled “Supreme Court and the Media” that displays news-report coverage of various orders and directions.⁸¹ This is quid pro quo because certain judges are known to make direct statements to court reporters, allow them special seats in courtrooms, and welcome camera shots.⁸² Another link on the Web site states “Pictorial View of Various Activities of the Chief Justice and the Judges.”⁸³ Electronic media coverage of Court proceedings and judges’ statements often had the frequency and urgency that surrounds an unfolding hostage crisis. Certain news channels took to reporting *obiter* observations by judges in politically charged

⁷⁸ See *Suo Motu Action* regarding the allegation of a business deal between Malik Riaz Hussain and Dr. Arsalan Iftikhar that attempted to influence the judicial process, PLD 2012 SC 664, at 668 [hereinafter *Arsalan Iftikhar case*].

⁷⁹ See *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265 (Justice Jawwad S. Khawaja concurring note paragraph 2).

⁸⁰ Available at http://supremecourt.gov.pk/Annual_Rpt/Supreme%20Court%20Museum.pdf (accessed August 17, 2013).

⁸¹ Available at http://supremecourt.gov.pk/Annual_Rpt/Supreme%20Court%20and%20Media.pdf (accessed August 17, 2013).

⁸² See “A Society without Meaningful Dissent.”

⁸³ Available at http://supremecourt.gov.pk/%2FAnnual_Rpt%2F;Pictorial%20View%20of%20Various%20Activities%20of%20Chief%20Justice%20and%20Judges.pdf (accessed August 17, 2013).

cases, accompanied by drum rolls and other sound effects to create a dramatic environment of impending doom – ostensibly for recalcitrant politicians and bureaucrats.⁸⁴

In addition to electronic media, another crucial constituency regularly courted by the Chaudhry Court is the legal profession. Another link on the Web site points to “Other Activities of the Chief Justice and the Judges” and carries reports of Justice Chaudhry’s meetings with various bar delegations.⁸⁵ There have been marked increases in violent protests against the district judiciary and physical altercations with policemen, media representatives, and political opponents on the part of some unruly lawyers.⁸⁶ Far from being disciplined by the bar or the bench for illegal and unprofessional behavior, these erstwhile “foot soldiers” of the Movement expected and received indulgence. At times, the Chaudhry Court came directly to their rescue through the ubiquitous *suo motu* notice.⁸⁷ In consequence, less scrupulous lawyers continued to leverage the Chaudhry Court’s reliance on constituency politics to engage in extortion and build coercive clout. Such behavior even led to the coining of a popular term: *wukula-gardi* (i.e., intimidation by lawyers).⁸⁸ The Chaudhry Court, it seems, was entirely oblivious to an important warning that Justice Aharon Barak, former President of the Supreme Court of Israel, issued some years ago, as follows:

We must distance ourselves from the erroneous view that regards judges as the representatives of the people and as accountable to the people much like the legislature is. Judges are not representatives of the people and it would be a tragedy if they became so . . . It is sufficient that the judiciary reflects the different values that are accepted in society, and it should have an accountability that reflects its independence and its special role in a democracy.⁸⁹

Still heavily infused by the spectacle of the Movement, the Chaudhry Court regularly endeavored to consolidate its power and prestige by directly courting public sentiment and support in an undisguised political manner;

⁸⁴ Osama Siddique, “The Lawyers’ Movement and its Fragments,” *The News on Sunday*, February 19, 2012 [hereinafter “The Lawyers’ Movement and its Fragments”].

⁸⁵ Available at http://supremecourt.gov.pk/Annual_Rpt/Other%20Activities%20of%20the%20Chief%20Justice%20and%20Judges.pdf (accessed August 17, 2013).

⁸⁶ Ali Ahmed, “Lawless Lawyers: From Heroes to Hoodlums,” *Express Tribune*, April 25, 2013.

⁸⁷ See *Suo Motu Case No. 19 of 2010*, available at <http://pakistanconstitutionlaw.com/suo-motu-case-no-19-of-2010> (accessed August 25, 2013).

⁸⁸ Khaled Ahmed, “Middle Class Gone Berserk,” *The Friday Times*, March 23–29, 2012.

⁸⁹ Aharon Barak (2002), “A Judge on Judging: The Role of a Supreme Court in a Democracy,” 116 *Harvard Law Review* 16: 161–2.

populism rather than conventional allegiance to a constraining constitution promises greater freedom and maneuverability to an institution exploring new horizons. A self-appointed role as the peoples' champion was articulated in various judgments that consciously distanced it from judicial thinking on limits on judicial power elsewhere. After describing the constitution as embodying the "will of the people," a learned judge defined a direct role and relationship for the Chaudhry Court with the people:

To find the will of the people, we, as Judges, are not required to embark upon any theoretical journey in the realm of abstract political philosophy or to try finding solutions to legal conundrums in alien constitutional dispensations materially different from ours; we need only examine our own Constitution to ensure that the people of Pakistan, the political sovereigns, are obeyed and their will, as manifested in the Constitution, prevails. This after all is the very essence of a democratic order.⁹⁰

He went on to delineate the ascendance of judges over elected representatives as follows:

The Court can effectively perform the role of the peoples' sentinel and guardian of their rights by enforcing their will; even against members of Parliament who may have been elected by the people but who have become disobedient to the Constitution and thus strayed from their will.⁹¹

Yet, the Chaudhry Court also discovered that the pursuit of popularity can come at a price. A popularity-seeking judge cannot always demand the decorum insisted on by a staid and reclusive counterpart. The populace can chant praises and hurl abuses – politicians anticipate this but judges do not. The Chaudhry Court's removal of the ruling party's prime minister was not well received by various sections of the polity, which made their displeasure known. The judicial reaction was indignant and dismissive, and the mode was quite unconventional in some cases. Inspired by the bestselling romantic Lebanese poet, Khalil Gibran, and borrowing the style of his poem "Pity the Nation," one judge's contemptuous disapproval was in verse and under the same title. He observed:

... Pity the nation that elects a leader as a redeemer
but expects him to bend every law to favour his benefactors.
Pity the nation whose leaders seek martyrdom

⁹⁰ See "Justice Jawwad S. Khawaja's Separate Note," *The News International*, July 4, 2012. Available at <http://thenews.com.pk/Todays-News-2%-118456-Justice-Jawwad-S-Khawaja%E2%80%99s-separate-note>.

⁹¹ *Ibid.*

through disobeying the law
than giving sacrifices for the glory of law
and who see no shame in crime.
Pity the nation that is led by those
who laugh at the law
little realizing that the law shall have the last laugh.
Pity the nation that launches a movement for rule of law
but cries foul when the law is applied against its bigwig
that reads judicial verdicts through political glasses
and that permits skills of advocacy to be practised
more vigorously outside the courtroom than inside.⁹²

One of the most problematic aspects of the Chaudhry Court's overreaching activism was its self-driven scrutiny of the parliament's constitution-making powers soon after democracy was revived. Constitutions inherited by elected governments in Pakistan are invariably unrecognizable patchworks due to self-perpetuating amendments, insertions, and ambiguities introduced under military rule. A major achievement of the new government was that through a rigorous and transparent process, it managed to create national political consensus to revisit the constitution to address these various alterations – apart from introducing important new mechanisms, dispensations, and rights. Introduced in 2010, a salient aspect of the Eighteenth Amendment to the Constitution was a new process for judicial appointments to the appellate courts. The previous mechanism was excessively open-textured, opaque, and politicized.⁹³ As a model centered on individual discretion, it did not visualize any meaningful role for the parliament; it vested inordinate power in the executive; it was increasingly vulnerable to deadlocks between the president and the Chief Justice (there were growing tussles over who had “the last word”); and it embraced processes that were opaque to any external scrutiny.⁹⁴

The Eighteenth Amendment introduced an inclusive and transparent two-level process, assigning the key role of making all appointment nominations to a Judicial Commission headed by the Chief Justice, with the majority of its other members senior judges, and the minority consisting of legal representatives of the executive and senior lawyers. The nominations were to be

⁹² See *Criminal Original Petition No. 6 of 2012 in Suo Motu Case No. 4 of 2010*. Available at http://supremecourt.gov.pk/web/user_files/File/Crl.O.P.6of2012.pdf.

⁹³ Osama Siddique (2010), “Across the Border: A New Avatar for India's ‘Basic Structure Doctrine,’” *Seminar: A Monthly Symposium on 60 Years of the Indian Constitution (1950–2010)*, 52–3.

⁹⁴ *Ibid.*, 53.

evaluated and final acceptance extended by a Parliamentary Committee consisting of four members each from both houses of parliament and with equal representation from the governing party and the opposition.⁹⁵ The Chaudhry Court overlooked the balance and mutual accountability presented by the new arrangement and unjustifiably imagined future parliamentary domination or foul play. Expressing open dismay at the amendment and again raising the spectre of the “independence of the judiciary being under threat,” it admitted PIL petitions that challenged the amendment – itself a controversial action because it thereby seemed to ascribe to the Court the power to review constitutional amendments.⁹⁶ Many months of judicial scrutiny followed. The Chaudhry Court seriously contemplated embracing controversial ideas such as its own brand of the “basic structure doctrine” and the controversial theocratic preamble to the constitution (which Zia subsequently added to the operative part as Article 2-A) – both debunked by past Supreme Courts as possible *grundnorms* to question other constitutional provisions. The Court eventually veered away from the temptation to grant itself the power to sit in judgment over constitutional amendments in view of sustained and wide-ranging criticism, which equated its decision to question a constitutional amendment as “judging democracy” itself.⁹⁷

However, the Chaudhry Court still pressed the government to review the amendment to further circumscribe the Parliamentary Committee’s role by requiring it to record reasons for its decisions and to forward those reasons to the Judicial Commission (which reasons the Chaudhry Court subsequently declared to be open to judicial review) and to hold in-camera sessions – changes incorporated in the Nineteenth Amendment to the Constitution in early 2011. The same rigor of process and decision making, however, seemingly was not required of judges. This became apparent at a later stage when the Parliamentary Committee objected to certain nominations by the Judicial Commission. The reason was that although the provincial Chief Justices who had initially forwarded the names had made certain adverse remarks about the nominees’ eligibility, the Judicial Commission left the concerns unaddressed and went ahead with their nominations. The Chaudhry Court responded by admitting a petition (again, under Article 184 (3)) and declared that the Parliamentary Committee lacked the technical expertise to gauge the competence of nominees or to sit in judgment over the Judicial Commission’s deliberations – even

⁹⁵ *Ibid.*, 53–4.

⁹⁶ See *Nadeem Ahmad v. Federation of Pakistan*, PLD 2010 SC 1165.

⁹⁷ See, for example, the special issue “Judging Democracy” in *The Friday Times*, September 17–23, 2010.

if a member or members of the Commission had previously raised qualitative concerns about any of the candidates. The Parliamentary Committee was told to restrict itself to either accepting or rejecting the nominations based on grounds falling within its domain (these grounds are never actually specified in the sixty-four-page judgment); any such rejections were held to be open to judicial review.⁹⁸ As a consequence, there is now great ambiguity concerning the remaining role and powers of the Parliamentary Committee. The Judicial Commission also formulated the Judicial Commission of Pakistan Rules 2010, under which only the Chief Justice of an appellate court can initiate the process of nominations, thereby reverting again to an individual-centric model. In essence, these developments have rendered the judicial-appointment process even more judiciary dominated than the pre–Eighteenth Amendment model.

While courting public attention, the Chaudhry Court at times demonstrated intent to take on the military establishment – although such ventures fell short of other judicial intrusions in the political sphere. For example, in the *Asghar Khan* case, the Court adjudicated allegations that the military establishment had masterminded and financed the outcome of national elections in 1990, which resulted in the defeat of Benazir Bhutto’s party. Although political pundits had always held serious reservations about the role of military agencies in those elections, the case had remained pending for sixteen years. In its judgment, the Chaudhry Court found that the then-president (a Zia confidante), the Chief of the Army Staff, and the head of the country’s premier secret service, including their subordinates, had violated the constitution and engaged in unlawful activities to make it easier for one group of politicians to prevail over their opponents using means that included illicit distribution of funds. The Court stated that any unconstitutional act called for action in accordance with the constitution and the law – which, most significantly, in the case of the now-retired military men, pointed directly to the prospect of treason proceedings.⁹⁹

The verdict had tremendous symbolic value given the historical inviolability of the men in uniform, regardless of the dimensions of their anticonstitutional actions.¹⁰⁰ Still, it could be argued that these are long-retired generals who also are estranged from the current leadership. Furthermore, unlike cases against politicians, the Chaudhry Court has not pushed for further action. It has been similarly careful regarding Musharraf, who – miscalculating his popularity

⁹⁸ See *Munir Hussain v. Federation of Pakistan*, PLD 2011 SC 407.

⁹⁹ See *Air Marshall (Ret.) Asghar Khan v. General (Ret.) Mirza Aslam Beg and Others*, PLD 2013 SC 1.

¹⁰⁰ Salman Akram Raja, “Asghar Khan’s Vigil,” *The Daily Dawn*, October 31, 2012.

while in exile – is currently back in Pakistan, under custody, and facing several charges. Hearing a petition exhorting it to direct the federal government to initiate treason proceedings against Musharraf, the Chaudhry Court readily accepted the government’s plea to set up a special team to investigate his acts of November 3, 2007, to determine whether they constituted treason. Unlike its typical approach, this time the Chaudhry Court did not mandate any time frame for a decision. It further stated that it was consciously and deliberately not addressing the question of “abrogation” or “subversion” so as not to prejudice the inquiry and investigation or the subsequent trial – if it should take place as a result of the investigation.¹⁰¹ This is in dramatic contrast to the Court’s zealous approach when initiating and supervising investigations against current political figures and civilian institutions.

While the Chaudhry Court embroiled itself in various time-consuming and politically contentious matters, its initial support steadily diminished due to unaddressed concerns regarding access, corruption, and delay in the formal court system. Justice Chaudhry’s court-centric and personalized administrative and policy-making approaches largely failed to adduce any meaningful administrative, procedural, fiscal, and service-delivery reforms.¹⁰² Available data and surveys reveal low morale and a sense of neglect in the district judiciary and escalating discontent in the litigating public.¹⁰³ Justice Chaudhry recently has been mired in a major controversy involving allegations that his son was the recipient of vast amounts of money and privileges from an influential and highly controversial property tycoon. The situation was not helped by the fact that Justice Chaudhry decided to take *suo motu* notice of the rumors and news reports. This was in clear violation of the Code of Conduct notified by the Supreme Court in 2009, which states that “A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friends.”¹⁰⁴ Doubts persist about the maintainability of the matter under Article 184(3), the Court’s appointment of

¹⁰¹ See Order dated July 3, 2013, in C.P. No. 2255 of 2010 & Constitution Petition Nos. 14, 16, 17, and 18 of 2013 with C.M. Appeal No. 157/2009 with CMAs 2335–2337 of 2013 and CMA 2368 and 2705 of 2013, 3. Available at <http://supremecourt.gov.pk/web/user.files/File/C.P.2255-2010-03.07.2013.pdf>.

¹⁰² See, generally, Osama Siddique, *Pakistan’s Experience with Formal Law: An Alien Justice* (Cambridge: Cambridge University Press, 2013).

¹⁰³ *Ibid.* See also Osama Siddique (2011), “Law in Practice: The Lahore District Courts Litigants Survey (2010–11).” Lahore University of Management Sciences: Development Policy Research Centre, Working Paper.

¹⁰⁴ See Article IV, Code of Conduct for Judges of the Supreme Court and the High Courts, notification dated September 2, 2009. Available at supremecourt.gov.pk/web/page.asp?id=435 [hereinafter Code of Conduct for Supreme Court and High Court Judges].

a controversial one-man commission to investigate the matter, and the neutrality of its adjudication by two judges known to be close to Justice Chaudhry (i.e., they heard the case after he eventually recused himself).¹⁰⁵ The judges characterized the matter as a politically motivated conspiracy from the start, invoked the narrative of the Movement to extol the integrity of judges rather than meaningfully address the factual questions before them, and took additional steps and made comments that were widely perceived as overprotective of the accused.¹⁰⁶

FUTURE DIRECTIONS

The Chaudhry Court's judicialization of politics presents an important case study for the literature on the modes of growth in judicial power. Its most characteristic feature has been its "proactive" involvement in mega-politics. As the analysis in this chapter shows, this was the outcome of a conscious choice and deliberate strategy on the part of a coterie of judges. In other words, almost all of the recent high-profile political cases have been neither pulled into controversial contestations by political circumstances or by strategic politicians, nor has the momentum of public-opinion pressure propelled them into such embroilment. On the contrary, the judges calculated and grasped the potential opportunities that such interventions present to occupy center stage, thereby progressively extending the ambit of judicial review; consolidating constituencies in the media and legal bars; building public support for their activism; and assuming legal, political, and moral supremacy over the arbitration of matters of national significance – despite tenuous jurisdictional justifications and increasing criticism from diverse quarters. This is in contrast to historical factors for the judicialization of politics in Pakistan, where the judiciary was coerced or co-opted in mega-politics by dictators or unavoidable political crises.

While engaging in unrestrained activism, the Chaudhry Court also endeavored to ensure that its interventions were widely publicized and celebrated. Furthermore, certain judges have shown a propensity for self-promotion. Their own Code of Conduct, which states that "Functioning as he does in full view

¹⁰⁵ See "The Arsalan Iftikhar Case: Is the Pandora's Box Really Closed?" *Pakistan Today*, December 8, 2012; see also "Arsalan Iftikhar Case: Asma Voices Concern over One-Man Commission," *The Daily Dawn*, September 3, 2012; Faisal Siddiqi, "Kinship, Money and Justice," *The Daily Dawn*, September 14, 2012; Babar Sattar, "Rule of Judges?," *The News International*, September 8, 2012; and Saroop Ijaz, "5-and-5: The Highs and Lows of the Outgoing CJ of Pakistan," *Express Tribune*, December 10, 2013.

¹⁰⁶ See "Arsalan Iftikhar Case," 671.

of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law,” has long become of mere academic value.¹⁰⁷ The fact that the *suo motu* jurisdiction, in particular, was the standard *modus operandi* for assuming jurisdiction demonstrates that this type of judicialization of politics is fundamentally self-driven. After all, even in typical PIL cases, there are particular sectional interests in society that approach the Court.

The initial public support for the Chaudhry Court in the wake of the Movement is an inadequate explanation for its subsequent trajectory. The Movement was an amalgamation of diverse anti-autocracy forces, and the sustenance and consolidation of the democratic process was a greater priority compared to abstract notions of judicial independence. When the Chaudhry Court opted for high-profile duels with the government as the vehicle for institutional profile building and power accumulation, it started alienating many significant sections of its supporters from the Movement days – especially because it neglected its various promises to reform the overall system of justice for the benefit of ordinary people. Neither has the Court been able to sustain the loyalty of luminaries and foot soldiers from the legal fraternity.¹⁰⁸ Over time, prominent leaders of the Movement have publicly parted ways and openly disparaged its key judgments. Elected officeholders of major bar associations now represent collectives of lawyers who are irate at the Court’s unrestrained activism and embroilment in controversies. The media routinely engages in an uninhibited critique of debatable aspects of its demeanor and jurisprudence. At times, the Court has waved the stick of “contempt of court” at the more irreverent critics, but that has only provoked defiance.¹⁰⁹ That the great judiciary–lawyer alliance now is deeply fragmented is an understatement. The Lahore High Court Bar Association recently filed references before the Supreme Judicial Council against four apex court judges, including Justice Chaudhry, that seek proceedings for misconduct and removal from office on the grounds of misusing the Court for personal and political ends.¹¹⁰

¹⁰⁷ See Article V, Code of Conduct for Supreme Court and High Court Judges.

¹⁰⁸ Jon Boone, “Pakistan’s Chief Justice Iftikhar Chaudhry Suffers Public Backlash,” *The Guardian*, August 28, 2013. See also “The Lawyers’ Movement and its Fragments.”

¹⁰⁹ Saroop Ijaz, “Contempt of the People,” *Express Tribune*, August 3, 2013. The Lahore High Court Bar Association recently condemned possible coercive use of the law of contempt to inhibit free speech; see Rana Yasif, “Bar vs. Bench: LHCBA Condemns ‘Abuse’ of Contempt Law,” *Express Tribune*, August 25, 2013.

¹¹⁰ See “LHCBA Files Reference against CJP, Three Other SC judges,” *The Daily Times*, October 12, 2013.

Such has been the domination of the Supreme Court by Justice Chaudhry and like-minded colleagues that institutional frameworks are subordinate to personality-driven rhetoric, decision making, and judicial prioritization and course setting.¹¹¹ The escalating backlash and controversy surrounding the Chaudhry Court's jurisprudence have not gone unnoticed by other judges who have not been at the forefront of its judicialization of politics – even if they seldom dissented in crucial cases in the larger interest of projecting the impression of an undivided Court. Some course correction may occur now that Justice Chaudhry has retired. At the same time, however, the Chaudhry Court brought the judiciary to the heart of several divisive national discourses and contestations. Any major immediate retreat to the periphery of mega-politics would be difficult to achieve, even if it were attempted. Meanwhile, allegations of self-promotion and politicking are more strident and uninhibited than ever before. Whether it lingers on or withdraws, the judiciary is so inextricably caught up in the political life of Pakistan that further constitutional instability is likely in the foreseeable future.

¹¹¹ Mohammad Waseem (2012), "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia*, 20:1.

Elections in “Democratic” Bangladesh

M. Jashim Ali Chowdhury

INTRODUCTION

Since its emergence in 1971, Bangladesh has become one of the world’s busiest constitutional laboratories.¹ Compared with its South Asian neighbors, Bangladesh is exceptional in its ethnic, cultural, and linguistic homogeneity among its people and its territorial proximity among the different units of its administration. At independence, Bangladesh carried the historical burden of Pakistani rule involving a civil–military bureaucracy and a nonrepresentative technocracy.² As a result, there was consensus for the adoption of a form of representative government modeled on the Westminster parliamentary model and for a constitution that enshrined core liberal-democratic values.³ Yet, there also were disadvantages rooted in the same historical legacy. Communal politics and the partition of British India led to Bangladesh’s separation from West Bengal (India) and its accession to Pakistan. The 1971 conflict – essentially economic, political, linguistic, and cultural in nature but purposefully projected as religious – culminated in secession from Pakistan.⁴ Pakistani rule in Bangladesh ended in genocide but Pakistan’s communalization of its identity

¹ Aleem Al Razee, *Constitutional Glimpses of Martial Law* (Dhaka: University Press Ltd., 1982), 24–6.

² Talukder Maniruzzaman (1967), “National Integration and Political Development in Pakistan,” *Asian Survey* 7 (12): 880. Available at <http://jstor.org/stable/2642531> (accessed July 25, 2013). See also Rounaq Jahan, *Pakistan: Failure in National Integration* (Dhaka: University Press Ltd., 1994), 139–40.

³ Abul Fazl Huq (1973), “Constitution Making in Bangladesh,” *Pacific Affairs* 46 (1): 59. Available at <http://jstor.org/stable/2756227> (accessed February 28, 2013).

⁴ Rehman Sobhan (2006), “Identity and Inclusion in the Construction of a Democratic Society in Bangladesh,” *Journal of the Asiatic Society of Bangladesh (Humanities)*, 51 (2): 155–77. Available at <http://asiaticsociety.org.bd/journals.htm> (accessed July 14, 2013).

continues to haunt the society and politics of Bangladesh today. So deep is the division between religious antagonists and secular liberals that elections result in not only the winner taking all but also in the loser being put to a Darwinian test of survival. Elections matter in any democracy; however, given the degree of polarization and the consequences of defeat, they matter even more in Bangladesh. Major political forces today, therefore, are left with no option other than entering and remaining in office, at whatever cost and with whatever steps doing so might entail.

Constitutionalism often is regarded as a doctrine of political legitimacy. Constitutionalism *prima facie* requires justification of state actions against a higher law. At its core, this higher law is meant to structure the political process. Yet, as a concept, constitutionalism involves more than mere legality; it aims to posit a wider and deeper criterion of good governance as well as political conventions and norms to be attained in the collective life of a nation. The experiences of novice and volatile democracies, including Bangladesh, provide enough lessons to see that actions taken with apparent legal authority could still trouble constitutional sentiments. Viewed from this perspective, the current political norms and institutional practices of Bangladesh suggest that it has far to go before it can achieve the goals of modern constitutionalism. From the number of tests to determine whether a country can be said to practice constitutionalism, let us explore the first and most fundamental one: the existence of a free, fair, and periodic competition for government power and positions.⁵

The first two decades (1971–1990) of Bangladesh’s political life were marked by frequent restlessness in military bastions, rigged elections, paralyzed legislatures, and executive omnipotence.⁶ Although the recovery from military autocracy through the mass upsurge of 1990 provided hope for democracy and the rule of law, Bangladesh’s actual progress in consolidating democratic institutions remains a matter of debate. Constitutional governance in Bangladesh has gained a certain degree of stability since then,⁷ but much also has been lost during this ‘work-in-progress’⁸ period. The past two decades (1990–2010) well

⁵ Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (New York: Penguin Books, 1998), 17–18.

⁶ Muhammad A. Hakim, “Parliamentary Politics in Bangladesh in the 1990s: Consensus and Conflict,” in Md. Mahfuzul Huq (ed.), *Thirty Years of Bangladesh Politics* (Dhaka: University Press Limited, 2004), 103.

⁷ A. K. M. Atiqur Rahman and Manzur Alam Tipu, *Understanding Reform: The Case of Bangladesh*. Available at gdnnet.org/global_research_projects/understanding_reform/country_studies/draft_studies/bangladesh_draft.pdf (accessed March 15, 2013).

⁸ Gouhar Rizvi, *Democracy & Constitutionalism in South Asia: The Bangladesh Experience* (Harvard University: The Ash Center for Democratic Governance and Innovation). Available at innovations.harvard.edu/showdoc.html/id=8644&p=1 (accessed October 12, 2012).

may be characterized as a phase of ‘illiberal democracy’ that resulted in an elected dictatorship of the ruling premier.⁹ Historically, the politics of elections has been a matter of central importance in Bangladesh’s national discourse. Although the liberation movement of Bangladesh derived its democratic legitimacy from comparatively free and fair elections of 1954¹⁰ and 1970,¹¹ the fairness of elections has remained a concern. In response, a *sui generis* system of ‘caretaker government’ was established in the mid-1990s to break through the vicious cycle of rigged elections.¹² Yet, as discussed in this chapter, the remedy proved to be as bad as the disease, damaging the credibility of both the Election Commission and the higher judiciary. Although the system of judge-led caretaker government generated substantial interest in constitutional discourse,¹³ the experiment failed due to both the inevitable inconsistencies lurking within the system and the predictable drawbacks within local politics. As a consequence, the Constitution (Fifteenth Amendment) Act of 2011 eliminated caretaker governments and returned electoral responsibility to the original custodian (i.e., the Election Commission). This action has generated its own difficulties and the fear of another constitutional breakdown in the future.

Against these developments, this chapter reflects on election law and politics in Bangladesh. It begins with a brief overview of the constitutional system of Bangladesh, followed by an exploration of the responsibility, power, and capacity of the Election Commission. A short narrative of the elections held under different political governments in independent Bangladesh is provided. The focus then turns to the mid-1990 model of a caretaker government and the problems that led to its inevitable but allegedly premature demise. The discussion that follows sheds light on the damaging impact that this model has had on the judiciary, which has resulted in support for the possible adoption of a legislature-led interim government for the election period (i.e., an

⁹ Rounaq Jahan, “Bangladesh at a Crossroad.” Paper presented at *Experiments with Democracy: A Symposium on the Asian Experience with Democracy* (New Delhi, India: August 2007). Available at india-seminar.com/2007/576/576.rounaq_jahan.htm (accessed July 29, 2013). The term *illiberal democracy* is borrowed from Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: Norton, 2003), 89–118.

¹⁰ The election of the provincial legislature in 1954 gave the *Bangalees* the first chance of self-governance within the framework of united Pakistan.

¹¹ The election of the provincial and national assemblies of 1970 emerged as the referendum of the independence of Bangladesh. The victorious political party, the Awami League, led the nation to independence in 1971.

¹² For an in-depth analysis of electoral corruption in Bangladesh, see M. Y. Akhter, *Electoral Corruption in Bangladesh* (Farnham: Ashgate Publishing Ltd., 2001).

¹³ A. N. W. Waheeduzzaman, “Caretaker Government: Round Three,” *The Daily Star*, January 28, 2007.

arrangement complementary to the empowerment of the Election Commission as the primary bearer of election responsibilities).

Bangladesh’s extraordinary experience with caretaker governments should contribute to the growing body of literature surrounding what Pildes called ‘the constitutionalization of democratic politics’.¹⁴ Countries around the world – democracies old and new – are wrestling with the appropriate devices that constitutional law may employ to fashion democratic institutions and shape the democratic process. Whereas in mature democracies, such debates might involve details such as delimitation and the technical details of campaign finance, in younger democracies such as Bangladesh, the central question remains an elementary one: How can a free and fair electoral process be ensured? The answer to this question has played out rather strikingly in Bangladesh, illustrating how even a well-written constitution operating within a volatile body politic without deeply embedded democratic norms results in constitutional instability.

THE CONSTITUTIONAL FRAMEWORK

Bangladesh started its constitutional journey with a formal Proclamation of Independence. The representatives of the people of Bangladesh, elected in the December 1970 election of erstwhile East Pakistan, formed a Constituent Assembly on April 10, 1971, and officially proclaimed the independence of Bangladesh. As a wartime arrangement, the Proclamation devised a presidential form of government. The executive and legislative powers of the Republic and supreme command of the armed forces were vested in the president. The president would appoint a prime minister and Cabinet to oversee executive affairs. The president could levy taxes and authorize expenditures. He also would summon and adjourn the Constituent Assembly and ‘do all other things that may be necessary to give the people of Bangladesh an orderly and just Government’.¹⁵ Bangabandhu Sheikh Mujibur Rahman, the leader of the

¹⁴ Richard H. Pildes (2004), “Foreword: The Constitutionalization of Democratic Politics,” 118 *Harvard Law Review* 28.

¹⁵ The Proclamation of Independence of 1971, the Seventh Schedule of the Constitution of Bangladesh. The Proclamation settled the number of seats in the Constituent Assembly at 469 (i.e., 169 members elected to the National Assembly and 300 members elected to the Provincial Assembly in the 1970 election). By 1972, however, there were changes in the landscape. The Bangladesh Constituent Assembly Order 1972 (President’s Order No. XXII of 1972) resettled the number at 430 because 10 members had died (5 were killed by the Pakistan Army in 1971); 23 members lost their seat by being expelled from their party, the Awami League; 2 were disqualified for declaring allegiance to Pakistan after the war; and 4 others were imprisoned for collaboration with the Pakistan Army during the liberation war.

liberation movement who was held captive in West Pakistan, was the appointed president. In his absence, the powers and functions of the presidency were discharged by Syed Nazrul Islam, the acting president.

After the liberation war ended on December 16, 1971, Bangabandhu Sheikh Mujibur Rahman was released from his Pakistani jail. He returned to his independent homeland, Bangladesh, on January 10, 1972. On January 11, 1972, the president – in exercise of his power to give Bangladesh ‘an orderly and just government’ – promulgated the Provisional Constitution of Bangladesh Order of 1972. Through this Provisional Constitution, the system of government was transformed into a quasi-parliamentary system, in the sense that the Cabinet would be headed by a prime minister who was a member and leader of the majority party of the Constituent Assembly. The president, however, assumed the role of symbolic head of the state who, in exercise of his powers, would act in accordance with the advice of the prime minister.¹⁶ Subject to this advice, the legislative power remained with the president. After promulgation of the Provisional Constitution Order, Bangabandhu resigned from the presidency and as leader of the majority party in the Constituent Assembly and assumed the post of prime minister. Justice Abu Sayeed Chowdhury, a former Judge of the Dhaka High Court, was appointed the new president. The Constitution of Bangladesh was formally adopted in the Constituent Assembly on November 4, 1972, and came into force on December 16, 1972.¹⁷

The 1972 Constitution adopted a parliamentary system with various checks and balances. The president assumed a symbolic role similar to the British monarch. Executive power was vested in the prime minister,¹⁸ legislative power in the parliament,¹⁹ and judicial power in the Supreme Court and subordinate courts.²⁰ Internal proceedings of the parliament were protected from judicial inquiry.²¹ The Court would not issue a *mandamus* to parliament to enact or repeal any legislation.²² Parliament, in turn, would refrain from debating any ‘issue or question that may contain any reflection on a decision of a court

¹⁶ Articles 5 and 8 of the Provisional Constitution of Bangladesh Order 1972. See also M. Shah Alam, *Constitutional History of Bangladesh and An Easy Reader into the Constitution* (in Bangla) (Chittagong: University of Chittagong, 1996), 17–19.

¹⁷ In the meantime, the president, on the advice of the prime minister, issued a total of 202 presidential orders that were varied and catholic in scope and content, and may be said to have laid the foundation of the new legal order in Bangladesh. See Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (Dhaka: University of Dhaka, 1994), 6.

¹⁸ The Constitution of the People’s Republic of Bangladesh, Article 55(2).

¹⁹ *Ibid.*, Article 65(2).

²⁰ *Mujibur Rahman v. Bangladesh*, (1992) 44 DLR (AD) 111, para. 71.

²¹ *Supra* note 18, Article 78.

²² *Sheikh Abdus Sabur v. Returning Officer*, 41 DLR (AD) (1989), 30.

of law or is likely to prejudice a matter *sub judice*.²³ The prime minister and his Cabinet remained collectively responsible to parliament, which could dismiss a government by initiating and passing a no-confidence motion.²⁴ Subject to the prime minister’s recommendation,²⁵ the president appointed the attorney general,²⁶ the chief justice and judges of the Supreme Court,²⁷ the Chief Election Commissioner (CEC) and other election commissioners,²⁸ the comptroller and auditor-general,²⁹ and the chairman and other members of the Public Service Commission.³⁰ The president was subject to impeachment by the parliament on constitutionally listed grounds.³¹ Judicial review was provided in Article 102 of the constitution. Any deviation from constitutional arrangements through legislative or executive action would attract judicial intervention as the ‘guardian of the constitution’³² under the authority of Article 7 in the clause providing for ‘supremacy of the constitution’.³³

It is important to note that the constitutional-supremacy clause has been used by the Supreme Court of Bangladesh to review constitutional amendments.³⁴ The Court held that the terms ‘any other law’ and ‘that other law’ in Article 7, which relate to the definition of ‘law’ in Article 152(1), include constitutional amendments.³⁵ The Supreme Court of Bangladesh also adopted the celebrated ‘basic-structure doctrine’ enunciated by the Indian Supreme Court in *Kesavananda Bharati v. State of Kerala*.³⁶ Through this doctrine,

²³ Rule 53 (xx) of the Rules of Procedure of Parliament.

²⁴ *Supra* note 18, Articles 55(3) and 57(2).

²⁵ Article 48(3) provides that except for appointing the prime minister pursuant to Clause (3) of Article 56 and the Chief Justice pursuant to Clause (1) of Article 95, the president always acts in accordance with the advice of the prime minister. The proviso to Article 48(3) states that whether any and, if so, what advice has been tendered by the prime minister to the president shall not be questioned in any court.

²⁶ *Supra* note 18, Article 64(1).

²⁷ *Ibid.*, Article 95(1).

²⁸ *Ibid.*, Article 118(1).

²⁹ *Ibid.*, Article 127(1).

³⁰ *Ibid.*, Article 138(1).

³¹ *Ibid.*, Articles 52 and 53.

³² *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (AD) (Spl) 1.

³³ *Supra* note 18, Article 7.

³⁴ M. Jafar Ullah Talukder and M. Jashim Ali Chowdhury (2008), “Determining the Province of Judicial Review: A Re-evaluation,” *Metropolitan University Journal*, 2 (2): 162.

³⁵ Per Mustafa Kamal J., in *Kudrat-e-Elahi v. Bangladesh*, 44 DLR (AD) 319, para. 84; *Bangladesh Italian Marble Works Ltd. v. Bangladesh*, 14 BLT (HCD) (Spl) 1, p. 54.

³⁶ (1973) 4 SCC 225; *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (AD) (Spl) 1. For an excellent exploration into the doctrine of basic structure, see Pratap Bhanu Mehta, “India’s Living Constitution: Ideas, Practices, Controversies,” in Zoya Hasan, E. Sridharan, and R. Sudarshan (eds.), *The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure* (Delhi: Oxford University Press, 2002), 99–148.

almost every constitutional amendment has been reviewed judicially to examine whether they violate the fundamental pillars of the constitution.³⁷

The year 1975 marked a dramatic change in the constitutional setup. The adversarial multiparty system was thought to be unsuitable for a war-ravaged Bangladesh. The president sought the highest possible concentration of authority. The first parliament established under the 1972 Constitution passed the Constitution (Fourth Amendment) Act of 1975 and replaced the parliamentary system with a one-party presidential system. Within seven months of introducing the change, however, Bangabandhu Sheikh Mujibur Rahman, the country's founder, was assassinated by pro-Pakistani elements in the army. The experiment with a one-party presidential system in Bangladesh was thereby 'nipped in the bud'. Different civil-cum-military or purely military governments of 1976–1990 continued the presidential system. The one-party system was publicly condemned, on the one hand, whereas the presidential omnipotence created by the system was continued and consolidated on the other. Article 92A was added to the constitution to make the parliament subservient to the president for all practical purposes.³⁸ Under the new arrangement, if the parliament failed to make grants, to pass the annual budget, or refused or reduced the demand for grants, the president – without concern about funds – could dissolve parliament. Although the one-party political system was abolished, prolonged military rule under martial-law proclamations and the

³⁷ In fact, judicial review of constitutional amendments has become a regular practice in Bangladesh. The Eighth Amendment was challenged in *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1. The Tenth Amendment was challenged in *Dr. Ahmed Hossain v. Bangladesh*, 44 DLR (1992) (AD) 109 and in *Fazle Rabbi v. Election Commission*, 44 DLR (HCD) (1992) 14. The Fifth Amendment was challenged in *Bangladesh Italian Marble Works Ltd. v. Bangladesh*, 14 BLT (HCD) (2005) (Spl) 1. The Thirteenth Amendment was challenged first in *Mashiur Rahman v. Bangladesh*, 17 BLD (HCD) (1997) 55, and second in *M. Saleem Ullah v. Bangladesh*, 57 DLR (HCD) (2005) 171. The Fourteenth Amendment was challenged in *Fardia Akter and Two Others v. Bangladesh*, 11 MLR (2006) (AD) 237. The Seventh Amendment was challenged in *Siddique Ahmed v. Bangladesh*, (2010) (HCD). All of these challenges were decided on the merits, and objections on attempted judicial review invariably were negated.

³⁸ The Second Proclamation (Fifteenth Amendment) Order of 1978 (i.e., Second Proclamation Order No. IV of 1978). Changing, amending, rewriting, or even suspending the whole or parts of the constitution through proclamations started with the Martial Law Proclamation of August 16, 1975. This was the act of Khandker Mushtaq Ahmed usurping the presidency after the assassination of Bangabandhu Sheikh Mujib on August 15, 1975. Justice A. S. M. Sayem, taking the baton from Mushtaq, and Major General Ziaur Rahman, succeeding Sayem, continued amending the constitution through orders and proclamations. All of the orders and proclamations were endorsed as a package by the servile parliament through the Constitution (Fifth Amendment) Act of 1979. As mentioned previously, the Fifth Amendment did not pass the juridical test of constitutionality and the Supreme Court invalidated the amendment.

occasional revival of multiparty democracy with ‘rubber-stamp’ parliaments under the lead of state-sponsored ‘kings’ parties’ remained the hallmark of this period.

It was not until 1991 that Bangladesh completed a ‘full constitutional cycle’.³⁹ After the fall of military ruler H. M. Ershad in December 1990, the Constitution (Twelfth Amendment) Act was passed on August 6, 1991. It removed presidential omnipotence – the most important remnant of the Fourth Amendment – from the constitution. Parliamentary democracy returned with the president as symbolic head and the prime minister as chief executive with accountability to the legislature. The original constitutional arrangement of 1972 thereby was restored. This clear choice amplified the necessity of holding free and fair elections to the parliament and impartial supervision of those elections. One method of supervision, the Thirteenth Amendment Act of 1996, introduced caretaker governments – the focus of this chapter – for electoral administration. The powers and responsibilities constitutionally vested in the Election Commission must be understood before understanding the unique system of caretaker governments.

THE ELECTION COMMISSION

The Election Commission as the primary duty bearer for holding free and fair elections never received the attention it deserved in the 1990s. The key issue of the Commission’s capacity was sidelined by political urgency of the groups that preferred temporary remedies for unfair electoral practices. Nevertheless, the constitution gives a remarkable amount of attention to the Election Commission.

The Election Commission of Bangladesh is entrusted with the principal duty of holding elections to the presidency, *Jatya Sangsad* (i.e., parliament), and various other local government bodies including the Union Council and the Municipal and City Corporations. The Election Commission is empowered to superintend, direct, and control the preparation of electoral rolls; the holding of elections; and the delimitation of electoral constituencies.⁴⁰ The range of responsibilities that the Commission is required to discharge – including the appointment and control of returning officers, the approval of the electoral code of conduct, the formation of inquiry committees, and the

³⁹ Syed Ishtiaq Ahmed (1992), “Constitution and Democracy in Bangladesh since 1972,” *Dhaka Law Reports Journal*, 44: 52.

⁴⁰ *Supra* note 18, Article 119.

regulation of political parties – is addressed in detail in the Representation of the People Order of 1972.⁴¹

For the meaningful discharge of these major responsibilities, substantial power has been entrusted to the Election Commission. It can assign and withdraw electoral duties,⁴² constitute inquiry committees,⁴³ summon and compel the production of evidence, require public records, decide electoral disputes,⁴⁴ issue commissions for the examination of witnesses and documents,⁴⁵ regulate the transfer of judicial and executive officers on election days,⁴⁶ cancel candidacies,⁴⁷ make rules,⁴⁸ and regulate its own procedure.⁴⁹ The most open-ended mandate of the Election Commission in conducting the election ‘honestly, justly, and fairly’ is in Article 119(2) of the constitution.⁵⁰ In the exercise of this power on various occasions, the Election Commission has filled the vacuum of law,⁵¹ ordered repolling,⁵² and upheld or rejected candidacies.⁵³

The Constitution of Bangladesh, along with the Representation of the People Order of 1972, has taken care of the institutional, budgetary, and functional independence of the Election Commission. The constitutional guarantee of functional independence has been reinforced by the imposition of a corresponding burden on the executive authorities ‘to assist the Commission’.⁵⁴ In their case, the Election Commissioners’ five-year guaranteed tenure in office⁵⁵ has been secured by a procedural requirement to follow the manner and grounds ‘for removal of a Judge of the Supreme Court’.⁵⁶ Article 118(3) of

⁴¹ The Representation of the People Order of 1972, Articles 11, 28(2), 91B(1), 91C, 90B(c), 91A(1), 90A, and 90H.

⁴² *Ibid.*, Article 7(1), (5), and (6).

⁴³ *Bangabir Kader Siddiqui v. Bangladesh*, 54 DLR (2002) (AD) 64.

⁴⁴ *Supra* note 41, Article 53.

⁴⁵ *Ibid.*, Article 91D(1).

⁴⁶ *Ibid.*, Article 44E.

⁴⁷ *Ibid.*, Article 91E.

⁴⁸ *Ibid.*, Article 94.

⁴⁹ *Ibid.*, Article 91D(4).

⁵⁰ *Altaf Hussen v. Abul Kashem*, 45 DLR (1993) (AD) 53, para. 11.

⁵¹ *Abdul Momen Chowdhury v. Bangladesh* W/P No. 2561 of 2005; full text of the judgment printed in Belal Husain Joy, *Constitutional History of Bangladesh: Comments on Contemporary Political Crisis and Leading Case Laws* (Dhaka: Bangladesh Law Book Company, 2008), 568.

⁵² *Abdul Quader Farazi v. CEC and Ors*, 4 MLR (1999) (HCD) 67; *A. F. M. Shah Alam v. Mujibul Haq*, 41 DLR (AD) (1989) 68; *Selim Ullah Bahadur v. The Election Commission and Another*, 11 BLD (HCD) 548; and *Gulam Murshed v. Mustafizur Rahman*, 10 BLD (AD) 21.

⁵³ *Afzal Hussain v. Chief Election Commissioner*, 45 DLR (HCD) (1993) 255; *Ataur Rahman v. EC*, 15 BLC (2010) (HCD) 506.

⁵⁴ *Supra* note 18, Articles 118(4) and 126.

⁵⁵ *Ibid.*, Article 118(3).

⁵⁶ *Ibid.*, proviso added to Article 118(5).

the constitution attempted to immunize the Commission from career hopefuls by prohibiting the appointment of a retired Election Commissioner to any other position in the service of the Republic.⁵⁷ Articles 88(b) and (c) make the administrative expenses and pay of officers and servants of the Election Commission a charge on the Consolidated Fund, which means that even the parliament may not propose amendments to vary the amount of any expenditure charged as remuneration for the Election Commissioners. Additionally, Section 7(1) of the Election Commission Secretariat Act of 2009 obliges the government to allocate money according to the requirements of the Election Commission. Although the government may ‘consider’ the requirement before granting the amount, the Election Commission does not necessarily need permission from the government for its spending.⁵⁸

In line with the scheme of the original Constitution of 1972, a secretariat under the direct control of the Election Commission was established by the Rules of Business of the government. However, the military ruler H. M. Ershad brought the Election Commission secretariat under the office of the president by amending the Rules of Business in 1984. The independent Election Commission thereby was subjected to the direct control and interference of the political government; unfortunately, this continued even after the 1990 democratic upsurge. Instead of making it independent, the Commission secretariat remained attached to the prime minister’s office. The secretary to the Election Commission was appointed on deputation from the prime minister’s office. The secretary remained accountable to the prime minister; in turn, others in the Commission secretariat remained accountable to the secretary, the administrative head of the Commission. Therefore, the system awkwardly placed the CEC and other commissioners at the top of an election administration that they did not govern. In 2008, the High Court Division in *Kazi Mamunur Rashid v. Government of Bangladesh* ordered the government to free the Election Commission from executive control.⁵⁹ Relying on *Masder Hossain v. Secretary, Ministry of Finance*⁶⁰ and *Idrisur Rahman v. Shahiduddin Ahmend*,⁶¹ the Court ordered the government to frame rules for separating

⁵⁷ *Ibid.*, Article 118(3), Clauses (a) and (b).

⁵⁸ The Election Commission Secretariat Act of 2009, Sections 7(2) and 16.

⁵⁹ *Kazi Mamunur Rashid v. Government of Bangladesh*, 28 BLD (2008) (HCD) 87.

⁶⁰ In *Masder Hossain v. Secretary, Ministry of Finance*, 18 BLD (HCD) 558, and *Secretary, Ministry of Finance v. Masder Hossain*, 52 DLR (1999) (AD) 82, the Supreme Court of Bangladesh issued *mandamus* on the government to have the president frame rules under his Article 115 power to separate the subordinate judiciary from the executive and establish a separate judicial service commission.

⁶¹ In *Idrisur Rahman v. Shahiduddin Ahmend*, 4 MLR (1999) (HCD) 199, the appointment of a Class I Executive Magistrate to the post of Chief Metropolitan Magistrate was challenged

the Election Commission secretariat from the prime minister's office. The Court held that, read together, Articles 118(4) and 126 of the constitution imposed a positive obligation on the government to strengthen the secretariat and allow it to function freely and independently.⁶² The president then promulgated the Election Commission Secretariat Ordinance of 2008, which later became the Election Commission Secretariat Act of 2009. The 2009 Act provided that the Commission secretariat would not be under the administrative control or supervision of any ministry, department, or division of the government and that overall control of the secretariat would remain with the CEC.⁶³

It is unfortunate that the constitutional scheme of an independent Election Commission has not been translated into a reality. The institutional prestige and stature of the Commission has been undermined by the tendency of those in power to conceive of it as a legitimizing institution that provides a means by which favorable political arrangements could be sustained.⁶⁴ Ruling parties have developed technical excuses to refuse the CEC's salary when they do not support him.⁶⁵ Members of the Commission are seen in the corridors of

on the grounds that before his appointment, the president did not consult the Supreme Court per Article 116 of the constitution. The government attorney argued before the Court that in the absence of a separate judicial service commission, the president was left with no mechanism whereby he could consult the Supreme Court. Holding the consultation a mandatory constitutional obligation, the Court observed: "If the fact is that the President could not consult the Supreme Court for want of mechanism, then the President, being authorized by Article 115 of the Constitution itself to frame rules to carry out the mandates, is required to take immediate steps for framing necessary Rules (para. 7)."

⁶² Supra note 59, per Justice Mammun Rahman, para. 24.

⁶³ Supra note 58, Sections 3(2), 5(1), 6(2), and 14.

⁶⁴ The disturbing trend, although it occasionally received judicial attention, has gone largely unchecked. Occasional enthusiasm on the part of the judiciary (see footnotes 65 and 66) has been outmoded at times by judicial indifference toward the executive tendency to interfere with the Commission's activities (e.g., *Bangabir Kader Siddiqui v. Bangladesh*, 54 DLR (AD) 64, in which the Ministry of Law's acting contrary to the Commission's requirement was condoned on trifling technical grounds) and also by the self-imposed inertia of the Commission itself in exploring the alternatives of capacity development. Therefore, although the celebrated Voter's Right to Information judgment (*Abdul Momen Chowdhury v. Bangladesh*, (HCD) (2006) confirmed in *Md. Abu Safa v. Abdul Momen Chowdhury and Others*, 5 ADC (2008) 64) succeeded in creating an amendment in the Representation of the People Order of 1972 requiring the candidates to disclose eight kinds of information, it failed in empowering the voters with the disclosed information. Instead of showing an active interest in publicizing that information in the January 5, 2014, national election, the Commission removed it from its Web site when embarrassing reports on ruling-party candidates started appearing in national dailies.

⁶⁵ In *CEC and Three Others v. Comptroller and Auditor General*, 57 DLR 113, the Court, consisting of Justice A. B. M. Khairul Haque and Justice Md. Miftahuddin Chowdhury, condemned the initiative as an attack on the independence of the Commission (para. 31).

the ministries to receive instructions from the executive.⁶⁶ The biggest threat to institutional independence remains the Commission’s composition. The posts of the CEC and other commissioners, like other constitutional posts, are filled by the president.⁶⁷ Because the president is to act on the advice of the prime minister, the political executive enjoys the sole privilege of appointment. Almost all appointments to the Election Commission until 2010 were overwhelmingly political. The experiences of 2006 were the worst. While the country was faced with serious doubts regarding the credibility and neutrality of the then-CEC, Justice M. A. Aziz, he decided to prepare a fresh electoral roll – a decision from which two other Election Commissioners dissented forcefully. Being outnumbered, Aziz refused to call a meeting of the Commission until the four-party alliance government appointed three more commissioners to ensure a majority for him. Simply stated, he packed the Election Commission. One of the new members was the secretary of the Election Commission, who had played a controversial role during the previous national election through which the Bangladesh Nationalist Party (BNP) government came to power and who was publicly condemned by the previous CEC, M. A. Sayeed.⁶⁸ The other two were retired Supreme Court judges with a strong bias toward the ruling party. Suddenly, the Election Commission became crowded with politically divided commissioners; discredited, all had to subsequently resign.

Thereafter, the Grand Alliance came to power and fixed the number of appointed Election Commissioners to a maximum of four.⁶⁹ Another important recent development has been the appointment of a search committee composed of the three senior-most judges of the Appellate Division to recommend names to the president for appointment to the Election Commission. The current Commission was formed through this process on an ad hoc basis and by the individual advice of the prime minister; therefore, it this does not legally institutionalize the process. In a country in which constitutional conventions hardly exist, there is every possibility of precedent being ignored by future governments. Furthermore, the appointment of Commission staff remains problematic. Constitutionally, the staff is appointed by the

⁶⁶ In *Masood R. Sobhan v. The Election Commission &ors*, 28 BLD (HCD) 317, Justice Abdur Rashid openly condemned the visit of the then-CEC to the Secretariat of the government by quoting ‘Rule of Law and Supremacy of the Constitution shall remain in axioms in the Constitution unless the constitutional functionaries are seen respecting them and following them in their words and actions’ (para. 45).

⁶⁷ *Supra* note 18, Article 118(1).

⁶⁸ M. Sakawat Hussain, *Electoral Reform in Bangladesh 1972–2008* (Dhaka: Palok Publishers, 2012), 63.

⁶⁹ *Supra* note 18, Article 118(1), as amended by the Constitution (Fifteenth Amendment) Act of 2011, Section 35.

president ‘as per the requirements of the Commission’.⁷⁰ The ‘requirement of the Commission’, however, must not be confused with an indication of its strength. It is, at best, a numerical requirement that the Election Commission places before the president. The Commission must draw a large staff from the civil administration, including those from law-enforcement agencies, and that administration usually remains within the control of the ruling party. Hence, this remains ‘the biggest problem’ of the Commission in conducting fair elections.⁷¹ For this reason, there is little faith among opposition parties and others that the Election Commission alone, as currently structured, is institutionally capable to conduct a free and fair election. For them, some type of caretaker government composed of either Supreme Court judges or another nonpartisan body is the only possible option.

ELECTIONS IN BANGLADESH: A HISTORICAL OVERVIEW

Elections in Bangladesh commenced with the first election to parliament on March 7, 1973. The Awami League (AL), the party that led the nation toward independence, received a clear majority by securing 292 of the 300 seats. Although the result was not unexpected, concerns surfaced about the capacity of the Election Commission to conduct free and fair elections.⁷² There were allegations that ruling-party hopefuls had exceeded limits, capturing polling centers and driving the opposition out of polling booths.⁷³ There was a ‘sea change’ in the political landscape of Bangladesh in the next few years. The Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, was brutally killed on August 15, 1975. Khondkar Mustaq Ahmed usurped the presidency, suspended the constitution, and imposed martial law. Three months later, he was forced to abdicate in the face of a counter coup. The then-Chief Justice of Bangladesh, A. S. M. Sayem, took charge of the presidency and martial-law administration. Subsequently, Major Ziaur Rahman, the then-Chief of Army Staff, took office as president on April 20, 1977, because of the ‘deteriorating health’⁷⁴ condition of Chief Justice Sayem. Zia arranged a referendum ‘unknown to the Constitution or any other law of Bangladesh’⁷⁵ to obtain the

⁷⁰ *Ibid.*, Article 120.

⁷¹ Sakawat Hussain, *Electoral Reform*, 51.

⁷² Fazl Huq, “Constitution Making,” 75.

⁷³ Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (Dhaka: University Press Limited, 1983), 143–4.

⁷⁴ *Bangladesh Italian Marble Works Ltd. v. Bangladesh*, 14 BLT (2006) (HCD) (Spl) 1, p. 91.

⁷⁵ *Ibid.*, p. 86.

‘confidence’ of the people. As the poll suggested, almost 99 percent of the people of Bangladesh had ‘confidence in Major General Ziaur Rahman and in the policies and programs enunciated by him’.⁷⁶ Meanwhile, the country adopted a presidential form of government and presidential elections were scheduled for June 1978. Zia, the Chief of Army Staff and a nominated president until then, put forth his candidacy. The Chief of Army Staff, a servant of the Republic, running for a political post of presidency appeared odd to some, and the legality of Zia’s candidacy came before the High Court Division in *A. K. Mujibur Rahman v. Returning Officer &ors* (1979).⁷⁷

The operative Regulations No. 291–93 of the Army Regulations Volume I (Rules) positively barred a military officer from being a candidate for any elected post, including that of president. Zia wanted to be president but, at the same time, he could not afford to leave the command of the army. Zia cleverly left the post of army chief but kept the post vacant. The Martial Law Proclamation of 1977 then was amended to provide that the Supreme Command of the Defence Forces would be vested in the Chief Martial Law Administrator (CMLA).⁷⁸ Zia thereby remained Commander-in-Chief of the Defence Forces in his capacity as the CMLA. Thereafter, another amendment to Army Regulations 291–93 provided that an officer of the Bangladesh Army holding the post of CMLA would be eligible to compete in presidential elections because the presidency was ‘not an office of profit.’ Now Zia commanded the army but he was not the army chief and therefore was eligible for the presidency. Before the Supreme Court, the government attorney argued that because the position of the Chief of Army Staff was vacant and General Zia was the Commander-in-Chief, he was neither holding any office of profit nor was he subject to military law per the amended Army Regulations.⁷⁹ The petitioner’s argument about the ‘sheer hierocracy’⁸⁰ behind the entire amendment process was not given any consideration. The Court, facing a ‘force-based or authoritative’ military ruler’s case, simply found no *mala fide*.⁸¹ The Division Bench of Justices Shahabuddin Ahmed and Abdul Matin Khan Chowdhury

⁷⁶ *Ibid.*, p. 123.

⁷⁷ 31 DLR (1979) (HCD) 156.

⁷⁸ *Ibid.*, para. 5. Because the amended provision was not placed before the Returning Officer earlier, the petitioner claimed that perhaps this amendment was made just before hearing of the writ petition through a back-dated Gazette Notification.

⁷⁹ *Ibid.*, para. 6.

⁸⁰ *Bangladeshi Italian Marble Works Ltd. v. Bangladesh*, 14 BLT (2006) (HCD) (Spl) 1, p. 238.

⁸¹ Ridwanul Hoque (2009), “The Recent Emergency and the Politics of the Judiciary in Bangladesh,” *National University of Juridical Sciences Law Review* 2: 189.

held that it was ‘for the President and CMLA’ to decide who should be Commander-in-Chief.⁸² In the ensuing election, Zia received 76.73 percent of the vote to become a ‘democratic’ president.

The second parliamentary election was held in February 1979. A few months before the election, Zia managed to form the BNP. Capitalizing on the uneven playground, the BNP secured 207 of the 300 seats and 41 percent of the total votes cast. Zia had his martial-law regime legitimized through the Constitution (Fifth Amendment) Act of 1979 passed by the newly convened second parliament. He left the military and appointed H. M. Ershad as the Chief of Army Staff. It is ironic that after leaving the military, Major Zia would not survive for more than two years; he was assassinated in May 1981 by a dissident military faction. Justice Abdus Sattar, the then-vice president, became the acting president and put forth his candidacy in the presidential election promised after Zia’s assassination. Because the constitution did not permit a person holding an office of profit in the service of the Republic to contest the election, it was amended to provide that the post of vice president was not an office of profit.⁸³ Crudely stated, the constitution was amended to ensure the candidacy of a particular candidate. The result was as expected – but Justice Sattar could not continue for long.

Martial law was imposed for the second time by the then-Chief of Army Staff Lieutenant General H. M. Ershad, who ousted Sattar’s government on March 24, 1982. Ershad followed his military predecessor Zia’s approach. First, he launched a catch-all type of government party (i.e., the Jaty Party [JP]) by co-opting some well-known politicians. A ritual of political legitimation then was observed by arranging a referendum on March 21, 1985. Ershad announced that through the referendum, he would assess to what extent the people supported his policies undertaken since March 1982. The referendum, however, would not be limited to a mere opinion poll. A positive verdict would allow Ershad to ‘continue as President of the country’. Although political parties openly asked citizens to ‘resist’ the referendum, the Election Commission claimed a voter turnout of 72.14 percent, with 94.14 percent affirmative votes for Ershad’s continuation. Independent local and foreign observers, however, found the figure inflated and affirmed a maximum voter turnout of 20 percent.⁸⁴

Ershad then arranged the third parliamentary election on November 10, 1986, in which the JP secured a decisive victory by obtaining 51 percent of the

⁸² *Supra* note 79.

⁸³ The Constitution (Sixth Amendment) Act of 1981, Section 3.

⁸⁴ Peter J. Bertocci (1986), “Bangladesh in 1985: Resolute Against the Storms,” *Asian Survey*, 26 (2): 229. Available at [jstor.org/stable/2644458](https://www.jstor.org/stable/2644458) (accessed July 23, 2013).

total seats and 42 percent of the votes cast. The JP secured a majority with 83.7 percent of the total seats in parliament yet again in the fourth parliamentary election held in 1988.⁸⁵ The scale of rigging in the 1986 elections, however, surpassed all previous records. The 'musclemen' of Ershad's JP captured many polling stations and terrorized voters. The extent of rigging led a three-member British observer team to describe the election as 'a tragedy for democracy' and a 'cynically frustrated' exercise.⁸⁶ Ershad resigned from his post as army chief, 'joined' the JP, and proceeded toward a total democratization by scheduling presidential elections for October 15, 1986. Political parties participating in the third parliament election a few months earlier decided not only to boycott but also to resist the election. A general strike was called and enforced on Election Day; Ershad was little affected. As the Election Commission found, he secured 83.57 percent of the 54.23 percent of votes cast. Whereas the opposition parties claimed less than a 3 percent voter turnout, independent observers put the figure around 15 percent.⁸⁷ With a recently established servile parliament at his disposal, Ershad successfully completed the transformation of his military rule into a 'constitutional' rule. On November 10, 1986, the third parliament passed the Constitution (Seventh Amendment) Act to legitimize Ershad's martial-law period of March 1982 to November 1986.

It is interesting that subsequent elections did not increase Ershad's political legitimacy. Instead of weakening the antiregime movement, elections intensified it. By 1987, the three major political blocks of Bangladesh led by the AL, the BNP, and leftist parties formed a strong alliance for unseating Ershad and restoring democracy. Following clashes and riots, Ershad dissolved the third parliament after only two years of its tenure. New elections to the fourth parliament were declared on March 3, 1988. With no major opposition parties participating, a Combined Opposition Party (COP) of seventy-six politically unknown parties opposed Ershad's JP. With 68 percent of votes cast, the JP won 251 seats. The COP won 19 seats with 12.63 percent of the votes cast. The Election Commission claimed a voter turnout of 54.93 percent, which boycotting opposition parties simply ridiculed by claiming a turnout of less than 1 percent.⁸⁸ The 1988 election deepened Ershad's legitimacy crisis. After a year of turmoil and political protests, the opposition parties signed a joint

⁸⁵ Nizam Ahmed, "Bangladesh," in D. Nohlen, F. Grotz, and C. Hartmann (eds.), *Elections in Asia: A Data Handbook* (Oxford: Oxford University Press, 2001), 528.

⁸⁶ Muhammad A. Hakim, *Bangladesh Politics: The Shahabuddin Interregnum* (Dhaka: University Press Limited, 1993), 27.

⁸⁷ Samina Ahmed (1991), "Politics in Bangladesh: The Paradox of Military Intervention," *Regional Studies*, 9 (1): 58.

⁸⁸ Hakim, *Shahabuddin Interregnum*, 30.

declaration on November 19, 1990, that outlined a formula for the transition from autocracy to democracy.⁸⁹ The opposition parties vowed not to take part in any further elections under Ershad. He was given an ultimatum to resign and hand over power to a ‘caretaker government’ that would oversee the transition to a ‘sovereign parliament’ elected through a free and fair election.

In the wake of the 1990 mass upsurge, on the morning of December 6, 1990, Ershad appointed the then-Chief Justice Shahabuddin Ahmed as vice president, as demanded by opposition parties. Ershad resigned the same evening. The Chief Justice-cum-Vice President then became the president, formed a government, and remained in power during the fifth parliamentary election held in February 1991.

EMERGENCE OF THE CARETAKER GOVERNMENT MODEL

The government of Ahmed was popularly termed a ‘caretaker government’. In the February 1991 election, the BNP won 133 seats in parliament and formed a coalition government with the Jamaat Islami (JI), which won 18 seats.⁹⁰ This was perhaps the most free and fair election that the people of independent Bangladesh had hitherto seen. Ahmed returned to his original post of chief justice and his government was legitimized by the Constitution (Eleventh Amendment) Act of 1991.

The nonpolitical government holding the 1991 election became a model for future elections. The year 1994 marked another eventful year in the history of Bangladesh. Three major opposition parties – the AL, the JP, and the JI – alleged that the March by-election in the Magura-2 constituency was unfair due to the BNP government’s interference and use of government machinery to win the seat. The Magura-2 seat, vacated due to a death, had been occupied by the AL for several preceding terms. Its loss to the BNP led to complaints of large-scale vote rigging. The opposition parties complained that there could no longer be any free and fair elections under BNP governments and declared that they would not participate in any future election except under a caretaker regime.⁹¹

Bangladesh then witnessed continuous boycotting of the parliament by opposition parties pressing their demands for a constitutional amendment that

⁸⁹ Fakhruddin Ahmed, *The Caretakers: A First-Hand Account of the Interim Government of Bangladesh (1990–1991)* (Dhaka: University Press Limited, 1998), 12–13.

⁹⁰ Zillur R. Khan (1997), “Bangladesh’s Experiments with Parliamentary Democracy,” *Asian Survey*, 37 (6): 581. Available at jstor.org/stable/2645531 (accessed February 2, 2013).

⁹¹ Golam Hossain, “Bangladesh in 1994: Democracy at Risk,” *Asian Survey*, 35 (2, 1995), 172. Available at jsot.org/stable/2645027 (accessed June 25, 2013).

would provide for at least the next three national elections being held under a neutral caretaker government like that of 1991. A government taking charge in a time of transition was seen as the only cure for electoral irregularities. The controversial caretaker system was to be formed with judges from the Supreme Court. The ruling party initially paid little heed to the demand and proposed to empower the Election Commission instead. Because the proposal was rejected outright by opposition parties, the BNP government moved to hold a one-party election for discharging the ‘constitutional obligation to sustain a legitimate administration’ and secured 92.7 percent of the total seats.⁹² Elections could not be held in at least eleven constituencies due to violence and boycotts by the combined opposition; thereafter, under fierce pressure from the opposition, the government pushed through the Thirteenth Amendment to the Constitution that introduced the caretaker system.⁹³

The Constitution (i.e., Thirteenth Amendment) Act of 1996 was passed on March 26, 1996. It provided for a non-party caretaker government, which – acting as an interim government – would render all possible aid and assistance to the Election Commission for the fair conduct of parliamentary elections. The non-party caretaker government, composed of the chief adviser and not more than ten other advisers, would be collectively responsible to the president. The typical process for forming a caretaker government involved the president appointing the chief adviser and other advisers within fifteen days after dissolution of the parliament. Between the dates on which the parliament stood dissolved and the chief adviser was appointed, the prime minister and his Cabinet in office immediately before the dissolution would continue to hold office.⁹⁴

Article 58C identified the categories of those eligible for the post of the chief adviser to the caretaker government in order of precedence: (1) retired chief justices of Bangladesh, the most recent being the first on the list; (2) retired judges of the Appellate Division of the Supreme Court, the most recent being the first; (3) anyone among the citizens of Bangladesh agreed to by political consensus; and (4) as a last resort, the president assuming the duties of chief adviser in addition to his duties of the presidency.⁹⁵ The advisers to the caretaker government were to be chosen and sworn in by the president from a

⁹² M. Rashiduzzaman, “Political Unrest and Democracy in Bangladesh,” *Asian Survey*, 37 (3, 1997), 260. Available at [jstor.org/stable/2645662](http://www.jstor.org/stable/2645662) (accessed June 25, 2013).

⁹³ Nizam Ahmed (2003), “From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973–2001),” *Pacific Affairs* 76 (1): 59. Available at <http://my.ilstu.edu/~ariazi/BangladeshMonopoly.pdf> (accessed April 20, 2013).

⁹⁴ *Supra* note 18, Article 58C(2), as it stood before the Fifteenth Amendment.

⁹⁵ *Ibid.*, Article 58(C)(3)–(6).

list provided by the chief adviser.⁹⁶ The constitutionally defined ‘qualifications’ of an adviser included (1) non-affiliation with any political party or organization associated or affiliated with any political party; and (2) a written statement promising not to be a candidate for the ensuing parliamentary election.⁹⁷

The chief adviser would have the ‘status, privileges and remunerations’ of a prime minister and the advisers were treated similarly on a par with ministers.⁹⁸ The principal mandate of the caretaker government was to give the Election Commission ‘all possible aid and assistance that may be required for holding the general election of members of parliament peacefully, fairly and impartially’.⁹⁹ Other than election-related activities, the caretaker government would remain mindful of its ‘interim’ status and restrict itself within ‘the routine functions’. Except in the case of necessity for the discharge of these routine functions, it would not make any policy decisions.¹⁰⁰ The caretaker government would be dissolved on the date on which the newly elected prime minister entered office after the constitution of the new parliament.¹⁰¹

DRAWBACKS OF THE CARETAKER GOVERNMENT MODEL

Although hailed by the populace in general, the system of caretaker government headed by a retired chief justice of the Supreme Court to ‘assist’ the Election Commission in holding parliamentary elections was not regarded as a sustainable solution to the problem of electoral corruption and fraud. Indeed, this system attracted judicial attention even before its adoption through the Thirteenth Amendment of the constitution.

In 1995, the continuous and unabated abstention from parliament by political parties such as the AL, the JP, and the JI to fulfill their demands for a caretaker government was challenged with a writ of *mandamus* to attend parliament being sought against them.¹⁰² Directing parties to attend parliament, the High Court Division Bench composed of Justices Qazi Shafiuddin Ahmed and Kazi A. T. Manowaruddin rejected the caretaker system.¹⁰³ ‘Nowhere within the four corners of the constitution’ could they locate any support for such a system.¹⁰⁴ Moudud Ahmed, a boycotting member of parliament,

⁹⁶ *Ibid.*, Article 58(C)(8).

⁹⁷ *Ibid.*, Article 58(C)(7).

⁹⁸ *Ibid.*, Article 58(C)(11).

⁹⁹ *Ibid.*, Article 58(D)(2).

¹⁰⁰ *Ibid.*, Article 58(D)(1).

¹⁰¹ *Ibid.*, Article 58(C)(12).

¹⁰² *Anwar Hossain Khan v. Speaker, Jatyā Sangsad*, 47 DLR (HCD) 42.

¹⁰³ *Ibid.*, para. 41.

¹⁰⁴ *Ibid.*, para. 36.

appealed. However, before disposal of the appeal, the demand of opposition parties was conceded and the caretaker system was introduced by amending the constitution. Therefore, the appeal (i.e., *Moudud Ahmed v. Anwar Hossain Khan*) did not decide the constitutionality of the caretaker system.¹⁰⁵ The Appellate Division instead set aside the order of *mandamus* for the reasons that non-appearance and non-participation in the internal proceedings of the parliament were matters outside of its jurisdiction. Moreover, such a *mandamus* risked being unenforceable. ‘Even if an MP is compelled to attend the sitting of the Parliament, he cannot be compelled to participate in the proceedings therein. So no purpose would be served by the Court’s order and the Court ought not to make such an order at all’, the Appellate Division opined.¹⁰⁶

In 2005, the caretaker system came under major judicial inquiry in *M. Saleem Ullah*.¹⁰⁷ The Thirteenth Amendment was challenged on two grounds. First, it was contended that by introducing a government not elected by the people, the amendment destroyed the basic structure of the constitution.¹⁰⁸ Second, it was argued that the amendment violated the core separation-of-powers principle of judicial independence. Whereas Article 99 of the constitution prohibited a Supreme Court judge from holding any office of profit after retirement, the newly inserted Article 58C – which required a retired chief justice or an Appellate Division judge to be the chief adviser – violated the norms of judicial independence.¹⁰⁹ The Court rejected the petition, holding that the system of caretaker governments was introduced to ‘consolidate democracy by ensuring free and fair elections,’ which was part of the basic structure of the constitution.¹¹⁰ Rather than being a threat to democracy, the Thirteenth Amendment, the argument stated, actually enabled it. Regarding the apprehension of politicization of the judiciary and the doctrine of separation of powers, the Court decided not to ‘question, suspect or undermine the wisdom of the legislature’ in choosing judges ‘of high moral and impartial character’.¹¹¹ Matters were left to the parliament with the Court opining that ‘If anything better comes out, the legislature is free to adopt it’.¹¹²

From 1996 on, the institution of caretaker governments traveled a tortuous journey toward its ultimate demise in 2011. The fear that the system might

¹⁰⁵ *Moudud Ahmed v. Anwar Hossain Khan*, 60 DLR (2008) (AD) 108.

¹⁰⁶ *Ibid.*, para. 70.

¹⁰⁷ *M. Saleem Ullah v. Bangladesh*, 57 DLR (2005) (HCD) 171.

¹⁰⁸ *Ibid.*, para. 27.

¹⁰⁹ *Ibid.*, para. 12.

¹¹⁰ *Ibid.*, para. 34.

¹¹¹ *Ibid.*, para. 40.

¹¹² *Ibid.*, para. 93.

politicize the judiciary and impact the ideal of judicial independence was painfully realized. Anomalies with the 2006 caretaker government invited another military intervention in politics. Military rule under the guise of a caretaker government continued for two years (2007–2008). All of this finally triggered changes in judicial attitudes. With an interim government indefinitely ruling the country, a writ petition was filed. The Single Bench of the High Court Division, finding the tenure not constitutionally mandated, opined that a caretaker government ‘should not remain’ in office for an unnecessarily prolonged period.¹¹³ Another writ petition challenged the indefinite continuance of emergency by a caretaker government without holding elections within the ninety-day outer limit contemplated by the constitution for a newly elected parliament to be sworn into office.¹¹⁴ The Single Judge Bench of the High Court Division of Justice A. B. M. Khairul Haque agreed and held that the ‘state becomes non-democratic and people lose the ownership of the state’.¹¹⁵ Thus, neither an emergency nor a caretaker government could continue for an indefinite period.¹¹⁶

Ultimately, in 2011, the Appellate Division decided to invalidate the system.¹¹⁷ Although there remains the charge that the Supreme Court ‘improperly excluded the specificities of local politics,’ the Fifteenth Amendment to the constitution quickly deleted the chapter on ‘caretaker government’. This action created a political dilemma regarding future elections.¹¹⁸ To better understand this situation, it is necessary to describe four problems with the system of caretaker governments.

First, instead of ensuring a balance of power between the president and the chief adviser, the system made the nonpartisan chief adviser and his Cabinet responsible to the president who, first and foremost, was a party man.¹¹⁹ Although the constitution modeled the caretaker government in the manner of

¹¹³ *Masood R. Sobhan v. The Election Commission and Ors*, 28 BLD (HCD) 317, para. 40.

¹¹⁴ *Advocate Sultana Kamal & Others v. Bangladesh*, 14 MLR (2008) (HCD) 105, para. 167.

¹¹⁵ *Ibid.*, Justice A. B. M. Khairul Haque, para. 138.

¹¹⁶ *Ibid.*, para. 176(4).

¹¹⁷ *Abdul Mannan Khan v. Bangladesh*, Civil Appeal No. 139 of 2005. This was an appeal from *M. Saleem Ullah v. Bangladesh*, 57 DLR (HCD) (2005) 171 disposed of in 2011. While the appeal against *Saleem Ullah* decision was pending in the Appellate Division, the appellant M. Saleem Ullah died and Abdul Mannan Khan was replaced as appellant.

¹¹⁸ Ridwanul Hoque, “Constitutionalism and the Judiciary in Bangladesh,” in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds.), *Comparative Constitutionalism in South Asia* (New Delhi: Oxford University Press, 2013), 317.

¹¹⁹ Article 58C inserted in the Constitution (Thirteenth Amendment) Act of 1996 provided that the last retired Chief Justice of the Supreme Court would lead the Non-Party Caretaker Government and the ten other members of his Advisory Council would be appointed from among the citizens of Bangladesh that have no affiliation with any political party.

a parliamentary system, Article 58B (read with Articles 58E and 61) produced a type of loose diarchy between the president, who was the head of the state, and the chief adviser, who was the head of the government.¹²⁰ The most ingenious change was introduced in Article 61. During the tenure of elected government, the exercise of the supreme command of the defence services is ‘regulated by law’, which in effect vests control in the hands of the prime minister, who is the leader of parliament and the popularly elected chief of the executive. Under the amended Article 61, however, the supreme command during the caretaker government was vested absolutely in the president who would ‘administer the laws’ regulating defence services. The Ministry of Defence thereby was constitutionally taken away from the control of the chief adviser. The rationale for this is in the inarticulate premise of expansion of presidential power. Although executive power was handed over to the neutral caretaker government, the incumbent President Abdur Rahman Biswas, a BNP appointee, used all of the powers at his command to interfere with the election process whenever necessary. Hence, the emergency power, military power, ordinance-making power, and power to hold the caretaker government accountable were all vested in the president, who otherwise was a symbolic head of state of a parliamentary democracy. All of a sudden, a pseudo-presidential government with an all-powerful president emerged from nowhere to fulfill party commitments. It is interesting that the president reverts to his original weak position under the parliamentary system on the date on which a new prime minister assumes office.

Early in this evolution, the possibility of abuse of such enhanced presidential power reared its ugly head. On May 20, 1996, only three weeks before the upcoming national election, President Abdur Rahman Biswas suddenly dismissed the military chief, Major General Nasim, for his alleged failure to suspend two senior military officers who were, in his words, ‘colluding with a certain political party’. Major General Nasim claimed that he was safeguarding his colleagues who were not given a fair hearing on the allegations brought against them. Major General Mahbubur Rahman, who later joined the active politics of the BNP, was appointed the new military chief. The ousted military chief revolted and a number of army barracks around the country rallied in his favor. However, the Dhaka Brigade of the Army, which was under the direct

¹²⁰ Article 58E of the Constitution of the People’s Republic of Bangladesh states that during this period, the requirement of the president to act on the advice of the prime minister or on his prior countersignature shall be ineffective. Article 58B(2) made the caretaker government collectively responsible to the president. Per Article 61, during this period, the supreme command of the defence services vested absolutely in the president.

command of the new military chief, took the president's side. The Dhaka Brigade guarded the presidential palace, streets, and television and radio stations in Dhaka while there were reports of rebel troop mobilization toward Dhaka. The AL, the party spearheading the caretaker-government movement, condemned the president's suspicious move and demanded a public disclosure of the allegations against the senior military officials. The BNP, however, supported the president's move. It is surprising that the chief adviser to the caretaker government, Justice Habibur Rahman, was not informed of the incident.¹²¹ The president's suspicious interference in the military ranks at such a crucial juncture almost caused another military intervention in politics. It is widely believed that the president was trying to declare an emergency by dragging the military into politics, thereby postponing an election that the AL was poised to win. As a result of the wisdom and calm of the chief adviser, Major General Nasim was persuaded the next morning to hand over the office to his newly appointed successor. Justice Habibur Rahman later wrote about the sleepless night of May 20, when he persuaded the military chief to put his rebellion to rest and allow the caretaker government to conduct the election.¹²²

Second, the amended constitution provided the scope for a partisan president to manipulate the appointment of the chief adviser of a supposedly nonpartisan caretaker government – and even usurp it for himself.¹²³ In October 2006, it appeared (in the words of one commentator) as an 'Aladdin's Lamp'¹²⁴ in the hands of the president. With the first two governments of Justice Habibur Rahman (1996) and Justice Latifur Rahman (2001), there had been considerable consensus over their appointment as chief advisor. However, matters became complicated in the third instance when the then-ruling four-party alliance government decided to amend the constitution to ensure that someone 'acceptable' to it assumed office.¹²⁵ Accordingly, Justice K. M. Hassan, the then-last retired Chief Justice of Bangladesh, who had a previous

¹²¹ For a brief account of the incident, see Amena Mohsin, "Bangladesh: An Uneasy Accommodation," in Muthiah Alagappa (ed.), *Coercion and Governance: The Declining Political Role of the Military in Asia* (Stanford, CA: Stanford University Press, 2001), 223–4.

¹²² For a personal account of the then-chief adviser Justice Habibur Rahman, see Justice Habibur Rahman, *The Burden of Caretaker Government* (in Bangla) (Dhaka: Prothoma Publications), 428–31.

¹²³ Article 58C(6) inserted by the Constitution (Thirteenth Amendment) Act of 1996.

¹²⁴ Sinha M. A. Sayeed, "Article 58C(6): Aladdin's Lamp? Amendment Needed for the Sake of Democracy," *The Daily Star, Law and Our Rights*, November 25, 2006.

¹²⁵ In the Fourteenth Amendment, Article 96(1) of the constitution was amended to increase the retirement age of Supreme Court judges. It was done allegedly to ensure that Justice K. M. Hasan assumed the office of chief adviser during the upcoming national election.

political association with the BNP, was chosen for the post. Complications arose when Justice Hassan, forced by the political movement of the opposition parties, expressed his unwillingness to assume the office. The president bypassed all other constitutional options and assumed the post himself, leading to the worst of the non-party caretaker governments. At the insistence of the military, an emergency was declared on January 11, 2007. Another caretaker government was formed and it continued for two years – even though the constitution ‘did not contemplate its duration beyond 90 days’.¹²⁶ In fact, including the provision for the possibility of a party president assuming the functions of the chief adviser in the Thirteenth Amendment was a legal blunder. It was an outright rejection of the concept of the neutral caretaker government introduced by the Thirteenth Amendment – which, of course, was devised in the wake of chronic mistrust and political parties doubting one another.

Third, the Thirteenth Amendment authorized the caretaker government to carry out only routine functions of the government. However, it was not barred in the discharge of such functions from making policy decisions in the case of necessity.¹²⁷ Nevertheless, the determination of ‘necessity’ – especially in the realm of foreign affairs, finance, and war – appeared hazy and allowed for the exercise of unaccountable discretion.¹²⁸ The concept of ‘routine function’ has played to both the advantage and disadvantage of different caretaker governments. Under the guise of ‘necessity’, the successive caretaker governments indulged in clearly extra-constitutional activities, such as forcing the Election Commissioners to resign under pressure¹²⁹ and amending the principal electoral law – namely, the Representation of the People Order of 1972.¹³⁰

¹²⁶ *Masood R. Sobhan v. The Election Commission and ors*, 28 BLD (HCD) 317, para. 40.

¹²⁷ *Supra* note 18, Article 58D(1), as inserted by the Constitution (Thirteenth Amendment) Act of 1996.

¹²⁸ Sinha M. A. Sayeed, “Non-Party, Neutral Caretaker Government Powers of President and Chief Adviser,” *The Daily Star, Law and Our Rights*, October 21, 2006.

¹²⁹ It was noted that the 1991 caretaker government of Justice Shahabuddin Ahmed ‘requested’ the CEC Justice Sultan Hossain Khan to resign and he obliged. The 1996 caretaker government of Justice Habibur Rahman ‘requested’ the CEC Justice Abdur Rouf to resign and he also obliged. The 2001 caretaker government of Justice Latifur Rahman caused the president to invite two of the election commissioners to a ‘tea’ and requested them to resign. The commissioners, however, declined. The 2006–2007 caretaker government also invited the CEC Justice M. A. Aziz and his colleagues to ‘tea’ and caused them to resign. See Md. Nazrul Islam (2013), “Non-Party Caretaker Government in Bangladesh (1991–2001): Dilemma for Democracy?,” *Developing Country Studies*, 3 (8): 122–3. Available at iiste.org/Journals/index.php/DCS/article/download/7066/7217 (accessed October 25, 2013).

¹³⁰ It is disturbing that almost all of the electoral reforms sponsored by the civil society and citizen groups were put forth and pressed on the caretaker governments. It was taken for granted that the political governments would not bring or be persuaded to bring amendments to the Representation of the People Order of 1972. Therefore, all of the 1991, 1996, 2001,

Again, on the excuse of a 'routine' mandate, the chief adviser to the caretaker government of 1996 was prevented from knowing the causes of the military crisis that almost toppled his government. Also, immediately after the 9/11 terrorist attack on the United States, the 2001 caretaker government of Justice Latifur Rahman instantaneously granted the U.S. Security Forces an unconditional license to use the land, air, and sea of Bangladesh for purposes of its 'war against terrorism'. How could an unelected, apolitical interim government with a mandate simply to supervise elections decide on such a fundamental issue regarding the sovereignty of the country, particularly when there was no legislature to deliberate on the matter? Furthermore, the 2001 caretaker government's initiative to separate the judiciary from the executive through executive order was perceived by many as beyond the constitutional limits of its authority.

Complexities peaked during the tenure of the 2007 caretaker government, which continued for a period well beyond that contemplated by the constitution. There was considerable ambiguity on the reasonable duration for which a caretaker government could exercise routine functions if parliamentary elections were delayed because of war or an act of God, such as a natural calamity or a manmade disaster such as that in October 2006.¹³¹ The military-backed caretaker government of 2007 undertook a wide range of forced 'reforms', including an anticorruption drive; controversial reforms in judiciary; and various levels of changes in the administration, police, and autonomous bodies such as universities, the Human Rights Commission, the Anti-Corruption Commission, and the Information Commission. In the extreme, the unelected caretaker government proposed and passed two annual budgets, levied taxes, and incurred expenditures without any parliamentary approval.¹³² Overnight change was sought in the political landscape, part of which was that a 'minus-two

and 2007 caretaker governments commenced their mission with a long list of amendments in the 1972 law that included, among others, enforcement of a ceiling on the maximum allowable election expenses and disqualification of candidates with criminal records. The successive caretaker governments therefore were hailed for these necessary 'routine' works; the political governments next coming to power unhesitatingly scrapped those reforms. The trend is 'disturbing' because it permanently labels the political forces as nonprogressive and encourages the people not to expect much from them. This negative impetus discouraged the representative elements from bothering with reform issues, thereby leading the country toward a reduced democracy in which the bureaucratic and technocratic elements consider themselves to be the rightful claimant of occasional powers to put the country on the 'right track'. See Villoro Luis, "Which Democracy," in *Democracy: Achievements and Principles* (Geneva: Inter Parliamentary Union, 1998), 96–9.

¹³¹ M. A. Sinha, "Non-Party, Neutral Caretaker Government."

¹³² Mashihur Rahman, "Budget, Ordinance and Constitutional Government," *Dhaka Courier*, May 11, 2007; 13.

formula¹³³ was about to be implemented by forcing the leaders of the two major political parties (i.e., Sheikh Hasina and Khaleda Zia) into exile. The military lobby backing the ‘caretaker’ government continued to call for a major restructuring in the constitutional fabric.¹³⁴ Because this also failed, the military-backed ‘caretaker’ government eventually was compelled to schedule elections in December 2008 and hand over power to the elected civilian government. However, a total of 117 ordinances promulgated by this caretaker government addressed issues not even remotely connected to a free and fair election.¹³⁵

The judicial responses to some of these ordinances were inconsistent and contributed to fostering further confusion.¹³⁶ The Supreme Court scrapped an ordinance dealing with licensing of the marriage registrars¹³⁷ on the grounds of there being no necessary and proximate relation¹³⁸ with the government’s ‘limited mandate of holding a national election’.¹³⁹ Another of the caretaker government ordinances regulating the appointment of Supreme Court judges was challenged in 2008. The petitioner argued that the ordinance regarding a policy issue such as appointments of High Court Division judges was not within the government’s mandate. It was argued forcefully by the attorney general that during the caretaker regime, Article 93 (i.e., Ordinance Making Power of President), coupled with Article 58E (i.e., the president’s freedom from complying with the prime minister’s advice), transforms the legislative power of the president into an ‘exclusive and inherent’¹⁴⁰ power. Hence, the president during this time could not be barred from formulating ‘legislative policy’.¹⁴¹ Had this argument been accepted, the ‘routine-function’ mandate essentially would be discarded. The judges constituting the bench were divided. Justice

¹³³ Kazi S. M. Khasrul Alam Quddusi (2013), “Elections in Bangladesh: Who after Caretakers?” *Social Action*, 63: 272.

¹³⁴ For a brief introduction with the constitutional thoughts of Moin U. Ahmed, the then-military chief, see Harun Ur Rashid, “New Democratic Political Order in Bangladesh: Chief of Army’s Message.” Available at sydneybashi-bangla.com/Articles/Harun_New%20Democratic%20Political%20Order%20in%20Bangladesh.pdf (accessed October 28, 2013).

¹³⁵ M. Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh* (Dhaka: Northern University Bangladesh, 2010), 409.

¹³⁶ *Pirjada Syed Shariat Ullah v. Bangladesh*, 61 DLR (2009) (HCD) 647; *Idrisur Rahman v. Bangladesh*, 60 DLR (2008) (HCD) 714. Other related instances include *M. Shamsul Hoque and Ors v. Bangladesh*, W/P No. 4300 of 2008, and *suo moto* Rule 5 of 2008 that declared the Contempt of Court Ordinance 2008 unconstitutional.

¹³⁷ *Ibid.*, *Pirjada Syed Shariat Ullah*, para. 6.

¹³⁸ *Ibid.*, para. 63.

¹³⁹ *Ibid.*, para. 49.

¹⁴⁰ *Supra* note 136, *Idrisur Rahman*, para. 29.

¹⁴¹ *Ibid.*, para. 141.

Abdur Rashid held that during a caretaker government, the president could not acquire any new powers.¹⁴² By constitutional convention, the president was obliged to act on the advice of the caretaker government,¹⁴³ and such a government could not advise the president beyond its own mandate. Justice Nazmun Ara Sultana, however, held that during the period of a non-party caretaker government, the president could promulgate ordinances containing policy decisions if that became ‘urgently necessary for the discharge of routine function’ of the caretaker government.¹⁴⁴ For him, appointment of judges to the Supreme Court was a routine function.¹⁴⁵ Faced with the division, some called for accepting the caretaker system as a ‘curse of democracy’ with its inherent paralysis as long as it survived.¹⁴⁶

Fourth, had a situation of war arisen during a caretaker government, the president – by the authority of Article 74 – could call the recently dissolved parliament back into session.¹⁴⁷ The reconvened parliament may enact laws indefinitely extending its tenure. This is subject only to a condition that the tenure may not be extended beyond one year by a single legislation and beyond a maximum six-month period after the termination of war.¹⁴⁸ It is important to note that this uncertainty regarding tenure is not the only concern. The Thirteenth Amendment added to the concern by ambiguously providing in Article 58A that constitutional provisions relating to the prime minister and his Cabinet ‘shall apply’ notwithstanding any provision of a caretaker government.¹⁴⁹ What could this mean? A natural interpretation bolsters the assumption that the chief adviser and his caretaker government would resign and the immediate past prime minister and his Cabinet would resume office. In this situation, the election arrangements are supposed to be halted.

This is not unanimously agreed to, unfortunately. As stated previously, the ruling party – while reluctantly conceding the demand for caretaker government in 1996 – was more committed to its short-term interest of returning to power through every possible means than to prescribe an objective solution to a constitutional crisis. Unfortunately, the lawyers and academia in

¹⁴² *Ibid.*, para. 94.

¹⁴³ *Ibid.*, para. 95.

¹⁴⁴ *Ibid.*, para. 144.

¹⁴⁵ *Ibid.*, para. 146.

¹⁴⁶ Mizanur Rahman Khan, “Validity of Ordinance: The Judgment of High Court Division Is Misleading” (in Bangla), *The Daily Prothom Alo*, July 17, 2008.

¹⁴⁷ *Supra* note 18, Article 72(4).

¹⁴⁸ *Ibid.*, Article 72(3).

¹⁴⁹ *Ibid.*, Article 58A as inserted by the Constitution (Thirteenth Amendment) Act of 1996.

Bangladesh – deeply and roughly divided along political lines – also developed a strong tendency to indulge in selective interpretive engineering that serves the interests of their respective political leanings.¹⁵⁰ Whereas supporters of outgoing governments forcefully argue for a return of the previous government and parliament, those sympathetic to opposition parties are reluctant to accept this apparently clear meaning. It has been argued that the recall of parliament would not invite the immediate past prime minister and his Cabinet to power.¹⁵¹ At best, they could sit in parliamentary sessions like all other members of the parliament. The caretaker government continues.¹⁵²

If this interpretation is accepted, only Article 74 would be complied with and Article 58A simply would be rendered nugatory. Additionally, such an interpretation destroys the very purpose of recalling parliament. When parliament is called back to exercise control over the budget and conduct of war, the existence of a caretaker government responsible to the president and not to the parliament does not serve any real purpose. Whereas one judge of the Appellate Division has accepted the probability of the outgoing prime minister resuming office,¹⁵³ another judge has opined that the caretaker government also would continue in office. It is interesting that this judge was unsure of the constitutional justifications for ‘acts, deeds, things and transactions’ of the caretaker government relating to the affairs of state.¹⁵⁴

Other than these major defects, the scale of politicization of the judiciary caused by the system of caretaker governments undermined the confidence of the people in the Supreme Court. It was against the background of these concerns that the Supreme Court invalidated the system, observing “There is, therefore, no gainsaying the fact that the system introduced by the impugned amendment [the Thirteenth Amendment] can be termed as hotchpotch system and the same violates the entire scheme of the Constitution’.¹⁵⁵

¹⁵⁰ Professor M. Shah Alam compares them with the situation of German academics and lawyers committed to the Bismarck doctrine of legality, wherein the ruler does what best suits his purpose and then hires hundreds of lawyers to justify his actions. See M. Shah Alam, “Article 58C and Assumption of Office of the Chief Adviser by the President,” *The Daily Star, Law and Our Rights*, November 11, 2006.

¹⁵¹ M. A. Sinha, “Non-Party, Neutral Caretaker Government.”

¹⁵² *Supra* note 117; per Justice Wahab Miah, p. 594.

¹⁵³ As Justice Wahab Miah stated: ‘With the summoning of the dissolved Parliament under Article 72(4)[,] Chapter II along with Article 56(4) shall automatically be revived and then the President shall have the authority to appoint the Prime Minister in exercise of his power under Article 56(3) thereof from amongst the persons who were the members of the dissolved Parliament. Therefore, no anomaly and uncertainty as to the post of Prime Minister would arise’, 684.

¹⁵⁴ *Supra* note 118; per Justice Sinha, 423–4.

¹⁵⁵ *Ibid.*, per Justice Sinha, 428.

THE JUDICIALIZATION OF POLITICS

An ideal model of the separation of powers would discourage the frequent resorting to the judiciary to solve all types of problems, without reflection over whether they are suited for judicial resolution. Although the judicialization of politics has been accused of producing a ‘juristocracy’ in several countries around the world, it is unfortunate that Bangladesh remains unmindful of the dangers of excessive judicial intervention in matters of politics.¹⁵⁶ The military dictators needed judges to lend legitimacy to their otherwise illegitimate regimes.¹⁵⁷ However, continuing the legacy of a well-oiled domesticated judiciary is a profoundly disturbing trend. It seems that, other than a few exceptions, Bangladesh could not imagine the Election Commission without judges, sitting or retired, from the Supreme Court. Justice Sultan Hossain Khan, Justice Abdur Rouf, Justice A. K. M. Sadek, and Justice M. A. Aziz – all are known more as CECs than as judges of the Supreme Court. Justice Sultan Hossain Khan has been exceptionally fortunate: he was the Chairman of the Press Council in 1991 as well as Chairman of the Anti-Corruption Commission in 2003.

It is interesting that the Constitution of Bangladesh is highly critical of such practices. In Bangladesh, the concept of ‘office of profit’ plays an instrumental role in the overall scheme of separation of powers. In principle, the members of the legislature are barred from holding ‘any other office of profit’ in the service of the Republic.¹⁵⁸ The philosophy underlying this prohibition is that holding an office of profit under the state may be either incompatible with a legislator’s duty or affect his independence. Yet, because the very nature of parliamentary democracy makes the executive more a part than a counterpart of the legislature, the constitution excludes specific offices from the definition of ‘office of profit’ in Article 66(2A).¹⁵⁹ The judiciary, conversely, is placed in an entirely different position. The constitution requires that judges, during their term of office, remain above inducement and the hope for future employment.¹⁶⁰ Hence, instead of applying any ‘office-of-profit’ threshold, the

¹⁵⁶ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), 169–210.

¹⁵⁷ Muhammad Golam Rabbani, *Constitution of Bangladesh: An Easy Reader* (in Bangla) (Dhaka: Samunnoy, 2008), 139.

¹⁵⁸ *Supra* note 18, Article 66(2)(dd).

¹⁵⁹ Because of this provision, a member of parliament may hold an office such as that of prime minister, minister, deputy minister, or minister of state simultaneously with his parliamentary office.

¹⁶⁰ Shaukat Mahmood and Nadeem Shaukat, *Constitution of the Islamic Republic of Pakistan 1973* (Lahore: Legal Research Centre, 1996), 1062.

original Constitution of 1972 precluded judges from holding ‘any other office or post whatsoever’ during both the continuance of their service and after retirement.¹⁶¹ The identity and status of the Supreme Court as an independent organ of the state thereby was safeguarded. Article 99 provided that a person who has held an office as a judge would not be appointed in any other service of the Republic.

Unfortunately, this provision was retailored in 1975 by Justice A. S. M. Sayem, the then-CMLA. The embargo was partially lifted by making a retired judge eligible for appointment in ‘judicial or quasi-judicial offices’. Article 99 was redrafted to prohibit judges from accepting any ‘office of profit’ in the service of the Republic ‘not being a judicial or quasi-judicial office’.¹⁶² Introduction of the ‘office-of-profit’ criterion in place of ‘any office or post whatsoever’ for judges has unnecessarily dragged Article 66(2A) into the judiciary. The introduction of the office-of-profit criterion, commonly used to preserve legislative independence, opened a ‘Pandora’s box of political favoritism’ for judges.¹⁶³ In that case, a partisan legislator and a Supreme Court judge were subjected to the same test of disqualification, which meant the opening up of several privileges during and after tenure. The executive thus could favor an ‘acceptable’ judge of the Supreme Court to the same degree that it may shower benefits and privileges on a politician. All that was needed was to show that a particular post is not an ‘office of profit’. It is easy to keep out even lucrative and executive-sponsored constitutional posts from the purview of this disqualification through measures including a different mode of appointment to those offices, greater job security, and apparent functional independence.¹⁶⁴

Additionally, the ‘judicial or quasi-judicial’ requirement for the office in question has done nothing to provide impartiality. In *Anwar Hussain Chowdhury*, Justice Shahabuddin Ahmed contemplated that under the color of ‘quasi-judicial office’, judges may be appointed to executive offices as well, something that was to emerge as painfully true in the future.¹⁶⁵ Political life in Bangladesh has witnessed many instances of judges holding non-judicial offices such as the CEC, Chairman of the Anti-Corruption Commission, and Chairman of the Law Commission, describing them as quasi-judicial offices. In the recent past, judges have been rewarded not only after their retirement but also during their tenure in the Supreme Court. The appointment of Justice Abdur Rouf

¹⁶¹ Supra note 18, Articles 147(3) and 99.

¹⁶² This Article was amended by the Second Proclamation (First Amendment) Order of 1975.

¹⁶³ M. Jashim Ali Chowdhury (2006), “Judiciary and Dilemma of ‘Office of Profit’: A Pandora’s Box,” *The Chittagong University Journal of Law*, 11: 61.

¹⁶⁴ *Abu Bakar Siddique v. Justice Shahabuddin Ahmed*, 17 BLD (1997) (HCD) 31.

¹⁶⁵ *Anwar Hussain Chowdhury v. Bangladesh*, 1989 BLD (AD) (Spl) 1, para. 365.

and Justice M. A. Aziz as CECs during their tenure severely tarnished the image of Supreme Court judges.

In December 1990, Justice Md. Abdur Rouf, then a Judge of the High Court Division of the Supreme Court of Bangladesh, was appointed the CEC of Bangladesh.¹⁶⁶ In 1994, however, he was faced with the COP movement for his allegedly controversial and partisan role during the Magura-2 by-election to parliament. Ultimately, he was forced to resign in 1995 and was reappointed as a judge of the Appellate Division of the Supreme Court of Bangladesh. This promotion of Justice Abdur Rouf was seemingly a reward for his ideological inclination to the then-ruling party. His new appointment was challenged¹⁶⁷; although the petition failed on narrow technical grounds, his return to the Supreme Court was criticized by lawyers who boycotted his bench for several months.

Another Appellate Division judge, M. A. Aziz, was appointed CEC in 2005.¹⁶⁸ The constitutionality of this appointment was challenged in *Advocate Ruhul Quddus v. Justice M. A. Aziz*. Because his political leaning with the ruling party was known to everyone, the High Court Division on this occasion asserted that the office of the Election Commissioner was anything but quasi-judicial. It also was argued successfully before the High Court Division that all ‘constitutional posts’ – including the presidency and membership in the Cabinet, the Election Commission, the Public Service Commission, the Ombudsman, and more – would be considered ‘offices of profit’ for Supreme Court judges. The result was that they may not be appointed to these offices either during their service in or after their retirement from the Supreme Court.¹⁶⁹ This assertion is supported by the retrospective validation of Justice

¹⁶⁶ Nizam Ahmed, *Non-Party Caretaker Government in Bangladesh Experience and Prospect* (Dhaka: University Press Limited, 2004), 68.

¹⁶⁷ *Shamsul Huq Chowdhury v. Justice Md. Abdur Rouf*, 49 DLR (1997) (HCD) 176. Although Justice Abdur Rouf’s accession to the office of CEC was not challenged, this time his reappointment to the Appellate Division did not go unchallenged.

¹⁶⁸ Justice M. A. Aziz was appointed CEC while he was a sitting judge of the Appellate Division. He did not resign from his post.

¹⁶⁹ *Advocate Ruhul Quddus v. Justice M. A. Aziz*, 60 DLR 2008 (HCD) 511, para. 264. Although the term ‘constitutional post’ is not used or defined in the Constitution of Bangladesh, the political, administrative, and judicial offices specifically mentioned therein are termed so in popular use. These are the posts and offices that the tenure and the privileges of which are constitutionally secured. The persons holding these posts are not removable therefrom without either a special majority in the parliament or following a stringent process of inquiry and recommendation by the Supreme Judicial Commission. The Commission is formed under the express instruction of the president and is composed of the chief justice and two other senior-most judges of the Appellate Division of the Supreme Court of Bangladesh. Other than the constitutionally mentioned offices, some offices established by special parliamentary statutes are given the same protections as the constitutional offices, including the Anti-Corruption Commission and the Human Rights Commission.

Shahabuddin Ahmed’s accession to the presidency in 1991 while he was the incumbent Chief Justice of Bangladesh. The legislature considered the office of the president to be an office of profit for a sitting chief justice and therefore strove for a constitutional amendment to validate the extraordinary events.¹⁷⁰ Thus, it was concluded that a sitting judge of the Supreme Court is prohibited from holding any other office of profit, including constitutional posts such as adviser to the caretaker government or member of the Election Commission, during the continuance of his service in the Supreme Court. With this note of disapproval, the Court highlighted that the arrangements it found impermissible would help no one – not the Supreme Court or the executive and, above all, not the people.¹⁷¹

As noted previously, the introduction of a retired chief justice–led caretaker government struck a decisive blow to the independence of the judiciary. Since installation of the system, not a single judge has been appointed to the Supreme Court without inquiring into his political and ideological background.¹⁷² Before 1998, 101 additional judges were appointed in the High Court Division of the Bangladeshi Supreme Court, of whom only 7 were refused appointment on a permanent basis. In contrast, almost 59 percent (i.e., fifteen of thirty-one) of the additional judges appointed by the AL government coming to power after 1996 were dropped by the BNP–Jammat alliance government of 2001 – despite a positive recommendation from the chief justice regarding their performance as additional judges.¹⁷³ The BNP–Jammat government in turn appointed forty-five additional judges and confirmed forty-two.¹⁷⁴ Of the dropped three, one was removed by the president on allegations of corruption and another resigned after confirmation of an allegation that his law-degree certificate was forged. Only the third judge was not confirmed due to the absence of the chief justice’s recommendation.¹⁷⁵

Not only the additional judges and permanent judges of the High Court Division but also the judges of the Appellate Division were appointed in

¹⁷⁰ The Constitution (Eleventh Amendment) Act of 1991.

¹⁷¹ *Supra* note 169, para. 296–301.

¹⁷² *Idrisur Rahman v. Bangladesh*, 60 DLR (HCD) 714; per Justice Sultana, para. 46.

¹⁷³ *Idrisur Rahman and ors v. Secretary, Ministry of Law*, 61 DLR (2009) (HCD) 531. Usually, judges in the High Court Division of the Supreme Court are appointed on an ad hoc basis for two years. After a two-year apprenticeship, an ad hoc judge – constitutionally designated as additional judge – is ‘confirmed’ to the High Court Division by the president on a positive recommendation of the chief justice.

¹⁷⁴ One of the appointees had been enrolled as an advocate in the Supreme Court for ten years without any active practice. It is important to note that she was the daughter of a sitting legislator from the government’s party, who happened to be the chairman of a parliamentary standing committee. Two other appointees were active members (in the position of *Rokon* [financial contributors]) of *Jamaat-E-Islami*.

¹⁷⁵ *Supra* note 173, paras. 37 and 38.

line with political affiliations. Violation of seniority became the norm rather than the exception within the Appellate Division. No single chief justice was appointed without calculating the future possibility of becoming the chief adviser. As Chief Justice A. B. M. Khairul Hoque observed in *Abdul Mannan Khan v. Bangladesh*, after the introduction of the caretaker government system in 1996, the fifteenth, sixteenth, and eighteenth chief justices were promoted to the Appellate Division superseding their senior colleagues in the High Court Division, whereas the thirteenth, fourteenth, sixteenth, seventeenth, and nineteenth chief justices superseded their senior colleagues in the Appellate Division at the time of their appointment.¹⁷⁶ Such rampant politicization of judicial appointments led a Supreme Court judge to compare the process with the ‘archaic nineteenth-century rule of master and servant’.¹⁷⁷

It is under these circumstances that the Appellate Division of the Supreme Court in *Abdul Mannan* suggested the adoption of a legislature-led government during elections. The interim government, as proposed by Justice Haque, would be formed by dissolving the existing parliament, restructuring and slimming down the incumbent Cabinet, or inducting to the Cabinet new members of parliament who represented the major political parties and were not seeking reelection in the ensuing race.¹⁷⁸ This, of course, was to be a measure complementary to the fullest empowerment of the Election Commission as the key player in election affairs. The Election Commission would remain in complete control of the electoral machinery and matters ‘directly or indirectly’ involved with the process.¹⁷⁹

CONCLUSION

For almost two decades of post-autocracy Bangladesh, politics has been in search of the best possible way to ensure a free, fair, and periodic system of elections. A *sui generis* system of caretaker governments was installed with overwhelming popular support. After minor initial success, this system left an excessively politicized bureaucracy and an exposed judiciary, ultimately paving the way for another military intervention in politics. Although the system of caretaker governments has been scrapped, the reaction of opposition political forces seems to circle around the arguments of 1994, without heeding the failures and defects of the system that have been revealed over time.

¹⁷⁶ *Supra* note 117, 313.

¹⁷⁷ *Supra* note 173, per Justice S. K. Sinha, para. 206.

¹⁷⁸ *Supra* note 117, 339.

¹⁷⁹ *Ibid.*, 337.

Although a concretized formula of reforms in the Election Commission’s power structure could be devised and advocated, the opposition parties in Bangladesh remain adamant in not moving beyond the 1994 formula of conducting elections. The most recent national election of January 5, 2014 (election to the Tenth Parliament), therefore, restaged the February 15, 1996, show: another non-participatory national election. This time, however, the BNP boycotted the election and the AL secured a landslide victory. Bangladesh thereby has completed the full cycle of experiments with caretaker government. The election of February 15, 1996, led to a violent movement for initiation of a new experiment. The election of January 5, 2014, has led to a fresh round of political violence for “revival” of the already failed experiment.

Although the failure of the caretaker-government model might be attributed to the conditions of Bangladeshi politics, it also is important to note that the 1996 formula represents a failure of constitutional design and institutional imagination in two different yet important ways. First, by saddling the judiciary with the additional and onerous responsibility of overseeing governance during the election phase, this formula completely toppled the delicate constitutional balance. The initial standing of the Supreme Court in upholding this formula and observing that free and fair elections are a part of the constitutional system’s basic structure failed to realize that this was not so much a question of constitutional values as one of constitutional design.¹⁸⁰ There is no doubt that the transparency of elections is a key factor in determining the democratic character of the polity in question. However, the deeper question is: Should a body designed to address questions of a fundamentally different kind and by virtue of its role – meant to be secured from any possible political interference or influence over its functioning – be asked to ensure operational transparency through the supervision of elections? The Bangladesh experience seems to clearly teach otherwise.

The second failure is the weakening of the Election Commission, an institution designed to actually ensure on-the-ground transparency. Would it not have been better to redress the inadequacies in its functioning as soon as they began to appear instead of continuing with a system that was meant only to confer legitimacy on military rulers? By focusing on the creation of parallel institutions that seemingly matched the executive in terms of stature, Bangladesh considerably weakened the constitutional body that was originally entrusted with the task of ensuring free and fair elections.¹⁸¹

¹⁸⁰ Supra note 107.

¹⁸¹ India may serve as an interesting comparative example on this major point. On public institutions in India and on the obsession with creating new institutions rather than remedying

Whereas constitutionalism requires circumspection, caution, and a long-term vision on the part of the body politic, the short-term benefit-oriented electoral politics of Bangladesh has done considerable damage to the nation, with the judiciary being most affected. The entire saga of caretaker governments represents instability in Bangladesh's constitutional system in the deepest sense: different actors cannot agree over how the basic principle of democratic politics will be policed and how the winners and losers of the system will be determined. This task is ultimately one of implanting the democratic idea and of determining the conditions that make democracy possible. It is difficult to believe that such an enterprise is possible without political leadership; in some ways, Bangladesh is a striking example of why this dilemma cannot be resolved through the formal lens of legalism and the adoption of a particular constitutional system. It is, above all, a tragic reminder of how a formally written constitutional text might fail to nurture the values of constitutionalism. As the former Chief Justice of Bangladesh, A. B. M. Khairul Haque, stated:

It should be remembered that the ingrained spirit of the Constitution is its intrinsic power. It is its soul. The Constitution of a country is its source of power. It is invaluable with such soul. It [helps] a nation move forward. But if the said spirit is lost, the Constitution becomes a mere stale and hollow instrument. Without its life and force, it becomes a dead letter.¹⁸²

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PART III

Reactions and Responses to Instability

The Indian Supreme Court and the Art of Democratic Positioning

Pratap Bhanu Mehta

INTRODUCTION

The Indian Supreme Court has been playing a “promiscuous” role in Indian democracy. It is not only interpreting law; it also is actively promulgating values. It is not only judging the constitutionality of legislation; it also can pronounce duly enacted constitutional amendments unconstitutional. It is formulating policy. It is taking over executive functions. It is directly superintending criminal investigations. It is ordering new institutions to be set up and mandating rules by which hitherto autonomous institutions must be governed. It is holding the executive accountable. It seems that nothing is beyond the scope of its power and jurisdiction. “Promiscuous” is perhaps the right description of its role, suggesting that the role is both wide-ranging and largely at the Supreme Court’s own whims and pleasures.

How can this role be understood? Is such a role legitimate? There are two approaches to thinking about the answer to this question. Normatively, the question suggests: Is this expanded role for the judiciary justified? On one view, the question itself presupposes a theory of a proper role for the judiciary. Is there an antecedent theory by virtue of which the Supreme Court can be judged? The other approach is more modest: Is there an emerging pattern to the Court’s interventions that give it a degree of coherence? Which overall values has the Court served empirically? The idea here is not so much that the Court’s behavior is judged against an antecedent yardstick, conjured up by a jurist. Rather, it is to determine whether there is an imminent story that emerges from the Court’s interventions. This story may not conform to a jurist’s idea of what judges should do but, if a democratic society broadly accepts this role, so be it.

This chapter offers skeptical reflections on different narratives that are used to think about the proper role for a Supreme Court in a country such as India.

I argue that these narratives leave us with an impasse in terms of understanding what courts do as a matter of description. They also are too general to provide any real normative guidance. Rather, the Indian Supreme Court's behavior, its exercise of jurisdiction, and the form of arguments it deploys must be viewed in the context of a messy political democracy. It is an institution that must be mindful of the fact that it is competing with other branches of government for broader public legitimacy and that its exercise of power is an intervention in an ongoing democratic discourse. Therefore, it will not often have classic rule-of-law characteristics; rather, it will be a messy compromise driven by competing concerns, values, and a sense of its own institutional possibilities. The Court's role is more as conflict manager, and its interventions will be tailored to how it perceives that it can best manage conflict. The first section of this chapter reviews grand narratives about what legitimizes judicial power and defines its limits. The second section investigates more closely the Indian experience and a set of "accountability" cases. These cases provide examples of a Supreme Court that is not reasoning consistently or from first principles but rather is acting as a custodian of what it perceives to be the public interest. However, the Court's sense of which interests need to be weighed is determined not by legal niceties but rather by an inchoate sense of what public opinion requires. The potentiality and dangers of such an approach are examined in detail.

THE NARRATIVES OF JUDICIAL LEGITIMACY

The Strange Demise of Normativity

It must be said that for the most part, normative theories of a proper judicial role have not fared well in the recent past. In particular in India, judges give scant evidence of even being conscious of these theories, and they are not seen as binding in any sense. There is certainly a lively debate in India about judicial overreach.¹ Such a debate presupposes exactly the type of normative debate to which this discussion alludes. After all, on what grounds is a judicial intervention characterized as overreach? The challenge, however, is that there is significant skepticism about the formal distinctions as well as the principles that usually were deployed in such theories.

One way to think about proper judicial behavior is to invoke a set of formal considerations. On this view, there are certain formal restraints on judicial behavior. Judges are bound by the text of the constitution. In traditional legal

¹ See, for example, S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2003).

conceptions, courts are disciplined by a set of formal techniques, which also form the basis of authority for their decisions. Therefore, courts routinely justify their rulings on the basis of a range of techniques: appeal to the text of a constitution, precedent, and so forth. Many judgments still have this formal structure and they seem to buttress the courts' authority by reference to these techniques. They will cite constitutional texts, cite precedent, make reference to formal distinctions between law and policy, allude to separation of powers, and point to different sources of law. However, these are not so much normative constraints on judicial behavior as they are forms in which judges express their opinions.

A judge, for instance, may appeal to a constitutional text, but the truth is that constitutionalism is not so much an appeal to a higher law that binds. Rather, it is a practice that is constantly being created and re-created through the actions of concrete agents, including judges. A constitution is not a text that binds with a transparent meaning. Instead, it poses a challenge about how we handle slippages in systems of meaning, resolve ambiguities, and overcome silences – all through acts of choice. Constitutional texts are indeterminate all the way down and, in any case, judges are the creators and arbiters of meaning; they are not bound by meanings given independently of their interpretation. In the case of Indian courts, this was already evident in the late 1960s. It is best exemplified by the legacy of Justice Gajendragadkar, one of India's most respected judges, who handed down major social-reform judgments. The late P. K. Tripathi once commented that:

Possibly the most vulnerable aspect of Gajendragadkar's opinions has been the process of decimating the sanctity of the constitutional text they seem to have inaugurated . . . As is well recognized the dividing line between interpretation and alteration is tenuous and deceptive. Constitutional interpretation can take the place of constitutional amendment and the interpreter that of sovereign authority invested with the power of amending.²

Gajendragadkar's decimation of the constitutional text, Tripathi observed, accompanied major substantive innovations, and it was these innovations that assumed greater credibility in the long term. Such examples are pervasive. For instance, the Indian Supreme Court has read all types of interpretations into the "right to life," in which the meaning of the terms *right* and *life* are now entirely a function of judicial interpretation. Judges are not bound by semantics; they exercise sovereignty over meaning.

² P. K. Tripathi, "Mr. Justice Gajendragadkar and Constitutional Interpretation," in *Spotlights on Constitutional Interpretation* (Bombay: N. M. Tripathi, 1972), 99.

These instances can be multiplied: the distinction between law and policy and between making and interpreting law and treating precedents as a binding feature of the rule of law seem, for the most part to be dead. It is difficult for judges and lawyers to openly admit this for two reasons. The first, of course, is perhaps sociological: the very identity of legal reasoning, the training in law schools, and the liturgy of argumentation in court rest on alluding to these formal techniques. The more substantive second reason, however, is that many of these formal techniques were thought to be essential to court judgments that have rule-of-law characteristics. For these judgments to be “law,” there must be a formal way to express fidelity to the idea of law, to the properties that bind judges. These properties – for example, citation of texts and wrestling with precedents – must be instantiated in forms of legal justification. However, there seems to be an emerging consensus that it is difficult to make sense of judicial behavior in these formal terms. Indian judges are more openly willing to acknowledge – perhaps more than scholars – that underneath the “panoramic compass for rationalization,” there is a straightforward pragmatism about the law.³ Legal reasoning, quite simply, is more openly instrumental. It exists to serve certain broad needs and expectations of a society, and no set of formal restraints can deter how judges serve those needs and expectations. The promiscuity one perceives is a court attempting to serve society; the promiscuity being warranted by the needs of that society. The test of the legitimacy of what the court does is not its fidelity to law; rather, it is its social acceptance. What does this mean, and how would judges take it into account? The discussion returns to these questions later in this chapter.

This skepticism still may leave some residual disquiet. In American jurisprudence particularly, there is a vast body of work on the topic of “by what judges should be bound?” One reason that we have so much investment in finding meta-theories of constitutional interpretation is precisely because we want to hold onto the supposition that the authority of the law and constitution is grounded in something other than the choices exercised by judges. Should the authority of judges rest on being conduits for the congealed intentions of the founders? Should it, as Dworkin suggested, rest on their ability to act as interpreters of an indubitable moral principle that lies behind the constitution?⁴ There is a presumption that law cannot be an empty vessel, subject only to the

³ See E. W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (New York: Cambridge University Press, 2005); and Richard A. Posner, *Reflections on Judging* (Cambridge, MA: Harvard University Press, 2013).

⁴ Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1997).

untrammelled will of the lawmaker. In a way, both positivism and legal realism had the advantage of dispensing with the question of what “constrains” judges. However, in legal theory, the fear that the “emperor has no clothes” persists. We are still trying to find a principle that both constrains judges and provides a yardstick of accountability. However, the blunt truth is that this horse, at least in the Indian case, bolted the door long ago; little constrains judges other than their own judgments.

The Rise of Institutional Theories

The second line of normative critique of judicial roles takes its cue less from normative than from institutional considerations. This shifts the grounds of the debate by asking: Are courts better at performing the tasks that they do perform? On one view, the choice of institution must be based largely on empirical grounds.⁵ Whether courts can perform these functions better is a debatable matter. The success of a court often is projected by taking examples of their success and comparing it with executive failure, but it is difficult to make the case that, as an institution, it performs better. It is important to judicial authority that the courts project the claim that they can do a better job in those instances when, in fact, they do a better job. However, there is an inner tension in the articulation of this type of pragmatic approach that courts perform. On the one hand, the arguments that suggest that judiciaries may be better at performing some roles than others (e.g., protecting rights versus governing) often already have a prior normative theory of what would count as performing better. On the other hand, if it were a strictly empirical theory, the test of what works better simply might be whatever a democratic political order is willing to tolerate. “Better” here simply means what is broadly acceptable to the political culture of a society.

There is a different institutional theory of the judiciary’s role based on a normative idea of legitimacy. Waldron, for instance, was critical of the idea of judicial review, based on the idea that it is incompatible with the dignity of legislation and representative democracy more generally.⁶ This argument was subject to various critiques,⁷ but it had the singular merit of trying to

⁵ Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: University of Chicago Press, 1997).

⁶ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

⁷ See, for example, Joseph Raz (1998), “Disagreement in Politics,” 43 *American Journal of Jurisprudence* 25; and Aileen Kavanagh (2003), “Participation and Judicial Review: A Reply to Jeremy Waldron,” 22 *Law and Philosophy* 451. For a recent exchange on this issue, see

place the Supreme Court's role in the context of democratic theory. Why should society repose so much authority in "unelected" judges at the expense of representative institutions? In India, also, one of the grounds for criticizing judicial overreach has been just this. Do judiciaries, in some ways, undermine democracy?

This argument also has a parallel sociological version. Recently, Hirschl provided a powerful version in the comparative context.⁸ The claim is that there is a broad movement in liberal democracies toward enhancing the power of unelected institutions. Some scholars attribute this to the complexities of the modern administrative state,⁹ but others argue that this is one form in which middle and upper classes continue to exercise influence in the face of being challenged by democratic upsurges from below. I am not entirely persuaded that the reliance on courts (and other nonelected institutions) as institutions of governance is largely a consequence of the fact that the electoral process has seen power shift away from traditional elites. I am less persuaded by this simply because there is no evidence that a shift in structures of representation actually threatens the economic power of traditional elites. Democracy has proven to be more a mode of acculturating rather than overturning new aspirants to existing structures of power. Democracies are considerably more conservative than their defenders acknowledge.

However, this argument has one implicit standard for critiquing judicial power: the idea that judicial power must be assessed from the perspective of those whose class interests it serves. There should be a presumptive suspicion over judicial power because it empowers elites in two ways. On the one hand, the exercise of this power is not independent of the class presumptions – that is, the values and prejudices of judges as a class. On the other hand, the repertoire of tools required to have access to judiciaries – lawyers, legal knowledge, the ability to mobilize experts, and the power to create hegemonic discourses – is predominantly vested in elites. Although judiciaries may cloak their enhanced power in a narrative that they are acting at the behest of the poor, and although they provide relief to the causes of the poor in some cases,

Jeremy Waldron (2006), "The Core of the Case against Judicial Review," 115 *Yale Law Journal* 1346; Richard H. Fallon (2008), "The Core of an Uneasy Case for Judicial Review," 121 *Harvard Law Review* 1693; and Mark Tushnet (2010), "How Different Are Waldron's and Fallon's Core Cases for and against Judicial Review?," 30 *Oxford Journal of Legal Studies* 49.

⁸ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2007).

⁹ See Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton, NJ: Princeton University Press, 2007); and Navroz K. Dubash and Bronwen Morgan (eds.), *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford: Oxford University Press, 2013).

it is difficult to argue that judiciaries have been potent instruments of addressing structural inequality or empowering the poor. They may appropriate the rhetoric of the poor and position themselves as “The People’s Court,”¹⁰ but they unwittingly serve the interests of the powerful. This argument is not easy to assess; it draws strength from the fact that courts have never been instruments of producing deep structural transformation in societies. They often have been potent instruments of ending unequal treatment, opening doors in the face of invidious discrimination,¹¹ but they are far less successful in empowering the poor.

One way that this can be demonstrated in the Indian context is to examine precisely those tools that courts craft to empower the poor. For example, it has been argued that the great innovation of public-interest litigation has become primarily a preserve of middle-class legal activism.¹² The Supreme Court also, by and large, has not questioned a middle-class discourse on development and the framing ideology that the executive often uses to intervene in the livelihood and property of poor people. In fact, it can be argued that had the judiciary exercised more stringent standards on the executive in its exercise of eminent domain, India’s land conflicts would have been less acute. In the early days of eminent-domain-related litigation, for example, the courts were driven by the thought that the state should not exercise eminent domain without adequately compensating landowners. However, as some have argued, the Court paradoxically made it possible to dispossess the poor of their land.¹³ Neither did the courts exercise great scrutiny until very recently on the state’s invocation of public purpose. It is perhaps unfair to place on the judiciary the burden of economic transformation. However, it would be difficult to convince those who are suspicious of the rise of judicial power that the courts are not dominated by middle-class conceptions and interests.

Of course, these two versions of the democratic narrative – that is, courts as a replacement for representative government, and courts as an instrument of deeper empowerment of the dispossessed – can work at cross purposes. It

¹⁰ The positioning was familiar, for instance, in the judgments of Justice V. R. Krishna Iyer, a major figure in the Supreme Court’s early public-interest-litigation era. See V. R. Krishna Iyer (2004), “Judicial Activism: A Democratic Demand,” 31 *Indian Bar Review* 1.

¹¹ The Court’s temple-entry jurisprudence is a good illustration of this. See, for example, *Nar Hari Shastri v. Shri Badrinath Temple Committee*, AIR 1952 SC 245; and *Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255.

¹² See Varun Gauri, “Public Interest Litigation in India: Overreaching or Underachieving?” World Bank Policy Research Working Paper 5109, November 2009. Available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5109>.

¹³ See Namita Wahi (2014), “The Right to Property and Economic Development in India.” (Cambridge, MA: Harvard Law School S. J. D. Dissertation.)

can be argued that courts are deferential to economic inequality because they are concerned to not be seen as intervening too often in economic decisions of the executive. Therefore, democrats must live with the idea that it is quite possible that judicial restraint, as a form of deference to representative government, ultimately may condone serious economic inequality. Conversely, interference on the grounds of a substantive conception of equal democratic rights indeed may subvert the authority of representative institutions. There is no easy answer to this question: which side one comes down on may depend ultimately on what one fears the most. However, implicitly, a court seeking to enhance its own legitimacy will balance these two considerations. This balancing, however, is not of principles as much as a determination of what the court can do without undermining its authority. It must expand rights to provide a sense that this is a court for the poor; it also must relax rules on standing to ensure access to justice on many consequential issues. At the same time, however, it cannot do this in such a way that society thinks electoral democracy is being undermined. The type of argument that Khosla makes about the gap between the rights that the Supreme Court promulgates and the remedies it fashions perhaps can be explained by exactly this tension.¹⁴ It is both providing enough to be a locus of hope but also restraining itself in its actual effects so as not to provoke a backlash.

I return to the question of democratic legitimacy of judicial review. There may be one way to approach this question that is consistent with the arguments being advanced herein. The question, "What is the degree of legitimate judicial intervention?" may be answered behaviorally. Judicial intervention is legitimate to the extent that it does not provoke, formally or informally, a democratic backlash. What counts as a backlash, and how it could be measured, is a tricky question. In part, this is because the form in which this backlash may be experienced is a function of institutional design or of contingent political configurations. A judicial system may be more emboldened to the extent that it judges that its patterns of intervention will not provoke a backlash sufficient to undermine its authority. In India, the argument was made that the increase in judicial power coincided with the advent of coalition government, in which (except in cases pertaining to reservations) it was unlikely that the political class could mobilize against judicial decision making. It is not a coincidence, on this view, that the first act of a full majority government in twenty years was to enact a Judicial Appointments Bill to increase the executive's role in judicial appointments.¹⁵ Representative institutions can take on judiciaries to different

¹⁴ Madhav Khosla (2010), "Making Social Rights Conditional: Lessons from India," 8 *International Journal of Constitutional Law* 739.

¹⁵ The National Judicial Appointments Commission Bill of 2014.

degrees in different contexts. Again, the idea is that there is no antecedent clear theory about which branch of government should exercise which power. It is disingenuous to think that such a theory exists. Rather, there is a set of institutions created by a constitution. Over time, these institutions will jostle for power, in relation to one another but also with regard to their standing in the eyes of a wider democratic public sphere. The real question is not what judges should or should not do; it is what they think positions them in this shifting contest over legitimacy.

Public Reason?

Surely, there must be something to discipline judicial reasoning. One possible line of reasoning that seriously considers the relationship between law and democracy tries to provide an answer. This is the Habermasian idea that what judges should do is “not appeal to reasons that they believe to be right, but to reasons that they sincerely believe that other reasonable people would and should accept as justification.”¹⁶ This theory argues that what courts are promulgating is not their own normative predilections, or fidelity to a technical conception of law, but rather the advancement of public reason.

There is a distinction to be made between transient legislative majorities and the will of the people. Transient majorities may subvert popular sovereignty. The rise of judicial power, at least in a country such as India, cannot be separated from a perceived sense of crisis in liberal democracy expressed in an ever-growing gap between legitimacy and representation. Judicial review, in some ways, steps in to preserve our status as free and equal citizens. This often involves protecting rights and often also protecting the institutional features of democracy. In short, courts preserve the constitutive rules that make citizens free and equal and allow them to exercise popular sovereignty. In the most general form, courts step in to bridge the gap between representation and legitimacy. *Representation* refers to a process of popular authorization. *Legitimacy* concerns the reasons that people have for accepting the political relationships in which they find themselves. Again, to simplify, the normative ideal is: “Are the relations in which citizens stand to each other as citizens acceptable to them? Are the policies they find themselves governed by those that they would have chosen as free and equal individuals?” The gap between legitimacy and representation arises when we think that practices of popular authorization do not necessarily or often routinely produce policies, or the promulgation of values that we would have chosen as free and equal individuals.

¹⁶ Ronald C. Den Otter, *Judicial Review in an Age of Moral Pluralism* (New York: Cambridge University Press, 2009), 50.

Judicial review in the classic sense is a safeguard to protect the fundamental identity of the state and its basic political form. In liberal democracies, it will protect the identity of a political system as a liberal democracy (e.g., protect rights). However, once we acknowledge a gap between representation and legitimacy, the question arises: Why cannot the scope of judicial power extend beyond traditional areas such as preservation of rights? What role can courts perform in bridging the gap between legitimacy and representation in other areas as well, including policy formulation? Hence, we see the road to promiscuity.

There is something attractive about the idea that courts should be exemplars of public reason. This overcomes the arid formalism of law, on the one hand, and the imperiousness of normative theories on the other. However, a conception of public reason must wrestle with a challenge. First, which reasons would be acceptable to all in the face of deep disagreement? These theories often risk smuggling in a thick account of normativity in their conception of what counts as a good reason, or they are reduced to the idea that judges are looking for something that would be acceptable to reasonable people (i.e., something that will not provoke widespread dissent among reasonable people). The test of legitimacy, then, becomes a form of political or social acceptability.

In summary, it seems unavoidable that judges can do anything but intuit what they think social acceptability might be. The questions are: How do they do this? Is the discovery of acceptability simply after the fact? How does this sense that they are engaging in public reason both empower and constrain their authority? Or is public reason simply another intuitive concept?

THE CONSTITUTION OF ACCOUNTABILITY

Public Legitimacy

This question becomes particularly pertinent when courts play a larger role in society that surpasses the narrow conceptions of rule of law. It is widely agreed that the Indian Supreme Court has played an important role in the preservation of Indian democracy. Its promulgation of the idea of the “basic structure” of a constitution, that no constitutional amendment can abrogate, is widely regarded as an excellent example of a judicial innovation that expressed and maintained India’s commitment to democracy.¹⁷ The idea of the core political identity of the constitution may be rough at the edges, but there

¹⁷ On the basic-structure doctrine, see Pratap Bhanu Mehta, “The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure,” in Zoya Hasan et al. (eds.), *India’s Living Constitution: Ideas, Practices, Controversies* (Delhi: Permanent Black, 2002), 179–206.

is no doubt that it has a strong conception of democracy and secularism at its center. Courts in India also have greatly expanded the ambit of rights through a creative interpretation of Article 21, and they have made several social and economic rights justiciable. The remedies that the Supreme Court crafts often may not be commensurate with its ambitious rhetoric, and the extent of real change that these decisions produce can be debated. However, there is no doubt that the Court has been a vehicle for the expansion of Indian democracy's commitment to justice. Finally, courts increasingly have become institutions of governance. They have advanced the cause of democracy by holding the executive accountable on a range of issues, from corruption to procedural impropriety. They increasingly have forced change in laws that many believed gave politicians undue protection. In summary, the Supreme Court may have overstepped its bounds, but it has deepened democracy by protecting India's political identity, expanding the scope of democratic justice, and producing a modicum of accountability.

In recent years, however, the judiciary has acquired more prominence in Indian democracy as an institution of accountability. Courts perform many routine functions, but it is not an exaggeration that in public consciousness, there is – in different time periods – a particular set of grounds on which courts gain legitimacy and prominence in ways that enhance their power. The role that a court performs in a network of institutions changes considerably and often is determined by broader political circumstances. This role is not determined by a simplistic reading of the text of the constitution or even by a consistent judicial philosophy. It often is determined by what the court sees as the nature of the threats to democracy. It carves out an institutional niche based in part on a sense of gaps in broader democratic institutions. In filling these gaps, however, a court must make a delicate judgment on the nature of its intervention, that such an intervention must have some type of democratic legitimacy. One easy test of democratic legitimacy is whether a court's decisions are overturned by the legislature or whether a backlash is provoked. The backlash may take many forms, but most prominent is the desire to control the judiciary. The extent to which this can be done, of course, will be determined by the nature of majorities in parliament. A parliament dominated by a single party with large majorities will find it easier to amend the constitution or pass a law to overturn a judicial intervention. On issues in which there is almost complete political consensus, the court's decisions will be overturned easily. This is the case with reservations cases in India, in which any attempts by the Supreme Court to roll back, limit, or clarify the terms of reservations (e.g., the *Inamdar* case)¹⁸ have been swiftly countered by constitutional amendments.

¹⁸ P. A. *Inamdar v. State of Maharashtra*, (2005) 6 SCC 537.

It is not an accident that the maximum number of constitutional amendments in recent years has been occasioned by reservations decisions of the Supreme Court.¹⁹ In some cases, fearing a democratic backlash, the Court refused to implement its own past rulings on reservations that had not been overturned by the legislature. A striking instance of this is the Court providing an exception to its own 51 percent ceiling on reservations for the State of Tamil Nadu, where reservations are as high as 69 percent.²⁰

In most cases, however, what the Supreme Court faces is not a direct “empirical” test of the democratic validity of its decisions. Rather, it faces something more complex that requires a democratic judgment of a different type. It must be seen, in the public perception, as not abdicating its responsibility. In fact, judges often speak about the need to discard purist or theoretical conceptions of the proper role of judges in the face of dire social need. However, the exercise of power must be sufficiently “popular” such that politicians perceive that there will be a political penalty involved in overturning a court intervention.

However, this judgment of democratic legitimacy is often both unavoidable and tricky. The political penalties involved in overturning court interventions are not only a product of the nature of majorities in parliament. They also are a product of the comparative credibility of different institutions. For instance, the Indian Supreme Court – much against the articles of the constitution – had acquired powers to appoint judges to the higher judiciary in a way that minimized the role of any other branch of government (through what are commonly known as the “three Judges Cases”).²¹ For almost two decades, this ruling was not overturned or challenged because there was a sense that doing so would be perceived as political interference with the judiciary. In 2014, a Judicial Appointment Bill was passed that created a new mode of appointment to the higher judiciary. Although judges will have a predominant voice in this selection, the bill makes provisions for the law minister and two other appointed representatives to be part of the selection committee. What made a near-unanimous passage of this bill possible were charges of favoritism and corruption within the judiciary. In summary, the outcome was determined by the perceived comparative democratic credibility of the two institutions: the

¹⁹ For a helpful overview of some of these developments, see Rajeev Dhavan, *Reserved! How Parliament Debated Reservations 1995–2007* (New Delhi: Rupa & Co., 2008).

²⁰ In a series of interim orders, the Court has repeatedly stayed such reservations and refused to strike them down. See, for example, *S. V. Joshi v. State of Karnataka*, (2012) 7 SCC 1.

²¹ *S. P. Gupta v. Union of India*, (1981) Supp (1) SCC 87; *Supreme Court Advocates-On-Record Association v. Union of India*, (1993) 4 SCC 441; *In re special reference 1 of 1998*, (1998) 7 SCC 739.

more the judiciary's credibility on appointments diminished, the easier it was for an executive to reinsert itself.

However, the crucial point is that in carving out a role for itself, the Indian Supreme Court is looking outward to a conception of public legitimacy – as it were – rather than inward to the text of the law or upward to a self-evident provision in the constitution. Of course, this does not suggest that it dispenses with the law or the constitution; rather, it must deploy them in ways that it believes will command democratic legitimacy. Its formal tools (e.g., reference to the text, statute, or precedent) do not determine what the Court does. They comprise the form in which judicial arguments are expressed, in which the substance is driven primarily by a sense of democratic and social purpose. Perhaps this explains why Indian courts are capacious in the sources that they cite and in their relative lack of reticence in acknowledging different sources of law, including international law. To paraphrase Deng Xiaoping: “What does it matter if the cat is black or white as long as it catches mice?”

Operating within the horizons of democratic legitimacy poses challenges. The moment that one invokes concepts such as “public interest,” as in public interest litigation (PIL) cases, the questions become: How do courts discipline their reasoning on what counts as the public interest? What balance of considerations determines the public interest? What does it mean to adjudicate the public interest in the face of competing versions of the idea? Which canons of reasoning are appropriate to such a concept? Answering these questions would require another chapter, but the pertinent point is this: inevitably, court interventions are shaped by judgments about public legitimacy. Yet, catering to this idea often involves dispensing with classic rule-of-law characteristics. The next section illustrates this by examining the Supreme Court's recent accountability jurisprudence.

The “Accountability” Court

As suggested previously, the grounds on which the Supreme Court has carved out its legitimacy have varied over time. It often has been a function of the comparative credibility of other branches of government and of the nature of the threats it perceives to the polity. To simplify, one account of its evolution might be as follows. During the 1950s and 1960s, the Supreme Court operated in a political environment in which the executive had large reservoirs of political legitimacy based on the legacy of the nationalist movement, a mandate for far-reaching social change. Under these circumstances, the Court's main role and niche was as a bastion of procedural safeguards. What often is perceived as the Court's conservatism during the 1950s – that is, its fidelity to

procedural issues, particularly in cases involving the right to property – can be reinterpreted as an attempt by the Court to carve out its own authority on the grounds of institutionalizing procedural safeguards in a young democracy.²² The executive responded by using its legislative majorities to amend the constitution, but it did not need to attack the judiciary as an institution. The Court did just enough to show that it mattered as an institution but did not stand in the way of the legislature once it had spoken through constitutional amendments.

During the late 1960s and early 1970s, the legitimacy of the executive was eroding in an era of great political tumult. The Supreme Court perceived two unprecedented types of threats to the constitution. The first was the genuine fear that democracy might come under threat and the Court needed to draw a red line over the extent to which transient majorities could alter the constitution. Although occasioned by property-rights cases, both *Golak Nath* and *Kesavanada* tried in different ways to draw this line: the first case by enunciating strongly a set of rights that no parliament could abrogate; the second case by invoking something more architectural, a basic structure that parliament could not overturn.²³ The Court positioned itself as a protector of democracy. The second threat was that the executive would interfere more directly with the functioning of the judiciary. Whether this was occasioned by the judiciary's own enunciation of a rights doctrine being a threat to the government's economic agenda or it was in keeping with the encroaching authoritarianism of the time is a debatable matter.

The Supreme Court did not acquit itself well during the Emergency; however, post-Emergency, it rehabilitated itself in three different ways. First, it began to expand the scope of rights to include social and economic rights. In a sense, the Court built on the political populism of antipoverty schemes to nudge the state in the direction of being a welfare state. Formally, the Indian state has always been preoccupied with poverty. During the 1950s and 1960s, there was still a sense that India's antipoverty aspirations had to be constrained by its means. In the 1970s, Indira Gandhi herself made "Garibi Hatao" a political slogan, thereby acknowledging that there was no irrevocable constraint on removing poverty. Thus, the policy became more receptive to the idea of social rights. The Supreme Court made the directive principles justiciable through

²² A good example of the familiar narrative on the early years of the Supreme Court is S. P. Sathe, "India: From Positivism to Structuralism," in Jeffrey Goldsworthy (ed.), *Interpreting Constitutions* (New York: Oxford University Press, 2006), 215–65.

²³ *Golak Nath v. State of Punjab*, AIR 1967 SC 1643; *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

Article 21. Second, it innovated through the creation of PILs that relaxed rules on standing and made the Court more accessible in matters relating to public interest. Third, it slowly began to assert its supremacy over judicial appointments in the name of judicial independence. Arguably, none of the three moves was simply a function of reading the law or the constitution. It is true in any judicial culture that courts subsequently may discover meaning in a statute or constitutional text that hitherto had remained undiscovered. It is equally true that external circumstances – for example, shifts in popular expectations of the state and the actual conduct of the executive – give the courts a new role.

Beginning in the early part of this century, the Supreme Court tried to personify a new *zeitgeist*: accountability. As political corruption became the central democratic anxiety, the Court began to address this concern more centrally, as discussed later in this chapter. First, however, three caveats are in order. First, the brief history sketched here should not be read too literally or teleologically, as if there were a neat progression from procedure and traditional rights to social and economic rights to governance. The actual history of the Supreme Court's conduct is more complicated. In the case of civil rights, for example, the Court has not always provided the strongest of protections. It has upheld the constitutionality of the Armed Forces (Special Powers) Act of 1958, legislation that gives extraordinary power and discretion to military personnel in peacetime.²⁴ The Court has been less than clear in its protection of artistic expression, such as in its refusal to permit the publication of a book about the Hindu philosopher Basaveshwara.²⁵ The Court recently made a shocking decision that overturned the decriminalization of homosexuality by a lower court.²⁶ It could be argued that even in the case of Fundamental Rights, the Court has operated with a sense of democratic acceptability: these happen to be areas in which, to put it simplistically, the political culture is more ambivalent than the logic of these rights or that the requirements of human dignity would warrant. This illustrates the point that the Court has tried to grapple with narratives of democratic anxiety, and its role and function have changed in response to those anxieties.

The second caveat, in the Indian case, is that the Supreme Court is not a monolithic institution. Because of the short tenure of chief justices, great turnover in benches, and inordinate effects of individual judges in small

²⁴ *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109. See Madhav Khosla, *The Indian Constitution* (New Delhi: Oxford University Press, 2012), 53–5.

²⁵ *Baragur Ramachandrappa v. State of Karnataka*, (2007) 5 SCC 11.

²⁶ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

benches, there can be substantial volatility in the interpretation of law.²⁷ Some scholars argue that to have a jurisprudence that is more considered and coherent, the Court must have a more stable system of constituting benches. This is a debatable matter. It can be argued that in a polity beset by differences, it is precisely this perceived lack of stability that can be attractive. It is precisely the fact that the Supreme Court is not always predictable, that its positions cannot be deduced from consistent ideological predilections or the requirements of legal formalism, that makes many litigants think they have a chance at relief from the Court, even against legal odds. A court captured by a more stable and coherent body of jurisprudence, paradoxically, may inspire less confidence because it might project the impression of being captured by a particular worldview. The Indian Supreme Court has given all sides a reason to play the game: that is part of its legitimacy.

The third caveat is that even when the Supreme Court formally expanded the scope of rights and provided a new basis for its own power, it was careful to do so in a way that did not impinge seriously on the fundamental workings of electoral democracy. This is best illustrated by the case of social and economic rights. There is the “strong courts, weak rights” paradox of Indian courts in contrast with the “weak courts, strong rights” observed elsewhere around the world.²⁸ The Indian Supreme Court in particular is strong on the promulgation of values and new rights; however, the expressive character of what it does is much stronger than the actual implications of what it does. As Khosla brilliantly argued with regard to several rights that the Court has promulgated – including the right to shelter, the right to food, the right to education – what the Court, in fact, promulgates is weak in terms of not challenging the executive or legislature (at least in budgetary terms).²⁹ In *Olga Tellis*, for example, the Court pronounced a right to shelter³⁰; however, this right turned out to be limited merely to protection against being evicted for a few weeks, and it did not impose much cost to the state. Therefore, the Supreme Court “courts” public opinion by a type of expressive populism. Charitably, however, this can be read as furthering a social dialogue on particular values. The demands that the Court imposes are weak; therefore, the Court has promoted a dialogue on rights and values, without seriously threatening executive power.

²⁷ See Nick Robinson et al. (2011), “Interpreting the Constitution: Supreme Court Constitution Benches since Independence,” 46 *Economic & Political Weekly* 27; and Nick Robinson (2013), “Structure Matters: The Impact of Court Structure on the Indian and U. S. Supreme Courts,” 61 *American Journal of Comparative Law* 173.

²⁸ See Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2009).

²⁹ Khosla, note 14.

³⁰ *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

These three caveats reinforce the point that jurisprudence has become as much about a form of democratic negotiation as it is about legal doctrine or first principles. It is about a Supreme Court positioning itself in a democracy; the direction in which it goes will be influenced by the nature of that democracy.

The Court as an Instrument of Accountability

As the nature of democratic anxieties shifted, the Supreme Court also began to shift in its role and functions. Corruption always has been a major issue in Indian politics, but beginning in the late 1990s, the issue acquired greater prominence. The spectacular growth of the Indian economy in the early part of this century increased the scale of rents available to the state manifold. In *Vineet Narain* (1998), the grounds for judicial intervention in corruption cases were established.³¹ Justice Verma cited, with approval, seven principles of “Standards in Public Life” recommended by the Lord Nolan Committee in the United Kingdom: selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. He then proceeded to note:

These principles of public life are of general application . . . and one is expected to bear them in mind while scrutinizing the conduct of every holder of a public office . . . If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated.³²

This then was the basis of the Supreme Court invoking the doctrine of continuing *mandamus*, which involved measures such as directly supervising corruption investigations. Nevertheless, from the late 1990s to the early part of the twenty-first century, the Court had little success in positioning itself as a major player in anticorruption cases. This was due to two reasons. First, the number of actual prosecutions of high-profile politicians was minuscule; indeed, the argument often was made that the Court is against corruption but not necessarily against corrupt politicians. Admittedly, the Court had little role in determining the nature of evidence presented. By and large, however, it was true that the political class was not threatened by the Court. Second, even if the lower courts delivered guilty pleas, politicians could continue their political career as long as the case was in appeal.

This situation changed after 2010. There were a series of major scams, with the comptroller and auditor general (a constitutional authority) alleging

³¹ *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

³² *Vineet Narain*, note 31, 267–8.

large-scale arbitrariness in the allocation of natural resources, such as spectrum and coal mines. This led to the creation of an anticorruption popular movement, which arguably was the central axis of the 2014 elections. Again, it took this democratic “crescendo” for the Supreme Court to position itself in the new democratic *zeitgeist*, which had three visible manifestations. First, the Court now became less sympathetic to the argument that the political career of legislators should not be jeopardized as long as a conviction was in appeal. It was the first time that the political class was truly threatened by a Court decision. In *Lily Thomas*, the Court held that a legislator would be disqualified if convicted by a lower court.³³ The government tried to overturn this judgment by promulgating an ordinance, but it was unsuccessful. Second, and perhaps coincidental, convictions of major politicians – particularly chief ministers – increased. As a result of the decision in *Lily Thomas*, these convictions now had real political consequences. Third, the Court subjected government allocations of natural resources to greater scrutiny.

There are technical details in all of these cases, but what is striking is that they did not give the Supreme Court pause in ways they might have only a few years ago. Indeed, the changing nature of politics and democratic discourse had changed the ways in which the Court perceived political risk. For instance, the Court’s position in *Lily Thomas* upheld the claim that legislators should be disqualified if convicted, even if an appeal was pending. In previous cases, the Court had been more nuanced in its approach to the question of disqualification. To see how nuanced the Court was, consider the following question and its answer: What is the best case that can be made for stating that a Member of Parliament (MP) must not be disqualified immediately after conviction by a lower court? That he should be given, at most, ninety days to appeal, to have a higher court look at the conviction, and be disqualified immediately if the appeal is not admitted. Why might this safeguard be necessary?

In the case of a sitting MP, the ramifications of the judgment extend to government as a whole and possibly to a democratic verdict. Consider a scenario in which a government has a thin majority of one or two. A lower court convicts an MP and the government falls as a result. Of course, if the MP is guilty, the court has no choice but to convict, regardless of the consequences. However, it is not entirely unreasonable to think that – given how significant the consequences might be for government – it would be better to have a superior judge at least ascertain that the lower-court judgment was not *mala fide* or deeply erroneous. The argument is not that MPs should not be disqualified, but surely it is not unreasonable to seek a safeguard against one

³³ *Lily Thomas v. Union of India*, (2013) 7 SCC 653.

mischievous or incompetent judge causing a major disruption in government. Given the high rates of appeals that overturn lower-court judgments, this is not an unreasonable concern. The idea is not to protect the wrongdoing of individual MPs; rather, it is to prevent the possibility of the House of the People and government being waylaid by a judicial error. Exactly such a possibility had been hinted at in an older constitutional judgment in the case of *K. Prabhakaran*.³⁴ Here, the Court had suggested that it was within legislative competence to provide safeguards for the integrity of the House of the People as a whole.

This background must be recalled in the discussion of another point often raised. Why should a sitting legislator and a potential candidate be treated differently? They should not. However, it is not unreasonable for a legislature to simply provide for an extra safeguard, given the potential political consequences. Again, in *K. Prabhakaran*, the Supreme Court had left open the possibility that the legislators, for certain purposes, may be singled out as a special class, provided that there was reasonable public justification for doing so. These considerations may not be decisive, but they are not without weight.

This is where a background reading of democratic anxiety makes a difference. The democratic mood had become more punitive, with a growing sense that fine distinctions in the law were becoming ruses to protect corrupt politicians. In *K. Prabhakaran*, the Supreme Court gave more weight to possible disruptions to the House than might be caused by disqualifications. In *Lily Thomas*, it gave more weight to the consideration that politicians were not being held accountable. The relative weight assigned to these two anxieties cannot be understood simply by invoking doctrine; it was a function of the Court's democratic judgment.

In some ways, what the Court was doing was recognizing that the "Rule of Law" in the larger sense (with uppercase letters) was being undermined by the "rule of law." The arsenal of legal doctrines, technicalities, and possibilities was being used in ways to convince people that politicians were not being held to account. Hence, it used what was, given its own history, a blunter ruling. The same tension between the "Rule of Law" understood as a broad regime of accountability that Justice Verma had outlined using the Nolan Report and the "rule of law" was manifest in two of the Court's most important recent decisions: the *Telecom* case³⁵ and the *Coal* case.³⁶

³⁴ *K. Prabhakaran v. P. Jayarajan*, (2005) 1 SCC 754.

³⁵ The two orders under examination here are *Subramanian Swamy v. Manmohan Singh*, (2012) 3 SCC 64; and *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1.

³⁶ *Manohar Lal Sharma v. Principal Secretary*, (2014) SCC Online SC 634.

In the *Telecom* case, the Supreme Court delivered a major order invalidating the government's award of spectrum licenses to several major telecom companies. These licenses were cancelled after the comptroller and auditor general's report alleged that their award caused a major loss to The Exchequer. Had these licenses been awarded through an auction, far greater revenue would have accrued to the government. The Court ruled that allocation of natural resources was a public good and therefore was subject to scrutiny by the judiciary. More controversially, it also ruled that natural resources should be allocated by auction, treading on what many regarded as a possible policy area.³⁷ The decision was a serious intervention. For the first time, the Court made it clear that the judiciary would scrutinize the allocation of natural resources, not only on procedural grounds but also by some criteria of the public good. Only time will reveal the true significance of this decision. Decisions acquire significance in light of subsequent history. *Vineet Narain* was a legal landmark, but its actual effect on governance was slight. Decisions such as the three judges cases were made on dubious legal grounds, but they salvaged the autonomy of the Supreme Court as an institution. Even the famed *Kesavananda*, a complex and contradictory mélange, acquired significance through later developments. For the time being, however, it appears that the Supreme Court has established a powerful idea that whether an allocation is in the public interest will be judged by courts and not by the executive.

In the *Telecom* case, the high-minded and independent assertion of important constitutional principles is praiseworthy and the observations are admirably pointed. Some of the Supreme Court's observations will reform governance for the better by forcing the executive to justify its decisions on a more considered basis. In this sense, the Court is instigating a larger movement from executive discretion to an exercise of public reason. However, the orders that the Court delivered also raise legal puzzles. Furthermore, there is an "odor" of politics surrounding some observations. Can we use this judgment as an opportunity to draw correct institutional lessons? How the institutional dynamics will play out is an open question. Otherwise, the more things seem to change, the more they will remain the same.

The immediate risk is that the Central Bureau of Investigation (CBI) has been made more powerful, which is a serious challenge. In *Vineet Narain*, the Supreme Court rightly identified two bottlenecks in the system: the CBI's

³⁷ In a subsequent advisory opinion on this case, the Supreme Court clarified that auction was not a mandatory route and that the mode of allocation should be left to the executive – subject, of course, to judicial scrutiny on legal grounds. See *In Re Allocation of Natural Resources, Special Reference 1 of 2012*, (2012) 10 SCC 1.

functioning and the sanction for prosecution. The Court has tried to fix the second bottleneck by stipulating a three-month limit. This is a sensible idea, but its actual effects will depend on other reforms. If this problem is fixed without reform of the CBI, there will be major perverse consequences. We are rightly fixated on the problem that the guilty go free; we should be equally concerned with the fact that there is little protection of honest public officials. It is not a state secret in India that the one mechanism by which officials who take a stand often are threatened is a CBI inquiry. With the filtering mechanism of a sanction to prosecution now eliminated and *locus standi* on complainants relaxed, it is possible that the state will acquire one more instrument to threaten those who stand in its way rather than more efficiently prosecute the guilty. This will be easier in a climate in which all government servants are presumed guilty by the larger public. It is facile to state that the honest have nothing to fear; after all, they can obtain justice in the courts, eventually. The political overtones to so many recent investigations should make citizens wary of the CBI. The degree of psychological coercion that the state and the CBI can deploy is immense. There but for the grace of God goes every honest civil servant. After *Vineet Narain*, there was a euphoric delusion that an external monitoring of a CBI investigation was possible. In principle, the Central Vigilance Commissioner can do that, but it has never been clear what this means operationally. Sins of omission and commission are difficult to detect. Under the illusion of monitoring, more injustice can be legitimized. Therefore, unless the culture of the CBI is reformed and made accountable, the good consequences of this judgment will be short-lived.

The second governance implication is that there is no question that the judiciary can scrutinize any policy for arbitrariness and unconstitutionality; it can do so even for constitutional amendments. Furthermore, the Supreme Court has made a nuanced case for why the first-come-first-served policy for the allotment of spectrum – at least in 2007 – was arbitrary. However, this debate over judicial review has been hampered by the unhelpful view of practical reason. There is an assumption in much of the discourse that for a decision to not be arbitrary, it must be derived from a rule. One sign of this is the way “discretion” is considered. *Discretion* has become a dirty word; it is automatically associated with arbitrariness. However, discretion is the power or right to make official decisions using reason and judgment to choose among acceptable alternatives. These decisions must be justified through public reason; however, giving reasons is not the same as making the decision fall under a general rule. We are called on to exercise judgment precisely because there are tradeoffs to be made and externalities to be taken into account. Elected governments must make these calls, not unelected judiciaries. There is a tendency in Indian

courts – across different domains – to suspect the exercise of judgment. Therefore, their solutions often are to propose rules, so that no discretion remains in the conventional sense of the term. We inherently suspect the exercise of judgment and overcompensate for it by peddling the illusion that rules are the only effective way to check arbitrariness. Between the binary of arbitrary discretion and rigid rules lies the space for public reason – and few are willing to occupy it.

In the *Telecom* case, both the government and the judiciary committed this fallacy. Government has the discretion to decide policy. It could have concluded that revenue maximization is not a worthy objective; giving the spectrum at no cost might be conducive for consumers or developing technology. However, it should have given a clear public justification for its decisions rather than relying on technical cover of precedence and so forth. The government's defense of its policy was shockingly feeble; the reasons adduced were vague and general. The Supreme Court was correct to see through it. However, this point is more important: democracy is not decision making only by rules or precedence; it is government by public justification. Barring a few exceptions, the culture of government is not attuned to clearly recording its reasoning for decisions and politically defending them in public. The judgment is a severe indictment of professionalism in government across the board judged by the yardstick of public reason.

The Supreme Court was not convinced that the government had adequately justified its decisions. However, it went to the other extreme by suggesting the idea that auctions are virtually the only legitimate way of disposing of natural resources. Although often true, the validity of this proposition depends on a number of factors: context, market conditions, and the tradeoff between different objectives. These can be a matter of debate and judgment. It almost seems to remove legitimate government discretion – understood in the correct sense of the term. Its overreach is not that it held a policy decision to judicial scrutiny; rather, the overreach is that it has used a generalized suspicion of the executive to prescribe a policy, with that also framed in terms of seemingly general rules. In the case of the telecom sector, at this juncture, it probably does not make any difference; it is the right thing to do. In the meantime, it has given – by implication – license to question first-come-first-served under the next government, when it ostensibly had more justification. How this will be used as a precedent remains to be seen. The Supreme Court, quite rightly, insisted that any procedures for allocation should be transparent and nondiscriminatory. In cases in which there are multiple and often competing objectives, translating this into practice will be a challenge. Courts should provide reasonable latitude on what counts as a fair procedure relative to specific

objectives. Government without the right degree of discretion is impotent, which is to be feared as much as arbitrariness. However, if new standards can be set on public justification, much will have been achieved, and there is evidence that this may be achieved. There is no question that after this judgment, no government will be able to arbitrarily dispose of natural resources. The Supreme Court sent a signal that it will hold the executive to account. What standard it will hold it to remains an open question.

However, this strong signal at an aggregate level came at a cost in terms of “rule of law” (in lowercase letters). In its implications for political institutions, the two *Telecom* orders are distinctly disconcerting. Simply stated, they seem to have put a “seal of approval” on the evisceration of two cardinal principles of democratic government: ministerial responsibility and Cabinet responsibility. The form in which this happened renders the Supreme Court somewhat less than convincing and internally inconsistent. Consider, for example, the following rather odd observation:

Unfortunately, those who were expected to give proper advice to Respondent No. 1 and place the full facts and legal position before him failed to do so. *We have no doubt* that, if Respondent No. 1 had been apprised of the true factual and legal position regarding the representation made by the appellant, he would *surely* have taken appropriate decision and would not have allowed the matter to linger for a period of more than one year.³⁸

This is an astonishing character certificate to the prime minister, but it is legally beside the point. How could anyone make a determination about what someone else, without a doubt, would have done in the future? A supposition about character, not a consideration of official responsibility, is the grounds for exoneration. What makes this logic utterly specious are the facts in the second *Telecom* order cancelling licenses. The Court indicted the telecom minister, Mr. Raja, for not following the prime minister’s advice, but it did not follow through on the implication of its own reasoning. In this instance, the prime minister and the Empowered Group of Ministers (EGoM) knew that a wrong policy was being pursued and did not act on it – so much for the assurance that the prime minister without a doubt would have acted if only he knew. There is an old joke that if you refute yourself, it does not count as a refutation; the Supreme Court seems to be following a similar logic. The prime minister advised the minister but he did not do anything to stop the policy from taking effect. In the first order, the prime minister was exonerated because he did not know but would have acted if he had known. In the second order, he knew but

³⁸ *Subramanian Swamy*, Note 35, 96 (emphasis added).

merely urged Mr. Raja to do something else. His knowledge, which should have at least signaled that he was capable of failing to act, is used as evidence for exoneration.

Two things are odd about this situation. The first is the presumption that the prime minister could not possibly abdicate his responsibility. One should not prejudge the matter as one should not prejudge anyone's guilt until the full facts are available. However, the way the judgments are written, it appears as if the prime minister, simply by virtue of who he is, could not have been guilty of any omission. This is an amazing personification of an office. Although it is a different type of case, even Judge Saini's order on the then-finance minister, Mr. Chidambaram, has this quality.³⁹ It does not contest the fact that Mr. Chidambaram knew and concurred with the policy. Contrary to the spirit of the Supreme Court, it finds that the policy decisions per se were not illegal or arbitrary. Much is being made of the fact that in the context of a criminal proceeding, one should make a distinction between possible criminal liability and possible moral or political responsibility. However, this distinction is beside the point. The Court was not being asked whether to judge Mr. Chidambaram as guilty; it was merely being asked whether there were grounds for further investigation. Given the Court's own pointed description of how much Mr. Chidambaram knew about the policy and how he was in a position to stop it, the refusal to further review the matter appears to be inconsistent with its own logic. The standard of proof required, even to merely inquire further, by definition would be impossible to meet. Nothing in this argument implies that the prime minister or Mr. Chidambaram did anything wrong. It merely points out that the Court's reasoning behind the refusal to inquire further seems less than convincing.

However, the fundamental institutional mistake in the *Telecom* case seems to be to eliminate any idea of ministerial or Cabinet responsibility. In the first order, officials of the prime minister's office are chided for not placing the full facts and legal issues before the prime minister. It is an interesting legal question as to whether this should constitute grounds for an appropriate investigation and action against those bureaucrats. Did they – and there seem to be many – merely make a mistake or was it by design? Surely, ministerial responsibility enters the picture, or is every official in the hierarchy now entitled to “get off the hook” because they were not fully appraised? It is true that the petition had not specifically alleged any wrongdoing by the prime minister. However, the Court rebukes the government for serious constitutional arbitrariness in

³⁹ *Subramaniam Swamy v. A. Raja*, C.C. No. 01(A)/11, delivered on February 4, 2012, (Special CBI Court).

the *Telecom* decision. It could have taken the view that there was nothing illegal about the policy but, having passionately indicted the policy, the Court failed to ask any probing questions of all those in a position to stop it. Having drawn a mighty sword on behalf of accountability, the Court then let it fall entirely on bureaucrats, corporates, and the telecom minister Mr. Raja alone. Given the rebuke to the Telecom Regulatory Authority of India, Mr. Raja, and civil servants, it is surprising that it does not show the slightest interest in the core question: Given that the prime minister himself seemed to know that a wrong policy was being acted on, given that an EGoM could have stopped it, why did the Court not act? In a parliamentary system of government, is there absolutely no conception of collective responsibility remaining? Is the prime minister's office simply like that of a private citizen's – all that he can do is write a letter? The Court seems to be rewriting the principles of parliamentary democracy – that is, a minister is not responsible for actions taken in his department. The Cabinet is not responsible, even when it has full knowledge and it empowered the decisions taken by one of the ministers. This can have potentially major governance implications because key actors are not being held responsible for decisions. However, it is difficult to fathom the revolutionary character of what the Supreme Court has enunciated. At least Judge Saini's order in the lower court was premised on stating that no wrong was done in the policy. However, the Supreme Court, having stated that the policy was arbitrary, implies that ministers have no responsibility for the fundamental decisions of their department, and the Cabinet has no collective responsibility for any policy decisions. Never has there been such a subtle subversion of the basic principles of parliamentary government in India, despite that fact that "accountability" was achieved, in a manner of speaking.

The other issue that the Supreme Court did not address was a nuanced consideration of the rights of the investors. To send a message, the Court cancelled the licenses of all telecom operators, without providing individual hearings. A similar move was made in a more recent decision when the Court cancelled the allocation of coal blocks, stretching as far back as 1993!⁴⁹ What is jarring in the *Coal* decision is not only that ordinary citizens will realize that there is no statute of limitations in India. The short-term economic consequences also are not an issue; the Court cannot be instrumental about the rule of law. The real issue is that if the state makes a mistake and, twenty years later, a private party that was a beneficiary of that particular contract with the state is caused to suffer because of mistake, what protection does it have? How is a private citizen supposed to know whether the state did its procedural

⁴⁹ Manohar Lal Sharma, Note 36.

due diligence? How does a citizen know whether the authorized committee met for three minutes or had a full discussion, whether all companies were properly vetted, and so on? Again, corruption is an easy issue: contracts in which there is corruption must be annulled. However, as in the *Telecom* case, the Court detected a massive lapse without fixing anyone's responsibility. The CBI becomes involved only if it can prove real corruption. Who bears the cost of the state's lapse? There is little protection for good-faith investors. Corruption has clouded our thinking to such an extent that these deeper underlying issues are being given short shrift. There is a vast range of areas in which this is at issue. For example, in land acquisition, if the state does not conduct a social-impact or an environmental-impact assessment appropriately, should the costs be borne only by the private party that accepted a contract in good faith? If corruption privatizes the public exchequer, this type of regulatory structure provides no private-party protection against state recklessness. If the Supreme Court were serious, it should have sent a real message to the state; the only message was that the state easily can pass all costs for its lapses to private citizens. Indeed, it could be argued that the Court implicitly used the suspicion of crony capitalism to deny justice to individual litigants.

What are the general features of these decisions, and what do they imply? It is clear that the Supreme Court produced accountability. Its main aim was to force the government to act according to public reason. It rode on a wave of popular discontent against corruption but, in the process, it managed to eliminate all nuances, all protections for individual litigants. In a strange twist, the Court detected massive wrongdoing in the state but did not fix responsibility. How is this outcome explained? One way to look at it is that the Court is engaging in democratic positioning; it is answering the clamor for accountability. It sets a benchmark for future decisions of the state. At the same time, however, the Court is careful not to venture where the current executive is destabilized, even though its own logic warrants fixing blame. Furthermore, the Court is able to penalize private players, not because they have been proven guilty but rather because fear of crony capitalism is the dominant political narrative. The Supreme Court is an actor in a democratic negotiation; it is not a purveyor of the simple idea of the rule of law.

CONCLUSION

This chapter suggests that normative theories of the judiciary's role in India do not capture what the courts actually do. It is too easy to criticize judges from a purely normative standpoint. However, such a standpoint often does not take into account how courts must position themselves in an ongoing democratic

negotiation, where they are driven by considerations of their legitimacy. The discussion shows how the Indian Supreme Court conducted this negotiation, especially in its most recent role as an institution of broader accountability. On one level, the Court's interventions can be seen as a triumph of accountability – a Supreme Court holding a deviant executive to account. However, this accountability of the executive also illustrates an institution now beset by confusion, uncertainty, and happenstance rather than a consistent rule of law.

Assume for a moment that the Supreme Court's final decision in these cases has some merit. Nonetheless, it is worth noting that the chasm between the judiciary's and the legislature's understanding of what the constitution requires is widening. This may be due to the executive's vested interest in corruption. However, corruption is only a small part of the story. In the past decade or so, the executive has lost a majority of important regulatory-reform cases in areas as diverse as education and taxation. This suggests that different branches of government are working with different interpretations of what the general provisions of the constitution require. This might be a risk when courts enter the governance arena because the challenge of manageable standards for the exercise of a court's jurisdiction becomes more difficult. If there are no clear standards for the exercise of judicial power, then the dialogue between the judiciary and other branches of government becomes that much more difficult. The Supreme Court has had major success in articulating a democratic norm: that is, accountability in all aspects of government functioning. However, the way the Court achieved this reflected a popular impatience with the more nuanced issues of individual rights, fair process, and so forth. The centrality and articulation of that norm satiated popular concern about corruption undermining democracy, but it also made it more difficult to design a regulatory system because it is more difficult to predict what will satisfy the Court's conception of public reason.

Important principles such as judicial independence, basic structure, separation of powers, and public interest, on which the Supreme Court has expanded its power, often are too abstract to know where they will apply. In a recent case on the legality of tax tribunals, the Supreme Court contended that the tribunal, constituted under the National Tax Tribunal Act of 2005, had not only usurped the powers of the High Court. It also suggested that the methods of appointment and so forth do not conform to the norms of independence that might be required for a quasi-judicial tribunal.⁴¹ This reasoning seems fair enough, but is it clear which standard a tribunal must meet to pass this test? The National Green Tribunal, another consequential economic tribunal, was

⁴¹ *Madras Bar Association v. Union of India*, (2014) SCC Online SC 771.

constituted practically under the supervision and orders of the Supreme Court. Did this tribunal pass the test? It could be said that it does because a Supreme Court judge is the chairman of the selection committee; conversely, it could be said that it did not because the government can vary the composition of the selection committee.⁴² In short, many of the high principles that the Supreme Court invokes are more like dice throws in a judicial roulette.

There is always a risk of a backlash to the Supreme Court's interventions. This risk is greater when the Court loses comparative legitimacy on issues such as corruption within its ranks. If history is any guide, however, the Court will discover its limits in the process of doing rather than in conforming to preset standards. The search for manageable standards to govern the Court's new avatar will continue. What is clear is that these standards will not be derived from traditional legal arguments; rather, they will be part of an ongoing democratic conversation. How coherent and compelling the Supreme Court will be, in the last instance, may turn on how coherent and compelling the larger democracy in which it is situated will be.

⁴² See Sections 5 and 6, National Green Tribunal Act, 2010.

The Judicialization of Politics in Bangladesh

Pragmatism, Legitimacy, and Consequences

Ridwanul Hoque

We understand little or nothing about the degree to which various judiciaries are politicized; how judges make decisions; how, whether, and to what extent those decisions are implemented; how ordinary citizens influence courts, if at all; or what effect courts have on institutions and cultures.¹

INTRODUCTION

This chapter discusses the judicial role in politics in what fairly could be called an “unstable” democracy: Bangladesh. It addresses the issues of legitimacy and pragmatism of judicial intervention into politics by not merely interpreting the judicial decisions on legal and technical grounds but also by seeing the judiciary as a site of politics and power. *Politics*, for this purpose, is seen as mega-political issues that, clad in “constitutional attire,” are brought before or foisted on the judiciary for adjudication. After this introduction, the chapter provides a conceptual description of the phenomenon of judicialization of politics, followed by a brief narrative of instances of judicial intervention in minor politics. It then proceeds to analyze judicial decisions that invalidated constitutional amendments, especially examining the Supreme Court’s decision that invalidated the Thirteenth Amendment of the constitution, which introduced the caretaker government (CTG) system.

The theme of this book is the study of the roles of law and politics in managing the tensions arising from and mitigating the factors liable for unstable constitutionalism in South Asia. As the editors of this volume stated, *unstable constitutionalism* refers to a political scenario in which all participants in

¹ James L. Gibson, Gregory A. Caldeira, and Vanessa A. Baird (1998), “On the Legitimacy of High Courts,” *American Political Science Review* 92(2): 343–58.

national politics appear to be sincerely committed to the idea of constitutionalism or the rule of law. However, they struggle to institutionalize a stable structure, including political stability that would promote and practice a form of constitutionalism appropriate to their nation.²

Seen in light of this conceptualization, Bangladeshi constitutionalism provides an example of unstable constitutionalism. For almost half of the period of forty-four-plus years of its independent existence, Bangladesh has been ruled by military–autocratic and nearly autocratic regimes. There was no political government for sixteen years from 1975 to 1990, in the pre-transition era (i.e., pre-1991), and for another two years from 2007 to 2008, when the military, in disguise, ran the government amid a prolonged “Emergency.” Following its independence in 1971, Bangladesh formally adopted a parliamentary form of democracy through its first national election in March 1973, which then faced a tragic demise the following year. In 1974,³ an Emergency was imposed and an authoritarian, one-party government was established through the controversial Fourth Amendment of the constitution.⁴ That was the beginning of “paternalism” and the “absence of constitutionalism and the rule of law” in the governance of the state.⁵

Soon after the abdication of constitutionalism by the people’s representatives, the military intervened in 1975 and began a regime of autocracy and unconstitutionality. This lingered until the end of 1990, when a spontaneous public upsurge for democracy⁶ eventually resulted in a new beginning of parliamentary democracy.⁷ In 1991, a general election was held under a consensus-driven mechanism under the stewardship of the then-Chief Justice of Bangladesh, and multiparty democracy was restored.

² See [Chapter 1](#) in this volume.

³ See J. S. A. Choudhury, *Bangladesh: Failure of a Parliamentary Government 1973–1975* (London: Jamshed Foundation, 2005).

⁴ The Constitution (Fourth Amendment) Act of 1975 (effective January 25, 1975). This Amendment destroyed many of the founding values of the nation (e.g., the independence of the judiciary), abrogated civil rights including freedom of the press, and stripped the Supreme Court of its judicial review power.

⁵ Paraphrased from Yash Ghai, “The Theory of the State in the Third World and the Problematics of Constitutionalism,” in D. Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York and Oxford: Oxford University Press, 1993), 186–96, 187.

⁶ The then-autocratic ruler, General H. M. Ershad, resigned as the president on December 6, 1990, ultimately making way for the chief justice of the country to become the president and to lead the neutral election-time government. See also [Chapter 7](#) in this volume.

⁷ For these accounts, I rely on one of my earlier works. See Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2011), 95–6.

The restoration of democracy in 1991 inspired hope that it would continue, but the promise soon appeared to be hollow. At the end of regime of the first post-autocracy government of the Bangladesh Nationalist Party (BNP), a major political crisis concerning the mode of the next general elections was already looming. The opposition, the Bangladesh Awami League (AL), demanded a neutral, non-party CTG for holding a free and fair election. After a constitutional crisis of several months, the CTG, a special type of election-time government system, was introduced in 1996.⁸

The next two general elections, in 1996 and 2001, were held under the CTG administration. However, a few months before the scheduled 2007 elections, the then-ruling party (i.e., the BNP) adulterated the CTG system by increasing the retirement age of Supreme Court justices to sixty-seven, with a particular chief justice in mind for the CTG head.⁹ The opposition (i.e., the AL) announced that it would not participate in the election under that particular justice's leadership and reacted violently. Consequently, another irreconcilable political crisis ensued, resulting in a State of Emergency being declared in early 2007; the elections were postponed and a military-backed civilian CTG was installed. The 2007 CTG remained in power for two years rather than three months; the next election was in December 2008 in which the AL won.

Although the 2009 AL government did not publicly announce so, it likely had a plan to eliminate the CTG system, which by then had become not only controversial but also had revealed generic defects. In early 2011, the Supreme Court's Appellate Division (in a case analyzed later in this chapter) declared the CTG system unconstitutional for being antidemocratic. Soon after the judgment, the parliament amended the constitution to abolish the CTG system. The new amendment triggered another crisis. The opposition parties demanded that unless the CTG system was reintroduced, they would not participate in elections. The ruling party continued to assert that every election would be held under the incumbent government, as in other democracies. It is not surprisingly, therefore, that the third and so far the longest-running constitutional crisis in post-1990 Bangladesh ensued. Amid the boycott by the opposition parties, the elections of the tenth parliament were held on January 5, 2014, and were marked by chaos, terrorism, and extremely low voter turnout.

⁸ The CTG system was introduced through the Constitution (Thirteenth Amendment) Act of 1996, with the principal function of ensuring "fair and free" national elections.

⁹ Per the now-repealed Article 58C of the constitution, the most recently retired chief justice was to be the first choice as head of the CTG.

The preceding narrative of the trajectory of Bangladesh's constitutional history illustrates how constitutionalism has never become stable. The lack of a permanent structure for holding free and fair elections has been a major source of instability. Other than the first general elections in 1973, other elections that brought into power democratic governments were preceded by instability and uncertainty. Beyond the elections, substantive factors of constitutionalism also remained unconsolidated. The Constitution of Bangladesh (the constitution)¹⁰ proclaims democracy as the mode of governance, emphatically declares the supremacy of the constitution, mandates the holding of free and fair periodic elections, ensures the separation of powers and judicial review of laws and state actions, guarantees judicial independence, and enumerates civil rights.¹¹ Despite these ideals of constitutionalism, however, the political institutions in Bangladesh remain weak, which is evident, for example, in the existence of a poorly functioning parliament¹² dominated by an omnipotent, self-serving executive.

There is an undeniable wider gap than often is appreciated in the literature between normative formulations of the constitution and the social and political realities in Bangladesh. Although “the law” and “politics” should have been the ideal instruments to contain the sources of instability, law and politics in Bangladesh sometimes appear to be the sources of unstable constitutionalism. On the one hand, military interventions and the military-*cum*-civil governments were a major extra-constitutional source of unstable constitutionalism. On the other hand, “politics” during elected governments also turned out to be a destabilizing factor. In Bangladesh, several “democratic” governments have on many occasions used the constitution or the law for selfish interests, thereby twisting the course of constitutionalism. In this context, the judiciary often has found opportunities to respond against sources of unstable constitutionalism. It is through this process that the scenario of judicial engagement with politics emerged, a phenomenon that is better called *judicialization of politics* that, depending on the surrounding support structure, has the potential for either mitigating or aggravating political impasses or disputes.

Based on a critical assessment of consequences of unpragmatic judicial intervention into politics, this chapter develops a framework of judicial engagement with “hard” constitutional issues entwined with politics. It argues

¹⁰ The Constitution of the People's Republic of Bangladesh (adopted on November 4, 1972, and entered into force on December 16, 1972).

¹¹ *Ibid.*, esp. Articles 7 (constitutional supremacy), 102 (judicial review), and 26–47 (fundamental rights).

¹² Nizam Ahmed, *The Parliament of Bangladesh* (Aldershot: Ashgate, 2002).

that – with effective strategies and judicial craftsmanship combined with constitutional wisdom – a Constitutional Court can stabilize constitutionalism in a country in which sources of instability often are litigated. Derived from this, another argument is that unpragmatic judicial intervention into mega-politics or structural-policy issues well may add to the existing sources of unstable constitutionalism.

JUDICIALIZATION OF POLITICS: CONCEPT AND CONTEXT

Judicial engagement in the resolution or aggravation of political disputes has become a spectacular global reality. The judicial role in politics in any given society, however, has been a subject of long-standing debate at the core of which lies the question of whether the judiciary can legitimately intervene to resolve political questions or controversies. Both scholars and judges have endorsed¹³ and questioned the appropriateness of judicial intervention in politics. In the context of the escalating trend of political issues being dragged to court for judicial answers,¹⁴ judges often effectively exercise “political power”¹⁵ or “supervise” the political process¹⁶ under their claim that they only interpret the law and do not resolve political disputes. This phenomenon of judicial adjudicative engagement with political or politically loaded constitutional issues has become known as *judicialization of politics*.

Judicialization of politics seems to be a growing feature in many constitutional systems of the global North and South.¹⁷ In South Asia, accordingly,

¹³ Constitutionalist Posner, for example, supports judicial intervention rather than abstention in cases of constitutional and national crises. See Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton, NJ: Princeton University Press, 2001), 162.

¹⁴ As Dworkin remarked in the U.S. context, “the range of issues that are now regarded, both by the institution and by the public, as appropriate issues for judges to decide seems . . . to be increasing.” See Ronald Dworkin, “judicial activism,” in Robert Badinter and Stephen Breyer (eds.), *Judges in Contemporary Democracy: An International Conversation* (New York: New York University Press, 2004), 17–65, 64.

¹⁵ See Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Co., 1980). See also M. Suresh and S. Narain (eds.), *Shifting Scales of Justice: The Supreme Court in Neo-Liberal India* (New Delhi: Orient Black Swan, 2014), 4–5 (evaluating the Indian judiciary “politically” by examining the link among the judiciary, politics, and discursive power).

¹⁶ Stephen Breyer, “Supervision of the Political Process,” in *Judges in Contemporary Democracy* 117, *supra* Note 14. (For Breyer, judges intervene in the political process in many ways, such that they sometimes “directly supervise elections” (i.e., fair voting rules); they set aside laws relating to the electoral process enacted by legislators; and they interpret the “ethics” laws that regulate the conduct of public servants, thereby affecting the governance and politics.)

¹⁷ Studies on judicialization of politics have increased significantly in recent years. In addition to the rich body of judicialization literature concerning the United States, scholarly works

judicialization of politics has achieved a significant place within the higher judiciaries of Bangladesh, India,¹⁸ and Pakistan¹⁹ – although in differing degrees and types. Despite “increasing judicialization” of politics in India, the Indian judiciary has maintained a balance between intervention and abstention regarding political questions.²⁰ In Pakistan, by contrast, the recent history of judicial activity has been one of overjudicialization of politics and, at times, a complete judicial usurpation of other organs’ powers – and, therefore, a threat to democracy.²¹ In Bangladesh, judicialization of politics recently embraced the phase of unprincipled and unpragmatic judicial intrusion into “mega-politics.”²²

As the nature and impact of judicialization of politics in Bangladesh are examined, it is pertinent to highlight the context in which the analyses are developed. In general, judicialization of politics refers to judicial policy making²³ such as the Supreme Court’s decision that any particular group of people within the country is entitled to receive citizenship or that the

are available on judicialization of politics in Asia, Latin America, Europe, and Africa. For a general recent overview, see Diana Kapiszewski et al. (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge: Cambridge University Press, 2013). See also Ran Hirschl (2006), “The New Constitution and the Judicialization of Pure Politics Worldwide,” *Fordham Law Review* 75: 721–53; Bjorn Dressel (ed.), *The Judicialization of Politics in Asia* (London and New York: Routledge, 2012).

¹⁸ On the judicialization of politics in India, see Baxi, *The Indian Supreme Court and Politics*, supra Note 15; S. Shankar, “The Judiciary, Policy, and Politics in India,” in *The Judicialization of Politics in Asia*, 56–74, supra Note 17; and O. Chinnappa Reddy, *The Court and the Constitution of India: Summits and Shallows* (New Delhi: Oxford University Press, 2009).

¹⁹ On Pakistan, see Chapters 5 and 6 in this volume. See also Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995); Charles H. Kennedy (2012), “The Judicialization of Politics in Pakistan,” in *The Judicialization of Politics in Asia*, 139–60, supra note 17; Anil Kalhan (2013), “‘Grey Zone’ Constitutionalism and the Dilemma of Judicial Independence in Pakistan,” *Vanderbilt Journal of Transactional Law* 46: 1–96.

²⁰ Shankar, *The Judiciary, Policy, and Politics in India*, 58.

²¹ As Kalhan observed, in the recent post-autocracy regime, the Pakistani Court reasserted itself not only as a guardian of the constitution but also as “an arbiter of core questions of ‘pure politics.’” Given the weak state of civilian institutions, as Kalhan further argued, this pattern of judicial intervention into purely political issues might “undermine” Pakistan’s “fragile efforts to consolidate democracy.” See Kalhan, *Grey Zone Constitutionalism*, 61, 2.

²² Ran Hirschl (2008), “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science* 11: 93–118.

²³ According to Tate and Vallinder, judicialization of politics refers generally to “the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives.” See C. N. Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), 28.

delimitation of any particular electoral constituency is or is not legal. In the modern sense of the term, it means judicial engagement with political issues such as the question about whether a prime minister accused of being partisan in appointing a security chief is disqualified for the office.²⁴

The breadth and the nature of judicialization of politics were the subject of a 2013 study titled *Consequential Courts*.²⁵ Essays in this study examined the judicial roles in the governance and politics of several states in the context of five different types of political-conflict arenas. As the essays showed, judicial interventions occur with regard to (1) disputes between political incumbents and challengers, (2) disputes between or among organs of the state about “who governs,” (3) conflicts about government stasis and maladministration, (4) cultural and religious cleavages, and (5) disputes about rights and equality.²⁶

The following discussion principally captures the first two arenas of conflict and controversy. The concept of judicialization of politics raises these questions: Do judges really adjudicate political questions? Are constitutional issues that arise from political controversies legal questions? Given the normative relationship between politics and constitutional law, drawing a clear line between the “political” and the “legal” often is a complex exercise. In difficult cases, judges indeed make “political decisions” in the sense that they have consequences for political controversies.²⁷ Judges’ treading into political controversies or their making of policy suggestions may be functionally inescapable in a given case and in a given context of specific local conditions.²⁸ Accordingly, automatic application of the “political-question doctrine” in the sense of not allowing the judges any authority to deal with policies does not meet the purposes of the separation theory in its modern version.²⁹ Some measure of judicial role in the national politics of any country, in fact, is inevitable,

²⁴ This was indeed the case with Thailand’s former prime minister Yingluck Shinawatra who in May 2014 was ordered by that country’s Constitutional Court to resign. The Constitutional Court’s intervention in this regard ultimately saw a military coup in Thailand.

²⁵ Kapiszewski et al. (eds.), *Consequential Courts*, supra Note 17.

²⁶ Kapiszewski et al., “Introduction,” in *Consequential Courts*, 1–41, 7 ff.

²⁷ Ronald Dworkin, “Political Judges and the Rule of Law,” in *A Matter of Principle* (Oxford: Oxford University Press, 1985), 9–32.

²⁸ Hoque, *Judicial Activism in Bangladesh*, 37–8.

²⁹ In the context of the German Constitutional Court’s experience, one commentator observed that “constitutional law, with its broad general clauses and its vague conception of values, offers a particularly wide scope for interpretation. Any wish to keep political considerations out of this interpretation would be doomed to failure at the outset.” See Otto Bachof (1976), “The West German Constitutional Judge between Law and Politics,” *Texas International Law Journal* 11 (3): 403–19, 405.

and constitutional adjudication is certain to produce political implications. Nevertheless, there are certain controversies that – although they arise in the background of conflicting constitutional claims made by opposing political parties – belong squarely to “mega” or “pure” politics, requiring pragmatic deference rather than adjudication by courts.³⁰

AN OVERVIEW OF JUDICIAL ENGAGEMENT WITH POLITICAL ISSUES IN BANGLADESH

This section surveys the way in which the Bangladeshi senior judiciary addressed political issues – that is, the way in which it drew the line between law and politics or helped them to interact.

Judicial engagement with policy matters in Bangladesh is not uncommon. The Supreme Court, however, often shies away from recognizing its policy role. On several occasions, including when addressing difficult issues, it has claimed that it would “go by the law as it is”³¹ and would say nothing in policy matters,³² stressing that what it does in any case is an interpretation of the constitution, not making of the law. Despite this claim, however, Bangladesh’s Supreme Court – from the beginning of its history – expressed policy preferences or exercised political power when adjudicating constitutional petitions. This tradition of judicialization of politics, which has not yet been thoroughly studied in Bangladesh, can be traced back to the political environment of unstable constitutionalism in early Pakistan, when the courts were frequently relied on for answers to political crises.

During the Pakistani regime, preceding Bangladesh’s independence, “the law” and the constitution often were used by politicians and rulers to override political opposition. In the early history of Pakistan, the legality of the dissolution of the Constituent Assembly a few months before the country’s constitution-framing was completed – and similar political disputes – was litigated. In *Maulvi Tamizuddin Khan v. Federation of Pakistan* (1955), the High Court held in favor of legislative supremacy by declaring unlawful the Governor-General’s dissolution of the Constituent Assembly.³³ However, the

³⁰ For Hirschl, judicialization of mega-politics is the reliance on courts for dealing with core political controversies “that define (and often divide) whole politics.” Ran Hirschl, “The Judicialization of Politics,” in Keith E. Whittington et al. (eds.), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2010), 119–41, 123.

³¹ *Mosharraf Hossain v. Bangladesh*, (2004) 56 DLR (AD) 13.

³² *Dr. Mohiuddin Farooque v. Bangladesh*, (1998) 50 DLR (HCD) 84, 97.

³³ PLD 1955 Sind 96. The Court viewed the decision as “politically progressive” but it was not concerned with whether a political crisis was or was not imminent or with the political environment in which they lived. See Newberg, *Judging the State*, 43–4.

Federal Court on appeal vacated the judgment on a technical ground that the law under which the High Court issued a writ against the act of the Governor-General had not been validly enacted because the Governor-General withheld his assent.³⁴ In 1966, a dispute arising from the resignation of a member of the National Assembly, his later withdrawal thereof, and the ruling by the Speaker of the Assembly that the resignation became effective was settled by the Pakistani Supreme Court on constitutional procedural grounds.³⁵ Similarly, in a famous decision in the 1960s, the Supreme Court ruled on the inability of the president's "constitutional" power to amend the law in a way that contradicts the structure of the constitution.³⁶

In the post-independence regime, the Supreme Court of Bangladesh generally pursued a broader approach to the justiciability of issues with political ramifications, a trend that began during the formative years of the Court. For example, in an abstract review petition³⁷ challenging the constitutionality of the Delhi–Dhaka Treaty of May 16, 1974, involving the exchange of territories between Bangladesh and India, the Appellate Division exercised its jurisdiction by rejecting the argument of non-justiciability of an "act of state" (i.e., the conclusion of a treaty).³⁸ Although it ultimately refused to issue the remedy, the Court advised that the treaty could not be implemented without first amending the constitutional definition of "the territory of the Republic." Arguably, this case showed how strategic judicial intervention into political issues through legitimizing government actions can be made. By exercising its authority over an abstract review petition, the Court in this case also set the grounds for judicialization of politics in constitutional challenges in the future.

Judicialization of politics in Bangladesh, however, did not flourish immediately after independence. Rather, the growth of the phenomenon has been

³⁴ *Federation of Pakistan v. Maulvi Tamizuddin Khan*, 1955 PLD FC 240 (Justice Cornelius dissenting). As Newberg (*ibid.*, 45) reported, during the appeal, Justice Munir suggested that the question presented for judicial determination was a political question and better resolved among the disputing parties. Yet, it became apparent that the 1955 decision was a political judgment.

³⁵ *AKM Fazlul Quader Chowdhury v. Syed Shah Nawaz*, (1966) 18 DLR (AD) (SC) 62.

³⁶ *Fazlul Quader Chowdhury v. M. Abdul Huq*, PLD 1963 SC 486 ("[F]ranchise and form of government are fundamental features of a Constitution and the power conferred upon the Presidency by the constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution") (affirming the Dhaka High Court's decision in *M. Abdul Huq v. Fazlul Quader Chowdhury*, (1963) 15 DLR (Dacca) 355).

³⁷ Abstract judicial review allows any citizen to challenge the constitutionality of any action or law on the face of it rather than by proving a "concrete injury or controversy."

³⁸ *Kazi Mukhlesur Rahman v. Bangladesh*, (1974) 26 DLR (AD) 44 (compare to the *Inter-German Treaty Case*, Note 129).

concomitant with the oscillation of democratic stability in Bangladesh.³⁹ Except for the first major instance of judicial activism in 1989, when the Supreme Court established the basic-structure doctrine (BSD),⁴⁰ judicialization of politics has been a post-autocracy (i.e., post-1990) development.

Two important drivers of post-1990 “judicialization” in Bangladesh are the politicians and victims of politics and the public-interest litigation (PIL). I claim elsewhere that the emergence of a new constitutional environment after the fall of the autocratic regime in 1990 meant that the people renewed their faith in constitutionalism.⁴¹ It also is in this period that the PIL became entrenched and judicial constitutional activism began to develop.⁴² Against such a backdrop, any attempt – real or purported – to circumvent constitutionalism was met with constitutional petitions either by politicians or individual or institutional public-interest challengers (i.e., cause-litigants). In particular, since the late 1990s, PIL has become the primary vehicle for judicialization of politics as well as for the politicization of the law and the constitution.⁴³ More recently, the volume and scope of constitutionalism-inspired PIL cases have increased significantly, with the purported intention of checking myriad forms of unconstitutionality,⁴⁴ whereas the post-Emergency (i.e., since 2009) judiciary is increasingly involved in policy-setting exercises with renewed enthusiasm.⁴⁵

In the context of an increasing number of political disputes being litigated, the Supreme Court adopted an engagement approach to interventions,

³⁹ For details on this idea (with reference to the development of judicial activism in Bangladesh), see Hoque, *Judicial Activism in Bangladesh*, ch. 4.

⁴⁰ See Note 86 and the accompanying text.

⁴¹ Hoque, *Judicial Activism in Bangladesh*, 118. This claim resonates with Justice Rahman’s assessment in M. H. Rahman (1998), “Our Experience with Constitutionalism,” *Bangladesh Journal of Law* 2: 115–32.

⁴² The Supreme Court accepted PIL authoritatively in a 1996 decision in *Dr. Mohiuddin Farooque v. Bangladesh*, (1997) 17 BLD (AD) 1 (granting, for the first time, standing to an organization to challenge in the public interest a flood-control project).

⁴³ Providing a detailed account of PIL in Bangladesh is beyond the scope of this chapter. For an overview of how PIL changed its focus from rights issues to constitutional issues, see Ridwanul Hoque (2006), “Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh,” *Contemporary South Asia* 15: 399–422.

⁴⁴ As further discussed herein, PIL in Bangladesh is increasingly being misused to take political issues to the Supreme Court. The abuse of PIL in Bangladesh for both “judicialization” and “politicization” must be urgently researched. The cases analyzed in this chapter provide only a partial picture of this abusive trend.

⁴⁵ “This shift, although it is often justified in terms of constitutional imperative, is arguably driven by the post-Emergency (2007–2008) democratic changes in the polity.” Ridwanul Hoque, “Constitutionalism and the Judiciary in Bangladesh,” in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds.), *Comparative Constitutionalism in South Asia* (New Delhi: Oxford University Press, 2012), 303–40, 327.

refusing to readily accept the doctrine of political questions⁴⁶ but remaining at times essentially passive on complex political issues, such as in the case of legality of *hartal* (i.e., political strikes).⁴⁷ In dealing with politically sensitive issues, the Court has sought to retain its authority by cautiously avoiding any severe conflict with other constitutional organs.⁴⁸ More specifically, in the early 1990s, it developed a type of guiding norm with regard to constitutional cases involving political issues, which is the rule of “self-constraint”⁴⁹ – although to what extent the guidance was followed later is a different question.

Regarding the issue of judicialization of politics, the post-1990 Supreme Court’s interventions were through the supervision of the political process, often adjudicating the disputes relating to fairness of elections and voting rights, and the enforcement of wider principles of constitutionalism, such as the representation of the people in governance or judicial independence.⁵⁰ For example, in an important case involving the question of public representation in democracy, the Appellate Division refused to strike down a law removing a local-government tier but enjoined the government to hold elections of the existing local bodies within six months of their order and “keeping in view the provision for special representation [of women].”⁵¹

⁴⁶ *The Constitutional Reference No. 1 of 1995*, (1995) III BLT (Spl.) 159, 173 (“There is no magic in the phrase ‘political question’”), per Chief Justice A. T. M. Afzal. See also the unreported case of *M. A. Mannan v. Bangladesh* (2008), HCD, judgment of November 2, 2008, concerning the legality of delimitation of constituencies. The Court, in effect, held that it could address politics-inspired issues of constitutional importance. See, however, *M/S Dulichand Omraolal v. Bangladesh*, (1981) 1 BLD (AD) 1, 7 (the Court avoided the issue of legitimacy of Yahya Khan’s regime, terming it a “political question”).

⁴⁷ In *Khondaker Modarresh Elahi v. Bangladesh*, (2001) 21 BLD (HCD) 352, 375, the Court thought that “this political issue should in all fairness be decided by the politicians.” Again, refusing to rule out *hartal* as illegal, the Appellate Division in *Abdul Manman Bhuiyan v. State*, (2008) 60 DLR (AD) 49, held that calling of *hartal*, unaccompanied by force or violence, is a democratic right.

⁴⁸ For example, although the Court recognized its lack of jurisdiction to scrutinize internal proceedings of parliament, it held that the Speaker’s ruling on a constitutional matter and the issue of the legality of a technocrat minister’s speech in parliament on a matter unrelated to his portfolio were justiciable. See, respectively, *Najmul Huda, MP v. Secretary, Cabinet Division*, (1997) 2 BLC (HCD) 414; and *Rafique Hossain v. Speaker, Bangladesh Parliament*, (2002) 54 DLR (HCD) 42. Cf. the case of *Najmul Huda* with an old case, *Fazlul Quader Chowdhury v. M. Abdul Huq*, (1966)18 DLR (SC) 69, in which the Supreme Court of Pakistan invalidated a law allowing unelected ministers in Ayub Khan’s Cabinet to answer questions in parliament.

⁴⁹ See the *Constitutional Reference No. 1 of 1995*, (1995) III BLT (Spl.) 159, 173, in which the Appellate Division observed that while maintaining judicial restraint, the Court can well “pronounce on an issue which may be dubbed as a political question.”

⁵⁰ For a different type of judicialization, however, see *Dr. M. A. Salam v. Government of Bangladesh*, Writ Petition (WP) No. 2577 of 2009 (HCD’s judgment of June 21, 2009, involving the question of who proclaimed Bangladesh’s independence on March 26, 1971).

⁵¹ *Kudrat-E-Elahi Panir v. Bangladesh*, (1992) 44 DLR (AD) 319, 366.

Judicial involvement with complex political issues began to be apparent in the mid-1990s. In a 1994 case, *Anwar Hossain Khan v. Speaker of Sangsad*,⁵² the issue of the legality of boycotting of parliament by members (MPs) of opposition parties, which they considered a bargaining chip to realize the demand for the CTG, was adjudicated by the High Court Division (HCD). The Court not only issued an injunction enjoining the boycotting MPs to join the House, it also entangled itself in “pure politics”⁵³ by commenting, *ex gratia*, that the demand for the CTG was not supported by the constitution.⁵⁴ On appeal, however, the Appellate Division took a pragmatic course, overruling the decision of the HCD. Disposing of the appeal almost thirteen years after its lodgement in early 1995, the Appellate Division held that an order of *mandamus* would not issue against unwilling members enjoining them to join the parliament. The Court also virtually held that internal matters of the parliament were beyond judicial scrutiny and that a judicial order, which would be inexecutable, would not solve that particular (political) problem.⁵⁵

The political crisis that was sought to be resolved by the HCD in *Anwar Hossain Khan* did not end with its order. Pending the hearing of the case, the opposition members continued to boycott parliament for more than ninety consecutive days and claimed that their seats became vacant according to the constitution.⁵⁶ On the contrary, the argument of the political incumbent was that “boycott” was not “absence” from parliament so as to trigger the law relating to the vacancy of seats. The Court did not declare vacant the seats of boycotting MPs either. In less than three weeks after the Court’s order, the opposition MPs resigned en masse on December 28, 1994. The Speaker of the parliament ruled that the resignations were ineffective. Eventually, the president sent a reference to the Supreme Court seeking its advice on whether the boycotting MPs’ seats would have become vacant for “absence” from parliament for ninety consecutive days. In the background of escalating political instability, the nation was expecting the apex court to play its due role vis-à-vis the political impasse, whereas the leading lawyers advised the Court

⁵² (1995) 47 DLR (HCD) 42 (judgment of December 11, 1994).

⁵³ Hirschl, *The New Constitutionalism*, 721.

⁵⁴ *Anwar Hossain Khan v. Speaker of Sangsad*, (1995) 47 DLR (HCD) 42, 51 (“The concept of Caretaker Government is nowhere to be found within the four corners of the Constitution”).

⁵⁵ *Moudud Ahmed v. Anwar Hossain Khan*, (2008) 60 DLR (AD) 108, 122 (judgment of December 11, 2007: “[Compelling members of parliament to join its sessions] could in no manner or way be done since participation or non-participation in the proceedings of the Parliament . . . by a particular member is absolutely [a] personal matter and [depends on his] own volition . . .”). These cases also are discussed in [Chapter 7](#) in this volume.

⁵⁶ The Constitution of Bangladesh, Article 67(1)(b).

not to step into politics. The Appellate Division, although it decided to answer the reference, was anxious to stay “aloof from political controversies”⁵⁷ – but not at the cost of its responsibility to resolve what it considered to be a legal question. Speaking for the Court, Chief Justice Afzal offered the following reasoning:

We are plainly at a loss to appreciate . . . why the absence of the members of the opposition should not be construed as absence . . . Does it enhance the cause of constitutionalism . . . by construing their absence as presence? . . . That it will be onerous for holding by-election if such a large number of seats fall vacant at a time is no ground for giving a twisted meaning to the word “absent” . . .⁵⁸

Of all litigated issues with political undercurrents, issues related to fairness in the electoral processes are the most frequent appearances. On different occasions, the Court adjudicated the issues of the legality of delimitation of constituencies and of making a fresh voters’ list; the constitutional appropriateness of appointing a Supreme Court judge as the Chief Election Commissioner⁵⁹; and similar issues, such as the legality of a “selective” local government.⁶⁰ In 2006, for example, in the wake of a violent political crisis over the issue of a neutral CTG, the HCD ruled that the voters’ lists drawn up for the upcoming 2007 election (which, however, was not held in 2007) were invalid, and ordered the Election Commission to draw up fresh electoral rolls on the basis of the 2001 roll.⁶¹ The case was filed by opposition leaders, and the judgment was later affirmed by the Appellate Division. The dispute over the electoral rolls did not end there. New electoral rolls were drawn up, which also were challenged in the Court.⁶² The 2007 elections were postponed, and a State of Emergency was declared on January 10, 2007. The political crisis that ensued worsened when the HCD in late January ruled that “elections could not be

⁵⁷ *The Constitutional Reference No. 1 of 1995*, (1995) III BLT (Spl.) 159, 160.

⁵⁸ *Ibid.*, 187–8.

⁵⁹ See *Ruhul Quddus v. Justice M. A. Aziz*, (2008) 60 DLR (HCD) 511.

⁶⁰ *BLAST v. Bangladesh*, (2008) 60 DLR (HCD) 234. In this case, the Court adjudged the Village Government Act of 2003 as unconstitutional for undermining the constitutional principle of representative governance by providing for a grassroots-level local government on the basis of selection of offices.

⁶¹ Hirschl regarded this particular judicial intervention as judicialization of “pure politics.” See Hirschl, *The New Constitutionalism*. *The Economist* critiqued this intervention as “courting danger.” See “Courting Danger: Democracy in the Lap of the Judges,” *The Economist*, June 3, 2006: 40.

⁶² *Kazi Mammur Rashid v. Bangladesh*, (2009) 61 DLR (HCD) 433 (in the final judgment, the Court underlined the government’s duty to make the Election Commission independent).

held for at least three months or until the voter-registration process had been completely overhauled”.⁶³

During the two-year-long State of Emergency (2007–2008), when judicial power was restrained by the Emergency laws, judicial activity to enforce democratic principles was a mixture of abstention and assertion. The Appellate Division of the Supreme Court remained largely hands-off vis-à-vis the issues of breaches of constitutionalism, whereas the HCD sought to assert its authority.⁶⁴ Although the politicians – many of whom remained incarcerated on corruption charges – did not choose to use the law to challenge the new extra-political regime, civil-society actors turned to the courts to strategically use the law to challenge the then-external source of “unstable constitutionalism” – that is, the pseudo-military regime of 2007–2008. In a high-profile PIL case, *Advocate Sultana Kamal and others v. Bangladesh* (2008),⁶⁵ the constitutionality of certain provisions of the Emergency laws,⁶⁶ but not the Emergency itself, was challenged. A few days before the State of Emergency was lifted in late 2008, the HCD struck down some provisions of the impugned laws on the grounds that they unconstitutionally barred judicial review of executive orders under any Emergency law.⁶⁷ The Court viewed the provisions under challenge as an affront to the principles of justice and the due process of law, observing that the State of Emergency cannot continue for an indefinite period under the constitution. On appeal, however, the Appellate Division by an interim order stayed the efficacy of the HCD’s decision. Before the HCD’s decision in *Advocate Sultana Kamal*, the Court accepted another PIL, *M. Saleem Ullah and others v. Bangladesh* (2008),⁶⁸ which challenged the constitutionality of the 2007 Emergency. Issuing a rule *nisi*, the Court directed the Emergency government to clarify how and when it planned to handover powers to elected representatives and observed that the promised transfer of power must be transparent.⁶⁹

⁶³ See “Bangladesh Crisis Deepens after Election Suspension,” Reuters, January 29, 2007. Available at <http://reuters.com/article/2007/01/29/idUSDHA15446> (accessed March 15, 2014).

⁶⁴ On judicial politics in Bangladesh during the 2007–2008 Emergency, see Ridwanul Hoque (2009), “The Recent Emergency and the Politics of the Judiciary in Bangladesh,” *National University of Juridical Science Law Review* 2(2): 183–204.

⁶⁵ (2008) 14 MLR (HCD) 105.

⁶⁶ The Emergency Powers Ordinance of 2007 and the Emergency Powers Rules of 2007.

⁶⁷ See Hoque, *The Recent Emergency*.

⁶⁸ WP No. 5033 of 2008.

⁶⁹ *Ibid.*, by an order of July 14, 2008. Another PIL challenging constitutional provisions providing for the Emergency was filed in 2008; however, before it could be heard, the Emergency was withdrawn. See *M. Asafuddowla and others v. Bangladesh* (WP of November 24, 2008).

When the post-Emergency AL government took charge in 2009, the issue of the legality of the Jamaat-e-Islami Bangladesh (JIB), the most prominent right-wing, religion-based political party, became a major political issue in two contexts: (1) the accusation that the party and its leaders were responsible for war crimes during Bangladesh's liberation war in 1971; and (2) the electoral pledge of the AL that, if voted to power, it would try the war criminals. In 2009, a leader of a little-known religion-based political party filed with the HCD a PIL challenging the registration of JIB with the Election Commission.⁷⁰ When the next general election approached, the Court in a 2013 split decision (two to one) declared the JIB's registration illegal.⁷¹

However, two weeks before the general election of January 5, 2014, a vice chairman of a political party (i.e., the Jatiya Party) – which, after the submission of candidacies, announced that it would not run in the elections – challenged the constitutionality of a provision in the main electoral law that allows “uncontested” winning of any lone candidate for a parliamentary seat.⁷² Following the 2014 parliamentary elections, the Court, on hearing the parties, refused to strike down the impugned law. In the words of the Court, given that 153 members of parliament (of 300) had already been elected “uncontested” in the tenth parliament, it saw no way to declare the law unconstitutional.

Now I turn to an instance of judicial intervention into politics of a different genre involving the Chittagong Hill Tracts Peace Accord of 1997 that was entered into between the government and a representative organization of indigenous communities in the Chittagong Hill Tracts (CHT) with a view to establishing peace in the region. The organization, called the Parbatya Chattagram Jana Samhati Samiti (PCJSS),⁷³ had long been pursuing an armed belligerence to establish indigenous people's right over the lands as well as their share in the governance of affairs relating to the CHT. The CHT Peace Accord of 1997 prompted a number of legislative acts in 1998, one of which established a special type of local government in that region: the Chittagong Hill Tracts Regional Council (CHTRC).⁷⁴ A Bangalee settler of the region

⁷⁰ *Maulana Syed Rezaul Haque Chandpuri and others v. Jamaat-e-Islami Bangladesh and others*, WP No. 630 of 2009 (arguing that JIB's constitution, other than being inconsistent with the Constitution of the Republic, failed to comply with the legal requirements of registration under Articles 90C and 90B(i)(b)(ii) of the Representation of the People Order of 1972, as amended in 2008).

⁷¹ *Ibid.* Judgment of August 1, 2013 (Justice M. M. Husain dissenting).

⁷² *Abdus Salam v. Bangladesh*, WP No. 12398 of 2013 (HCD's judgment of June 18, 2014). When the case was being heard, the petitioner's party remained reticent, whereas the government and the prime minister expressed agony and discontent with the case.

⁷³ Meaning the *Chittagong Hill Tracts People's Solidarity Association*.

⁷⁴ Established by virtue of the Chittagong Hill Tracts Regional Council Act of 1998.

challenged the constitutionality of the Peace Accord and the Regional Council in 2000.⁷⁵

As the issues surrounding this case unfolded, it became apparent that behind the private litigant was a political party, the JIB. When the constitutional petition of 2000 was awaiting a hearing, another challenge of the legality of the CHT Peace Accord was brought by a lawyer affiliated with that party in 2007, when a military-backed CTG was in power.⁷⁶

Conjoining the two petitions, the HCD in a 2010 decision⁷⁷ declared the CHTRC unconstitutional for violating the state's unitary character, as well as not being a local government body created within the constitution's mandate,⁷⁸ and also struck down certain statutory provisions as discriminatory against citizens other than aboriginals in the CHT. The Court, however, refused to invalidate the CHT Peace Accord of 1997 and was cognizant of the limitations of its "authority, expertise, and ability" to resolve an admixture of social, economic, and political issues.⁷⁹ The type of intervention that ultimately was made in these two cases, as may be gleaned from its reasoning, was seen by the Court as a necessary intervention to make the ongoing peace process ultimately fruitful.⁸⁰

The conclusion of the 1997 Peace Accord was a high-level policy issue and the Accord, despite the fact that its terms were not being satisfactorily complied with by the government, was a notable success in convincing the rebels to agree to surrender arms and establish peace. The CHTRC was one of two new institutions that were established in pursuance of the Peace Accord objectives. This not only forged an innovation in the style of aboriginal people's participation in the CHT-region but also extended to them a tacit recognition of their cultural and separate political identity. From the normative perspective of inclusive constitutionalism and in light of historical-political contexts that are specific to the CHT issue, it seems that the Court failed to properly appreciate the political environment that led to the creation of a special body like the CHTRC and made up the background of the two cases. Questions

⁷⁵ *Mohammad Badiuzzaman v. Bangladesh*, WP No. 2669 of 2000.

⁷⁶ *Advocate Md. Tajul Islam v. Bangladesh and others*, WP No. 6451 of 2007.

⁷⁷ *Mohammad Badiuzzaman v. Bangladesh* (2010) 7 LG (HCD) 208.

⁷⁸ *Ibid.*, 230. The CHT was not predeclared an "administrative unit" within the meaning of Article 152(1) of Bangladesh's Constitution, which the Court held was a condition precedent to the establishment of any local government.

⁷⁹ *Ibid.*, 238 and 219.

⁸⁰ In the Court's view, "the CHT peace process to be sustainable must be informed by concerted innovative efforts at constant evaluation and reinvention." Having said this, the Court set out to frame certain inexhaustive guidelines for the policy makers to follow. *Ibid.*, 238.

remain as to whether the Court took the “devolution” of power to the CHTRC as so radical an affront to the unitary character of the country.⁸¹

JUDICIAL ANNULMENT OF CONSTITUTIONAL AMENDMENTS

This section takes a critical look at judicial engagement with mega-political decisions in Bangladesh through the application of the BSD, with special reference to the Supreme Court’s annulment of the Thirteenth Amendment of the constitution. The BSD refers to the idea that certain fundamental cores of any given constitution may never be altered by parliament. This is underpinned by the logic that parliament has only a limited amending power and lacks the “constituent power”⁸² that belongs only to the people.⁸³ As such, the judiciary, the organ that is more insulated from politics, should have the legitimate power to “declare” unlawful (rather than to unmake) any constitutional amendment that destroys the basic structure of the constitution.

The Court’s power to annul constitutional amendments is an intensely debated phenomenon.⁸⁴ In South Asia, however, this power of the Constitutional Courts appears as a unique tool with potential to mitigate forces of unstable constitutionalism.⁸⁵ As discussed in this section, the BSD, particularly

⁸¹ A petition for leave to appeal against this judgment was made to the Appellate Division of the Supreme Court, which on March 11, 2011, granted a leave and also stayed the effectiveness of the HCD’s decision.

⁸² For a history and different modern concepts of “constituent power,” see Joel Colon-Rios (2014), “Five Conceptions of Constituent Power,” *Law Quarterly Review* 130: 306–36.

⁸³ *Kesavananda Bharati v. State of Kerala*, (1973)4 SCR 225. See also *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

⁸⁴ This chapter does not enter into this debate except to the extent that it is relevant. The volume of literature on the BSD currently is quite large. Among many works, see Gary J. Jacobsohn (2006), “An Unconstitutional Constitution? A Comparative Perspective,” *International Journal of Constitutional Law* 4: 46–87; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (New Delhi: Oxford University Press, 2009); and Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa, Turkey: Ekin Press, 2008). On the Bangladeshi perspective, see Hoque, *Judicial Activism in Bangladesh*, 112–19; Salimullah Khan (2011), “Leviathan and the Supreme Court: An Essay on the ‘Basic Structure’ Doctrine,” *Stanford Journal of Law* 2: 89–107; and M. Jafar Ullah Talukder and M. Jashim Ali Chowdhury (2008), “Determining the Province of Judicial Review: A Re-evaluation of ‘Basic Structure’ of the Constitution of Bangladesh,” *Metropolitan University Journal* 2 (2): 161–70.

⁸⁵ Providing a developmental account of the BSD is beyond the scope of this chapter. It is important to note, however, that the theory of inviolability of basic constitutional structure is increasingly gaining hold in other civilian and common-law systems of constitutionalism. For example, in the United Kingdom, where the doctrine of parliamentary sovereignty has the strongest roots, the Supreme Court in recent decisions suggested that the UK system has certain “constitutional fundamentals” that “even a sovereign Parliament” cannot abolish.

in Bangladesh, has been used recently as a vehicle for overjudicialization of politics.

Before delving into the judicial invalidation of the Thirteenth Amendment, it is pertinent to briefly survey the judicial annulment of other amendments. The Appellate Division first established the BSD in a landmark decision in *Anwar Hossain Chowdhury v. Bangladesh* (1989)⁸⁶ by invalidating the Eighth Amendment that diffused the Supreme Court's HCD into several regional benches.⁸⁷ The majority Court (three to one) reasoned that the diffusion of one division of the Supreme Court was against the unitary character of the Republic, a feature of the basic structure of the constitution.

The Constitution (Eighth Amendment) Act of 1988 was based on several martial-law regulations issued in the early 1980s by the then-military ruler (1982–1990) diffusing the HCD into seven permanent benches. Following the withdrawal of martial law and the revival of the constitution in 1986, the change was inserted into the constitution by amending the original Article 100. A pliable parliament (i.e., the third parliament) that was ingeniously constituted through a sham election when the military ruler was still the president of the country⁸⁸ passed the amending act.⁸⁹ The government claimed that the establishment of permanent branches of the HCD in regional cities was necessary to enable the people to have access to the country's apex court. The autocratic government, however, allegedly sought to make the top judges subservient in the name of decentralizing the Supreme Court for the benefit of the people, by making them transferrable from one place to another. As such, the Eighth Amendment cannot, on substantive grounds, be called an *amendment* by a parliament in the true sense of the term. The entire legal profession had been demonstrating for years against the legal change that was unduly made by the autocratic government. Furthermore, by the time the Court declared the Eighth Amendment Act addressing the HCD's diffusion void, the political

Jackson v. Attorney General, [2006] 1 AC 62, per Lord Steyn. See Colon-Rios, "Five Conceptions of Constituent Power," 312.

⁸⁶ (1989) BLD (Spl.) 1, Justice Afzal dissenting (however, he conceded [212–13] to the view that in the name of the amendment, "the Constitution cannot be destroyed").

⁸⁷ It seems that the trend of interfering with politics through the use of the BSD is significantly influenced by comparative constitutional law. It is widely acknowledged that the doctrine's acceptance in Bangladesh was attenuated by the famous Indian decision in *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCR 225.

⁸⁸ The parliament of 1986 (and also of 1988), constituted by precalculated candidates, was marred by widespread electoral fraud and unprecedented rigging. See M. Y. Akhter, *Electoral Corruption in Bangladesh* (Aldershot: Ashgate, 2001), 132–7.

⁸⁹ The same parliament also enacted the Constitution (Seventh Amendment) Act of 1986, discussed later in this chapter.

environment was gradually becoming congenial for a democratic transition, making political retaliations on the Court unlikely to be fierce.

Following entrenchment of the BSD in Bangladesh in 1989,⁹⁰ the Supreme Court in 2010 and 2011 declared unconstitutional three more constitutional amendments: the Fifth, Seventh, and Thirteenth Amendments.⁹¹

In the case of *Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2005),⁹² which has become known as the Fifth Amendment Case, the HCD declared unconstitutional the Constitution (Fifth Amendment) Act of 1979,⁹³ which gave constitutional protection to the first martial-law regime (i.e., August 20, 1975, to April 9, 1979) and its actions and laws.⁹⁴ As in the case of the Eighth and Seventh Amendments, the election of the third parliament that enacted the Fifth Amendment was through a controversial process overseen by the president-*cum*-martial-law administrator. The Supreme Court held that the changes brought into the constitution were against several elements of its basic structure and that martial law, being no law at all, lacked authority to amend the constitution.⁹⁵ The political party, the founder of which promulgated the martial law now declared void, reacted strategically against the judgment, and the party's secretary appealed the HCD decision. The Appellate Division, by a unanimous 2010 decision,⁹⁶ generally endorsed the HCD and made a policy suggestion that parliament may make law criminalizing coups or extra-constitutional usurpations of power.⁹⁷ Being pronounced many years after the withdrawal of the first martial law, the Court's judgment in the Fifth Amendment Case was first thought to be merely academic. It later became clear that the decision was consequential because it validated certain constitutional changes brought by the Fifth Amendment while striking down most changes. Despite weaknesses and ambiguity in the Court's reasoning

⁹⁰ It is interesting that the BSD was internalized in the Constitution of Bangladesh in 2011 via the Constitution (Fifteenth Amendment) Act of 2011. See Article 7B (the "eternal clause") of the constitution.

⁹¹ In these few paragraphs, I rely on my earlier analyses in Hoque, *Judicial Activism in Bangladesh*, 315–18.

⁹² (2006) BLT (Special) (HCD) 1 (judgment of August 29, 2005). The case involved the taking over of a private property by the government by virtue of a martial-law regulation.

⁹³ Act No. 1 of 1979.

⁹⁴ It inserted into the constitution's Fourth Schedule a paragraph (No. 18) to "ratify" and "confirm" martial-law proclamations and regulations issued by the military ruler.

⁹⁵ For a brief note on this, see Ridwanul Hoque, "On *Coup d'Etat*, Constitutionalism, and the Need to Break the Subtle Bondage with Alien Legal Thought: A Reply to Omar and Hossain," *The Daily Star* (Issue 213, *Law & Our Rights*), Dhaka, October 29, 2005.

⁹⁶ *Khondker Delwar Hossain v. Bangladesh Italian Marble Works Ltd.*, (2010) 62 DLR (AD) 298.

⁹⁷ See Article 7A of the constitution, inserted through the Fifteenth Amendment in 2011 (declaring that subversion of or conspiracy to subvert the constitution should be regarded as "sedition").

with respect to the “fruits of a poisonous tree,” the decision seems to be a bold assertion against unconstitutional usurpation of state powers. The 2005 decision of the HCD arguably acted as a deterrent to a full-blown military takeover during or before the 2007 Emergency.

Inspired by the Fifth Amendment decision, the HCD in *Siddique Ahmed v. Bangladesh* (2011)⁹⁸ declared unconstitutional the Constitution (Seventh Amendment) Act of 1986⁹⁹ that legitimized the second martial-law regime (i.e., March 24, 1982, to November 11, 1986),¹⁰⁰ although it refused to sustain the petitioner’s claim that his criminal conviction during the military regime was illegal. The political party whose founding leader promulgated the second martial law was not assertive in reacting to the decision; however, the petitioner, still dissatisfied, appealed to the Appellate Division, which unanimously endorsed the HCD’s decision.¹⁰¹

INVALIDATION OF THE THIRTEENTH AMENDMENT: THE CASE OF OVER-JUDICIALIZATION

In the most recent BSD case, *Abdul Mannan Khan v. Bangladesh* (2011),¹⁰² the Appellate Division by a four-to-three decision declared (prospectively) unlawful the Constitution (Thirteenth Amendment) Act of 1996¹⁰³ that instituted the CTG system, which would take over state power during the interregnum between two elected governments (i.e., ninety days) to conduct and oversee national elections.¹⁰⁴ The Court reasoned that the CTG system, being an unelected government and the retired chief justices having been involved in its governance, is against “democracy” and “judicial independence,” two elements of the basic structure of the constitution.

Abdul Mannan Khan was an appeal against the HCD’s decision in *M. Saleem Ullah v. Bangladesh* (2004),¹⁰⁵ which was filed as a PIL by a lawyer

⁹⁸ (2011) 63 DLR (HCD) 84.

⁹⁹ Act No. 1 of 1986.

¹⁰⁰ By way of inserting paragraph 19 into the Fourth Schedule of the constitution, providing that the acts, laws, proclamations, and regulations made during the martial-law period would be valid and immune from challenge.

¹⁰¹ *Siddique Ahmed v. Government of Bangladesh and others*, (2013) 65 DLR (AD) 8 (judgment of May 15, 2011).

¹⁰² (2012) 64 DLR (AD) 1.

¹⁰³ Act No. 1 of 1996.

¹⁰⁴ Political anecdotes surrounding the CTG issue are discussed in [Chapter 7](#) in this volume.

¹⁰⁵ (2005) 57 DLR (HCD) 171 (judgment of August 4, 2004). The challenge was made in 1999 (WP No. 4212 of 1999), after the first challenge in WP No. 1729 of 1996 by another petitioner was unsuccessful. See Note 106.

on the grounds that the CTG was incompatible with the constitution's basic structures. Although the Court did not question the genuineness of the petitioner's "public-interest" grievance, it rejected his argument and found the CTG system to rather have boosted democracy, a basic constitutional feature, by helping it to consolidate. In regard to the engagement of a retired chief justice as head of the CTG, the Court preferred not to interfere with the political wisdom, leaving it to the parliament to find another option. Long before this decision, the legality of the CTG was challenged in another abstract review petition, which the HCD rejected summarily because it found "no unconstitutional action" on the part of the "legislature" in enacting the Thirteenth Amendment to provide for the CTG for a "limited period."¹⁰⁶

These rationales of the HCD, underpinned by an approach of judicial restraint with regard to structural political and policy issues, were sidelined by the Appellate Division with not as cogent reasoning. As discussed later in this section, the plurality in the Appellate Division applied the BSD quite mundanely and not in light of the local context.

It is not surprising that the Appellate Division's Thirteenth Amendment decision produced serious political implications, as discussed previously. The decision effectively sharpened the ongoing political crisis over the CTG issue. Immediately after the AL assumed power following the 2009 elections, the ruling party showed signs that it would discard the CTG system. Following the Court's "short order" on May 10, 2011, the government, which had an absolute majority in parliament, claimed that it would implement the judgment. The parliament, then, rushed to enact the Fifteenth Amendment¹⁰⁷ within two months of the Court's preliminary order, to eliminate the system of non-party CTG without the concurrence of the opposition party (i.e., the BNP).¹⁰⁸ Major opposition parties began violent protests to a degree never seen before to press their demand for the restoration of the CTG system, and they boycotted the January 2014 elections. Ironically, the unnatural exclusion of the CTG system on the plea that it is "undemocratic" resulted in a type of distorted democracy. The election of the tenth parliament was virtually a one-party election (with

¹⁰⁶ *Syed Muhammad Mashiur Rahman v. President of Bangladesh*, (1997) 17 BLD (HCD) 55, 57 (judgment of July 25, 1996).

¹⁰⁷ The Constitution (Fifteenth Amendment) Act of 2011 (Act XIV of 2011).

¹⁰⁸ Although the government claimed that a constitution-reform committee had been working for two years preceding the Fifteenth Amendment, the committee actually was formed to consider changes in light of the Supreme Court's decisions striking down the Fifth and Seventh Amendments. The committee, however, held quick consultations before finalizing its report on the Fifteenth Amendment Bill, and was advised by experts and politicians to not discard the CTG system. In its May 29, 2011, decision, the committee decided to retain the CTG system, but it ultimately recommended the abolition of the system.

the AL once again in power) with no opposition in parliament to challenge the government and therefore was deficient in legitimacy.¹⁰⁹ The major political party (i.e., the BNP) that is left out of parliament is now demanding an interim, all-party election under a neutral administration, and it is likely to stage further protests and movements. As such, the crisis that put the nation into a deep abyss before the 2014 elections is not yet over, putting in limbo the certainty about how and when the next election will be held.

Did the Appellate Division consider these political consequences when it invalidated the CTG system? Should a Constitutional Court be concerned about consequences of its decisions? It seems that the Appellate Division was not entirely unaware of the consequences of its decision to void the CTG system. In its short order, the Court made a policy suggestion, deficient in reasoning, that “[t]he election of the Tenth and Eleventh Parliament may be held under the provision of the . . . Thirteenth Amendment” on the grounds of state necessity and public safety.¹¹⁰ This raises the question of why it was so urgent to adjudicate on the legality of the CTG system in 2011 when the Court was suspicious of the break in public safety if the system were negated.

To understand the judicialization of politics in the Thirteenth Amendment Case, the decision-making process must be reviewed. The leading judge writing the judgment for the court was Chief Justice A. B. M. Kahirul Haque. The appeal against the HCD’s judgment in *M. Saleem Ullah*, which was pending in the Appellate Division since 2005, was heard after Justice Haque took office as chief justice.¹¹¹ Furthermore, the judgment concerning such an important structural issue was handed down by issuing a one-page “short order” on May 10, 2011, only eight days before Justice Haque’s retirement.¹¹² All but two of the eight *amici curiae* either were in favor of a “restrained” Court over the constitutionality issue of CTG or asked the Court to see it as constitutional, advice on which it chose not to act. It is important to note that the full judgment of the

¹⁰⁹ Candidates in 153 seats (of 300 seats to be elected) were declared “elected” without contestation. Also, candidates of the Jatiya Party – which, after submitting nominations of candidature, declared that it would not participate in the 2014 election – were elected because their withdrawals were held to be not lawful. This party later joined the current Cabinet. As such, although the government officially appointed the Jatiya Party as the opposition parliamentary party, there is no opposition party in the current parliament.

¹¹⁰ *Abdul Maman Khan v. Bangladesh*, supra note 102. The Court referred to the principles of *quod alius non est licitum, necessitas licitum facit* (i.e., that which otherwise is not lawful, necessity makes lawful) and *salus populi suprema lex* (i.e., safety of the people is the supreme law).

¹¹¹ Justice Haque was appointed the Chief Justice on September 30, 2010, by superseding two senior judges of the Appellate Division – namely, Justice Matin and Justice Rahman. The case was heard on ten dates beginning on March 1, 2011.

¹¹² Justice Haque retired as the nineteenth Chief Justice of Bangladesh on May 18, 2011.

Appellate Division was written more than a year after the interim judgment in 2011, with Justice Haque writing it after his retirement.¹¹³ In the meantime, the Fifteenth Amendment abolishing the CTG system was enacted, and the plurality Court's detailed judgment is alleged to be conforming to changes brought about through the amendment.

It seems that the Appellate Division in the Thirteenth Amendment Case misapplied the BSD.¹¹⁴ In Western jurisprudence, the BSD is widely held as contrary to democratic norms. Yet, the BSD has become entrenched in South Asia as a tool for preserving the “identity” of the state – that is, to protect the independence constitutions vis-à-vis pressure of change or onslaughts from communal politics, political revolutions, and military coups.¹¹⁵ The critics' apprehension about judicial excessiveness with regard to the BSD, however, is not entirely baseless or nebulous. The Court indeed may marginalize essential political wisdom by invalidating any given constitutional amendment such as the Thirteenth Amendment in Bangladesh.¹¹⁶ In a BSD case, therefore, the more fundamental issue of whether it should invoke the doctrine to strike down any constitutional amendment should be decided essentially by applying local constitutional standards.

The BSD's inappropriate application resulted from a misreading of the constitution and improper exclusion of specificities of local politics characterized by, among other things, distrust among politicians with regard to fair play in elections.¹¹⁷ When looking at the contours of “democracy” as a basic feature

¹¹³ The detailed judgment was not made public until September 2012, when it was not even known that three judges gave their dissenting opinions.

¹¹⁴ Unjustified application of the BSD also occurs in other jurisdictions. In 2009, for example, the Czech Constitutional Court invalidated a Constitutional Act that retrospectively reduced the fifth term of Office of the Lower Chamber of Parliament. One commentator stated that although the Czech Court was generally correct in claiming an authority to substantively review even constitutional norms, the present case was not the appropriate one in which to annul a constitutional amendment. See Yaniv Roznai (2014), “Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act,” *Vienna Journal of International Constitutional Law* 8(1): 29–57. See also Yaniv Roznai and Serkan Yolcu (2012), “An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision,” *International Journal of Constitutional Law* 10: 175–207 (arguing that the Turkish Court's annulment of an amendment abolishing the headscarf ban in universities was unjustified).

¹¹⁵ See Krishnaswamy, *Democracy and Constitutionalism in India*.

¹¹⁶ I elsewhere argue for a strong form of judicial review and therefore for the retention of the BSD, claiming that judges are more likely to invoke the doctrine cautiously and with due appreciation for the legislature. In the Thirteenth Amendment Case, the Appellate Division did not keep any margin for the elected organs of the state.

¹¹⁷ For a brief note on the Thirteenth Amendment verdict, see Ridwanul Hoque, “Taking the Constitution Away from the Courts?,” *The Daily Star* (Issue 219, *Law & Our Rights*), Dhaka, May 21, 2011. Available at <http://archive.thedailystar.net/law/2011/05/03/review.htm>.

of the constitution, the Court interpreted the constitution as a mere text and assessed “democracy” from the Western world perspective, where elections have not been as problematic as in Bangladesh. In doing so, it excluded from consideration social and political ramifications of the neutral interim electoral system that it nullified.¹¹⁸ Seen through the lens of Western-inspired legal and political theories, the CTG system is an antithesis to democracy. Bangladesh deliberately adopted this apparently undemocratic system and as an exception for the greater sake of democracy itself. Presumably, it is a temporary measure, but the question of when to replace it should be for the people to decide.

Every constitutional amendment that the Supreme Court of Bangladesh has addressed so far involved a higher-level policy issue. The Thirteenth Amendment, however, involved not only a policy issue but also became the cause of a complex political crisis over the national general election. The political context, as well as the legitimacy of the Thirteenth Amendment, is entirely different than other constitutional amendments. The majority Court in this case failed to appreciate the Thirteenth Amendment in light of other characteristically divergent amendments declared unconstitutional so far: the Eighth, Fifth, and Seventh Amendments. In the Fifth and Seventh Amendments, parliament ratified constitutional changes brought forth through martial law that it could not enact for itself. In the Eighth Amendment, as often is argued, the decentralization of the HCD of the Supreme Court breached the “unitary character” of the state. The Thirteenth Amendment resembles none of them but rather evolved from a political consensus of that time (i.e., 1996).

The minority judges in the Thirteenth Amendment Case, by contrast, preferred not to interfere with the political wisdom over the highly complex structural issue of election-time government. In his powerful dissent, Justice Muhammad Imman Ali reasoned that “the Thirteenth Amendment was neither illegal nor ultra vires the Constitution and does not destroy any basic structures of the Constitution.”¹¹⁹ For Justice Ali, the republican and democratic character of the state was no more infringed on or after this amendment than it had been before the non-party CTG system was introduced.¹²⁰ He further argued that in the context of the 1996 political quagmire, the people chose the CTG system as a solution. Accordingly, for the current crisis, the solution

¹¹⁸ There has not been any serious deliberation on the constitution and constitutional history of the nation; no political scientists, much less the opinion of the wider public, were consulted by the Court.

¹¹⁹ (2012) 64 DLR (AD)1, 472.

¹²⁰ *Ibid.*

must come from the representatives of the people and should be worked out through a dialogue in parliament.¹²¹ The minority judges refused to link the question of constitutionality of the CTC with the claim that the system did not work in 2007 and that it had generic defects. As Justice Ali explained, the non-functionality of the system ensued because the then-president misapplied the provisions of the Thirteenth Amendment. Therefore, the task of replacing it with a better option should belong to the elected representatives.

JUDICIAL BALANCING AND STRATEGIC INTERVENTION

There is no denying that courts around the world, including the top courts in Bangladesh, increasingly are playing their role in politics or in the establishment and maintenance of democratic governments.¹²² Judicial decisions, however, to resolve political crises are “difficult and easily backfire.”¹²³ Unpragmatic and locally uncontextual judicial intervention may further deteriorate political instability. In the Thirteenth Amendment Case, for example, the Appellate Division of the Supreme Court became a source of instability.¹²⁴ Although strategic judicial interventions may produce successful solutions for political turmoil or politico–constitutional issues, most scholars and commentators converge in their opinions that judicial interventions in politics almost “always run the risk of politicization.”¹²⁵ Undeniably, the success of judicial intervention in politics ultimately depends on the political environment and culture of any given society, as well as the absence of politicization of the law and the judiciary. If a Constitutional Court allows “political considerations”

¹²¹ See also the dissenting opinion of Justice Mia with whom Justice Sultana agreed (“the Thirteenth Amendment has become a constitutional necessity”). *Ibid.*, 457.

¹²² Lee Epstein, J. Knight, and O. Shvetsova (2001), “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government,” *Law & Society Review* 35: 117–63.

¹²³ Wen-Chen Chang (2010), “Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences,” *International Journal of Constitutional Law* 8(4): 885–910.

¹²⁴ This also has been the case with Thailand’s Constitutional Court when it intervened in a major political crisis in that country. On May 7, 2014, in a case involving abuse of power by the prime minister in transferring the security chief, the Constitutional Court ordered Ms. Yingluck to resign. The ruling came up during a prolonged political deadlock that began in November 2013 when protesters tried to oust Ms. Yingluck. The prime minister resigned and a new premier was sworn in, but the army nevertheless staged a coup and usurped state power in June 2014.

¹²⁵ Chang, “Strategic Judicial Responses,” *supra* note 123 (discussing two South Korean and Taiwanese top-court decisions that successfully resolved political crises). Chang showed that well-crafted judicial strategies include the creation of “win-win” situations, a unanimous decision, the use of literal interpretations, and the adoption of self-empowering legal doctrines.

to prevail, there might be a weakening of legitimacy or the nonenforcement of its decision, and the other branches also may be tempted to act without constitutional control.¹²⁶

Faced with difficult political issues litigated through constitutional challenges, the challenge for a Constitutional Court is to strike the right balance between upholding the constitution and respecting other coordinate state organs' authority to resolve policy disputes. When adjudicating politico-constitutional issues, "the constitution," – which invariably must be interpreted – must be read not through a positivistic lens but rather in light of long-standing values of society¹²⁷ and "constitutional identity."¹²⁸ In such a situation, the Court must not abandon its authority but rather should address the issue strategically or defer it to the political arena when deference is due.

In this regard, it is pertinent to cite the *Inter-German Basic Treaty Case*,¹²⁹ in which the German Constitutional Court upheld the constitutionality of the treaty after asserting its right to fully review its conditions and terms. On its deference to the political branch of the state regarding the politico-constitutional issue of the unification of East and West Germany, the Court observed:

The principle of "judicial self-restraint" does not imply the foreshortening or weakening of judicial competence. It does require the judges to "refuse to play politics by trenching upon the area created and circumscribed by the Basic Law as appropriate for the unrestricted operation of the political institutions."¹³⁰

Any Constitutional Court dealing with politically important issues that is willing to use its authority strategically or to maintain strategic silence should appreciate the areas of free operation of the political branches. Concerning the constitutional challenge to the Thirteenth Amendment, it can be argued that the Appellate Division could have deferred to the parliament by upholding the

¹²⁶ Andras Sajo, "Constitutional Adjudication in Light of Discourse Theory," in Michel Rosenfeld and A. Arato (eds.), *Habermas on Law and Democracy: Critical Exchanges* (Berkeley and Los Angeles: University of California Press, 1998), 336–70, 351.

¹²⁷ By this, I do not mean that courts should ignore generic global values. As Dixon proposed, by linking notions of what is "fundamental" in a domestic constitutional system to common or generic transnational legal practices, the judges may control their discretion and thereby may prevent themselves from becoming imperialistic. See Rosalind Dixon, "Transnational Constitutionalism and Unconstitutional Constitutional Amendments," Chicago Public Law and Legal Theory Working Paper No. 349, May 2011, University of Chicago Law School.

¹²⁸ Gary Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2011).

¹²⁹ No. 1, 36 *BVerfGE* 1 (1973) 14.

¹³⁰ Quoted in Thomas M. Franck, *Political Questions, Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, NJ: Princeton University Press, 1992), 122.

constitutionality of the CTG system, which was not irrational or unreasonable. Because the judicial resolution of the problem of the legality of CTG was not as urgent or compelling, the Court also could maintain a strategic silence by keeping the cause pending and allowing political wisdom to prevail.

CONCLUSION

The aim of this chapter is to show that judicialization of politics in Bangladesh has become a reality. As discussed, however, the Supreme Court's intervention into politics has not always followed a consistent pattern. Regarding political disputes and politics-inspired constitutional challenges, the Court has played its role differently at different times. As is the case in other jurisdictions, judicialization in Bangladesh during extra-constitutional regimes has been mostly negative in the sense that the Court acted as a legitimizing player. During difficult political scenarios, however, the Court occasionally asserted itself, as in the HCD's activity during the 2007 Emergency. Conversely, during democracy, the Court often imposed self-restraint with regard to political issues, whereas it dealt strategically with political controversies at other times. Moreover, the Court recently has entered a phase of overjudicialization of politics, as in the case of the Appellate Division's decision on the CTG system.

In societies such as Bangladesh, characterized by unstable constitutionalism, there is a need for a context-specific approach to the judicial role vis-à-vis structural-political issues in particular. The core argument of this chapter is that judges must avoid political issues not on the grounds that the judiciary is incompetent but rather on the grounds of allowing institutional freedom for other political institutions. Moreover, it is argued, judicial intervention in politics is likely to be futile in an environment of constitutional instability or when the political culture is antagonistic.

The instances of judicialization of politics discussed in this chapter demonstrate that it is through the vehicle of judicial review — sometimes judicial public-interest review — that the Supreme Court of Bangladesh played a role in politics. To better realize its role against factors of unstable constitutionalism, or so the Court does not become a partner in perpetuating instability, theories of constitutional supremacy and popular sovereignty require the Court to cautiously apply the judicial-review tool. In particular, the extraordinary judicial-review power vis-à-vis constitutional amendments should be exercised rarely¹³¹ and only for the cause of preserving the “identity” of the state.

¹³¹ See Teresa S. Collett (2010), “Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments,” *Loyola University Chicago Law Journal* 4: 327–49.

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Debating Federalism in Sri Lanka and Nepal

Rohan Edrisinha

INTRODUCTION

In recent years, both Sri Lanka and Nepal have explored fundamental constitutional reform, including federal options, as part of post-peace-agreement efforts to sustain peace, address the root causes of the conflicts they face, and promote reconciliation and social justice. This chapter describes these processes, sets out the context in which claims based on federalism emerged in Sri Lanka and Nepal, considers the debate on federalism in both countries, and identifies similarities and differences in the two countries. It concludes with reflections on federalism and its prospects in Sri Lanka and Nepal.

In Sri Lanka, a Norwegian-facilitated ceasefire agreement in 2002 created an opportunity for negotiations between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) on a political solution to the island's long-standing ethnic conflict. Before the agreement, beginning in 1995, the government of President Chandrika Kumaratunga had pursued a campaign for a political solution based on constitutional reform that included enhanced devolution of power. Although the task of producing the text of a new constitution was assigned to a Select Committee of Parliament, the inadequacies of such a process were mitigated by the public campaign for constitutional reform that was led by the government and pro-peace civil-society organisations. The Kumaratunga government's devolution proposals to address the shortcomings of the fragile scheme of devolution introduced through the provincial council system of the Thirteenth Amendment to the Constitution in 1987 were accompanied by widespread public discussion on the need for a political solution that responded to the reasonable grievances and aspirations of the Tamil people.¹

In Nepal, the Comprehensive Peace Agreement (CPA) of November 2006 brought an end to a decade-long Maoist insurgency and paved the way for

¹ D. Panditaratne and P. Ratnam (eds.), *The Draft Constitution of Sri Lanka: Critical Aspects* (Colombo: Law and Society Trust, 1998).

constitutional reform to address the issues of exclusion and disempowerment of the majority of the Nepalese population, the underlying causes of the conflict. The CPA contained several clauses committing political parties to radical constitutional reform, including the elimination of the centralised unitary state and the promotion of social inclusion through a process of progressive state restructuring.² Unlike in Sri Lanka, the CPA stipulated the mechanism by which Nepal's new constitution should be adopted – an inclusive, elected Constituent Assembly – more ambitious and legitimate than in Sri Lanka but understandable given the Maoists' proclaimed commitment to radical reform. Continuing political agitation by the Madhesi groups and other excluded minorities further refined the commitments on state restructuring that were included in the Interim Constitution of 2007. An amendment to the Interim Constitution committed Nepal to a federal, democratic republic.³ Also in Nepal, therefore, there was widespread public discussion on federalism, its advantages and disadvantages, and its relevance for managing diversity in a plural society.

In both Sri Lanka and Nepal, disenchantment on the part of minority or excluded groups with the status quo and the traditional or accepted political processes resulted in a period of conflict and violence to address the grievances and aspirations of such groups. The violent campaigns proved partially successful in that the rebels in both countries were able to control territory and assert their political power. Eventually, however, there was a military stalemate and a realisation that the military option was not viable. This, in turn, led to internationally facilitated ceasefire agreements with commitments to address the underlying causes of the conflict through political negotiations and constitutional reform that included state restructuring. As constitutional-reform processes evolved in Sri Lanka and Nepal, the idea of federalism acquired great significance. Before undertaking a comparative analysis, the following discussion first considers the ways in which the federal idea took root in both nations.

HISTORICAL OVERVIEW

The Federal Demand in Sri Lanka

Although a small number of individuals and organisations suggested federal-type arrangements in what became Sri Lanka when political reforms were

² M. Lawoti, *Towards a Democratic Nepal: Inclusive Political Institutions for a Multicultural Society* (New Delhi: Sage Publications, 2005).

³ B. R. Upreti, N. Topperwein, and M. Heiniger, *Peace Process and Federalism in Nepal* (Kathmandu: NCCR North-South, 2009).

discussed in the early 1900s and in the period leading to independence from British colonial rule, federalism was not the preferred option of Tamil political leaders even at the time of independence in 1948. The preferred option of the main Tamil political party at the time, the All Ceylon Tamil Congress (ACTC), and its leader, G. G. Ponnambalam, was to share power at the centre. Ponnambalam and the ACTC decided to accept a Cabinet portfolio in the first post-independence Cabinet of Ministers, thereby ensuring participation at the centre of government – which, in turn, they thought, would ensure that Tamil concerns and aspirations could be raised and addressed at the heart of where power was located.⁴

Only when the Ponnambalam approach was perceived to have failed did Tamil support move to an approach favoured by S. J. V. Chelvanayakam, which stressed the importance of decentralisation and autonomy in Tamil-majority areas of the country. Chelvanayakam broke away from the ACTC and formed the Federal Party; for the first time, the Tamil political leadership espoused federalism as its basic political demand. Chelvanayakam, who was a committed Gandhian, believed in peaceful, nonviolent, democratic means for the pursuit of federalism. He also was willing to consider compromise alternatives to federalism, as he did in 1957 and 1965 when he entered into two well-known agreements with the then-prime ministers of Ceylon: S. W. R. D. Bandaranaike in the Bandaranaike–Chelvanayakam Pact of 1957; and Dudley Senanayake, the so-called Dudley–Chelva Pact of 1965.⁵ Both agreements envisaged decentralisation of power to the north and the east, with the possibility of the two areas working together, and were to be enacted by legislation rather than by constitutional amendment. The agreements fell short of basic features of federalism and, on both occasions, opposition from within and outside of the ruling governments forced the prime ministers to withdraw their support for the agreements. It must be noted that during the 1950s and 1960s, Tamil frustrations continued on other issues as well. Laws dealing with citizenship and language that were discriminatory against the Tamils were enacted and legal challenges to such initiatives on the basis that they violated the much-touted minority-protection provision of the constitution, Section 29, failed due to the legalistic and positivist approach of the judiciary. In general, there was growing frustration at the rise of Sinhalese majoritarianism in addition to the failure of Ceylonese governments to respond positively to demands for regional autonomy. Tamil youth and nationalist elements became impatient with the Chelvanayakam approach, which – they argued – had failed to deliver positive results.

⁴ J. Jupp, *Sri Lanka: A Third-World Democracy* (London: Frank Cass, 1978).

⁵ A. J. Wilson, *Politics of Sri Lanka, 1947–1973* (London: Macmillan, 1974).

The parliamentary elections of 1970 gave a sweeping victory to the United Front, a coalition of the Sinhala nationalist Sri Lanka Freedom Party and the Marxist parties. The coalition obtained a two-thirds majority in parliament and decided to initiate a process of constitutional reform to replace the Soulbury Constitution that had been introduced before independence and had served as the country's post-independence constitution since 1948. A Constituent Assembly consisting of all members of the House of Representatives elected in the 1970 elections was convened and assigned the responsibility of drafting and adopting a new constitution. The fact that the United Front government possessed a two-thirds majority in parliament made it unwilling to accommodate opposition proposals. The Minister of Constitutional Affairs, Colvin R. de Silva, initiated proposals in the form of basic resolutions that were debated and then voted on. He proposed in Basic Resolution No. 2 that the new constitution should include a provision expressly declaring that "Sri Lanka is a unitary state." The Soulbury Constitution, although clearly unitary in character, contained no such express self-description.

The First Republican Constitution of 1972 made things worse by introducing several other substantive constitutional provisions. Not only did it abolish many of the minority safeguards, including Section 29 of the Soulbury Constitution; it also entrenched majoritarianism in the supreme law of the land. The secular character of the state was severely undermined by the provision that gave Buddhism the foremost place. The language of the majority, Sinhalese, was made the sole official language. The cumulative effect of these new features in the constitution was to further alienate an already frustrated Tamil political leadership and polity. The introduction of the Constitution of 1972 was a major landmark in the process of national disintegration.⁶ It is not surprising that the Tamil militant movement commenced in the mid-1970s, exploiting the growing sentiment within the Tamil community that power sharing and decentralisation options pursued through peaceful democratic means for more than twenty-five years had not only yielded no results but that also during this period the situation for the Tamils in fact had become worse.

The Second Republican Constitution of 1978 did not make the situation better for the Tamil people. The framers of the constitution, who believed in a strong, centralised government to promote economic development, introduced an executive presidential system to establish a strong executive. The article declaring Sri Lanka to be a unitary state was reproduced and made

⁶ R. Edrisinha, "Sri Lanka: Constitutions without Constitutionalism: A Tale of Three and a Half Constitutions," in R. Edrisinha and A. Welikala (eds.), *Essays on Federalism in Sri Lanka* (Colombo: Centre for Policy Alternatives, 2008), 7–58.

more secure because it was part of a series of articles that were granted special protection. These were the so-called entrenched articles, the amendment of which required – in addition to the usual two-thirds majority affirmative vote in parliament – the approval of the people at a referendum. Almost ten years later, following attacks and violence against the Tamil community in 1983 and increasing Indian pressure on the government, the government of President J. R. Jayewardene reluctantly introduced a system of provincial councils, or devolution within a unitary state, through the Thirteenth Amendment to the Constitution.⁷

Perhaps because the Thirteenth Amendment sought to introduce devolution within the framework of a unitary state, the devolution was not substantial and secure. It provided for a veneer of devolution while retaining vast powers in the centre. The amendment ultimately failed to grant complete control over any subject to a provincial council and also made it easy for the centre to retake power. There was no clear division of powers between the central parliament and the provincial councils. Furthermore, the fact that the Thirteenth Amendment was incorporated into a constitution that provided for a centralised political structure with a powerful executive president contributed to the retention of power at the centre and to the undermining of effective devolution of power.

Several other constitutional features, many of which are found in federal countries, were conspicuously absent in the Sri Lankan Constitution. There was a constitutional prohibition on judicial review of legislation and there was no independent public service or second chamber to facilitate provincial representation at the centre. The absence of comprehensive judicial review of legislation, combined with the wide immunity given to the president,⁸ prevented the president from being made a party to legal proceedings for acts or omissions. It also permitted important sections of the Thirteenth Amendment, including those dealing with police powers and land, to remain unimplemented.

It therefore was not surprising that moderate Tamil political parties totally rejected the existing constitutional framework and called for “substantial devolution of power,” or federalism. The LTTE by this time had waged an armed struggle for a separate state based on the principles of self-determination, nationhood, and a Tamil homeland in the northeast of the country.

⁷ K. Loganathan, *Sri Lanka: Lost Opportunities: Past Attempts at Resolving Ethnic Conflict* (Colombo: Centre for Policy Research and Analysis, University of Colombo, 1996).

⁸ It is noteworthy that the Maoists in Nepal proposed an executive presidency in their initial set of constitutional proposals. The executive presidency in Sri Lanka was promoted by the conservative United National Party and introduced in 1978. It has not only undermined devolution of powers but also promoted authoritarianism and subverted constitutionalism.

The Federal Demand in Nepal

The demand for federalism arose in Nepal as a response to the dominance of a privileged elite group and the economic, social, and political exclusion of a large section of the population. Since its unification as a state in 1768, in one sense Nepal has been a country of disparate minorities, and the diversity of population is far greater than in Sri Lanka.⁹ Nepal has more than 120 ethnic groups that speak more than 100 languages.¹⁰ The dominant group constituted about 30 percent of the population; therefore, strictly speaking, it did not constitute a majority. However, the centralisation of power in the Kathmandu-based dominant Bahun–Chhetri elite excluded large sections of society, including women, Dalits, ethnic groups or “janajathis,” people from remote and inaccessible regions, and otherwise marginalized groups.¹¹

The movement for democracy that developed in the second half of the twentieth century was focused mainly on the powers of the monarchy; multiparty, parliamentary democracy as opposed to the panchayat system; and the degree of influence of Hinduism in Nepali society. The democratisation process reached a significant landmark with the promulgation of Nepal’s fifth constitution in November 1990.¹² The new constitution, drafted by a commission of constitutional experts, declared that the power of government was vested in the people; accepted the principle of universal franchise (although there was disagreement on who was entitled to be treated as citizens); imposed restrictions on the power of the monarchy; introduced a Constitutional Council, an independent body to appoint persons to important public positions (a feature subsequently copied in Sri Lanka); and included several other provisions that were broadly consistent with basic norms of liberal constitutionalism. Although the constitution recognised that Nepal was a multiethnic and multilingual kingdom, it also reaffirmed the Hindu character of the state and declared that the king must be an adherent of Aryan culture and the Hindu religion as the symbol of the Nepalese nation and the unity of the Nepalese people.¹³ The dominant language, Nepali (and the Devanāgiri script), was recognised as the sole official language. The constitution prohibited political parties based on ethnicity or religion, and restrictions on Fundamental Rights

⁹ K. M. Dixit and S. Ramachandran (eds.), *State of Nepal* (Kathmandu: Himal, 2002).

¹⁰ H. Gurung, *Nepal: Social Demography and Expressions* (Kathmandu: New Era, 2001).

¹¹ L. R. Baral, *Nepal: Problems of Governance* (Delhi: Konark, 1993).

¹² S. Dhungel, B. Adhikari, B. P. Bhandari, and C. Murgatroyd, *Commentary on the Nepalese Constitution* (Kathmandu: DeLF, 1998).

¹³ M. Malagodi, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics, and Democracy in Nepal* (Oxford: Oxford University Press, 2013).

could be imposed if the exercise of such rights disturbed “harmonious relations subsisting among various castes and communities.” The cumulative effect of many of these provisions was to orient the nature of the state in favour of the majority religion and the dominant language and culture, whereas the unitary state made it easier for the Kathmandu-based dominant elite to continue to wield power to the exclusion of other caste and ethnic groups.¹⁴

The Constitution of 1990 therefore was seen as doing little to address structural inequality and the aspirations of the majority of Nepal’s population, the excluded minorities. It was not surprising that the Maoist insurgency that developed in the mid-1990s grew in the mid- and far west of the country and other remote areas where poverty was widespread and access to basic infrastructure and the resources of the state was limited.¹⁵ The Maoists used the feelings of alienation and exploitation of people from excluded groups and skillfully modified their demands to include those that were responsive to the Dalits, Janajathis, Madheshis, and other vulnerable groups.¹⁶ The Maoists were soon seen as the force for change even though the People’s War they had launched was accompanied by acts of terrorism, intimidation, and brutality. Among the Maoists’ demands were a new constitution drafted by the representatives of the people rather than a commission of elite experts; a secular state; equal rights for women; the abolition of untouchability and caste-based discrimination; the equal status of all languages; mother-tongue education; and decentralisation and local autonomy.

As the conflict intensified after 2001, King Gyanendra declared states of emergency, reconsolidated the powers of the monarchy, and dismissed the democratic government of Nepal. As the Maoists and the democratic parties came together to challenge the king, a collaboration that culminated in the Peoples Movement (i.e., Jana Andolan II), various agreements between them highlighted the need for “full democracy” to address problems relating to class, gender, and region through the “restructuring of the state.” These commitments were further strengthened in the CPA of November 2006 that brought an end to the conflict and contained various commitments with respect to both process and substance for a new constitution for a new Nepal.¹⁷

¹⁴ L. R. Baral, *Nepal: New Frontiers of Restructuring the State* (New Delhi: Adroit Publishers, 2008).

¹⁵ D. R. Pandey, *Nepal’s Failed Development: Reflections on the Mission and the Maladies* (Kathmandu: Nepal South Asia Centre, 2009).

¹⁶ D. Thapa and B. Sijapati, *A Kingdom under Siege: Nepal’s Maoist Insurgency 1996–2004* (Kathmandu: Zed Books, 2005).

¹⁷ B. Adhikari (ed.), *Nepal: Design Options for the New Constitution* (Kathmandu: Nepal Constitution Foundation, Tribhuvan University and Supreme Court Bar Association, 2010).

Clause 3.5 of the CPA declared an agreement to “eliminate the existing centralized, unitary state system and introduce inclusive, democratic, and progressive restructuring of the state in order to address problems relating to women, Dalits, indigenous and janajathi communities, Madheshis, oppressed, neglected and minority communities, and backward regions, by ending the prevailing discrimination based on class, caste, language, gender, culture, religion and region.” Whereas opposition to a unitary state and a commitment to state restructuring were made clear in the CPA and other statements made during its preparation, the commitment to federalism was not made explicit until later. Amendments to the Interim Constitution of 2007 and 2008 introduced commitments that the state shall be restructured into a “progressive, democratic, federal system and that accepting the aspirations of indigenous ethnic groups and the people of backward and other regions, and the people of the Madhesh, for autonomous provinces, Nepal shall be a Federal, Democratic Republic.” The Interim Constitution that was adopted in 2007 to provide for an election to a Constituent Assembly and the transition to the new Nepal already had committed Nepal to be a secular state.

Sri Lanka and Nepal: The Contexts Compared

In both Sri Lanka and Nepal, the demand was fueled by (1) majoritarianism (of the Sinhalese Buddhist majority in Sri Lanka) or the dominance of a large privileged group (the Bahun – Chhetris in Nepal); and (2) a strong perception of discrimination and a denial of equality among the nondominant groups and the desire for recognition, respect, and dignity on the part of such groups. Although in Sri Lanka there was a campaign for federalism and an attempt to explore a federal solution during peace negotiations between the government and the LTTE, federalism per se was never accepted by the country at any stage. In Nepal, however, the CPA, the Interim Constitution, and (finally) the main political parties all agreed to an Interim Constitution that committed Nepal to be a federal, secular, inclusive, democratic republic. The debate advanced to a stage in which there was even agreement that the provinces should be based on identity and viability. Ultimately, however, consensus was not reached on the balance between these two criteria and the details for the demarcation of provinces.

In both countries, however, there also was widespread opposition to federalism. Opponents argued that far from promoting unity in diversity or offering a solution to ethnic conflict and exclusion, federalism would only exacerbate ethnic conflict and polarise and divide ethnic groups that, in turn, would

endanger the territorial integrity and national unity of the country. Whereas many opponents of federalism were motivated by chauvinism or a belief that the dominant group was entitled to its position of privilege, some opponents of federalism presented arguments that were more reasonable and therefore required a response from the advocates of federalism.

In both countries, the “minorities-within-a-minority” critique of federalism evoked many sympathizers, as did the fear that a division into provinces, over time, would result in demographic shifts that would lead to ethnic polarisation. The “minorities-within-a-minority” critique suggests that as attempts are made to address demands for autonomy of minorities in a particular region, the interests of smaller minorities within that region may be ignored.¹⁸ In Sri Lanka, the Muslims, for example – the third largest group in the country with a significant population in the east – were apprehensive that constitutional responses to the Tamil homeland claim to the northeast of the island ultimately would be detrimental to their interests. The critique was used in Nepal where, given its diversity, in none of the proposed provinces would a particular ethnic group constitute a majority. The argument was made by critics of federalism that federalism was not appropriate for Nepal or that it would only favour the larger minority ethnic groups and be detrimental to the interests of the smaller minorities.

DEBATING FEDERALISM

In both Sri Lanka and Nepal, the advocates of federalism were challenged with respect to their commitments to constitutionalism, democracy, and pluralism. In this section, the federal debate in both countries is examined more closely in light of these more reasonable critiques of federalism.

Sri Lanka

When Chelvanayakam established the Federal Party in 1949, the party in the Tamil language was called the *Ilankai Thamil Arasu Katchi*, which in English means Tamil State Party of Lanka. The word *arasu* (state) was ambiguous because it could stand for either a state within or outside of a federal entity.

¹⁸ See A. Eisenberg and J. Spinner-Halev (eds.), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005). For a broader discussion on the subject, see also W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

There were no obvious terms in both the Tamil and Sinhalese languages for the word *federalism*; more recently, terms have been developed that are not completely satisfactory because they could be open to misinterpretation.¹⁹ The main opponents of federalism, the Sinhala Buddhist nationalists, accused the Federal Party of deception and deviousness in using a less-threatening title for the non-Tamil-speaking populations while pandering to Tamil nationalists by implying commitment to an independent Tamil state. From the beginning of the federal debate in Sri Lanka, mistrust and suspicion made it difficult for an objective and more rational discussion to develop on the merits and demerits of the federal idea.

The conduct of the Federal Party throughout its existence, however, belied the fear that the party actually was seeking separation. As stated previously, the party on two significant occasions, in a spirit of compromise, agreed to proposals based on decentralisation, which the Sinhalese political leadership subsequently repudiated. During the parliamentary elections of 1970, when Tamil leaders contested several electorates on a separatist platform, Chelvanayakam and the party were categorical in their rejection of secession. The party manifesto declared:

The Tamil-speaking people of Ceylon also believe that the Federal-type of Constitution that would enable them to look after their own affairs alone would safeguard them from total extinction. Only under such a Constitution could the Tamil-speaking people of this country live in dignity and with our birthright to independence as equals with our Sinhala brethren.

Significantly, the manifesto included a categorical repudiation of separation, as follows:

It is our firm conviction that division of the country in any form would be beneficial neither to the country nor the Tamil-speaking people. Hence, we appeal to the Tamil-speaking people not to lend their support to any political movement that advocates the bifurcation of the country.

The candidates who adopted a prosecessionist line were heavily defeated by the Federal Party, which swept the polls in the north and the east. This clearly demonstrated that the Tamil people, at least until 1970, desired a certain degree of autonomy and self-government but had no interest in secession. The situation became more complicated after the adoption of the “autochthonous”

¹⁹ For example, the Sinhala term for *federalism*, “Sandheeya,” has a connotation of previously independent states coming together. It implies integrative federalism and not devolutionary federalism and is more relevant in both Nepal and Sri Lanka.

republican Constitution of 1972, when the next phase of the Tamil campaign for equality, dignity, and recognition commenced.²⁰

Soon after the adoption of the 1972 Constitution, the Federal Party, the ACTC, and the Ceylon Workers Congress came together to establish the Tamil United Front, which later was renamed the Tamil United Liberation Front (TULF). The Vaddukodai Resolution was adopted by the TULF at its first convention held in May 1976. The resolution was based on four key ideas: (1) the recognition of the Tamils as a nation and their historical possession of the northern and eastern provinces; (2) the creation of a free, sovereign, secular, socialist state of Tamil Eelam based on the right to self-determination inherent in every nation; (3) the will of the Tamil nation to exist as a separate self-governing entity; and (4) a call to the Tamil nation and its youth to join the struggle for a sovereign state.²¹

The dominant discourse of the main Tamil political movement shifted from a moderate federal discourse to a more assertive discourse based on nationhood and self-determination. This was a reaction to the failure of the Sinhalese political leadership to respond to more moderate demands for power sharing, decentralisation, and (finally) the adoption of the new Constitution of 1972, which further entrenched Sinhala Buddhist majoritarianism and expressly repudiated federalism.²²

The Tamil militant movement gained momentum in the late 1970s and 1980s. The tragic events of July 1983, when Tamils in the south of the island – including the capital of Colombo – were attacked and killed and their property looted and destroyed. There was little or no protection from the law-enforcement agencies, described by many as an anti-Tamil pogrom, which led to increased pressure from India on the Jayewardene government to engage in serious negotiations with the Tamil political leadership. At a meeting convened by India in Thimpu, Bhutan, in 1985 – where discussions were held between the Government of Sri Lanka and both the TULF and the Tamil militant organisations – all of the Tamil groups endorsed what was to become

²⁰ It is ironic and indeed tragic that the constitution that likely had the greatest consensus across the ethnic and political-party divide was the Soulbury Constitution “imposed” on Ceylon by Britain. Both “autochthonous” constitutions were partisan documents rejected by the main party in opposition and by the Tamil political leadership.

²¹ See R. Edrisinha, M. Gomez, V. Thamilmaran, and A. Welikala (eds.), *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926–2008* (Colombo: Centre for Policy Alternatives, 2008) for all Sri Lankan documents referred to in this chapter.

²² R. Edrisinha, “Federalism: Myths and Realities,” in *Essays on Federalism in Sri Lanka*, op. cit. Note 6.

known as the Thimpu Principles: that is, recognition of the Tamils as a distinct nationality; recognition of an identified Tamil homeland and the guarantee of its territorial integrity; based on these principles, recognition of the inalienable right of self-determination of the Tamil nation; recognition of the right to full citizenship; and other fundamental democratic rights of all Tamils, who look on the island as their country. The principles were summarily rejected by the Government of Sri Lanka as undermining the sovereignty and territorial integrity of Sri Lanka.

The nature of the discourse and the debate from then onward was different and far more complicated. In the period 1949–1972, the debate was about equality of status with respect to language, equality with respect to dignity, power sharing and decentralisation, or a degree of self-government in areas where the Tamils had constituted a majority population for generations. The Sinhalese majority and their political leaders rejected these claims and, in 1972, they ignored appeals from moderate Tamil leaders that the best way to protect the unity and territorial integrity of the island was by the adoption of a federal constitution. From 1985 onward, the discourse and the gap between the two sides widened considerably. The Sinhalese political leadership was compelled to become more amenable to decentralisation or, as demonstrated by the introduction of the Thirteenth Amendment to the constitution in 1987, to devolution within a unitary state. However, the Tamil political leadership was committed to the Thimpu Principles, the recognition of which in constitutional terms went beyond conventional federal-type constitutional arrangements. The saga of the Sinhalese responding with “too little, too late” continued.

An attempt to finally break the shackles of the constitutional commitment to a unitary state was made when President Chandrika Kumaratunga was elected president in 1995 and her government sought to introduce a new constitution. Her strategy was to introduce enhanced devolution of power and remove the provision that declared Sri Lanka a unitary state – but without explicitly declaring the country to be federal. The proposals sought to overcome the by now well-documented defects in the Thirteenth Amendment by removing the pro-centre bias in the provisions addressing the division of powers, abolishing the concurrent list of subjects and functions that was ultimately under the control of the central parliament, reassigning some of those powers to the provinces, and strengthening the revenue-raising power of the provinces.²³ However,

²³ N. Tiruchelvam, “The Politics of Federalism and Diversity in Sri Lanka,” in Y. Ghai (ed.), *Autonomy and Ethnicity* (Cambridge: Cambridge University Press, 2000), 197–218.

there was opposition to many of these pro-devolution features from within Kumaratunga's own party,²⁴ whereas the United National Party – the main opposition party – was ambivalent about its support. It finally cited the unwillingness of the government to deliver on its campaign commitment to abolish the executive presidency as the excuse for opposing the new constitution. Sinhalese Buddhist nationalist forces both within and outside of her party accused her government of seeking to introduce federalism by stealth. Federalism, they argued, would divide the country, promote ethnic consciousness and polarisation, discriminate against the minorities within proposed provincial entities, and impliedly accept the concepts of a Tamil homeland and nation. These forces also argued that given the LTTE's maximalist position on Tamil national independence and their lack of respect for political pluralism and constitutional democracy, it would only exploit the enhanced devolution arrangements and the weaker central government to further its secessionist aims.

A further weakness in the Kumaratunga constitution-making initiative was that it was not conducted in a participatory manner but rather through the mechanism of a Select Committee of Parliament. The process, therefore, was essentially closed from public scrutiny. Furthermore, the Tamil militant group, that had by this time eliminated its rivals and assumed a dominance that included control over parts of the northern part of the country, was not involved in the process. Kumaratunga's brave attempt to reach a consensus among the moderates of all communities by addressing what she perceived as the reasonable aspirations of the Tamil people failed. The failure was due to her inability to reach consensus both within her ruling coalition and with the main political opposition, as well as to the fact that it sought to marginalise the LTTE – which had, by that time, become an actor that could not be ignored.

The next occasion in which federalism surfaced as a basis for a solution to the island's ethnic conflict was when parliamentary elections in 2001 resulted in the opposition gaining power in the legislature, thereby creating a cohabitation government with Kumaratunga as president and the former leader of the opposition, Ranil Wickremasinghe, becoming the new prime minister. Under the new government, primarily at the insistence of the new prime minister, the strategy changed. The new strategy was to engage with the LTTE and seek agreement on political and constitutional reform for conflict resolution. Norway entered the process as a facilitator. A cessation-of-hostilities agreement was signed by the Government of Sri Lanka and the LTTE and was followed by Norwegian-facilitated negotiations. A significant breakthrough was reached

²⁴ One of the dissidents was her then-Prime Minister, Mahinda Rajapakse.

in the third round of negotiations held in Oslo in December 2002, when the LTTE, which remained committed to the Thimpu Principles and the government, which remained bound to maximum devolution within a unitary state, agreed to “explore a solution founded on the principle of internal self-determination in areas of historical habitation of the Tamil-speaking people, based on the federal structure, within a united Sri Lanka.”²⁵

There also was agreement to initiate discussions on power sharing between the centre and the region, as well as within the centre and the region, and on human-rights protection. The Oslo Statement of December 2002 also stated that the solution should be acceptable to all communities. This was a clear reference to the island’s third-largest group with a substantial presence in the east, the Muslims, who were apprehensive that a negotiated settlement between the two largest groups would be at the expense of their dignity and security. The significance of the Oslo Statement was that it clarified the ambiguity of the Thimpu Principles. The references to internal self-determination and a united Sri Lanka were crucial in allaying the consistent and perennial fear of the Sinhalese – that federalism was a steppingstone to secession. For the Government of Sri Lanka, responding positively to the federal idea and internal self-determination was not difficult given the groundwork of the constitutional-reform project of 1995–2000, in which the limitations of the unitary state and the Thirteenth Amendment had been widely discussed and debated in the public arena. Although the initiative to introduce a new constitution might have failed, the public awareness and education campaigns of both the government and civil society certainly had an impact. People were more sensitised to the challenges of constitutional design for a plural society, the need for a political solution to a problem that was essentially political in nature, and the inadequacy of a solely militarist response.

The promise of the Oslo agreement was not without problems, however. Soon afterwards, there were statements from the LTTE that raised doubts about its commitment to the Oslo formulation, and the negotiations became more difficult with both sides accusing the other of violating the cessation-of-hostilities agreement. The conduct of the LTTE in continuing to silence alternative voices within the Tamil community raised serious doubts about its commitment to pluralism, human rights, democracy, and power sharing – values that were inextricably linked to the federal idea. The negotiations broke

²⁵ For the full text of the Oslo statement and other documents cited in this chapter, see R. Edrisinha, M. Gomez, V. Thamilmaran, and A. Welikala (eds.), *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926–2008* (Colombo: Centre for Policy Alternatives, 2008).

down right before the parties were to discuss two matters: a human-rights memorandum of understanding (a major lacuna in the negotiations up to that point) and the “roadmap” to implement the Oslo agreement.

The negotiations resumed after concerted international pressure, and the LTTE insisted that the issue of the interim arrangements for the governance of the northeast be the focus before negotiations on a final political settlement based on the Oslo agreement continued. This resulted in the LTTE releasing a set of proposals for an Interim Self-Governing Authority (ISGA) in October 2003. The proposals were maximalist in nature and provoked an outcry among Sinhalese opponents of devolution of power as well as among the Muslims in the east. The most vociferous critics of the proposals were conservative Sinhalese lawyers who were deeply skeptical about the *bona fides* of the LTTE, committed to Sinhalese majoritarianism and the preservation of the unitary state, and therefore opposed in principle to the Oslo agreement.

The proposals, however, also were amenable to a more powerful critique from a constitutionalist and federalist perspective. The ISGA proposals were entirely about self-rule with no mention of shared rule. The proposals were extremely weak with respect to basic constitutional principles of the rule of law, separation of powers, and protection of the rights of minorities. Proposals that went far beyond powers exercised by regions in federal countries to give the ISGA control of and the right to control access to the marine and offshore resources of the adjacent seas were cited by critics of the negotiation process to raise doubts about both the *bona fides* of the LTTE and its commitment to a federal solution. It was ironic but not surprising that when the dominant Tamil nationalist group was given a chance at constitution-making produced proposals that would have resulted in a unitarist, centralised, majoritarian northeast with woefully inadequate human-rights and minority-rights protection mechanisms – this despite the fact that it had campaigned for years against the unitary, majoritarian constitutional framework of Sri Lanka. Another negative aspect of the ISGA proposals was that the text suggested that the LTTE was contemplating a two-nation confederal model, rather than a more conventional or even asymmetrical federal arrangement, designed to promote unity in diversity.

By the next presidential election in 2005, the perception that the LTTE had out-negotiated the Kumaratunga–Wickremesinghe cohabitation government, that they were not interested in a federal-type solution within a united Sri Lanka, and that they therefore could not be trusted was widespread. This mistrust combined with dislike for Wickremesinghe’s liberal economic policies and provided candidate Mahinda Rajapaksa a platform for an effective challenge in the election. Realising that outgoing President Kumaratunga’s support for him was lukewarm and that she controlled their party’s machinery,

Rajapakse depended on two small Sinhalese nationalist parties, the Janatha Vimukthi Peramuna (JVP) and the Jathika Hela Urumaya (JHU), for organisational support. These parties insisted on various commitments in the election manifesto that were hawkish, unashamedly Sinhala nationalist in tone, and contained a promise to preserve the unitary status of the island's constitution. The final "nail in the coffin" was when the LTTE called for and forcibly implemented a boycott of the presidential elections in the north, thereby depriving Wickremesinghe of a significant number of Tamil votes. The fact that the LTTE helped to ensure the hawkish Rajapakse's victory in the election raised a host of new doubts about its commitment to a negotiated political settlement and a constitutional compromise based on federalism.

The election of President Rajapakse in 2005 effectively ended the ten-year effort to solve Sri Lanka's ethnic conflict through negotiation, constitutional reform, and compromise. In both initiatives, the first under President Kumaratunga and the second under the Kumaratunga–Wickremasinghe cohabitation government, the governments were willing to explore quasi-federal or federal-style solutions with strong safeguards to prevent secession and protect the territorial integrity of the country. Many would argue that this willingness was "too little, too late." The fact that there was a powerful body of opinion within the Sinhalese community that strongly opposed both initiatives indicated that many possessed a majoritarian mindset that could not comprehend or have empathy for power sharing or a political arrangement that accepted the equality of groups, group rights, and recognition of their dignity.²⁶ Concepts such as plurinational or multinational states, internal self-determination, and possibly even federalism remained for them academic or theoretical concepts that had little practical relevance.

The decade of exploring peace was followed by almost a decade of war. The LTTE was defeated militarily in 2009, at an enormous price in terms of lives – both military and nonmilitary – human rights, and interethnic goodwill and coexistence. The militarisation of the north and east continues today. There is little if any discussion about addressing the underlying causes of the conflict, which many in power will argue do not exist. They argue that the cause of the conflict was terrorism and that it is legitimate for a majority community to be privileged.²⁷ In fact, powerful elements within the government want to dilute the powers of the ineffectual provincial councils established under the

²⁶ A. Welikala, "Theorising the Unitary State: Why the United Kingdom Is Not a Model for Sri Lanka." Paper presented at the 60th Anniversary Academic Sessions of the Faculty of Law, University of Colombo, Sri Lanka, 2008. (Paper is on file with the author.)

²⁷ This is complicated by what many commentators have referred to as the Sinhalese being a "majority with a minority complex," given Tamilnadu to the north and the spread of the Tamil language and culture, for example, in other countries such as South Africa and Malaysia.

Thirteenth Amendment, the inadequacy of which was the basic assumption of the constitutional-reform initiatives of the decade of peace.²⁸ Today in Sri Lanka there is no discussion about federalism.

Nepal

The debate on the merits and demerits of the federal idea, and its relevance for a country of diverse minorities like Nepal, intensified as the participatory constitution-making process commenced in 2008. It is widely believed that a main reason for the failure of the Constituent Assembly to adopt a final constitution – despite several extensions of its original deadline of two years – was the inability to reach consensus on the details of the federal system. The CPA committed the parties to ending the unitary, centralised state and to progressive restructuring; amendments to the Interim Constitution in different provisions *declared* Nepal a federal, democratic republic; stated that Nepal *is* an indivisible, secular, inclusive, federal, democratic republic; and also stated that Nepal *shall be* a federal, democratic republic. The reality, of course, is that notwithstanding these provisions in the Interim Constitution, between 2008 and 2014, Nepal was not federal because it did not have even a second tier of government; however, the provisions are aspirational in character and meant to ensure that the final constitution is indeed federal. Today in Nepal, as a second Constituent Assembly attempts to complete the constitution-making process, there is still a consensus that Nepal should be a federal republic; however, there is no consensus on the design of the federal system.²⁹

The CPA and the post-1990 political developments clearly demonstrated the need for political and constitutional reform that would end the dominance of the Kathmandu-based, high-caste elite and empower the diverse minority ethnic groups in Nepal. Federalism and state restructuring thus were inextricably linked with not merely devolution of power but also with the empowerment of excluded and marginalised groups. In subsequent years, the federalism debate in Nepal was complicated by the linkages with inclusion and empowerment. Even with respect to the vexed questions of the name, number, and boundaries of the proposed provinces, calculations were made regarding what influence the dominant Bahun–Chhettri group would have in the proposed provinces.

²⁸ K. Guruparan, “The Irrelevancy of the 13th Amendment in Finding a Solution to the National Question: A Critical Note on Sri Lanka’s Post-War Constitutional Discourse” (Colombo: *Junior Bar Law Review*, 2013), 30–42.

²⁹ K. Khanal, “Federalism Discourse in Nepal: An Appraisal,” in L. R. Baral and K. Hachchetu (eds.), *South Asia: Nation Building and Federalism* (New Delhi: Vij Books, 2014).

Generally, the smaller the number of provinces that were proposed, the greater was the likelihood that the elite would remain influential. The proponents of a ten- or fourteen-province federal model argued that under such a framework, the dominance of the elite would be significantly reduced.³⁰

The debate on federalism became more complicated after the Government of Nepal ratified International Labour Organization Convention 169, a convention on the rights of indigenous peoples, in 2006. Many of Nepal's ethnic minorities asserted indigenous status and made claims based on the convention.³¹ Some of the dominant groups also claimed to be indigenous, because the definition of the term *indigenous* in the law focused on language, traditional customs, distinct cultural identity, social structure, and history. Some of the proposals on federalism that emerged from this rather confusing situation combined ethnicity as the main basis for demarcation of a province, preferential rights for the largest group in the province, and included references to terminology used in ILO 169 and related international documents. This mix of concepts and claims confused the debate on federalism. Because these proposals included a strong emphasis on ethnicity, they often were described as proposals for ethnic federalism and evoked fear and opposition among many Nepalis. Many Nepalis, particularly from the elite and smaller ethnic groups, stated that they were willing to accept federalism but not ethnic federalism.

The first Constituent Assembly assigned the task of developing the details of Nepal's federal structure to one of the thematic committees appointed to facilitate its work, the Committee on Restructuring of the State and the Distribution of State Powers (CRSDSP). In its draft report published in 2010, the CRSDSP highlighted several reasons for the federalisation of Nepal, including recognition of its sociocultural diversity including ethnicity, language, and culture; the need to enhance representation, participation, and ownership of as well as affinity for and proximity to the state; enhancement of the democratisation of society and the search for equal and inclusive democracy free from discrimination; and the provision for more equitable distribution of services, facilities, and development.³²

The CRSDSP, by a majority decision, proposed that the basis for the federalisation process should be twofold: identity and capability. *Identity* was defined to include ethnicity, community, language, culture, and historical habitation

³⁰ See M. Lawoti, *op. cit.*

³¹ The National Foundation for the Development of Indigenous Nationalities (NFDIN) Act 2002 recognised fifty-nine groups.

³² P. Sharma, *Unravelling the Mosaic: Special Aspects of Ethnicity in Nepal* (Lalitpur: Himal Books, 2008).

in certain regions. *Capability* was defined to include economic capacity and interrelationships, natural resources, infrastructure development, and administrative convenience. The CRSDSP report proposed that Nepal should be divided into fourteen provinces and it specified their names and boundaries. The report proposed a three-tiered governmental structure – federal, provincial, and local – but envisaged “special structures within a province to deal with concentrations of populations from particular ethnic groups that may require autonomous arrangements within a province.” The report proposed that the provinces should have the right to self-determination, provided such right did not undermine the sovereignty, territorial integrity, and unity of the country. The minority dissenting report proposed a six-province federal model.

The majority report was criticised on the grounds that it gave too much weight to identity at the expense of capability. Two of the proposed provinces would have only 0.2 and 0.4 percent of the national population and would find it difficult to be viable in economic terms. The publication of the report generated a debate on the basic issue dividing Nepal and the political parties in the Constituent Assembly: that is, the balance to be struck between identity and viability in designing the federal structure. Proponents of giving identity greater weight invariably propose a larger number of provincial units, whereas those who focus more on viability tend to propose a smaller number. Supporters of recognising identity as the preeminent factor tend to dismiss the focus on viability, declaring that Nepal itself may not be a viable entity if assessed by the criteria used by critics and that intergovernmental transfers and equalisation payments are inevitable in Third-World federations. Supporters of viability argue that it would be irrational to have large disparities in size, population, and resources among provinces and that “weak” provinces that are dependent on the centre would have little effective political power and autonomy, thereby undermining the federal scheme and its rationale.

Given the deadlock on the issue of federalism, the main political parties agreed to form a High Level State Restructuring Commission (HLSRC) in November 2011. The nine members or experts were nominated by these parties and tended to reflect their respective nominating party’s views. They were unable to reach a consensus. In this case, as well, two separate reports – a six-member majority report and a three-member minority report – were submitted to the government. The majority report proposed eleven provinces: ten on the basis of territory and a nonterritorial entity for the Dalits. The minority report proposed six provinces. Whereas some of the smaller provinces envisaged by the CRSDSP were dropped, some aspects of the majority report – including the delineation of boundaries to promote greater ethnic homogeneity at the provincial level – suggested that the majority gave even greater significance

to identity. The proposal of a nonterritorial entity to address the concerns of the Dalit community also highlighted the recognition of identity by the majority members of the HLSRC. The Dalit community, which is dispersed throughout the country, was divided on whether such an entity would be effective in addressing the aspirations of their community. This issue is one example of how in the context of Nepal's exceptional range of diversity, there is a close interrelationship between federalism and inclusion. For some groups, principles or mechanisms that would fall under the category of federalism might be advantageous, whereas for other groups, principles or mechanisms that would more accurately fall under the category of inclusion might be preferable.

Confusion in terminology in the debate on federalism in Nepal was related to the dispute about the naming of the provinces. Advocates of using the name of the largest ethnic group in the proposed province were referred to as proponents of single-identity provinces. Critics argued that because all provinces were plural and unlikely to have the largest group constituting a majority, they should have multiple identities in their nomenclature. A third group sought to seek a compromise on the issue by proposing a mixed identity for the naming of provinces – a “double-barrel” name with one focusing on the ethnicity of the largest group in the province and the other name using a significant geographical term to represent other groups in the province. Single-identity provinces were considered part of ethnic federalism, whereas multiple- or mixed-identity-based provinces were part of a more reasonable or moderate form of federalism. Thus, the issue of the “name, number, and boundaries” of the provinces emerged as the most contentious issue in the federalism debate. In the frantic attempt to reach consensus in the weeks leading up to May 27, 2012 – the final, extended deadline for the Constituent Assembly to adopt a constitution – the pragmatic suggestion that the naming of the provinces be left to the provincial legislatures was welcomed as a compromise solution.

The debate on federalism in Nepal therefore has been more detailed than the debate in Sri Lanka. This is perhaps because there has been a broader consensus on the need for federalisation in Nepal than in Sri Lanka. The debate has been confused, however, by concepts and terminology that often are contested or capable of different interpretations. For example, a common response of many Nepalis when questioned about federalism was that they were open to federalism but not ethnic federalism. However, most Nepalis had very different understandings about what was meant by the concept of “ethnic federalism.” To some, it was a federalism that focused on ethnicity as one of the bases for the demarcation of provinces; to others, it was where ethnicity was the dominant aspect – not only with respect to the demarcation

of boundaries but also where the dominant ethnic group in a province was assured the position of provincial premier, the preferential use of land, and other features that privileged ethnicity. There were differences of emphasis and nuance between federalism that recognised ethnicity as one criterion in the demarcation of provinces and federalism that privileged ethnicity in various ways, in addition to it being the main criterion in establishing provinces. It is the latter form of strong ethnic federalism that seems to be unacceptable to a large body of opinion within Nepal.

The dissolution of the Constituent Assembly on May 27, 2012, created a crisis of constitutionalism in Nepal.³³ The Interim Constitution of 2007 did not envisage such a scenario, assuming that the Constituent Assembly would draft and adopt a new constitution, the promulgation of which would see the repeal of the interim document. The Interim Constitution could not be amended to respond to the new political reality because the Legislature Parliament, which had the sole power to amend the constitution, had ceased to exist.³⁴ The collapse of the process also generated apprehension and suspicion among those for whom the constitution was important for the introduction of radical change; the fear was that the conservative elite that felt threatened by change had orchestrated the collapse. The major political forces negotiated a political agreement in early 2013 that the way forward was to conduct fresh elections to a second Constituent Assembly and that some residual powers vested in the president be used to “amend” the constitution to facilitate such a process. The elections that were held on November 19, 2013, were widely recognised as free and fair despite attempts by a breakaway faction of the Maoists to sabotage them. The election resulted in a shift from the Maoists, which was the largest party in the 2008 elections, to a shift in favour of the Nepali Congress Party (which obtained the largest number of seats) and the United Marxist Leninist Party (UML) – both of which are seen as reluctant federalists.

The post-election period witnessed a debate about what the election results meant on constitutional issues. Whereas conservative commentators were quick to interpret the decline in support of the Maoists as a vote against ethnic federalism (however defined), others suggested that the decline in support resulted from other political factors, such as the party seen as the party of change losing some of that lustre as it was co-opted into the political mainstream and became distant and alienated from its mass base. Another weakness in the argument that the results were a vote against federalism is the fact that

³³ B. Adhikari, *Nepal Constituent Assembly Impasse: Comments on a Failed Process* (Kathmandu: Nepal Consulting Lawyers, Inc., 2012).

³⁴ The Interim Constitution provided that the Constituent Assembly also will function as the Legislature Parliament.

both the Nepali Congress and the UML in their manifestos had commitments to a three-tiered federal model, which – to varying degrees – accepted identity and capability as comprising the basis for the demarcation of the provinces. The manifestos affirmed the plural character of the provinces, thereby requiring a multiple-identity approach to the controversy on naming the provinces but accepting that a provincial institution should make the final decision on the matter. Both parties also highlighted the importance of building on the agreements made under the first Constituent Assembly, recognising the importance of moving the constitution-making process forward without revisiting some of the difficult issues that the first Constituent Assembly grappled with for several years.

Nepal therefore needs to resume and complete its constitution-making process as a matter of priority. The process that it deliberately embarked on was participatory and inclusive. Such processes are more complicated and challenging than more closed processes led by commissions of experts. An inclusive participatory process also generates greater expectations, particularly on the part of excluded groups that have struggled for years for dignity and recognition. Adopting a constitution that fails to respond to such expectations of change – commitments made in the CPA or entrenched through amendments to the Interim Constitution – will be seen as a betrayal by a large segment of the population. For better or for worse, the change agenda – important for a majority of the population – is through the adoption of a federal, secular, inclusive, democratic republic. The fact that Nepal – which was a unitary, Hindu monarchy until 2006 – has reached consensus on these broad constitutional features is – when viewed in comparative perspective – a remarkable achievement. The challenges are in the details and in ensuring a culture of accommodation on the part of the elite that is apprehensive of change and that has legitimate concerns about a strong ethnic federalism. This also includes the minority ethnic groups using the discourse of self-determination and single-identity-based, strong ethnic federalism. Many of these groups remain apprehensive that the commitments of the CPA and the achievements of the first Constituent Assembly will be repudiated or undermined by well-entrenched conservative elites that is determined not to change. Unlike in Sri Lanka, therefore, the debate on federalism continues and has proceeded much farther and in greater detail.

FEDERALISM AND IDENTITY

An obvious similarity between Sri Lanka and Nepal that serves as a lesson learned for other countries in the region is that in both countries, a violent struggle commenced when there was a perception that nonviolent, democratic

means of addressing grievances and aspirations were not yielding results. Both countries had to endure long periods of conflict – violence that destroyed the lives of peoples of all communities and human-rights violations by the parties to the conflict. The federal idea then was discussed in earnest when it was recognised as an obvious compromise constitutional and political model to address the underlying causes of conflict while preserving the unity and territorial integrity of the two countries.³⁵

One of the challenging issues that confronted both countries was the reality of identity politics and the rise of ethnicity as a determining factor in their politics. There has been ambivalence with respect to the recognition of ethnicity and identity as legitimate features in both countries' politics and constitutional design. Pre-independent Ceylon/Sri Lanka adopted different policies on ethnicity and identity politics at different times.³⁶ In the mid-to late 1800s, representation in Legislative Councils that had limited powers was on the basis of "communal representation," or ethnicity. In 1930, a constitutional commission appointed by the British colonial government to recommend constitutional reform recommended the abolition of communal representation, describing it as a "cancer eating at the vital energies of the country and preventing the development of a national consciousness." The early political parties in Ceylon/Sri Lanka were generally national and based on ideology. However, because these parties were perceived as insensitive to ethnic minorities, ethnic-based parties – first Tamil, then Muslim – were established. There were similar developments in Nepal as feelings of exclusion and under-representation in public institutions, coupled with the perception that one ethnic group was dominating, fuelled group and ethnic consciousness and mobilisation. Thereafter, political and constitutional claims based on group identities developed. More recently in Nepal, the phenomenon of ethnic-based parties also has become a reality. The impact of this ethnic consciousness and assertiveness on federalism is what has made the campaign for federalism in both countries more difficult. Because federalism is about shared rule as much as it is about self-rule, federalists must simultaneously affirm or recognise ethnicity or identity and transcend. This is a difficult undertaking.

A related argument challenges the "unitary" definition of ethnicity. In both countries, it is argued that the use of categories such as Sinhalese or Tamil, or Newar or Magar, is simplistic and does not account for the diversity within

³⁵ Many of the issues discussed herein relative to Sri Lanka and Nepal are considered at a more conceptual level in S. Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008).

³⁶ K. M. De Silva, *A History of Sri Lanka* (London: C. Hurst and Co., 1981).

each ethnic identity. Within the Sinhalese and Tamil ethnic groups, for example, there are differences based on geography, religion, and caste. Within the Newar community in Nepal, there are Hindus and Buddhists, as well as differences of caste. These differences may matter and contribute to a variety of opinions or preferences on many issues, including political issues. Broad, general categorisation that fails to appreciate the nuances within such categories therefore is not only inappropriate but also possibly counterproductive because it undermines the celebration of difference and diversity and also acts as a disincentive for “mixedness.” If pluralism and diversity are constitutional and political values to be promoted and encouraged, it is ironic that the recognition of identity might promote them at one level but also undermine them at another. It is clear that the ambivalence toward recognition of ethnicity as a marker in politics and constitutional design in Nepal and Sri Lanka is not only for chauvinist reasons but also for reasons based on more liberal, cosmopolitan, and pluralist considerations.

A related challenge for defenders of federalism is the argument that whereas federalism may be attractive or useful in the short to intermediate term, in the longer term, it will result – if based on ethnicity or identity – in ethnic polarisation or ethnic cleansing by stealth. The argument was made in Sri Lanka that because a large number of Tamils lived outside the north and east, granting rights such as specific territory-based language rights (e.g., the language of record and administration in the north and east) might encourage Tamils to move to those provinces. It was argued that it would be a better option to ensure that such rights were granted to Tamils irrespective of where they lived so as not to provide incentives for movement that, in the long term, would result in increased ethnic polarisation. The same argument was made even more forcefully in Nepal in the context of the push to name provinces to reflect the identity of the largest group in the province and also permit that group to have certain preferential rights regarding political representation in the provincial government and access to land. It was stressed that this would imply that the largest group had a greater claim or ownership over the province and, over time, would encourage migration into the province by members of the largest group and migration out of the province of the other groups. For example, a system that suggested that for Magars to have the full panoply of rights available for Magars, they would have to move to the “Magar” province, would promote such two-way migration that – it is argued in Nepal’s context of disparate minorities – would not be in the long-term interests of interethnic harmony and cooperation. Such a development, it is argued, would not be in the interests of longer-term national unity and interethnic engagement and coexistence.

SELF-RULE AND SHARED RULE

Because the champions of federalism in Sri Lanka and Nepal have been those who are attracted primarily by the self-rule dimension of federalism, there has been insufficient attention to the shared-rule dimension in the public debate. This includes establishing a new postconflict inclusive national identity and redesigning national institutions to reflect that new inclusive, pluralist identity. In Sri Lanka between 1995 and 2005 and in Nepal post-2006, there was limited discussion on these important issues. The “rainbow-nation” concept popularised by Nelson Mandela and South Africa, which highlights not only the distinctiveness of the particular but also the unity of the whole, is a useful exemplar when explaining the relevance of federalism in a plural society.

In Sri Lanka, it was disappointing that both the draft Constitution Bill of 2000 and the discussions about a federal-type solution based on internal self-determination failed to focus on a second chamber or a mechanism to facilitate second-tier participation at the centre. In the debates on federalism in Nepal as well, there has been little if any focus on provincial representation at the centre or the establishment of national – as opposed to central – institutions to promote the shared-rule dimension of federalism. The rationale for second-tier participation at the centre, through a second chamber or national council of provinces, is not only to ensure that the provinces have a voice at the centre when national legislation and policies are deliberated on but also to enable the provinces to feel part of the whole or the nation. Rationales for a second chamber include the protection of national unity and power sharing. The need for reshaping the centre so as to make it truly national or inclusive must not be limited to a second chamber but rather should extend to other institutions to ensure a sense of ownership among the second-tier provincial entities. The absence of such a focus on shared rule fosters the perception that federalism is only about autonomy and the favourite argument of the antifederalists in both countries – that is, federalism is a steppingstone to division or secession. If the federal idea was championed as a mechanism for creating a rainbow nation, in which the constitutional design had to focus on the *unity-in-diversity* features as much as on the mechanisms to recognise autonomy and difference, this would have generated confidence among groups that were apprehensive of federalism.

The federal debates in Sri Lanka and Nepal also remind us of the inter-relationships among federalism, constitutionalism, and democracy. During the peace negotiations between the government and the LTTE in 2002 and 2003, there was considerable doubt about the *bona fides* of the LTTE and its

commitment not only to federalism but also to constitutionalism and democracy. The LTTE's ruthless suppression of dissent, political rivals, rejection of pluralism, and fundamentally flawed ISGA proposals raised serious concerns about the possibility of a negotiated political settlement based on constitutionalism and democracy. In Nepal, much of the scepticism about federalism was linked to concerns about the Maoists' commitment to constitutionalism and democracy as well as their repudiation of the concept of political pluralism. The refusal of both the LTTE and the Maoists to permit references to the term *pluralism* in various political agreements and documents during the negotiations on political agreements and subsequent memoranda on roadmaps and related materials often raised concerns among sceptics about their commitment to basic values of constitutionalism, federalism, and liberal democracy. This scepticism and lack of trust made the task of reaching agreement on interim arrangements and constitution making more difficult.

The "minorities-within-a minority" critique of federalism is relevant in Sri Lanka and to an even greater extent in Nepal. There were fears in both countries that negotiations on federalism would be led by and therefore ultimately be in the interests of the dominant or majority group, on the one hand, and the larger or more assertive minority groups on the other, and that the smaller minorities or minorities within the proposed second-tier entities would not have their interests considered. In Sri Lanka, this was clearly demonstrated in the negotiations between the government and the LTTE, in which discussions on the issues of whether the northern and eastern provinces should be merged, the recognition of the north and east as a homeland of the Tamils, and the ISGA proposal of the LTTE had significant consequences for the large Muslim minority in the eastern province. In Nepal, the diversity within the proposed provinces and the absence of a majority of a single ethnic group in the country as a whole or in any of the proposed provinces made demands for the naming of a province and determination of boundaries a cause for concern, particularly for minority ethnic groups within provinces. The quest to nationally disempower the dominant ethnic group, by empowering larger minority groups at the provincial level raised its own set of challenges with respect to equality and dignity within the second-tier entities. In this respect, a constitutionally entrenched, nationally applicable bill of rights with strong individual-rights guarantees that is binding on all tiers of government is vital to build confidence among the minorities within a minority.

These concerns were compounded by the fact that in both countries, the advocates of a strong second tier of government were lukewarm or even opposed to a strong third tier of government. In Sri Lanka during the constitutional-reform project of 1995 to 2000, the Tamil parties wanted local

government to be a devolved subject, whereas it was clear that under the proposed ISGA, the third tier of governance would be controlled by the authority. In Nepal, the Madhesi parties were insistent that local government should be a competence assigned to the provinces and that provinces should be entitled to determine the scope and extent of powers of local government entities within their provinces. The desire of the second tier to control local government in both countries was generated by a common concern that the centre or first tier will use whatever power it had over the third tier to undermine the powers of the second tier. The experiences of India, Sri Lanka since the introduction of the provincial-council system, and several other countries suggest that the concern about such manipulation was not unfounded.

However, the solution was not to weaken or eliminate an effective system of local government but rather to ensure that local government was independent and immune from such manipulation. In both Sri Lanka and Nepal, the argument also was made that effective local government was a logical extension of the federal idea and the principle of subsidiarity that was closely connected with it. An obvious response was to give constitutional recognition to the three tiers of government,³⁷ constitutionally entrench at least a minimum set of powers and standards for local government, while possibly leaving some discretion to either the first or second tier of government with regard to policy matters concerning local government. The fact, however, that leading proponents of federalism in both countries were seen as hostile to power sharing within a province or extending the federal principle to smaller units created fear among minorities and smaller groups within provinces that the principle of power sharing and devolution would stop at the provincial level.

CONCLUSION

It must not be forgotten that federalism was seriously considered in both countries as a mechanism for resolving interethnic conflict and as part of a process to address the root causes of conflict after long and costly civil wars. The parties to the conflict in both countries agreed that radical constitutional reform was essential to sustain peace, include the marginalised, and reimagine and refashion the architecture of the state. Federalism was seen as one of the main constitutional mechanisms to achieve such radical reform. However, the failure to adopt a federal constitution in Sri Lanka and the delay in forging

³⁷ See the South African Constitution of 1996, which recognises the principle of cooperative government and guarantees powers for the three tiers of government.

consensus on the design of federal arrangements in Nepal raise questions on which federalists in the region need to reflect.

Probably the most difficult question is the issue of ethnicity and the degree of emphasis or the extent of the recognition that should be given to it in the federal design. Many have commented on its Janus-like character³⁸ and the fact of its reality in the politics of the region, whether or not they like it. To explore federalism in Nepal and Sri Lanka by ignoring ethnicity would be absurd. However, just as ethnicity can empower, mobilize, and democratize, it also can divide, polarise, and create the worst kind of factionalism. The ambivalence about the recognition of ethnicity in a strong sense – for example, the homeland concept in Sri Lanka or the so-called single-identity-based federal units in Nepal – was a main reason for the opposition to federalism in Sri Lanka and Nepal. In Sri Lanka today, it may not be possible to debate federalism. Several opportunities were missed between 1995 and 2005. In Nepal, there remains a good chance that a federal system that is consistent with the commitments made in the peace agreement of 2006 will be introduced. It will have to be a federal model that recognises ethnicity as a primary criterion for the demarcation of provinces but that also stresses the equality of all groups, the shared-rule dimension of federalism, and the commitment to a new inclusive and united Nepali state.

Finally, given the lessons from Sri Lanka and Nepal, it also may be necessary to be mindful of the limitations of federalism. Can federalism address claims that are made by strong ethnonationalists? There may be groups such as the LTTE, for whom demands for self-determination, homeland, and nationhood are so strong that to combine such claims with commitments to pluralism, the shared-rule dimensions of federalism described previously, and to a constitutional-reform process that embraces a “rainbow-nation”-type arrangement, are too much of a compromise, given their struggle and experiences. Although there may be creative constitutional arrangements to address these concerns (e.g., asymmetrical federalism), as indeed was proposed in Sri Lanka, it may be necessary to concede that ultimately there are limits to what the federal idea can accommodate in terms of special measures to accommodate difference.

³⁸ See J. Uyangoda, “Democracy, Ethnicity and Political Parties: Trends and Issues in Sri Lanka.” Paper presented at a seminar titled “Managing Democracy in South Asia: Representation, Ethnicity and Political Parties,” December 4–6, 2003, and organised by United Nations Development Programme/Support to Participatory Constitution Building in Nepal. See also J. Uyangoda (ed.), *State Reform in Sri Lanka: Issues, Directions and Perspectives* (Colombo: Social Science Association, 2013).

There is a danger that the federal idea, in its attempts to facilitate conflict resolution, can compromise on its essential features including respect for pluralism, equality, and individual freedom. The federal idea is essentially a mechanism that is pluralist in character. It presupposes constitutionalism and the rule of law, and it cannot function without them. It requires at least two tiers of government, each having a relationship with the people. The federal debates in both Sri Lanka and Nepal highlight the need for the federal idea to be clear about its possibilities and limitations. For federalism to be accepted and implemented in South Asia, its interrelationship with constitutionalism, pluralism, and liberal democracy must be recognised. Its justification and rationale as a constitutional model to promote unity in diversity, autonomy, and internal self-determination while also being a counter-secessionist mechanism must be highlighted.

Constitutional Form and Reform in Postwar Sri Lanka

Towards a Plurinational Understanding

Asanga Welikala

INTRODUCTION

Sri Lanka's protracted civil war ended in May 2009, with the comprehensive defeat by the Sri Lankan government of Tamil-armed secessionism. Widespread expectations that the government's military victory would be consolidated with a comprehensive programme of postwar reconstruction and reconciliation have been frustrated. The government's 'military solution' to the problem of terrorism has not been accompanied by a 'political solution' addressing the anomalies between the constitutional form of the state and the ethnic pluralism of its polity that lie at the root of Sri Lanka's conflict. Indeed, the government has not shown any initiative in fully implementing even the existing scheme of limited devolution under the Thirteenth Amendment to the constitution, and its political allies, both within and outside of the government, have been stridently campaigning for the wholesale removal rather than the enhancement of devolution and power sharing. As demonstrated by other actions – such as the Eighteenth Amendment to the constitution, which abolished the presidential two-term limit and curtailed key procedural limitations on presidential powers¹ – or its increasing militarisation of parts of the civil administration and the economy,² the government is palpably transforming the postwar Sri Lankan state into a model of control relative to both pluralism and democracy.³

¹ R. Edrisinha and A. Jayakody (eds.), *The Eighteenth Amendment to the Constitution: Substance and Process* (Colombo: CPA, 2011).

² See, e.g., International Crisis Group (2013), *Sri Lanka's Authoritarian Turn: The Need for International Action*, Asia Report No. 243; and *ibid.* (2012), *Sri Lanka's North II: Rebuilding under the Military*, Asia Report No. 220.

³ For an earlier characterisation of Sri Lanka as a 'control democracy', see N. DeVotta (2000), "Control Democracy, Institutional Decay, and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka," *Pacific Affairs* 73 (1), 55–76.

The constitutional anomalies – stemming from the consistent denial of the substate Tamil nationalist aspiration to autonomy by the majority Sinhala-Buddhist nationalism in control of the state – that generated extra-institutional violence for so much of Sri Lanka’s postcolonial history therefore are being exacerbated rather than resolved. Despite the stalemate regarding reform, from the perspective of the normative justice of the constitutional order as well as from the more practical one of the peaceful management of pluralism, there is no doubt that the Sri Lankan state needs fundamental constitutional reforms if the potential for instability and the reproduction of conflict are to be obviated over the long term. If there is a consolation to be drawn from this unsatisfactory state of affairs, it is that it provides another opportunity to think anew about the constitutional options for the democratic accommodation of ethno-national pluralism – and to do so with a deeper consideration of the theoretical challenges that confront constitutional law in the Sri Lankan context.

Constitutional Theory in a Context of Constitutional Stasis

The constitutional reform debate in Sri Lanka that spans a century to the early 1900s has three striking features.⁴ The first feature is the richness of intellectual imagination in ideas for institutional reform that have been proposed for enduring problems of constitutional democracy and ethno-cultural pluralism.⁵ The second is the failure of those ideas to find traction and implementation in the realm of the political, whereby ethnicised majoritarianism, partisan political interests of the government in power, and executive convenience have either dominated or hijacked every major attempt at constitutional change, especially in the post-independence era.⁶ The third feature is the near complete absence of theory in this debate. Reformist arguments for the institutional

⁴ See R. Edrisinha, M. Gomez, V. T. Thamilmaran, and A. Welikala (eds.) (2008), *Power-Sharing in Sri Lanka: Political and Constitutional Documents, 1926–2008* (Colombo: CPA); A. J. Wilson, *The Break-Up of Sri Lanka: The Sinhalese-Tamil Conflict* (London: C. Hurst & Co., 1988); L. Marasinghe, *The Evolution of Constitutional Governance in Sri Lanka* (Colombo: Vijitha Yapa, 2007); N. Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities* (Colombo: Vijitha Yapa, 2006); M. Roberts, “Introduction: Elites, Nationalisms, and the Nationalist Movement in British Ceylon,” in M. Roberts (ed.), *Documents of the Ceylon National Congress and Nationalist Politics in Ceylon*, Vol. 1 (Colombo: Department of National Archives, 1977), xxvii–cxcxii.

⁵ Illustrated in the documents in Edrisinha et al. (2008).

⁶ Except perhaps two: viz., the Thirteenth and Seventeenth Amendments to the 1978 Constitution, which introduced, respectively, a scheme of provincial devolution and a framework for the depoliticisation of key public services.

restructuring of the state in appreciation of societal pluralism or in furtherance of constitutional democracy have been richly informed by constitutional comparativism.⁷ They also no doubt have been influenced by various analytical and normative perspectives, including those provided by liberalism and liberal constitutionalism,⁸ socialism, republicanism, and even ethno-symbolic explorations of the precolonial past.⁹ Yet, in the main, these institutionalist responses have not been adequately theorised and contextualised to the empirical conditions of the Sri Lankan case, and they have followed the dictum articulated by Neelan Tiruchelvam that “The quest for a political resolution [of the ethno-national conflict] within a united Sri Lanka must . . . relate to the substantive issues relating to the exercise of political power rather than more abstract formulations of political identity.”¹⁰

This absence of theory has had several consequences, especially for liberal constitutionalism. The lack of descriptive theory has meant that the fullest implications of key political dynamics and empirical factors, including sociological and historical implications of phenomena such as nationalism and ethnicity, have not been considered in proposing institutional solutions.¹¹ Liberals, therefore, have consistently underestimated the power of the past and, by extension, the deep legitimacy of majoritarian ethnic nationalism – however repugnant to the liberal values of choice, tolerance, and pluralism that nationalism might be. Their general critique of ethnic nationalism on civic-rationalist grounds also has been seen as a selective critique of Sinhala-Buddhist nationalism because the liberal commitment to minority accommodation favours the Tamil claim to territorial autonomy, even though Tamil nationalism

⁷ Edrisinha et al. (2008); S. Bastian (ed.), *Sri Lanka: The Devolution Debate* (sixth edition) (Colombo: ICES, 2006).

⁸ R. Edrisinha, “Sri Lanka: Constitutions without Constitutionalism: A Tale of Three and a Half Constitutions,” in R. Edrisinha and A. Welikala (eds.), *Essays on Federalism in Sri Lanka* (Colombo: CPA, 2008), chap. 1; N. Tiruchelvam, “The Politics of Federalism and Diversity in Sri Lanka,” in Y. Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000), chap. 9.

⁹ S. J. Tambiah, *Buddhism Betrayed? Religion, Politics and Violence in Sri Lanka* (Chicago: Chicago University Press, 1992), 172–7; R. de S. Wijeyeratne, *Nation, Constitutionalism and Buddhism in Sri Lanka* (London: Routledge, 2013), chap. 9.

¹⁰ Tiruchelvam (2000), 216.

¹¹ Notable exceptions include C. R. de Silva, “Decentralisation, Devolution or Federalism in Sri Lanka: Some Theoretical and Historical Considerations,” in C. Amararatunga (ed.), *Ideas for Constitutional Reform* (Colombo: Council for Liberal Democracy, 1990); M. Roberts (1978), “Ethnic Conflict in Sri Lanka and Sinhalese Perspectives: Barriers to Accommodation,” *Modern Asian Studies* 12: 353–76; N. DeVotta, *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka* (Stanford, CA: Stanford University Press, 2004); and Wickramasinghe (2006). Note that there are three historians and one political scientist in this list; there are no constitutional lawyers.

is as ethnic-communal and should be as unacceptable to liberal values as its counterpart. Flowing from this, the failure to contextualise the normative principles underpinning institutional-reform proposals, by means of historical, sociological, or other theoretical arguments, has entailed their easy rejection by nativist nationalists on the grounds that especially liberal democratic norms are ethnocentric Western values – which have as much place in contemporary Sri Lanka as colonial rule.

Conversely, the mechanical comparativism that has characterised institutional reformism so far, together with its indiscriminating adoption of norms developed on the basis of radically different empirical conditions elsewhere (perhaps because they are norms that have a dominant following internationally), also has meant that the Sri Lankan debates added little to comparative constitutional law or global constitutionalism. In particular, the distinctive features of the Sri Lankan case as a multinational polity require the reconceptualisation of several key assumptions and organisational principles of the modern ‘nation-state’ at a deeper and more general level than mere reform of the state’s institutional framework.

The Structure and Scope of the Argument

These critical considerations constitute the entry point of this chapter into the Sri Lankan constitutional-reform debate. Only a small selection of the issues raised by these questions can be addressed here. The first substantive concern is the issue of ‘national pluralism’ – that is, the existence of more than one group claiming to be a ‘nation’ within the territorial and historical space of the state, as well as the issues for constitutional law and theory that arise in the structural accommodation of this distinctive type of polity. Second, this is an intervention into the debate among those who subscribe broadly to the principles of democratic constitutionalism; it is not directed at those who reject those values on nationalistic or other grounds of cultural authenticity. Accordingly, my theoretical critiques also are directed at the conceptual assumptions of reformist political opinion in Sri Lanka rather than those who reject reform outright. Third, it is a contribution of applied constitutional theory and comparative constitutionalism for Sri Lanka, using the critical theses, principles, and structures associated with the model known as the ‘plurinational state’. The primary purpose is to encourage theoretical debate and clarity so that choices about institutional forms are analytically contextualised and normatively focussed (contra the Tiruchelvam dictum); it is not concerned with the political viability of plurinational ideas in the current political context.

The substantive and methodological issues involved in introducing a new model of constitutionalism to any given political context are complex and multifarious, and all of these matters cannot be addressed here. Accordingly, the chapter does *not* deal with the following relevant issues. The plurinational logic of constitutional accommodation seems fundamentally incongruent with the centralised state tradition that Sri Lanka has had since the instantiation of the modern state through British colonialism in the nineteenth century. However, in fact, it can be strongly historically contextualised in Sri Lanka by reference to the highly devolutionary and asymmetrical precolonial ‘galactic’ form of the state.¹² Likewise, plurinational constitutionalism so far has been concerned with civic–societal models of nationalism, whereas in Sri Lanka, we must contend with ethnic forms of the nation and nationalism. The challenge of the civic–ethnic dichotomy also can be overcome, both theoretically and empirically. The Western plurinational state is firmly a liberal democratic model of state, whereas in Sri Lanka, there is an established procedural democracy – the substantive values of which are derived not from political liberalism but rather from other cultural values, in particular, ethnic nationalism. The plurinational state in these circumstances must and can be theorised by reference to a broader conception of democracy than political liberalism. All of these issues require serious attention and much theoretical work, which must be pursued elsewhere.

Similarly, this chapter is devoted to the underlying theoretical issues arising from national pluralism for constitutional law, and this focus has meant that I am unable to fully canvass the institutional options through which a plurinational settlement might be actualised. I seek forbearance for this choice, partly because, as observed previously, the Sri Lankan constitutional-reform debate is saturated with discussions about institutional form but is striking for its poverty of theory. This is not a mere scholarly complaint. As previously shown, the absence of theory – by failing to adequately contextualise institutional reform within political, cultural, and historical realities – has had the regrettable practical consequence of contributing to the failure of liberal reformism in Sri Lanka.

Before discussing the merits of plurinational constitutionalism and its relevance to Sri Lanka, an elucidation of the main positions of ideology and ethno-political interest in the postwar constitutional-reform debate is necessary. The second section delineates four major positions according to a typology based on the traditional unitary–federal dichotomy (which, for the first

¹² Tambiah (1992); Wijeyeratne (2013), chap. 4; M. Roberts, *Sinhala Consciousness in the Kandyan Period: 1590s to 1815* (Colombo: Vijitha Yapa, 2004), chaps. 3, 4, 5.

time in nearly four decades, following the military defeat of the Tamil Tigers, does not include an explicitly secessionist position). The two dominant positions with regard to the constitutional form of the state on the unitary–federal axis are associated with the two major ethnic-nationalisms; the unitary state and federalist positions can be appreciated only through an understanding of the ethno-cultural, historical, and territorial claims asserted by these two nationalisms. Both the unitary and federal perspectives also are supported in Sri Lankan constitutional discourse on grounds other than ethno-nationalism; however, because they are politically less dominant, they are included in the typology as ‘variants’ to the dominant positions. Nonetheless, the conceptual assumptions of the variant positions, representing different traditions of democratic modernity, are the main critical concerns of this chapter.

The third section argues that all of the positions with regard to constitutional order reflected in this typology – and especially the two variant positions, however conceptually opposed to one another they may seem – are united by a common subscription to the type of normative order associated with the traditional Westphalian nation-state. Furthermore, this model of internal constitutional organisation is inadequate to the task of addressing the type of pluralism that characterises Sri Lanka’s polity. In the context of the historic failure of postcolonial nation-state building – that is, the failure to build a modern ‘Sri Lankan’ nation-state that transcends traditional ethnic identities – the main question of this part of the argument is the utility of continued subscription to this model. Other models of state have emerged that may provide better answers in terms of both norms and structures to the central constitutional problem of Sri Lanka.

Based on this critique, the fourth section outlines an alternative approach drawing on the body of constitutional theory known as ‘plurinational constitutionalism’, which has relevance and use to the Sri Lankan case in three ways. First, it offers a new *analytical* understanding of the sociological nature of the Sri Lankan polity as one characterised by national pluralism rather than one of mere ethno-cultural pluralism. Second, it articulates the *normative* propositions that must inform constitutional approaches to national pluralism, in particular to expose the conceptual inadequacy of the monistic conception of the modern nation-state and the need to disaggregate the ‘nation’ from the ‘state’. Third, plurinational constitutionalism allows us to outline the principles of *structural* organisation, including the principles of autonomy, recognition, representation, and reciprocity, that are necessary to the constitutional accommodation of national pluralism according to a specifically plurinational logic within a united state. The discussion closes with concluding remarks in the last section.

THE STATE OF THE POSTWAR CONSTITUTIONAL REFORM
DEBATE: TWO DOMINANT PERSPECTIVES AND
THEIR VARIANTS

This preliminary step of the discussion presents a typology of four main substantive positions in the Sri Lankan constitutional-reform debate. They are ideal types and each, in isolation, may not describe the position of any individual; however, together, I believe they capture comprehensively the range of major perspectives that feature in the postwar debate.

The Unitary State Perspective

The two approaches to constitutional form discussed in this section – Sinhala-Buddhist nationalism and the Jacobin Variant – both support the maintenance of Sri Lanka as a unitary state, albeit on the basis of quite different analytical and normative justifications.

Sinhala-Buddhist Nationalism as *the* Nation of the State

The Sinhala-Buddhist nationalist perspective on the constitutional form of the Sri Lankan state, dominant throughout the postcolonial era, has become in the postwar political context virtually unassailable. Informed by a widely resonant but highly manipulated nationalist historiography of the island as the exclusive domain of the Sinhalese as protectors of Theravada Buddhism, this position has defined postcolonial state-building as a process of restoring the Sinhala-Buddhist nation to its historic precolonial status as the rightful owners of the state. In the *vamsa* tradition of Sinhala-Buddhist historiography, Sri Lanka is not only the *Sihaladeepa* (the island of the Sinhalese) but also the *Dhammadeepa* (the island of the dharma). In modern terms, the unitary state is the natural form of centralised government that is required to defend the Sinhala-Buddhist patrimony, especially against the historic ‘other’ – the Tamils.¹³ This is not a mere elite project, for as Jayadeva Uyangoda observed, this historiography informs ‘the presence in Sinhalese society of a very specific political culture, along with an ideology and idiom of a centralised State’.¹⁴ In legal terms, this necessitates constitutional recognition of a privileged status for the Sinhala language and Buddhism and, structurally, the preservation of

¹³ For a fuller account, see A. Welikala, ‘The Devolution Project in Sri Lanka: Towards Two Nations in One State?’, in Edrisinha and Welikala (2008), chap. III.

¹⁴ Cited in Tiruchelvam (2000), 199.

the centralised unitary state at all costs. All three of these central postulates have been enshrined in the republican constitutional order since 1972.¹⁵

This provided the historical import and legitimacy of the war against Tamil secessionism as not only a historically ordained task of the Sinhala-Buddhists but also one that was bound to succeed in restoring the rightful positions of both Sinhalese and Tamils as superiors and subordinates in the political order of the island. These myths, memories, symbols, and values of Sinhala-Buddhist nationalist historiography constituted the *mythomoteur*¹⁶ for postcolonial – and now postwar – state-building, in which the identity of the state is impregnated with the identity of the majority nation through the practices and doctrines of what Tilly called ‘top-down nationalism’.¹⁷

This approach to the state has instantiated the model of state known as ‘ethnocracy’ in Sri Lanka, a process that has been reinvigorated in the postwar context. Yiftachel’s conceptual definition of the model includes the following elements:

Ethnocracy denotes a type of regime that facilitates and promotes the process of ethnicisation, that is, expansion and control. It surfaces in disputed territories, where one ethno-national group is able to appropriate the state apparatus and mobilise its legal, economic, and military resources to further its territorial, economic, cultural, and political interests. The struggles over the process of ethnic expansion become the central axis along which social and political relations evolve.¹⁸

Yiftachel includes Sri Lanka as an example of a contemporary ethnocratic regime and observes that:

Most ethnocracies are neither democratic nor authoritarian nor totalitarian. They possess deep ethnic and racial hierarchies, expressed in most aspects

¹⁵ I have theorised the unitary state as underpinned by this dominant nationalism elsewhere: A. Welikala, “The Sri Lankan Conception of the Unitary State: Theory, Practice and History,” in A. Amarasingham and D. Bass, *Post-War Sri Lanka: Problems and Prospects* (Lexington: University Press of Kentucky, 2014). See also the relevant essays in A. Welikala (ed.), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Colombo: CPA, 2012).

¹⁶ A. D. Smith, *The Ethnic Origins of Nations* (Oxford: Blackwell, 1986), 57–68.

¹⁷ C. Tilly (1996), “The State of Nationalism,” *Critical Review* 10: 299–306 at 303–4. See also N. Wickramasinghe, ‘Producing the Present: History as Heritage in Post-War Patriotic Sri Lanka,’ ICES Research Paper No. 2 (Colombo: ICES, 2012).

¹⁸ O. Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (Philadelphia: University of Pennsylvania Press, 2006), 295. See also J. Uyangoda, “Travails of State Reform in the Context of Protracted Civil War in Sri Lanka,” in K. Stokke and J. Uyangoda (eds.), *Liberal Peace in Question: Politics of State and Market Reform in Sri Lanka* (London: Anthem Press, 2011), chap. 2.

of the public domain. Ethnocracies may range in their levels of oppression and freedoms, but invariably they are chronically unstable and replete with ethnic conflicts and tensions.¹⁹

In all essential elements, including its distorted modernity and its procedurally democratic structures, doctrines, and practices, the Sri Lankan state under the dominant influence of contemporary Sinhala-Buddhist nationalism conforms to this model. In all of these respects, moreover, the Sri Lankan state reflects a constitutional order that is substantially incongruent with the ethno-cultural diversity of its polity and one that is categorically incapable of accommodating its multinational character. Beneath the stiff carapace of ethnocratic state sovereignty, therefore, lurks a fundamental crisis of legitimacy and chronic instability. This pathological crisis of the state is addressed through ethnocratic strategies of intensifying control and militarisation rather than democratic reform.

The Jacobin Variant

The unitary state also is defended by a position in the constitutional-reform debate that is opposed to Sinhala-Buddhist chauvinism and instead is grounded in the political theory and philosophy of modernism, secularism, and civic nationalism – albeit with a strong emphasis on state sovereignty, nonintervention in the domestic affairs of states, and ‘Third World’ solidarity. For the purposes of this chapter, this can be described as a ‘Jacobin’ position because its view of the republican nation-state elides the nation and the state in a unitary discourse of national identity and institutional form (notwithstanding commitments to devolution within the unitary state). The Jacobin variant builds on the conventional discourse of postcolonial nation-building to promote a modern Sri Lankan political community that is synonymous with the Sri Lankan state. It concedes that in a multiethnic, multireligious polity, some concessions may have to be made to cultural particularity. Thus, the traditional Jacobin commitment to strict state ethnic and religious neutrality is mitigated by openness to policies of multiculturalism, official multilingualism, affirmative action, and even a measure of territorial devolution, to the extent that devolution is consistent with the centralisation of political power and legal authority in the unitary state and the mononational identity of the state. Exponents of this view therefore would support the structural framework of the current Sri Lankan constitution together with its level of provincial devolution, while critiquing

¹⁹ *Ibid.*, 296.

the ethnocrisation of the state by Sinhala-Buddhist nationalists. Its attitude to the competing claims of ethno-cultural pluralism, moreover, is governed by structural realism in terms of both internal political management and external relations rather than by any strong a priori normative commitments to the recognition of pluralism. As Dayan Jayatilleka noted:

Sovereignty cannot be successfully defended by a state acting as a mono-ethnic straightjacket on the country's stubbornly diverse, irreducible and colliding identities. It is best defended by a Sri Lankan state which represents all its peoples, acts as neutral umpire providing and guaranteeing adequate space for all ethnicities on the island. Sovereignty is secured by a Sri Lankan identity which accommodates all the country's communities, paving the way for a broadly shared sense of a multi-ethnic yet single Sri Lankan nationhood.²⁰

Clearly, therefore, this vision of the nation-state accommodates pluralism to the extent that minority claims do not seriously challenge the overarching unitary conception of state, nation, and sovereignty. Its accommodative capacity categorically does not extend to the recognition of any substate *national* claims. Furthermore, Jacobins would justify the use of force to suppress such substate national movements – a fundamental threat to unitary order – as consistent with their conception of the sovereign state.

The Federal State Perspective

The two approaches represented by Tamil nationalism and the Liberal Variant both argue for the federalisation of the Sri Lankan state but on different grounds. The former demands federal autonomy as an ethnic claim to self-government; the latter advocates federalism as a general check on majoritarianism.

The Tamil National Substate Challenge

The scholarly and political literature on the origins and development of Tamil nationalism in Sri Lanka offers an account that is historically linear and remarkably ideologically consistent. It is possible to delineate four major features to this dominant narrative. First, even though ancient and medieval historiographical information is marshalled in support of the articulation of

²⁰ D. Jayatilleka, *Long War, Cold Peace: Conflict and Crisis in Sri Lanka* (Colombo: Vijitha Yapa, 2013), 485.

political and legal rights claims, Tamil political consciousness generally is presented as an historically modern phenomenon, originating in the nineteenth century. Second, the Tamil collective identity is presented essentially as a distinctive ethno-culture, based primarily on the Tamil language, its forms, and history. Third, there is wide consensus that the development of collective identity, from a culture-based ‘group awareness’ to a politically salient ‘national consciousness,’ was a gradual process occurring throughout the British colonial and postcolonial era, in the context of changing institutional forms of political representation and broader socioeconomic transformations.

In what is a distinctive but not unique feature of Sri Lankan Tamil nationalism as a postcolonial substate nationalism, the common narrative advances the view that the formation of this substate national identity is almost entirely the result of the intolerant or perfidious actions of Sinhala-Buddhist nationalism, institutionally empowered to consolidate its numerical primacy through territorial democracy from the late colonial period onwards. It therefore can be argued, albeit counterfactually, that had the host state been more constitutionally accommodative in respect of addressing Tamil *minority rights* (including a measure of territorial devolution), Tamil constitutional claims may well not have been asserted in categorically nationalist terms. The dominant ‘defensive and reactive’ theory of national identity thus conforms closely to the model of ‘bottom-up nationalism’ theorised by Tilly.²¹

It is from within these perspectives that Wilson’s seminal account of the rise of Tamil nationalism commences with the observation that it ‘evolved gradually, as a defensive reaction to events’.²² The notion of a ‘defensive’ and ‘reactive’ nationalism therefore must be underscored as the predominant feature of Tamil nationalism’s political self-representation. In respect of constitutional norms and structures, outright separate statehood or some form of asymmetrical federalism (reflecting the international-law principle of internal self-determination) appear to be the two preferred constitutional models among Tamil nationalists within Sri Lanka and in the Tamil diaspora. Except for the period of the Tamil Tigers’ dominance over Tamil politics, the default position of parliamentary Tamil nationalist parties has been asymmetrical federalism, and this is the postwar position.

As noted previously, the postcolonial Sri Lankan state has been characterised throughout its existence not by policies of inclusion, pluralism, and accommodation rather but by the ethnicised majoritarianism, discrimination, exclusion, and violence that is characteristic of an ethnocracy. To the extent

²¹ Tilly (1996).

²² Wilson (2000), 1.

that it has adopted constitutional and other measures towards the accommodation of ethno-cultural diversity, the state has done so under force of political circumstances – and then demonstrated reluctance or indifference with regard to their meaningful implementation.²³

It is in this insalubrious context that the Tamil electorate in the north and east of Sri Lanka has consistently returned political parties affirming the basic claims of Tamil *nationhood* in every general election since 1956. Thus, the Tamils of the north and east of the island electorally endorsed a vision of distinctive nationality virtually from the beginning of Sri Lanka's postcolonial existence, and they have done so even after the armed secessionist movement was militarily defeated in 2009. That is the substate national challenge that renders Sri Lanka not merely a multiethnic but also a multinational polity, and with which constitutional law and theory need to contend if the Sri Lankan state is to fully reflect this sociopolitical reality in its constitutional order – both normatively and structurally, consistent with fundamental democratic values.

The Liberal Variant

The liberal variant of the federalist perspective on the Sri Lankan state shares much in common with the Jacobins in relation to the normative precepts that underpin the modern nation-state – chief among them, the preference for demos over ethnos – although they reject the centralisation immanent in the unitary state on both democratic and pluralist grounds. They typically would subscribe to the classical liberal views on consent and popular sovereignty as constitutive of both the nation as a political community of shared values and the state as a contractarian instrument of self-government. The commitment to federalism as an institutional form of the state stems from this liberal ideal of the relationship between the political community and the government rather than as an institutional response to the claims of ethnic minorities per se. Thus, Chanaka Amaratunga advocated a federal constitution for Sri Lanka 'not so

²³ For example, the Thirteenth Amendment to the Constitution (1987), which eventually granted language parity and a degree of provincial devolution, was enacted only under severe pressure of the Indian government. Its most important feature and rationale – territorial autonomy in the north and east – has never properly materialised. See Edrisinha et al. (2008): chaps. 16, 17; K. Loganathan, *Sri Lanka: Lost Opportunities: Past Attempts at Resolving Ethnic Conflict* (Colombo: University of Colombo, 1996), chap. 5; N. Seevaratnam (ed.), *The Tamil National Question and the Indo-Lanka Accord* (New Delhi: Konark, 1989); R. Amarasinghe, A. Gunawardena, J. Wickramaratne, and A. M. Navaratna-Bandara, *Twenty Two Years of Devolution: An Evaluation of the Working of Provincial Councils in Sri Lanka* (Colombo: Institute for Constitutional Studies, 2010).

much as a means of resolution of the Tamil problem/ethnic conflict but for its intrinsic merits and as a means of strengthening the liberal democratic process in Sri Lanka'.²⁴ The intrinsic merits he speaks of are the orthodox liberal propositions of the constitutional entrenchment of individual rights and the division and sharing of sovereignty. Moreover, Amaratunga argued that:

... while the rights of all individuals including those of minority ethnic groups should be respected, the principal motivation for any constitutional arrangement should *not* be the political promotion of ethnic consciousness but *rather its diminution* by the creation of a truly free and individualist political order.²⁵

Liberal federalists therefore make the distinction, in both descriptive and normative terms, between civic nations that foster values such as individual liberty, the rule of law, limited government, and economic freedom, and ethnic nations, in which ascriptive attributes of the community take centre stage and both the identity and the rights of the individual are determined by the community rather than vice versa. Thus, their willingness to contemplate federal forms of minority accommodation are justified by traditional liberal arguments of counter-majoritarianism but, above all, by the argument that any concession to ethno-territorial autonomy is balanced by the commitment to the overarching civic national identity of the state and rights-based common citizenship.

Amaratunga stakes out the distinctive liberal-federalist position in opposition to both majoritarian and minoritarian perspectives in the following terms:

... the successful operation of a federal constitution leads *not*, as the advocates of the pure unitary state assume, to the establishment of separate states in all but name and eventually, perhaps even to formal separation and *not*, as the ethno-political advocates of federalism believe to the permanent creation of ethnic political units *but* to the decline of ethnic consciousness and the promotion of national unity in the context of diversity.²⁶

Thus, this type of liberal envisages a functional compromise with ethnicity by accommodating ethno-territorial demands through the expedient of federal autonomy, while promoting demotic nation-building at the level of

²⁴ C. Amaratunga, "Checking Democracy: A Case for a Federal Sri Lanka", in Amaratunga (1989), 485.

²⁵ *Ibid.*, 414, emphasis in original.

²⁶ *Ibid.*, 415, emphasis in original.

the state, and urging ethno-nationalists to recognise individuals' capacity for multiple identities. The accommodation-as-relegation strategy is built on the hope that primordial and even antimodern attachments to ethnic identity will recede in the progressive environment for individual self-development secured by the liberal-democratic state and that federal autonomy would diminish the political force of substate ethnic nationalism as a mobilising ideology.

Many of these assumptions and prescriptions can be shown to be flawed, and worse, inconsistent with the liberal virtues that liberal-federalists claim to uphold. The principal problem here in the context of multiple nations is not so much the normative preference for the civic demos as the definition of the nation in monistic terms – an infringement of the liberal norm of pluralism. Especially in the formalistic way in which Sri Lankan liberals have tended to deploy it, the problem with federalism as a form of territorial autonomy in particular is that classical conceptions of federalism offer no scope for the accommodation of plural nationhood or nationality. That is, federalism might offer extensive territorial autonomy (self-rule) and representation in central institutions (shared-rule) for substate nations, but its accommodative capacity usually does not extend to the recognition of plural *national* identities.²⁷ Thus, federalism could provide the *constitutional form* for a plurinational polity, but only if it follows the deeper interrogation of the normative and organisational precepts of the modern state suggested by plurinational constitutionalism.

The assumption that in a state based on liberal values there can be only one demos (or nation) answers to neither the sociologically ethnic character of collective identity that all but the liberals seem to regard as their primary referent in Sri Lanka nor to the fact that the Tamil claim to autonomy is premised not as an internal minority or a regional identity but rather on a distinctive claim to *nationhood*. If we are to address this nationality claim *without* creating a separate state, it would appear that liberalism must meet the challenge of national pluralism with a fundamental reconceptualisation of its own normative foundations. It would be both theoretically inadequate and, indeed, decidedly *illiberal* to present an either/or response to this challenge on the blunt assertion that the liberal conception of the good is ineluctably superior to ethnic forms of collective identity.

²⁷ W. Norman, *Negotiating Nationalism: Nation-Building, Federalism and Secession in the Multinational State* (Oxford: Oxford University Press, 2006), chaps. 3, 4, 5, 6. See also S. Tierney (2008), "Beyond the Ontological Question: Liberal Nationalism and the Task of Constitution-Building", *European Law Journal* 14 (1): 128–37.

ELUSIVE MODERNITY: THE FAILURE OF POSTCOLONIAL
NATION-STATE BUILDING AND THE NEED FOR A NEW
CONSTITUTIONAL SELF-UNDERSTANDING

The dominant paradigm of nation and state building in the decolonising world of the mid-twentieth century reflected many of the analytical and normative assumptions that feature prominently in the Jacobin and Liberal views on the ideal to which the Sri Lankan nation-state should aspire. Even some Tamil federalists (as opposed to Tamil separatists) including Neelan Tiruchelvam shared these assumptions. In addition to being a distinguished constitutionalist, he was a Member of Parliament representing the main Tamil nationalist party when he wrote, ‘Can modern constitutionalism accommodate multiple and distinct forms of belonging to the community, the region and the nation?’²⁸ Paradoxically, Tiruchelvam was not only reiterating the conflation of the nation with the state but also, by terminological fiat, effacing the *national* as opposed to the merely communal or regional character of the Tamil claim. The postcolonial nation-building literature reflected in many ways a teleological vision, in which tradition, ethnic loyalties, and particularisms should give way – and made to give way – to modernity, rationalism, and civic homogeneity in the progress towards a world order of democratic nation-states.²⁹ The canonical status of this once widely accepted school of thought has been eroded by scholars who have pointed to the ‘modernity of tradition’ or the resilience of tradition within modern conditions.³⁰ It also has been attacked for its Western ethnocentrism,³¹ and its claims to the universalism of Enlightenment thought have been widely rejected.³²

²⁸ Tiruchelvam (2000), 216.

²⁹ Standard works of postcolonial nation-building include D. Lerner, *The Passing of Traditional Society* (New York: Free Press, 1958); K. Deutsch and W. Foltz (eds.), *Nation-Building* (New York: Atherton, 1963); and R. Bendix, *Kings or People: Power and the Mandate to Rule* (Berkeley: California University Press, 1978). For an example of how this theoretical approach has been applied in relation to early postcolonial Sri Lanka, see R. Kearney, “Nationalism, Modernisation and Political Mobilisation in a Plural Society”, in M. Roberts (ed.), *Collective Identities, Nationalisms and Protest in a Plural Society* (Colombo: Marga Institute, 1979), 440–61.

³⁰ L. I. Rudolph and S. H. Rudolph, *The Modernity of Tradition: Political Development in India* (Chicago: Chicago University Press, 1984); Wijeyeratne (2013); M. Roberts, “Sri Lanka: Intellectual Currents and Conditions in the Study of Nationalism,” in M. Roberts (ed.), *Sri Lanka: Collective Identities Revisited*, Vol. 1 (Colombo: Marga Institute, 1997), 6.

³¹ J. Coakley, “National Majorities in New States: Managing the Challenge of Diversity,” in A.-G. Gagnon, A. Lecours, and G. Nootens (eds.), *Contemporary Majority Nationalism* (Montreal and Kingston: McGill-Queen’s University Press, 2011), chap. 5.

³² S. Amunugama, “Ideology and Class Interest in One of Piyadasa Sirisena’s Novels: The New Image of the ‘Sinhala Buddhist’ Nationalist” in Roberts (1997), 342.

For our purposes, what is important is the plurinationalist critique of the standard model of the nation-state on which the entire postcolonial nation-building discourse is based. I discuss these issues in more depth herein, but first, I need to place a question mark over three major assumptions of the nation-state model. First, can there be only one nation within the state (i.e., the ‘monistic demos thesis’ discussed later in this chapter) and this nation should be exclusively associated with the state (as in the hyphenated ‘nation-state’)? Second, is the *statal* demos defined in civic as opposed to ethnic terms culturally neutral and can it act as impartial arbiter over competing group claims at the substate level? Third, does the normative universality and superiority of the civic nation-state justify suppressing ethnic identities even though the latter constitute the primary social context within which individuals exercise agency in places like Sri Lanka? The specific problem in this regard is not so much the encouragement of democratic modernity (which as I argue later in this chapter is both good and necessary in a plurinational dispensation) as its imposition on ethnic nations, and the procrustean expectation that tradition is jettisoned in favour of modernity if the full potential of the liberal good life is to be achieved. Such determinism seems more redolent of Marxism than liberalism. In light of these issues, we might ask if the civic-nationalist normative consensus between the Jacobin and Liberal positions reflects an adequate conceptual response to the challenge of national pluralism. Are these positions correct in continuing to argue that the principal conceptual answer to Sri Lanka’s mismanaged pluralism is to recommit to the course of nation-building from which it deviated after independence?³³

Ceylon, as Sri Lanka was known before 1972, was considered a ‘constitutional pioneer’ in the British Empire with the introduction of the Donoughmore Constitution of 1931.³⁴ This unique system of government was founded on the universal franchise (the first among British colonies to be granted this right) and a diarchic form of power sharing between the Ceylonese and the British. In the next step of reform, Ceylon was given a more conventional Westminster-style parliamentary system in the Soulbury Constitution of 1946 under which, in February 1948, it also was granted independence as a Dominion of the British Commonwealth. Many have noted the smooth, negotiated, and constitutional

³³ See, e.g., Wickramasinghe (2006), 199; G. Moonesinghe (ed.), *Nation Building: Priorities for Sustainability and Inclusivity* (Colombo: Shramaya, 2010); H. Rambukwella, “Reconciling What? History, Realism and the Problem of an Inclusive Sri Lankan Identity,” International Centre for Ethnic Studies Research Paper No. 3 (Colombo: International Centre for Ethnic Studies, 2012); and Jayatilleka (2013).

³⁴ M. Wight, *The Development of the Legislative Council: 1606–1945* (London: Faber & Faber, 1945), 74.

character of the transfer of power in Ceylon: a model colony that also illustrated the model process of decolonisation. Beneath this ‘deceptive tranquillity’, however, the explosive political forces that would lead within a few decades to the disembowelment of the independence constitutional settlement emerged soon after independence.³⁵

Except for the conservative centre-right dominated by the United National Party (UNP) of Ceylon’s independence leader, D. S. Senanayake, significant constituencies within the body politic had no involvement in the negotiations for independence and, consequently, felt no affinity with that constitution. For the Marxist Left, the official opposition in the first parliament, the Soulbury Constitution was no more than an elaborate veneer for the neo-imperial continuation of capitalist exploitation by both British and Ceylonese commercial interests, when direct rule had become too costly to maintain. For the Tamils, the Soulbury Constitution provided wholly inadequate safeguards against the prospect of Sinhala domination. Soon after independence, they began the demand for federal autonomy on the basis of a separate nationality claim that would lead eventually to the armed struggle for a separate state. For the increasingly strident Sinhala-Buddhist nationalists, the Soulbury Constitution represented a deracinated, liberal, elitist anathema. Gaining momentum around the campaign for restoring to the Sinhala-Buddhists what they had lost during the preceding five centuries of colonialism, Sinhala-Buddhist nationalists demanded the introduction of Sinhala as the sole official language, an appropriate recognition of Buddhism in the symbols of the state, and other cultural initiatives for reestablishing Sinhala-Buddhist ownership of the island. Although rebuffed by UNP leaders in the first few years after independence, the Sinhala-Buddhist nationalist movement, led by cultural revivalists and the increasingly politicised Buddhist monkhood, found a vehicle for political mobilisation in the coalition called the *Mahajana Eksath Peramuna* (MEP, or People’s United Front) in the mid-1950s.

The MEP swept to power in the general elections of 1956 on a platform of introducing, among other things, the ‘Sinhala Only’ policy, whereas in the north and east, the Tamil Federal Party equally dominated the electoral landscape, winning virtually all parliamentary seats in the Tamil-majority provinces on the demand for federal autonomy (and, needless to say, complete opposition to the introduction of Sinhala as the sole official language). The general elections of 1956 were remarkable in that it was first occasion of a democratic change of government anywhere in the decolonised

³⁵ H. Kumarasingham (2013), “‘The Jewel of the East Yet Has its Flaws’: The Deceptive Tranquillity Surrounding Sri Lankan Independence”, *Heidelberg Papers in South Asian and Comparative Politics*, Working Paper No. 72.

world. Nationalist mobilisation on both sides of the ethnic divide ensured an unprecedented level of public participation and identification with the political process that – in the absence of a mass independence movement – hitherto had been dominated by elite politics throughout Ceylonese history.³⁶ Yet, as it broadened democratisation, it also ruptured the postcolonial polity along the key *ethno-national* divide; it is the deeper implications of this conundrum that, in my view, the civic-nationalist position described previously fails to appreciate adequately.³⁷

In light of this political history, therefore, I pose the following counterarguments to the civic-nationalist view. At a deeper level, what underpinned the institutional innovations of the introduction of universal electoral democracy in 1931,³⁸ and in the first few years after independence in 1948,³⁹ were the attempts by the departing colonial power, as well as the local political elite, to consolidate the legitimacy of the successor state with the deliberate construction of an inclusive ‘Ceylonese’ statal nation. In accordance with the governing paradigm of postcolonial nation-building, this process attempted to emulate the modernity of Western nation-states by constitutional frameworks premised on and aimed at the promotion of a unified demos transcending ethnic and religious cleavages, mainly through the traditional liberal strategy of privatising cultural diversity.⁴⁰ Although the monistic demos assumption implied the rejection of any notion of multiple nations within the island, the liberal modernist experiment was, as noted previously, short-lived. Any potential it had as a viable model for Sri Lanka’s plural polity was nullified by the rise of Sinhala-Buddhist nationalism laying claim to the ownership of the state, registered in the watershed general elections of 1956.⁴¹ Democratic proceduralism, together with absent or ineffective constitutional protections for pluralism, paved the way for the majoritarian ethnic nationalism to occupy the embryonic national space of the postcolonial state, displacing the ideal of a monistic but pluralist demos with the reality of a hegemonic ethnos.

³⁶ A more detailed account of this political history from the perspective of failed nation-building is in Welikala (2008).

³⁷ For an excellent analytical overview of the historic significance of the 1956 general election in Sri Lanka’s postcolonial political trajectory, see DeVotta (2004), 62–9.

³⁸ J. Russell, *Communal Politics under the Donoughmore Constitution, 1931–1947* (Colombo: Tisara Prakashakayo, 1982); N. Wickramasinghe, *Ethnic Politics in Colonial Sri Lanka, 1927–1947* (New Delhi: Vikas, 1995).

³⁹ H. Kumarasingham, *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I. B. Tauris, 2013), hap. 7; K. M. de Silva, *A History of Sri Lanka* (Colombo: Vijitha Yapa, 2005), chap. 36.

⁴⁰ On Section 29 of the Independence Constitution, see Edrisinha et al. (2008), chap. 7.

⁴¹ See R. Kearney, *Communalism and Language in the Politics of Ceylon* (Durham, NC: Duke University Press, 1967).

This ethnocentric state-formation process (described previously) therefore has totally eclipsed whatever inclusionary and egalitarian potential the traditional Westphalian nation-state might have had. The failure to build a postcolonial civic-statal nation – underscored by decades of violent conflict and a postwar triumphalist victor’s peace that has not merely reproduced the constitutional anomalies at the heart of the conflict but also reinforced them – seems to require not a rededicated commitment to the failed model of postcolonial nation-statehood but rather a fundamental reconsideration of it. The ethnocentric tendency of the Sri Lankan state under the dominating influence of Sinhala-Buddhist nationalism adds the decisive, further layer of illegitimacy to monistic conceptions of the constitutional order, which in turn calls for more radical responses in the accommodation of national pluralism than anything traditional liberal democracy or the orthodox Westphalian nation-state has to offer. Except for its familiarity, therefore, there is little sense in regurgitating an orthodox model of statehood that might have been useful at the mid-twentieth-century decolonising moment but which has subsequently globally demonstrated its severe limitations in respect of the accommodation of democratic pluralism and especially national pluralism, and which therefore has now been superseded by major developments in both the theory and practice of democratic constitutionalism.⁴²

More insidiously, by its failure to account for the democratic aspiration to recognition as a distinct *nation* that has been registered by Tamils of the north and east in every election since 1956, it is not only the theoretical inadequacies of this model in relation to national pluralism that are apparent but also how it serves to actively *deny* the sociological reality of multiple nations and, thereby, the normative challenge of national pluralism. Although the process of modernity with regard to both nations and the state in Sri Lanka therefore must be encouraged, it must be a process conceived in complementarity to the more pressing requirement of the pluralisation of the constitutional order rather than a condition precedent to the latter imperative.

A LIBERAL-DEMOCRATIC ALTERNATIVE? THE PLURINATIONAL STATE AS AN ANALYTICAL AND PRESCRIPTIVE MODEL OF CONSTITUTIONAL ORGANISATION

For many, the preceding narrative of Sri Lankan political history and its ethnic divides (together with the typology of positions in constitutional

⁴² See, e.g., J. Bertrand and A. Laliberté (eds.), *Multination States in Asia: Accommodation or Resistance* (Cambridge: Cambridge University Press, 2010), chaps. 1, 11.

discourse set out previously) engage both well-known debates concerning the conceptual underpinnings and the institutional architecture of the state in divided societies as well as established explanatory theses about these societies. This includes the famous debate in the field of comparative politics between Arend Lijphart and Donald Horowitz,⁴³ or the more recent interpretive and prescriptive schema worked out by John McGarry, Brendan O'Leary, and Richard Simeon in terms of the institutional models along a conceptual continuum between 'integration' and 'accommodation'.⁴⁴ Whereas these debates and proposals and especially the accommodationist approaches no doubt provide a number of highly significant insights for the Sri Lankan situation, I contend that an empirically *multinational* polity demands a normatively and structurally *plurinational* state. It is a distinctive type of polity that requires a discrete model of constitutional state, which in many ways defies categorisation within the terms of the Lijphart–Horowitz debate or, as Tierney incisively pointed out, even within the much broader possibilities contemplated by the accommodation models in the McGarry, O'Leary, and Simeon schema.⁴⁵

Against the assumptions that have served these scholars, therefore, it is again necessary to emphasise, analytically, that the empirical problem at issue in the Sri Lankan case is not merely one of ethnic pluralism or multiculturalism or of majority-minority relations but rather one of *national pluralism*. Conceptually, the principal problem here is one that I identified in relation to the unacknowledged but actual consensus between Liberals and Jacobins in Sri Lankan debates in the previous typology, and one to which the discussion returns shortly. This problem is encapsulated in the 'monistic demos thesis' (i.e., that there can or should be only one civic nation within the state), which constitutes both the major premise in analysis and the ideal-type for normative theory and institutional modelling for most political scientists and constitutional lawyers.

The combination of critical theses, normative precepts, and constitutional principles associated with specifically plurinational constitutionalism has never been applied in relation to Sri Lanka as either an analytical or

⁴³ For an excellent summarization of the central themes of this long-standing debate, see S. Choudhry, "Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies," in S. Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008), 15–26. See also J. B. Meyers (2010), "Rethinking 'Constitutional Design' and the Integration/Accommodation Dichotomy," *Modern Law Review* 73 (4): 656–78.

⁴⁴ J. McGarry, B. O'Leary, and R. Simeon, "Integration or Accommodation? The Enduring Debate in Conflict Regulation," in Choudhry (2008), chap. 2.

⁴⁵ S. Tierney, "Giving with One Hand: Scottish Devolution within a Unitary State," in Choudhry (2008), 440–6.

prescriptive framework. Thus, one of the first insights that the application of a plurinational framework to the Sri Lankan case yields is to understand this polity as consisting of two historic ethnic nations as well as other communities, in addition to the diversity of religion, language, and culture that overlap and crosscut these national conceptions. Contrary to the Jacobin and traditional Liberal views in constitutional discourse, therefore, the analytical characterisation of the Sri Lankan polity as one of ‘national pluralism’ is a novel suggestion, even though historians, anthropologists, sociologists, political scientists, and constitutional lawyers have been addressing ethno-national conflict and its causes, dynamics, and potential solutions for decades. The application of the analytical and prescriptive precepts of plurinational constitutionalism, therefore, represents a fresh approach to constitutional self-understanding in Sri Lanka, with regard to both a clearer understanding of the sociological character of the polity and as a potential normative and constitutional framework that affords a more sustainable foundation for the Sri Lankan state.

The term *plurinational state* derives from the Spanish (Castilian) *estado plurinacional* and has been adopted by English-language theorists ‘in place of the more common “multinational” in order to express the plurality not merely of nations, but conceptions of nationality itself’.⁴⁶ Likewise, Ferran Requejo and Miquel Caminal explain the preference in the following terms:

First, ‘plurinational’ refers both to the descriptive side of the concept (the fact that some democracies include different national societies within them) and to the prescriptive side of the concept (the claim for recognition and protection of . . . national pluralism . . .). In contrast, the term ‘multinational’ only covers the descriptive side of the concept.⁴⁷

Thus, the plurinational state is a model of constitutional accommodation in contexts in which there is more than one claim to nationhood and more than one conception of nationality – that is, ‘national pluralism’ – within the territorial and historical space of an existing state. It is distinct from other models of pluralism – such as multiculturalism, minority rights, federalism, decentralisation, or regionalism – in terms of the political phenomenon that it seeks constitutionally to accommodate. The substate challenge is conceived in specifically *nationalist* terms; that is, assertions of sociocultural identity, grounded on a ‘historically contextualised territorial space’, carry with them

⁴⁶ M. Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford: Oxford University Press, 2001), x.

⁴⁷ F. Requejo and M. Caminal, “Liberal Democracies, National Pluralism and Federalism,” in F. Requejo and M. Caminal (eds.), *Political Liberalism and Plurinational Democracies* (London: Routledge, 2011), 1, n. 1.

normative claims to recognition, autonomy, and representation and to the expression of those claims in the constitutional order and governing arrangements of the state within which they are located.

Although substate nations in plurinational states actively address themselves to legal and political orders over and above the state, they are distinct from traditional separatist models of nationalism in that there is no necessary teleological commitment to secession *per se*. As in the democratic process of statal polities, political discourse within substate national spaces also features the full range of opinions, which may include ‘separatist’ voices. However, despite the language of independence in the rhetoric of substate nationalist political actors, what is important to note is that in terms of concrete constitutional claims, their agendas are more complex and nuanced than a straightforward commitment to secession and the establishment of a separate sovereign state.⁴⁸ More generally, as Keating stated:

The argument is that we cannot resolve nationality issues by giving each nation its own state, but neither can, nor should we seek to eliminate nationality as a basis for political order. Rather we need to embrace the concept of plural nationalities and shape political practices and institutions accordingly.⁴⁹

Theorists of the plurinational state widely agree that substate nationalism is not synonymous with separatism and that ‘from a legal perspective, constitutional accommodation *within* the plurinational state in fact raises more interesting questions on the nature of sovereignty and its potential for divisibility than does secession’.⁵⁰ Accordingly, plurinational state theory contains both descriptive (or historiographical) and normative dimensions; in both senses, it presents fundamental critiques of the theoretical foundations, political practices, and constitutional arrangements of the modern nation-state, which is traditionally conceived in unitary terms with regard to national identity even in federal states.⁵¹ In suggesting plurinational alternatives to dominant narratives of constitutional self-understanding in light of those critiques, plurinational constitutionalism is concerned with both the reinterpretation of existing constitutional arrangements of the host state and in their structural amendment, in appreciation of the state’s plurinational character.

The plurinational state so far has been theorised as a ‘discrete category of multilevel polity’ within the discourse of liberal-democratic constitutionalism from the empirical experience of national pluralism in Western industrialised

⁴⁸ S. Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2006), 92–8.

⁴⁹ Keating (2001), ix.

⁵⁰ Tierney (2006), 18–19, 18, n. 52.

⁵¹ Norman (2006).

states (chiefly Canada, Spain, and the United Kingdom) in relation to the substate nations of Quebec, Catalonia, and Scotland. Having already undergone modernist processes of state-formation, nation-building, and constitutional development, these states also are entering a phase of ‘late sovereignty’⁵² in which governmental functions traditionally associated exclusively with the nation-state are being transferred to alternative sites of authority⁵³ at the same time that governance is becoming a more diffuse and less statist activity.⁵⁴

Notwithstanding their liberal modernity and constitutionalist character, the political aspirations, discursive traditions, and constitutional agendas of the substate nations of Scotland, Quebec, and Catalonia are deeply rooted in their own national historiographies as well as the constitutional history of their host states. Theoretical generalisations must carefully regard these differences of historical sociology in understanding each substate nation in its own terms. Bearing those specificities in mind, however, recent theorisations of the plurinational state have attempted to articulate the common issues of disaffection that these substate nations entertain with regard to their respective host states, as well as the shared normative and politico-constitutional claims they present for the better accommodation of their aspirations. A number of specific conceptual, normative, and constitutional propositions can be identified as defining attributes of the current theory concerning the plurinational state. Although noting that not all of these constitutional propositions are relevant outside of the Western contexts – conditioned as they are by the sociological nature of civic-societal nationalisms and by ideological liberalism in relation to politics and constitutionalism – two of the main theses of plurinational constitutionalism as they relate to the Sri Lankan case are discussed in the next section.

The Monistic-Demos Thesis and Host-State Societal Dominance

A key ground of normative critique presented by plurinational constitutionalism against the Westphalian nation-state model, and political liberalism’s

⁵² N. Walker, “Late Sovereignty in the European Union,” European Forum Discussion Paper (Florence: European University Institute, 2001). ‘Late sovereignty’ and, indeed, ‘post-sovereignty’ are particularly relevant for European plurinational states more than elsewhere due to their location in the unique context of the supranational legal order of the European Union. See Keating (2001); N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999).

⁵³ Tierney (2006), 83–4.

⁵⁴ J. Loughlin, “The Transformation of the Democratic State in Western Europe”, in Requejo and Caminal (2011), chap. 4.

attachment to it, concerns the ‘monistic-demos thesis’ – that is, the notion that operates as both postulate and presumption that the nation is synonymous with the state.⁵⁵ In other words, substate nations, by their very existence, challenge the monistic presupposition of traditional liberalism (or ‘Liberalism I’ in Taylor’s term) that there is or can be only one demos within the state.⁵⁶ A related contention is that regarding ‘host-state societal dominance’ – that is, that the conceptualisation of the nation in both unitary terms and in exclusive association with the state not only prevents the fullest constitutional recognition of national pluralism but also serves to privilege, in effect, a majority or otherwise dominant cultural identity to the disadvantage of minority nations – and in violation of fundamental principles that traditional liberalism claims to defend. Implicit in this challenge is the question of whether liberalism as an ideology has the theoretical and normative capacity to respond to the realities of national pluralism. As discussed herein, the monistic-demos thesis is the central conceptual basis on which the Jacobin and Liberal positions approach constitutional reform in Sri Lanka; consequently, there is a tendency in both of these positions to give insufficient regard to the potential for cultural dominance that is inherent in the nation-state model itself, regardless of the ethnocentric character of the Sri Lankan state. This also is reflected in the tendency to perceive ethno-nationalism as an exclusively or mainly substate problem.

The plurinational critique of traditional liberalism points to the imperviousness with which the existence of plural demoi within the state and their attendant claims has been treated, rendering substate nations ‘voiceless and faceless’.⁵⁷ As Requejo noted in relation to the work of liberal scholars such as Rawls and Habermas, national pluralism ‘is a question that is not so much badly resolved as completely unaddressed by the premises, concepts and normative questions of these theorists’.⁵⁸ Tierney goes further in pointing out a more insidious consequence of this empirical and, consequently, theoretical deficiency in traditional liberalism:

What is particularly debilitating about this gap in the conceptual precepts of traditional liberal theory is that it has led to a false assumption that the liberal democratic state is neutral in cultural and societal terms. Whereas in reality, as

⁵⁵ *Monistic demos thesis* is Tierney’s term, as is *host-state societal dominance*. Tierney (2006), 9–12, 128–9.

⁵⁶ C. Taylor, “The Politics of Recognition,” in A. Gutman (ed.), *Multiculturalism and the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1992), 25–73.

⁵⁷ Tierney (2006), 10.

⁵⁸ F. Requejo, “Introduction,” in F. Requejo (ed.), *Democracy and National Pluralism* (London: Routledge, 2001), 4. See also observations on Rawls and Dworkin, in W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), 128.

Requejo contends, ‘practically speaking, all liberal democracies have acted as nationalising agencies for specific cultural particularisms’. Accordingly, many of the normative prescriptions emerging from traditional liberal accounts have been built on epistemological error, or at least, imprecision.⁵⁹

The assumption that the collective identificatory function of nationhood rests only with the statal nation denies the possibility of multiple conceptions of national identity that are commonly held by citizens of plurinational polities. By the failure to acknowledge this important dimension of individual identity and autonomy, traditional liberalism denies to individual members of substate nations – for whom the substate societal space is an important means of political self-expression – such cardinal commitments of political liberalism as choice, equality, and justice. Conversely, the pretence that the state national society is a culturally neutral entity held together by purely normative values (sometimes accompanied by the disparaging implication that substate nations are not similarly modern, progressive, and inclusive entities⁶⁰) hides the reality that the statal identity more often than not is associated with a dominant societal or cultural influence within the plurinational polity. The failure to apprehend the homogenising consequences of this approach, it is contended by plurinationalist critics, signals a failure on the part of traditional liberal theory to fulfil fundamental liberal precepts.⁶¹ Moreover, the tendency among some traditional liberal theorists to treat the reemergence of substate nationalism as premodern ethnic particularism – and therefore as something to be discouraged – fails to recognise the nationalist dynamics that animate the state itself. The elision of state and nation in the theory of traditional liberalism, as much as in everyday political parlance, conceals the fact that statist discourse also is a form of nationalism – albeit one that seeks to undermine the validity of substate nationalisms at the same time as refusing to acknowledge the intensely nationalist nature of its own discourse and praxis.⁶²

Since the early 1990s, these conceptual inadequacies of traditional liberalism have given rise to a new school of liberal political philosophy that seeks to reposit the normative values of liberalism in ways that take proper account of both nationalism and national pluralism. According to Norman, this theoretical work addressing the interstice between nationalism and traditional

⁵⁹ Tierney (2006), 10.

⁶⁰ See M. Canovan (2001), “Sleeping Dogs, Prowling Cats and Soaring Doves: Three Paradoxes in the Political Theory of Nationhood,” *Political Studies* 49: 203–15, 204–6.

⁶¹ H. Rae, *State Identities and the Homogenisation of Peoples* (Cambridge: Cambridge University Press, 2002), ch. 1.

⁶² Tierney (2006), 11, n. 32.

liberalism came in two waves. The first attempted to prove ‘that it was *not impossible* to be a liberal and a nationalist at the same time’ and the second used the insights produced by that work in proceeding to critique traditional liberalism and its conception of the state according to the monistic-demos thesis.⁶³ The ‘liberal nationalist’ theoretical accounts developed in this second wave, in particular, constitute the body of political philosophy that Taylor termed ‘Liberalism II’, associated prominently with the work of Taylor himself and Kymlicka, among others.⁶⁴

In contrast to the mixture of complacency and hostility that marks traditional liberal accounts, the methodology of liberal nationalist theorists places emphasis on the sociological reality of nationalism in and as a form of ‘normal politics’.⁶⁵ They recognise that substate nations are deliberative spaces for the conduct of politics, which play an essential intermediary role in the relationship between the citizen and the state. The substate nation rather than the statal national society often is the foremost vehicle of identity for the individual member of the substate nation. Accordingly, ‘the value which he finds in the democratic process can be more fully explained by appreciating these ties, and by understanding the preferences felt by this citizen for the location of his right of *individual* self-determination within the broader condition of *collective* self-determination for his primary *demos*’.⁶⁶ The most important analytical proposition of liberal nationalist theory, therefore, is that the meaningful realisation of liberal democratic commitments in respect of citizenship in plurinational polities requires the empirical reality of national pluralism to be fully acknowledged and accommodated constitutionally.

With regard to the Sri Lankan case, there are three points to note in these respects. In practical terms, it would seem as if the issue of the host state’s cultural dominance needs no further stress, given the ethnocratic character of the state that makes the ethnic dominance of the Sinhala-Buddhist nationalism over it transparent. Nonetheless, at a more abstract level, we need to emphasise the absence of cultural neutrality in the nation-state model itself, given the way in which both Jacobins and Liberals deploy it as a heuristic exemplar. This suggests that the standard model of modern nation-state is inadequate and inappropriate as a state form in multinational polities, and that no amount of federalist or devolutionary institutional reform within this paradigm meets the deeper challenge of national pluralism.

⁶³ Norman (2006), 1–9.

⁶⁴ Taylor (1992); Kymlicka (1995); Tierney (2006), 52–8; D. Miller, *On Nationality* (New York: Oxford University Press, 1995); Y. Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993).

⁶⁵ Keating (2001), viii.

⁶⁶ Tierney (2006), 11.

Related to this, constitutional theory and practice must treat ethnicity seriously as well as positively – and not as some unpalatable primordial remnant that hopefully will disappear with the march of time and progress. This is not so much an exercise in making a virtue out of necessity as a realistic appraisal of the ‘societal context’⁶⁷ of constitutional law in Sri Lanka, in which the resilience of ethnicity as the primary referent of identity materialises from the total collapse of modernist assumptions with regard to nation-building in the six decades since independence. In other words, there seems to be little point in the dogmatic adherence to modernist shibboleths about the nation in the face of the ethnic reality. At the theoretical level, the plurinational critique has shown the conceptually problematic nature of the modernist nation-state in the context of national pluralism to be both deeper and more general than the specificities of the Sri Lankan case.⁶⁸

Finally, it is important to recall that some exponents of the Liberal view have grappled with the issues of democracy and multiple identities in the context of balancing civic and ethnic conceptions of the nation within the constitutional structure of the Sri Lankan state. The importance of the civic-statal demos was underscored by Edrisinha when he observed that there is a vital need, ‘given the dominance of ethno-nationalism in the past three decades to forge a supra-ethnic authentic Sri Lankan national identity’.⁶⁹ His argument continues:

It is only where the understandably dominant ethno-nationalism is at least complemented by civic nationalism, that the principle of unity in diversity may be realised. The existence of multiple or cross-cutting identities must be recognised and fostered to act as a countervailing force to ethno-nationalism. Such a balance or juxtaposition of the national and the regional, the overarching civic or political and the ethnic is essential for the success of a constitution for peace and reconciliation.⁷⁰

This can be readily endorsed, subject to the critical caveat that in our scheme, both state and substate are *national* spaces rather than the hierarchy suggested by Edrisinha’s formulation of ‘national and regional’. Although we should reject the monistic-demos thesis implicit in this formulation and

⁶⁷ Kymlicka (1995), 82–4.

⁶⁸ See also Tierney’s critical comment on both the linear teleology of and the assumption of the normative immutability of its values that traditional liberalism holds with regard to the modern nation-state. Tierney (2006), 58.

⁶⁹ R. Edrisinha, “Meeting Tamil Aspirations within a United Sri Lanka,” in Edrisinha and Welikala (2008), 142.

⁷⁰ *Ibid.*, 143.

some of the more simplistic descriptive conclusions with regard to the ethnos to which other traditional liberals are led as a result of applying the civic–ethnic classification to nationalisms, the democratic normative vision of the demos that they endorse cannot be dismissed. The argument rather is that democratic consent *as well as* cultural inheritance define the nation⁷¹ or, more precisely in the plurinational context, the *nations*. How the divide between civic and ethnic conceptions of the nation might be bridged is beyond the scope of this discussion. However, it is possible to do so theoretically by challenging the civic–ethnic dichotomy itself⁷² and empirically by drawing a distinction between nations (as organisational cultures) and nationalisms (as ideological movements),⁷³ which serves to differentiate the historical and sociological nature of ethnic nations from the ideological claims of contemporary nationalists. This differentiation enables us to reveal the pluralistic potential of ethnic nations in history, against the intolerance of contemporary ethno-nationalist ideology. This in turn allows us to recast ethnic nations within a plurinational framework that promotes multiple nationality allegiances to the substate and state levels, while acknowledging that the substate nation is the ‘primary demos’ – in our case, the ‘primary ethnos’ – through which the individual citizen’s relationship with the plurinational host state is mediated.⁷⁴

The Disaggregation of Nation and State

From the preceding discussion, it is clear that a polity defined by national pluralism is not only in a distinctive politico-sociological category but also that it calls for a fundamental normative reconceptualisation of the Westphalian conception of the sovereign nation-state. From the perspective of constitutional law and theory, an essential feature of the plurinational challenge may be summarised in Tierney’s words:

... central to the challenge presented by sub-state national societies to the host state is a call for the disaggregation of the terms ‘state’ and ‘nation’; those who adhere to the traditional conceptualisation of the ‘nation-state’ as

⁷¹ E. Renan, “What Is a Nation?”, in H. Bhabha (ed.), *Nation and Narration* (London: Routledge, 1990), 19.

⁷² See B. Yack, “The Myth of the Civic Nation” and W. Kymlicka, “Misunderstanding Nationalism” in R. Beiner (ed.), *Theorizing Nationalism* (Albany: State University of New York Press, 1999), chaps. 5, 7.

⁷³ Smith (1986), 2.

⁷⁴ What Kymlicka terms the ‘context of choice’. Kymlicka (1995), chap. 5; S. Tierney, “Rights versus Democracy? The Bill of Rights on Plurinational States”, in C. Harvey and A. Schwartz (eds.), *Rights in Divided Societies* (Oxford: Hart, 2012), 16–17.

one politico-constitutional territory encapsulating a unitary national society are charged with the task of reconceiving the plurinational state in appreciation of its essential societal plurality.⁷⁵

Although not theoretically elaborated, a similar observation was made from within the Liberal view in the Sri Lankan constitutional-reform debate. Relying on the work of Lapidoth and Buchanan, Bastiampillai noted:

... the need to re-think the understanding of 'state' and 'nation'... [and]... to reformulate the notion of sovereignty to accommodate both which can exist separated. The challenge is to [devise new] structures that can accommodate diverse peoples so that they live together peacefully while freely joining together in important areas of common interest...⁷⁶

From the analytical characterisation of the Sri Lankan polity as one of national pluralism that was established previously, this proposition with regard to the nation-state must be extended to the Sri Lankan case, which then reframes the entire constitutional-reform debate about structures as well as norms. As indicated by Bastiampillai, in a plurinational context, sovereignty is one of the major norms associated with the nation-state that would require a new form and explanation going far beyond the monist and positivist understanding of the doctrine (which Jacobins, especially, treat as a "sacred cow"). Although this chapter is not the place to address this issue in detail, the 'relational' concept of sovereignty is especially useful here. The essence of this approach is set out by Croce: 'In the relationship between the ruler and the ruled, sovereignty belongs to neither but to the relationship itself'.⁷⁷ This implies, on the one hand, that sovereignty is essentially a political relationship between citizens and state, and on the other hand, the importance of the correspondence between that political relationship and the legal structures of the state. Plurinational constitutionalists extend this relational conceptualisation of sovereignty to the plurality of peoples or nations within the plurinational state.⁷⁸

Whereas the scholarly work in relation to the Western plurinational state demonstrates that the separation of nation and state is a theoretically viable epistemological shift, and thus liberates us from the constraints of Westphalian orthodoxies, the comparative application of the plurinational-state model to

⁷⁵ Tierney (2006), 5.

⁷⁶ B. Bastiampillai, "Devolution and Power Sharing: The Means to Peace and Development," in Bastian (2006), 28.

⁷⁷ Cited in M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), 83.

⁷⁸ Tierney (2006), 102–4.

the empirically distinct Sri Lankan case requires, in some respects, a different approach to the normative consequences that are intended to flow from the disaggregation of nation and state. Central to this proposition in Western pluralist constitutionalism is the historical reconceptualisation of the pluralist polity as a ‘union state’⁷⁹ or a ‘coming-together-federation’⁸⁰ on the basis of which further claims are made for the recognition, representation, and autonomy of substate nations constituting the union on a footing of equality.

The same methodological concern with the history and historiography of state-formation takes us in Sri Lanka into the precolonial era and the dominant state form that prevailed then. There is much that is promising in the cosmo-topographical model, theorised in historical anthropology as the ‘galactic polity’ or the ‘*mandala*-state’, in helping to historically contextualise constitutional responses to national pluralism in the present. This historical exploration also takes us into the realm of constitutional metaphysics and to an ontology of the state that is fundamentally different from that of the West. The contractarian ideal at the heart of the union state is anchored in Enlightenment rationalism, whereas the pluralist potential of the precolonial state form derives from the principles of Indic cosmology. Although this provided for an extraordinarily heterogeneous conception of society, and devolutionary, asymmetrical, and ‘pulsating’ administrative practices, this political order also was governed by principles of hierarchy and encompassment that maintained cohesion. In contemporary terms, this appears to demand an emphasis on *asymmetry* as opposed to *equality* in the constitutional treatment of substate nations.

The disaggregation of nation and state also raises the issue about the form and content of the statal ‘Sri Lankan’ national identity within a putative pluralist dispensation. A ‘thin’ conception of the state-nation would render it a minimalist juristic identity, virtually devoid of any ‘national’ content, with the substate level assuming primacy over the identificatory and functional roles of nationhood. Although a hypothetical possibility, the political and historical implausibility of this model suggests that it would be a misleading line of constitutional enquiry, not least because of its formal likeness with the confederal postures associated with the erstwhile secessionist movement.⁸¹

⁷⁹ S. Rokkan and D. Urwin, “Introductions: Centres and Peripheries in Western Europe,” in S. Rokkan and D. Urwin (eds.), *The Politics of Territorial Identity: Studies in European Regionalism* (London: Sage Publications, 1982), 11.

⁸⁰ A. Stepan (1999), “Federalism and Democracy: Beyond the U.S. Model,” *Journal of Democracy* 10: 19–34.

⁸¹ For example, Bates, Wells, and Braithwaite (Solicitors) (1995), *A Framework for the Constitution of the Union of Ceylon*, discussed in Edrisinha et al. (2008), chap. 20.

In the Western context, illustrated in the debates over the Scottish constitutional referendum, the liberal-democratic host state is committed in policy and principle to respect the democratic wishes of the substate nation, either to effect a separation or to fundamentally renegotiate the terms of the union. Needless to say, such options do not form part of the empirical context on which constitutional theory of any solidity can be built in the Sri Lankan case; arguments for the reform of the *unitary* state are strengthened if they are based on a clear a priori commitment to the *unity* of the state. To this extent, the theoretical limits of substate autonomy are predetermined in the Sri Lankan case in a way that they are not in the Western contexts. This then suggests that we need a more substantial, ‘thick’ conception of Sri Lankan identity to underpin or overarch the radical pluralisation and devolution involved in a plurinational constitution.

More specifically, due to the failure of postcolonial nation-building, the sharply defined divisions determined by ethnic nationalisms, the injustice of the ethnocratic state, the substate mistrust of central institutions, and the history of violent ethno-national conflict, the radical autonomy of a plurinational constitution in the Sri Lankan case well might lead to ethnic division and disintegration unless it is counterbalanced by stronger guarantees for the integrity of the statewide constitutional order than the weak incentives contemplated by liberal plurinationalism. Such an eventuality would constitute a resounding failure of the thesis advanced in this chapter that both unity and autonomy can be secured by a plurinational constitution in Sri Lanka. At the same time, it is important to marshal those residual attachments to a united Sri Lanka and Sri Lankan identity that have survived protracted ethnic antagonism and conflict. As even R. Sampanthan, the most senior Tamil nationalist politician, stated recently:

If there is justice and equality, and if there is a sense of belonging, if people are able to live in dignity and self-respect, we would all be looking towards a Sri Lankan nationalism and a Sri Lankan nation, where you can be a Tamil but nevertheless a true, proud Sri Lankan.⁸²

A fresh approach therefore is needed and, above all, as Edrisinha emphasised, this involves a critical need to inculcate an inclusive, shared, overarching national society at the level of the state that balances the constitutionalisation of

⁸² R. Sampanthan, “The *Ilankai Tamil Arasu Katchi* (Federal Party) and the Post-Independence Politics of Ethnic Pluralism: Tamil Nationalism Before and After the Republic,” in Welikala (2012), 958.

substate national identity and autonomy.⁸³ As Kearney pointed out in the UK case, ‘there has been a “British” history over and above our “multi-national history” and therefore the central question of national and institutional pluralism is not so much “four nations *or* one” as “four nations *and* one”’.⁸⁴ Transposed to the Sri Lankan case, this approach can be articulated as recognising an overarching Sri Lankan national identity at the state level as well as the Sinhala and Tamil nations at the substate level, together with the non-national diversity represented by the smaller ethnic and religious minorities. Moreover, such a statal nation – which is substantially to be conceived in civic-societal and constitutional terms rather than ethnic-communal and ascriptive terms (although shared myths and memories also may have a place) – is a valuable opportunity to incorporate an element of civic-constitutionalist values into a plurinational system that is otherwise primarily concerned with ethnic forms of the nation. In this regard, the concept of the ‘state-nation’ has major relevance as a model for a plurinational Sri Lankan statal nation.⁸⁵ Although permitting plurinational-type substate autonomy, it provides for a robust yet noncoercive framework for the preservation of the unity of the whole. It does so by providing an incentive for the modernisation of the statal nation, *not* by a resumption of teleological, monistic nation-building⁸⁶ but rather according to a specific politico-institutional logic that is meant to implant (or ‘craft’) a pattern of *multiple but complementary* collective identities across the plurinational polity.

Guiding Principles in a Plurinational Constitution

Building on the preceding theoretical discussion, we are now in a position to enunciate more prescriptively the contours of the major principles that should inform the design of a plurinational constitutional system. I rely here substantially on Tierney’s work.⁸⁷ The principles are set down in deliberately broad and general terms, seeking to articulate the normative core of a

⁸³ This is a process that already has occurred in advanced liberal democracies, which Western plurinational constitutionalists have been able to regard as a given.

⁸⁴ H. Kearney, “Four Nations or One?,” in B. Crick (ed.), *National Identities: The Constitution of the United Kingdom* (Oxford: Blackwell, 1991), 4.

⁸⁵ A. Stepan, J. J. Linz, and Y. Yadav, *Crafting State-Nations: India and Other Multinational Democracies* (Baltimore, MD: Johns Hopkins University Press, 2011), 4–5.

⁸⁶ See *ibid.*, chap. 5, in which the authors demonstrate how the pursuit of ‘hard nation-state policies’ in Sri Lanka led to secessionism and armed conflict.

⁸⁷ Tierney (2006), 125–9.

plurinational system but without overly constraining design options within that framework.

First is the *principle of self-determination* or autonomy. This principle involves the right of each substate nation within the plurinational state to determine its own political and constitutional future and self-development. In liberal theory, this may or may not involve a right of secession,⁸⁸ but the principle is more concerned with ensuring the national status of a substate nation to be reflected in extensive autonomy in the constitutional arrangements of the plurinational state. Tierney observes that this principle accords with MacCormick's notion of 'self-rule' in which 'the members of a nation are as such in principle entitled to effective organs of political self-government within the world order of sovereign or post-sovereign states; but these need not provide for self-government in the form of a sovereign state'.⁸⁹ The principle of self-determination in the sense used here is more a tenet of political morality than the rule in international law; therefore, it applies not only to a substate nation seeking specific legal recognition but also to the host state to respect the aspirations to recognition of such groups.

Second, the *principle of representation* again recognises that the 'primary agenda' of substate entities is not secession but rather full and fair representation in the constitutional and political processes of the host state. This involves power sharing and representation in central government, particularly the legislature and the judiciary and also, critically, in procedures for constitutional change. This principle therefore seeks to reflect the interdependent and cooperative nature of the plurinational state, which not only recognises national pluralism in the self-rule dimension but also the shared-rule dimension in the governance of the whole.

Third, the *principle of recognition* has both a symbolic and a practical character. Recognition of the plurinational character of the state in symbolic commitments and institutions has a practical effect in that they 'set the tone for the way in which the constitution is in general interpreted and applied, and will determine whether a vision of a plurality of nations, interacting equal to equal, is in fact a constitutional reality'.⁹⁰

⁸⁸ See Kymlicka (1999), "Liberalism and Minority Rights – An Interview with Ruth Rubio Marin," *Ratio Juris* 12: 133, cited in support of the proposition that 'Liberal nationalists often argue that the concession of autonomy by the state makes secessionism less likely'; Tierney (2006), 126, n. 3.

⁸⁹ Tierney (2006), 126.

⁹⁰ *Ibid.* In the application of this principle to Sri Lanka, note the previous observation about asymmetry and equality.

Fourth, the *principle of reciprocity* stresses the tenet of political morality that in plurinational states in which substate nations enjoy the kind of respect ensured by the first three principles, the latter in turn owe certain obligations to the host state. Tierney identified three such duties: to reciprocally recognise the 'national status' of other entities within the state, to work in 'good faith to consolidate the state as a common polity',⁹¹ and to respect the rights and interests of all citizens arising out of the common citizenship of the state as a whole. There is an important caveat attached to this principle: 'nationalist movements with an overtly "separatist" programme may not accept these responsibilities, but in turn they must accept that the normative force of any claims they might make of the host state in terms of representation and recognition may, accordingly, be substantially weakened'.⁹²

Fifth, the *principle of democracy* relates to the situation of the individual within a substate nation, in which an overriding concern is to ensure that its individual members in the exercise of their democratic rights determine the collective political direction of the group and not the converse. This underscores an important point made previously, that the substate nation in the plurinational scheme is not only an ethno-cultural entity but also a territorial unit of government. It therefore must respect the democratically expressed wishes of resident citizens and not only the interests of members of the ethnic nation.

CONCLUSION

This chapter presents an alternative analytical, normative, and structural perspective with regard to the constitutional architecture of the postwar Sri Lankan state, based on a critique of what I perceive as the major deficiencies of the reformist positions in the constitutional-reform debate today. This has been a preliminary enquiry into the role and relevance of plurinational ideas in the Sri Lankan context; as noted at various points in the discussion, there are a number of issues that require further exploration and theoretical work to render this account comprehensive. As a subsequent step, the fully worked-out theoretical model also must be articulated in institutional terms. For some, the constitutional ideal outlined in this chapter may seem like stretching constitutional radicalism too far and beyond the horizons of the possible in a South Asian state. I disagree because I think devolution and asymmetry in

⁹¹ *Ibid.*

⁹² *Ibid.*, 127.

constitutional arrangements are far more in keeping with the precolonial history of this region than the centralised unitary nation-state of colonial provenance. In any case, a liberal democratic constitutional settlement to the issue of national pluralism is not a choice but rather an imperative necessity – if Sri Lanka is to realise its considerable potential as South Asia’s oldest democracy rather than languish as a hostage to its conflict-ridden and violent past.

Constitutional Federalism in the Indian Supreme Court

Sudhir Krishnaswamy

INTRODUCTION

Since the year 2000, the political theory of Indian federalism has undergone dramatic revision. Three strands of argument deserve special attention. The first is the positive claim that the breakdown in the political monopoly of the Indian National Congress over State and Union governments in 1967 and the emergence of a coalition Union government in the 1980s has revitalized constitutional federalism.¹ The second is the novel and illuminating claim that Indian federalism must be reassessed by the normative standards of a ‘state-nation’ model as distinct from a ‘nation-state’ model.² A third more recent claim is that a key challenge to Indian federalism is the capacity of the Union to preserve the territorial integrity of India in the face of terrorism.³ However, these new empirical and normative developments in the political theory of Indian federalism give minimal attention to legal and constitutional arguments and, more particularly, to the decisions of the Indian Supreme Court.⁴

¹ Subrata Mitra and Malte Pehl, ‘Federalism’ in N. G. Jayal and P. B. Mehta (eds.), *The Oxford Companion to Politics in India* (New Delhi: Oxford University Press, 2010), 43–60, 45–46.

² A. Stepan, J. Linz, and Y. Yadav, *Crafting State-Nations: India and Other Multinational Democracies* (Baltimore, MD: Johns Hopkins University Press, 2011), chaps. 1, 2.

³ A. Varshney (2013), ‘How Has Indian Federalism Done?’ *Studies in Indian Politics* 1 (43–63): 59–60.

⁴ There are other significant contributions to the political literature on Indian federalism in the last few years that I do not focus on in this chapter. See Lloyd I. Rudolph and Susanne Hoeber Rudolph (2010), “Federalism as State Formation in India: A Theory of Shared and Negotiated Sovereignty,” *International Political Science Review* 31 (5): 1–21, for the claim that the history of state formation in the Indian subcontinent adopts a multinational federal path sharply distinguished from European experience.

This inattention may arise partly out of the tired air that hangs about contemporary academic and professional debates on legal and constitutional federalism. Recent writing in this field has failed to keep up with recent legal developments, engage with scholarly work in allied fields, or communicate with the lay public. It was not always like this. The vertical division of power in the Constitution of India of 1950 between the Centre and the States was the subject of an intense debate in the early decades of the twentieth century.⁵ The failure to develop a nonterritorial federalism, or consociational political and institutional arrangements, to accommodate the political demands of the Muslim League contributed to the partition of British India.⁶ The debates of the Constituent Assembly, which drafted the Constitution of India, responded to this failure by drafting a constitution that, in the view of some of the framers, created a federation with a unitary bias.⁷ Whereas Dr. Ambedkar took great care to distinguish the Indian federal model from that in the United States,⁸ critical commentators persisted in using the United States as the relevant comparator against which the Indian institutional framework came up short.⁹ Some commentators were not inclined to consider India a federation at all and characterized it as a ‘quasi-federal’ arrangement.¹⁰ So, in the early decades of the twentieth century on either side of the founding of the Republic, the academic and public debates on the legal and constitutional character of Indian federalism were vibrant and engaging.

The Supreme Court of India had the unenviable task of clarifying and developing legal doctrine for a new constitutional and political model of

⁵ Stepan, (n. 2), 50–6.

⁶ Rudolph and Rudolph, (n. 4), 8–12. For a detailed historical analysis of legal documents that seeks to apportion blame between J. Nehru and M. Jinnah, see H. M. Seervai, *Constitutional Law of India* (Bombay: N. M. Tripathi Publishers, fourth edition, 1994), chap. 1, “Partition of India: Legend and Reality” (on Nehru’s role), 108–13. See also B. R. Ambedkar, *Pakistan or the Partition of India* (Bombay: Thacker & Co., 1945).

⁷ Pandit Laxmi Kanta Maitra argued that the First Draft Constitution should recognize its ‘unitary bias’ and avoid calling the provincial units ‘States’ because this term connotes an independent and sovereign status. *Constituent Assembly Debates* (Monday, November 15, 1948), Volume 7. Available at <http://164.100.24.207/LssNew/constituent/debates.html> (accessed October 18, 2014). Alladi Krishna Swami Ayyar confirmed that the inclusion of numerous subjects in the Concurrent List of the Draft Constitution, to be shared by the Union and the States, confirmed the unitary bias in the Draft Constitution. *Constituent Assembly Debates*, (Monday, November 8, 1948), Volume 7. Available at <http://164.100.24.207/LssNew/constituent/debates.html> (accessed October 18, 2014).

⁸ *Constituent Assembly Debates* (Thursday, November 4, 1948), Volume 7. Available at <http://164.100.24.207/LssNew/constituent/debates.html> (accessed October 18, 2014).

⁹ Ivor Jennings, *Some Characteristics of the Indian Constitution* (Madras: Oxford University Press, 1953), 1.

¹⁰ K. C. Wheare, *Federal Government* (London: Oxford University Press, 1963), 27–8.

federalism and of applying this to an intricately diverse ethnic and political environment. In the first three decades, the Court's federalism doctrine evolved through cases resolving three major types of disputes between the Union and the States: the distribution of legislative power; the executive relationship between the Union and the States in normal and exceptional times; and the modification of territorial boundaries of the States. The last serious book-length review of the role of the Supreme Court and High Courts in the development of constitutional and legal federalism in India concluded that overall – barring a few ‘over-publicized and spectacular cases’ in which the judiciary arguably contributed to over-centralisation – the judiciary has done well in legitimating and validating State power.¹¹ Prasad's argument that the Supreme Court sustained a balance between Union and State power in the Indian federation rests on claims of fidelity to text, history, and precedent. He does not rely on or develop clearly a political theory of the Indian model of federalism that may better explain and illuminate the decision making in this period. For example, we may explore whether the Indian courts struggled in vain to fit Indian constitutional federalism within the normative confines of coming-together nation-state federalism. However, this is yet to be done.

In the decades since Prasad's work, commentaries on Indian constitutional law by various authors have sustained professional lawyerly engagement with the Supreme Court's approach to federalism.¹² Notably, there has been no rigorous academic review of the legal and constitutional principles developed and applied by the Court in federalism cases during this period. Furthermore, there has been no serious attempt to bring the recent developments in the political theory of federalism in India to bear on our understanding of the Court's decisions in this field. This chapter bridges these gaps by critically analyzing cases that develop new law or articulate a distinct constitutional basis for previously established propositions to test and clarify key claims in the political theory of Indian federalism. In particular, the chapter focuses on two aspects of federalism that the Indian courts have addressed in substance: state-nation federalism and partisan federalism.

Before proceeding, two important limitations to the analysis presented here must be clarified. First, the Indian Supreme Court does not directly use any

¹¹ A. Prasad, *Centre-State Relations in India: Constitutional Provisions, Judicial Review, Recent Trends* (New Delhi: Deep and Deep Publications, 1985), 654–8.

¹² See, generally, D. D. Basu, *Commentary on the Constitution of India* (New Delhi: Lexis Nexis, ninth ed., 2011); and A. Datar, *Commentary on Constitution of India* (New Delhi: Lexis Nexis, second edition, 2007).

of these conceptual categories in its analysis and neither does the Court's decision making illustrate these concepts to the fullest extent. The discussion of the Court's doctrine is organized under these categories because they better explain and illuminate the court's decision making in this field. Second, the practice of federalism relies only partially on the courts: other institutions such as the legislature and executive at the Union and State levels, political parties, and various constitutional bodies including the Finance Commission also define and shape federalism in India. The following sections focus only on the extent to which the 'Court' anticipates or develops these conceptual categories in federalism cases.

The second section discusses whether the distinction between nation-state and state-nation federal arrangements has any bearing on the federalism decisions of the Indian courts. Two types of cases are reviewed: the representation of the States in the Upper House (i.e., Council of States) and the redrawing of State boundaries. I argue that understanding India to be a state-nation federal arrangement rather than a nation-state federal model, in which autonomous States may be considered bearers of State rights, provides a better account of the judicial decision making in these cases. The third section turns to the Indian courts' response to the problem of partisan federalism. Whereas Indian political theorists have celebrated the collapse of the Congress monopoly for revitalizing Indian federalism, the courts have struggled to evolve a set of neutral rules and principles that prevent the entrenchment of partisan considerations at the root of federal conflict. Partisan federalism is most apparent in cases relating to the appointment and dismissal of governors, the proclamation of regional emergencies, and the executive capacity of the Union to intervene in the States to restore law and order. This third section shows that by recognizing the dangers of partisan federalism, the Supreme Court may provide a robust justification for its intervention in these cases.

Taken together, these two themes of enquiry develop new insights into the Supreme Court's evolving doctrine on federalism and provide guidance for future decision making. The failure to develop coherent normative justifications for the Indian judicial opinions, as well as wider constitutional discourse, on federalism in part lies in the 'instabilities' and political challenges to dominant normative models of federalism. These political challenges are not opposed to the idea of a stable constitutional arrangement per se but rather force design choices that call for a different normative framework to accommodate them. For too long, constitutional law and doctrine in India has been shielded from political theory, and this chapter shows why the cross-pollination of ideas across these fields will help to reshape our understanding of Indian federalism.

CRAFTING A STATE-NATION

In *Crafting State-Nations*, Stepan, Linz, and Yadav argue that India is best understood as adopting a ‘state-nation’ political-institutional approach ‘that respects and protects multiple but complementary socio-cultural identities’.¹³ The constitutional and institutional elements constitutive of state-nations include the flexibilities of holding-together federalism and some version of asymmetrical federalism or consociational political arrangements.¹⁴ They argue that Indian political and constitutional history anticipates and incorporates the key insights of a state-nation arrangement – though this is yet to be generally appreciated in the academic discourse on Indian federalism.

This distinction between nation-state and state-nation political arrangements has not been expressly appreciated or applied by the Supreme Court. Despite some recognition of the novelty of Indian federal arrangements in the Constituent Assembly Debates, the Court has labored to adapt legal doctrine borrowed and adapted from nation-state federal jurisdictions to the Indian political and constitutional systems, with mixed results. This section analyzes three types of court decisions that illustrate these analytical problems of fit: representation in the *Rajya Sabha*, the formation of new states, and asymmetrical federalism.

Representation in the Rajya Sabha

The distinction between coming-together and holding-together federalism provides both a descriptive account of the formation of federal polities and a set of normative principles about the sovereign autonomy of States and their relationship with central government. The representation of the States in the composition of the legislative branch of Union government is one device used to preserve States’ interests at the federal level and to protect their autonomy. The parliament in India is composed of two houses: the Council of States and the House of the People.¹⁵ Article 80 of the constitution provides that the Council of States shall have not more than 238 ‘representatives of the States and of the Union Territories’.¹⁶ Article 80(4) further provides that such representatives shall be ‘elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional

¹³ Stepan et al., (n. 2) 4.

¹⁴ Stepan et al., (n. 2) 17–18, describe the nested policy grammar of state-nations to include individual rights and collective recognition, parliamentary systems, and polity-wide and regional parties.

¹⁵ Constitution of India 1950, Article 80.

¹⁶ Constitution of India 1950, Article 80(1)(b).

representation by means of the single transferable vote'.¹⁷ Article 84 specifies two minimum requirements for a member of the Council of States: Indian citizenship and a minimum age of thirty years.¹⁸ The parliament is empowered to specify further qualifications of candidates for such an election through ordinary law,¹⁹ and it is these specifications that effectively determine the extent of effective representation of the States and have been the focus of Court challenges.

The Representation of People Act of 1951, a law made under Article 84(c) of the constitution, originally provided in Section 3 that 'A person shall not be qualified to be chosen as a representative of any State or Union territory in the Council of States unless he is *an elector* for a Parliamentary Constituency in that State or territory'.²⁰ To be 'an elector' on the electoral rolls of a territorial constituency maintained by the Election Commission of India, one must be 'ordinarily resident in a constituency'.²¹ The Representation of People (Amendment) Act of 2003 amended this section to substitute the concluding phrase, 'in that State or territory', with the phrase, 'in India'.²² Hence, the amendment effectively removed the requirement that candidates for the Council of States must be ordinarily resident in that State as long as they can show ordinary residence in India.

In *Kuldip Nayar v. Union of India*,²³ the petitioners challenged the 2003 amendment to the Representation of People Act on the grounds that it destroyed the basic feature of federalism, which motivates the creation of a bicameral legislature with different models of representation. They urged the Court to read in a State 'domicile' requirement into Article 80(4) and to declare the statutory amendment unconstitutional. In its response, the Union relied on the absence of a State domicile requirement in Articles 80 and 84 and on parliament's power to legislate on all 'other qualifications' required for a member of the Council of States.²⁴

The five-judge constitutional bench in *Nayar*, speaking through Chief Justice Sabharwal, reviewed the institutional history of the bicameral structure

¹⁷ Constitution of India 1950, Article 80(4).

¹⁸ Constitution of India 1950, Articles 84(a) and 84(b).

¹⁹ Constitution of India 1950, Article 84(c).

²⁰ Representation of People Act of 1951, Section 3, prior to amendment in 2003.

²¹ Representation of People Act of 1951, Section 19. Section 20 of the Act clarifies the meaning and exceptions to the ordinary-residence requirement.

²² Representation of People (Amendment) Act of 2003. This Act introduced amendments to Sections 59, 94, and 128, which were subject to challenge in *Kuldip Nayar* but are beyond the scope of this chapter.

²³ *Kuldeep Nayar v. Union of India*, (2006) 7 SCC 1.

²⁴ Constitution of India 1950, Article 84(c).

of the Houses of Parliament prior to the Constitution of India 1950 to conclude that:

[U]nder strict federalism, the Lower House represents ‘the people’ and the Upper House consists of the ‘Union’ of the Federation. In strict federalism both the Chambers had equal legislative and financial powers. However, in the Indian context, strict federalism was not adopted’.²⁵

A careful survey of the Constituent Assembly debates on the qualifications of candidates to Parliament reveals that while ‘ownership of assets, dwelling house, income, residence’ was discussed as potential qualifications for a candidate for the Houses of Parliament, none of these were included in the Constitution.²⁶

Hence, the Court concluded that ‘residence/domicile is an incident of federalism which is capable of being regulated by the Parliament’²⁷ by laws enacted under Article 84. Chief Justice Sabharwal’s distinction between ‘strict federalism’ and Indian federalism is one that rests on the recognition that the Indian Constitution was dissimilar from the U.S. Constitution with respect to the composition of the upper house. However, he did not pay attention to the more relevant and critical academic literature on the history of Senate election reform and the impact of the Seventeenth Amendment to the U.S. Constitution, which replaced election by State legislatures with direct election to the Senate.²⁸ His focus was on the particular role and function assigned to the Council of States in the Indian Constitution.

Chief Justice Sabharwal noted that except for its special legislative function under Article 249, where it may resolve to grant the Union legislature temporary superiority over the State legislature on a specific subject matter, the Council of States did not perform any other federal function. Hence, he concluded that India adopted the bicameral legislature not to advance federalism by creating a chamber to ‘champion local interests’²⁹ but rather as a ‘revising chamber’ that enhanced the quality and extent of deliberation.³⁰ Although

²⁵ *Kuldeep Nayar*, (2006) 7 SCC 1, 45, Para. 38.

²⁶ *Kuldeep Nayar*, (2006) 7 SCC 1, 46, Para. 42. A constitution bench is a bench of at least five judges of the Indian Supreme Court constituted under Article 145(3) of the constitution to hear matters involving a ‘substantial question of law as to the interpretation of [the] Constitution.’

²⁷ *Kuldeep Nayar*, (2006) 7 SCC 1, 47, Para. 44.

²⁸ Jay S. Bybee, “Ulysses at the Mast: Democracy, Federalism and the Sirens’ Song of the Seventeenth Amendment,” 91 *Northwestern University Law Review* 500 (1996–1997); Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, MD: Lexington Books, 2001), chap. 6.

²⁹ *Kuldeep Nayar*, (2006) 7 SCC 1, 47, Para. 47.

³⁰ *Ibid.*

he justified the *Rajya Sabha* composition rule as an expression of bicameralism, he did not reject the idea that the Indian Constitution is a federal constitution. He surveyed the Constituent Assembly Debates and Supreme Court precedent to locate '[t]he basic principle of Federalism [to be] that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but the Constitution itself'.³¹ Furthermore, he attempted to reconcile the principle of federalism with the new amendments to the composition of the *Rajya Sabha* by proposing that in India, the 'principle of federalism is not territory related'³² and that it 'is no part of Federal principle that the representatives of the States must belong to that State'.³³ He stressed that this nonterritorial federal principle was a basic feature of the Indian Constitution and the amendment to the Representation of People Act of 2003 did not damage or destroy this constitutional principle.³⁴ In other words, the 'Constitution does not cease to be a federal constitution simply because a *Rajya Sabha* Member does not "ordinarily reside" in the State from which he is elected'.³⁵ The use of the phrase 'nonterritorial federalism' in this case bears little resemblance to the academic use of it.³⁶ *Nonterritorial federalism* refers to the constitutional strategies devised to reconcile ethnic, linguistic, or religious diversities that are not territorially dispersed. Chief Justice Sabherwal's reference to nonterritorial federalism simply refers to his conclusion that a representative of the State in the Council of States need not reside in the State.

A more convincing rationale for the decision in the case would be one that distinguished between nation-state and state-nation federal relations that could articulate why representation of the States in the Council of States may have a different normative status in a coming-together rather than a holding-together federation. In a holding-together federation, the State is not an autonomous independent unit and a bearer of sovereign rights that accedes to the federation only on the premise that their sovereign autonomy will not be eroded. Instead, bicameralism in the Indian Constitution arguably is motivated by the need to

³¹ *Kuldeep Nayar*, (2006) 7 SCC 1, 50, Para. 52.

³² *Kuldeep Nayar*, (2006) 7 SCC 1, 56, Para. 71.

³³ *Kuldeep Nayar*, (2006) 7 SCC 1, 56, Para. 73.

³⁴ *Kuldeep Nayar*, (2006) 7 SCC 1, 62, Para. 89.

³⁵ *Ibid.*

³⁶ See D. Elkins, *Beyond Sovereignty: Territory and Political Economy in the Twenty-First Century* (Toronto: University of Toronto Press, 1993) for the application of nonterritorial federal principles to Canada; Jan Erk, 'Federalism and Non-Territorial Representation,' Forum of Federations Working Paper 2003, Available at <http://forumfed.org/libdocs/SriLanka02/946-SLMG0306-Erk.pdf> (accessed October 18, 2014), for a proposal of nonterritorial federalism applied to Sri Lanka.

preserve ‘difference’ in composition and deliberation in the different legislative chambers by representing politically salient linguistic and cultural diversity.³⁷ The change in the mode of representation of the Council of States in *Nayar* does not vitiate the demos-enabling features and the principles of political asymmetry embedded in the federal design of the Union legislature. Hence, state-nation federalism better justifies the conclusion arrived at in *Nayar* than the account of nonterritorial federalism offered by the Court.

Redrawing State Boundaries

Stepan, Linz, and Yadav posited that when the history and formation of the nation is better understood to be the result of a holding-together rather than a coming-together process, state-nation federal arrangements tend to be adopted. In a holding-together federation, there often is a need to reorganize State boundaries or to create enclaves within States that enjoy a special relationship with the State and Union government. Often, the capacity to alter State boundaries has been criticized as an illustration of why India is not a ‘proper’ federation.³⁸ Instead, as Stepan et al. argue, if we understand this flexibility of State boundaries to be a valuable feature of a state-nation’s capacity to accommodate and reflect politically salient cultural, linguistic, and ethnic demands, it no longer seems constitutionally or normatively deviant.

In the past three decades, two types of cases in which the Union alters State boundaries deserve close attention: reorganization of existing States (in this section) and the admission of new States (in the following section). The process of internal reorganization of State boundaries has been motivated by the need to accommodate four contingencies: linguistic-identity-based political-autonomy claims; tribal and ethnic claims in northeast and central India; new territory added to the Union by conquest or accession; and emerging claims of underdevelopment and political neglect.³⁹ Often, these contingencies combine to present a complicated case for division of existing States into one or more resulting States.⁴⁰

In *Pradeep Chaudhary vs. Union of India*,⁴¹ the petitioners challenged the Uttar Pradesh Reorganization Act of 2000, which created the State of

³⁷ See, generally, Jeremy Waldron, “Bicameralism” 65 (1), *Current Legal Problems* (2012): 31–57.

³⁸ K. C. Wheare, (n. 10), 27.

³⁹ Maya Chaddha (2002), “Integration through Internal Reorganization: Containing Ethnic Conflict in India”, *The Global Review of Ethnopolitics* 2: 44–61. See also Louise Tillin, *Remapping India: New States and their Political Origins* (New Delhi: Oxford University Press, 2013).

⁴⁰ S. Krishnaswamy, “Telangana: No Constitutional Barriers,” *The Hindu*, January 4, 2014.

⁴¹ *Pradeep Chaudhary v. Union of India*, (2009) 12 SCC 248 (2J).

Uttaranchal. Under the proviso to Article 3, the president must refer the Bill to create a new State ‘to the Legislature of that State for expressing its views thereon’.⁴² The Schedule to the Bill creating the new state of Uttaranchal referred to the Uttar Pradesh State legislature included Haridwar ‘city’ but not the entire Haridwar ‘district’. Once the State legislature approved the Bill by resolution, the parliament amended the Schedule to include the entire ‘Haridwar’ district. Petitioners claimed that the president had to refer the amended Bill back to the State legislature to satisfy the conditions set out in Article 3. The Court rejected this argument and held that ‘substantive compliance’ with the proviso was sufficient and ‘even in a case where substantive amendment is carried out, the amended Parliamentary Bill need not be referred to the State Legislature again for obtaining its fresh views’.⁴³

The predominance of the Union legislature in determining State boundaries is not a novel development in Indian constitutional law. In this case, the two-judge bench affirms the earlier constitutional-bench decision on this question.⁴⁴ However, the Court did not recognize and reaffirm the unique model of ‘state-nation’ federalism to justify this extraordinary Union power in the Indian Constitution. The failure to justify this Union power to reorganize territorial boundaries with substantive constitutional or political reasons has led to persistent criticism and renewed political demands to construe the State resolution as a constitutional fetter on the Union power. In *Babulal Parate*, a constitutional bench of the Supreme Court confronted the political jostling around whether the city of Bombay should belong to Maharashtra or Gujarat. The president had referred a Bill to the State Assembly, which proposed a three-way split among Gujarat, Maharashtra, and a Union Territory of Bombay. After the State Assembly approved this Bill, it was amended by parliament to include Bombay within the State of Maharashtra – a not-so-insignificant change! Despite the significant unilateral alteration by the Union parliament, the Supreme Court concluded that this was not a sufficient reason to strike down the Union law because the States had no rights under the Indian Constitution.

The Court’s appreciation of the unique character of ‘state-nation’ federalism is critical to understanding and justifying the Union’s preeminence while designing state boundaries. In 2013, there was divisive and rancorous political and constitutional argument about the creation of the new State of Telangana from the existing State of Andhra Pradesh. It was argued that no new State

⁴² Constitution of India, 1950, Article 3.

⁴³ *Pradeep Chaudhary*, (2009) 12 SCC 248, 255, Para. 24.

⁴⁴ *Babulal Parate v. State of Bombay*, (1960) 1 SCR 605.

should be created if the Andhra Pradesh legislative assembly rejects or refuses to pass a supporting resolution. However, as discussed previously, the absence of a resolution by the State Assembly will not be a constitutional barrier to the creation of the Telangana State unless the Supreme Court changes its interpretation of Article 3.

Hence, the constitutional argument against the creation of the Telangana State is not about what the law *is* but rather what it *should be*. There is nothing in the text of the proviso to Article 3 to indicate that the parliament must accept or act on the views of the State legislature. The Supreme Court's justification for such a view should be understood as the result of the embrace of a particular type of federalism: a holding-together federalism as a part of a state-nation political arrangement. In *Babulal Parate*, the Supreme Court observed that:

None of the constituent units of the Indian Union was sovereign and independent in the sense the American colonies or the Swiss Cantons were before they formed their federal unions. The Constituent Assembly of India, deriving its power from the sovereign people, was unfettered by any previous commitment in evolving a constitutional pattern suitable to the genius and requirements of the Indian people as a whole. Unlike some other federal legislatures, Parliament, representing the people of India as a whole, has been vested with the exclusive power of admitting or establishing new States, increasing or diminishing the area of an existing State or altering its boundaries, the Legislature or Legislatures of the States concerned having only the right to an expression of views on the proposals.⁴⁵

As Stepan, Linz, and Yadav showed, in a federation of this type, the Union's capacity to shape State boundaries to respond to claims for political autonomy based on linguistic, ethnic, religious, or tribal identities arguably has strengthened the capacity of the Indian federation to endure in the past sixty years. Any attempt, by the president or the Supreme Court, to constrain this Union power with new constitutional or political limitations may have a lasting impact on the future of the Indian federation. However, it appears that the state-nation federalism justification for the Union power to create new States does not take the problem of political partisanship seriously enough. The third section of this chapter considers this aspect of the federal problem. The final part of this section discusses State-nation federalism, which examines the capacity of the Union to create an asymmetric federalism in India.

⁴⁵ *Babulal Parate*, (1960) 1 SCR 605, 613, Para. 8.

Asymmetric Federalism

The second case in which the Union power to alter State boundaries has come up before the Supreme Court relates to the power to admit new States into the Union. In the 1960s, the Supreme Court clarified that the cession of the territory of the Union required a constitutional amendment under Article 368 but said nothing about the accession of territory by the addition of new States.⁴⁶ Subsequently, the Union added the new State of Sikkim to the Union of India under Article 2 and, through the Constitution (Thirty-Sixth Amendment) Act of 1975, preserved certain historical features of the erstwhile princely state in Article 371-F. In *RC Poudyal v. Union of India*,⁴⁷ the addition of the new State under Article 2 and the reservation of seats for certain ethnic and religious groups through Article 371-F was challenged on the grounds that this damaged or destroyed the basic features of the Constitution – namely, secularism, democracy, and republicanism.⁴⁸ The basic structure arguments in this case are reviewed elsewhere⁴⁹; this chapter focuses on the arguments around Article 2 in this case.

Article 2 of the constitution provides that ‘Parliament may by law admit into the Union . . . new States on *such terms and conditions* as it deems fit’.⁵⁰ The central questions in *Poudyal* are the extent to which parliament’s power to admit new States is constrained by basic principles of Indian constitutionalism and the need to maintain parity between States. The Court concluded that parliament must adhere to the foundational principles of the constitution (i.e., secularism, republicanism, and democracy) but need not ensure complete equality among the States. It is surprising that at no point in this judgment did the Court offer a justification for this view of Indian federalism that is tolerant of unequal States in the Union. It avoided a substantive account of State asymmetry and preferred to justify this conclusion to arise from due deference to parliament’s power under Article 2. A substantive constitutional justification for Sikkim’s place in the Indian Union would be one that gives special attention to state-nation federal arrangements. However, there seems to be considerable academic disagreement on whether Sikkim is representative of Indian federalism.

⁴⁶ In *Re: Berubari Union*, (1960) 3 SCR 250.

⁴⁷ *RC Poudyal v. Union of India*, 1994 Supp (1) SCC 324.

⁴⁸ The specific challenge was that the measures violated the principle of one person-one vote and Article 332(3) of the constitution, which stipulates that the degree of reservations in legislative assemblies must be proportionate to the reserved community’s population.

⁴⁹ S. Krishnaswamy, *Constitutionalism and Democracy in India* (New Delhi: Oxford University Press, 2009), 158–63.

⁵⁰ Constitution of India 1950, Article 2.

The academic view on the significance of Sikkim's status in the Union under the constitution is rather sharply divided. Tillin argued that we should see Sikkim and other North Eastern States as 'peripheral' units whose relationships with the Union and the other States are distinct from those of the main constituent units. Hence, Tillin concluded that these are not serious asymmetric federal arrangements characteristic of Indian federalism.⁵¹ More recently, Saxena argued that Tillin's view of Sikkim and other North Eastern states as peripheral units misunderstands the radiating effect of constitutional and political asymmetry beyond these examples to contribute to a robust plural and 'postmodern' democracy.⁵² By giving equal attention to political and constitutional asymmetry, Saxena argued that these arrangements well may indicate the future political and constitutional contours of Indian federalism. This debate in the political science literature ignored the decision on the special status of Sikkim in *Poudyal*, which effectively locates a constitutional principle of asymmetric federalism in its interpretation of Article 2. Arguably, this is a principle with a more general application beyond Parliament's power to admit new states. The discussion now considers another asymmetric federal arrangement.

The second type of asymmetric division of power arrangement adopted under the Indian Constitution relates to sub-State political entities. Such entities are vested with political autonomy so that they enjoy greater political autonomy than other regions within the State, as well as a special relationship with the Union government. This sub-State asymmetry is constitutionally distinct from the federal territorial division of power because these arrangements were established through the Fifth and Sixth Schedules of the Constitution, special constitutional amendments for regions such as Vidarbha and Telangana, and nonconstitutional statutory arrangements as in the Gorkhaland Autonomous Hill Councils. These constitutional and legal arrangements have been seldom tested before the courts. However, in *Pu Myllai Hlychho v. State of Mizoram*,⁵³ the role of the governor in constituting the Sixth Schedule Councils was challenged before the Court.

The provisions of the Sixth Schedule to the Constitution evolved a separate scheme for the administration of the tribal areas in Assam, Meghalaya, Mizoram, and Tripura through the institution of District Councils or Regional Councils. The Mara Autonomous District Council (MADC) set up under Paragraphs 2(1) and 20 of the Sixth Schedule of the Constitution had nineteen

⁵¹ L. Tillin (2007), "United in Diversity? Asymmetry in Indian Federalism", *Publius* 37: 45–67.

⁵² Rekha Saxena (2012), "Is India a Case of Asymmetric Federalism?", *Economic and Political Weekly* 37: 70–5.

⁵³ *Pu Myllai Hlychho v. State of Mizoram*, (2005) 2 SCC 92 (5J).

elected and four nominated members. The Governor of Mizoram was empowered under Paragraph 2(1) and Paragraph 20BB to nominate four members of MADC. After the general elections to the MADC in 2000, the governor appointed Pu Myllai Hlychho and three others as nominees to the MADC. In 2001, the governor issued a notification terminating the nomination of Hlychho and others and, by another notification, nominated four other members as nominees in their place. Hlychho challenged the termination and new nomination by way of a writ petition before the Gauhati High Court, which upheld the validity of both notifications. Hlychho and others filed appeals before the Supreme Court. The main issue was the nature of the discretion to be exercised by the governor of a State while nominating and removing members of a council under Paragraphs 2 and 20BB of the Sixth Schedule.

Typically, the executive powers of the State are vested in the governor who exercises his functions on the aid and advice of the Council of Ministers headed by the Chief Minister, 'except in so far as he is by or under this Constitution, required to exercise his functions or any of them in his discretion'.⁵⁴ Hlychho argued that Paragraph 20BB the Sixth Schedule of the Constitution read with the Object and Reasons of Constitution Amendment Act of 1988 required the governor to discharge a dual role: the ordinary constitutional role as the head of the State executive and a special role as the guardian of minorities in the Sixth Schedule areas. The constitutional bench failed to appreciate the arguments of the petitioner that rested on the special asymmetric character of the political arrangements in the Sixth Schedule areas and held that the governor was bound by the aid and advice of the Council of Ministers. Justice Balakrishnan concluded that the dismissal of the four members from the MADC by order of the governor, after consultation with the Council of Ministers, did not in any way constrain the exercise of discretion by the governor.

Unlike in *Poudyal*, in *Hlychho*, the Court failed to appreciate and develop the special political and constitutional character of asymmetric sub-State political entities.⁵⁵ In both of these cases, the political branches of government have been adroit at developing asymmetrical federal and sub-State arrangements to respond to political challenges at maintaining a state-nation federal polity. However, the courts have failed to identify, recognize, and develop a constitutional jurisprudence that comprehends state-nation federalism. This section shows how an appreciation of the distinctive character of state-nation

⁵⁴ Constitution of India, 1950, Articles 154(1) and 163(1).

⁵⁵ See K. K. S. Hausing (2014), "Asymmetric Federalism and the Question of Democratic Justice in Northeast India", *India Review* 13: 87–111, for the argument that the asymmetric federal arrangements in North East India are crucial to understanding the history of state formation in India and the possibility of democratic justice.

federalism will liberate the Indian courts to offer, in some cases, better remedies and in others more persuasive justification for their decisions in the federalism cases before them. The next section turns to another aspect of Indian federalism in which the Indian courts have responded with more alacrity and insight: the problem of partisan federalism.

PARTISAN FEDERALISM

Federalism as a normative and philosophical concept relies on the need to balance citizen preferences for joint action for some purposes and self-government for other purposes.⁵⁶ Although a normative theory of federalism may justify these political arrangements because they enhance political participation (i.e., are demos enabling) or protect individual or other liberties (i.e., are demos constraining),⁵⁷ most conventional accounts claim that citizen preferences of territorially concentrated groups or nations are granted special status in federal arrangements and that preference aggregation around these identities is considered politically salient.⁵⁸ The standard accounts of political history of the Indian federation take note that the breakdown of the Congress stranglehold over Central and State governments coincides with the revitalization of Indian federalism, in general, by enhancing the bargaining power of States. However, they fail to recognize that the assertion of States may no longer represent the peculiar aggregation of preferences of minority linguistic, cultural, or subnational identity groups but rather merely the interests of political parties. The conflation of a robust federalism with a partisan federalism is endemic in Indian political theory; however, it is significant that the Indian courts have attempted in vain to develop neutral rules to combat partisan federalism. In the past three decades, the Supreme Court intervened in at least three types of disputes to craft neutral constitutional rules that prevent partisan federalism: proclamation of regional emergencies or President's Rule under Article 356; appointment of governors and the scope of their power; and exercise of the Union power to create new States.

Before turning to these cases, it is useful to focus on the development of the idea of partisan federalism in other jurisdictions because this allows for greater analytical sophistication in the argument that follows. In the

⁵⁶ R. Watts, *Federal Systems and Accommodation of Distinct Groups: A Comparative Study of Institutional Arrangements* (Kingston, Ontario: Institute of Intergovernmental Relations, Queens University, 1998), 120.

⁵⁷ Helder De Schutter (2010), "Federalism as Fairness", *Journal of Political Philosophy* 19 (2): 167–89.

⁵⁸ Michael Burgess, *Comparative Federalism: Theory and Practice* (London and New York: Routledge, 2006), 2–4.

United States, there has been more attention given to partisan conflict and its mobilization along federal lines.⁵⁹ More recently, Bulman-Pozen in her analysis of federalism in the United States concluded that '[w]ithout an appreciation of partisanship's influence, dynamics considered fundamental to our federal system are obscure'.⁶⁰ She suggested that we must account for 'political actors' use of state and federal governments in ways that articulate, stage, and amplify competition among the political parties and the affective individual understandings of state and national identification that accompany this dynamic. She particularly noted that '[a]ttending to partisanship reveals that our contemporary federal system generates a check on the federal government and fosters divided citizen loyalties, as courts and scholars frequently assume. But it does so for an unexplored reason – because it provides durable and robust scaffolding for partisan conflict'.⁶¹ These observations would apply in full measure to an analysis of Indian federalism in the past three decades. I am not suggesting that partisanship envelops all of the disputes or animates all of the tension in Indian federalism but only that it explains a significant part of the legal and constitutional disputes that come before the Court.

However, there are three important limitations to extending the partisan federalism framework as developed by Bulman-Pozen to understand federalism in India. First, whereas the United States has a stable two-party democracy around which institutional and individual allegiances coalesce, India has a robust multiparty democracy with national, regional, and State parties with progressively narrower political bases. Moreover, the national parties adopt a federated structure that incorporate and respect State identity and therefore may represent both State and partisan interests. In this multiparty political arena with federated party structures, the parsing of party interests and State interests often is more difficult than in a stable two-party system. Second, because a majority of Indian States are organized around linguistic-identity groups, survey data suggest that individual identity is simultaneously built around both State and national identities.⁶² Hence, it is difficult to disaggregate where federalism challenges rely on regional and State party's partisan considerations and where they arise from the political interests of the political

⁵⁹ See Jerry Perkins and Randall Guynes (1979), "Federalism and Partisanship", *Publius* 9: 57–73, for an early account. Elizabeth Rigby and Jake Haselswerdt (2013), "Hybrid Federalism, Partisan Politics, and Early Implementation of State Health Insurance Exchanges", *Publius* 43 (3): 368–91.

⁶⁰ Jessica Bulman-Pozen (2013), "Partisan Federalism", 127 *Harvard Law Review* 1077–9.

⁶¹ *Ibid.*, 1080–1.

⁶² Ashutosh Varshney (2013), "How Has Indian Federalism Done?", *Studies in Indian Politics* 1 (43–63): 48–9.

community of a State. Finally, it is important to note that in India, private citizens or associations initiate a majority of federalism cases. These actors more often than not are motivated by neither State identity concerns nor partisan political considerations. They seek to assert State or Union jurisdictional claims to fend off regulation or taxes irrespective of whether they originate in State or Union government. In these cases, the State or Union government whose jurisdiction is challenged is arraigned as a party while the other government may not even argue the case. These three limitations in applying the partisan federalism framework to an analysis of Indian federalism heighten the attention needed for the precise ways in which we use such a framework. In particular, we must distinguish between the limited descriptive aspect of the argument that seeks to demonstrate that partisan motivations drive state and Union legal and the constitutional disputes from the normative claim that partisan federalism is a corruption of constitutional design – either because it is demos constraining or that it does not accurately aggregate the preferences of the political community in a State. The following sections evaluate the extent and manner in which the Court appreciates the role and place of partisan federalism in Indian constitutional arrangements.

Proclamation of Regional Emergencies

The Constitution of India grants the President of India an exceptional power to suspend a State government and legislature if the president is convinced that ‘the government of a State cannot be carried on in accordance with the provisions of this Constitution’.⁶³ The president’s exercise of this power may be prompted by the report of the governor of a State. The frequent use of Article 356 after the collapse of the single-party monopoly of the Congress Party in 1967 resulted in searching judicial review of the decisions of both of these high constitutional authorities: the governor and the president. The first significant case in which the politically egregious use of these proclamations was challenged was the *State of Rajasthan v. Union of India*.⁶⁴ The Janata Party for the first time had won the general elections to the Union Government and broken the Congress monopoly. Promptly, the new government issued a letter or directive to six Congress Party–ruled State governments to resign or face the risk of a presidential proclamation of regional emergency under Article 356. The States challenged this directive before the Supreme Court, which was confronted with a case in which evidently partisan considerations sought to

⁶³ Constitution of India, 1950 Article 356(1).

⁶⁴ *State of Rajasthan v. Union of India*, (1977) 3 SCC 592.

override federal constitutional arrangements that provided for autonomous independent government in the Union and the States.

The seven-judge bench issued plurality opinions, which for the most part steered clear of parsing partisan political considerations from constitutional justifications for the use of Article 356. The difficulty of such an exercise is best set out by Justice Bhagwati, who deferred to the executive's view on the relevance of partisan considerations in the proclamation of emergency. He observed that:

Whether the situation is fraught with such consequences or not is entirely a matter of political judgment for the executive branch of Government. But it cannot be said that such consequences can never ensue and that the ground that on account of total and massive defeat of the ruling party in the Lok Sabha elections, the Legislative Assembly of the State has ceased to reflect the will of the people and there is complete alienation between the Legislative Assembly and the people is wholly extraneous or irrelevant to the purpose of Article 356, Clause (1). We hold that on the facts and circumstances of the present case this ground is clearly a relevant ground having reasonable nexus with the matter in regard to which the President is required to be satisfied before taking action under Article 356(1).⁶⁵

However, this permissive approach in *State of Rajasthan* allows partisan political reasons to masquerade as constitutional justifications under Article 356 and effectively opened the gates to the abuse of Article 356. In the next fifteen years, in almost all instances in which an Article 356 proclamation of emergency came to be used, the party in power at the Union government was different from the party in power at the State government. Nine judges of the Supreme Court were called on to revisit the place of partisan considerations in Article 356 proclamations in *SR Bommai v. Union of India*.⁶⁶ In this case, the Supreme Court was confronted with several legal issues, including the applicability of basic-structure review to protect federalism and the scope and extent of administrative law judicial review of high constitutional authorities. Because these questions have been addressed elsewhere,⁶⁷ this chapter focuses on the capacity of the Court to address the problem of partisan federalism.

The Supreme Court's reasoning on this issue is best understood by analyzing the relief granted by the court in *Bommai*. With respect to Karnataka, Meghalaya, and Nagaland, the Court invalidated proclamations issued by the

⁶⁵ *State of Rajasthan*, (1977) 3 SCC 592, 655, 656 Para. 153.

⁶⁶ *SR Bommai v. Union of India*, (1994) 3 SCC 1.

⁶⁷ S. Krishnaswamy, *Democracy and Constitutionalism in India* (New Delhi: Oxford University Press, 1999), 43–69.

president on the grounds that these proclamations were issued without exhausting or in contravention of constitutional ‘options’ that could have enabled the respective newly constituted governments to justify their formation. When proclamations were issued on the grounds that the secular fabric of these States had been compromised – by the involvement of several Members of Legislative Assemblies in the demolition of Babri Masjid and the subsequent riots that broke out in the Bharatiya Janata Party–ruled States of Himachal Pradesh, Madhya Pradesh, and Rajasthan – the Court upheld these proclamations. Although in all six States opposition parties were in power or had the potential to secure power, the Court effectively distinguished constitutionally valid reasons for a presidential proclamation from invalid partisan reasons.

The majority judgment of Justices P. B. Sawant and Kuldeep Singh squarely grasped the core analytical issue posed by partisan federalism and recognized Indian democracy’s multiparty character:⁶⁸

Under our political and electoral system, political parties may operate at the State and national level or exclusively at the State level. There may be different political parties in different States and at the national level. Consequently, situations may arise, as indeed they have, when the political parties in power in various States and at the center may be different. It may also happen – as has happened till date – that through political bargaining, adjustment and understanding, a State-level party may agree to elect candidates of a national level party to the Parliament and vice versa. This mosaic of variegated pattern of political life is potentially inherent in a pluralist multi-party democracy like ours. Hence the temptation of the political party or parties in power [in a coalition government] to destabilise or sack the Government in the State not run by the same political party or parties is not rare and in fact the experience of the working of Article 356[1] since the inception of the Constitution, shows that the State Governments have been sacked and the legislative assemblies dissolved on irrelevant, objectionable and unsound grounds.

The judges proceeded to observe that the provision had been used in more than ninety instances and almost invariably against opposition-party governments. It was the task of the judiciary, they argued, to intervene in such cases and preserve a pluralist Indian democracy. By locating the use of presidential proclamations at the fault lines between the multiparty system and the federal constitutional arrangement, this opinion rightly identifies the judicial role in the preservation of the federal constitutional arrangement by negating the place of partisan considerations in federal decision making. However, is it

⁶⁸ *SR Bommai*, (1994) 3 SCC 1, 117, Para. 104.

always possible for judges to identify such partisan considerations? Justices B. P. Jeevan Reddy and Aggarwal in their concurring opinion in *Bommai* clarify the judicial role by distinguishing between the constitutional and political considerations that motivate presidential proclamations under Article 356:

In a sense, it is not really a power but an obligation cast upon the President in the interest of preservation of constitutional government in the States. It is not a power conceived to preserve or promote the interests of the political party in power at the center for the time being nor is it supposed to be a weapon with which to strike your political opponent. The very enormity of this power – undoing the will of the people of a State by dismissing the duly constituted government and dissolving the duly elected Legislative Assembly – must itself act as a warning against its frequent use or misuse, as the case may be.⁶⁹

The Supreme Court's willingness to distinguish between valid constitutional reasons and invalid partisan reasons to invoke the presidential proclamation under Article 356 clarifies the question of constitutional validity and emphasizes the normative purpose of federalism as a constitutional doctrine in India: to be demos-enabling in character. However, it is not always possible to distinguish between demos-enabling and demos-constraining outcomes in complicated and fast-developing political situations.

A constitutional bench of the court in *Rameshwar Prasad v. Union of India* was confronted with such a situation.⁷⁰ The Governor of Bihar, appointed by the Union government, issued a notification dissolving the State Legislative Assembly, even before its first meeting, on the grounds that attempts were being made by a political party in opposition to the Union government to cobble a majority by illegal means in a hung assembly with no clear political majority. The governor concluded that if this situation were allowed to persist, it would amount to a derailment of the democratic constitutional process. The president approved this notification. The petitioners filed a petition alleging that the governor had misused his power to prevent the formation of a government led by a party opposed to the one in power at the Union government for partisan political reasons. Several legal arguments were raised in this case, which have been responded to more fully elsewhere.⁷¹ This discussion focuses primarily on the Court's capacity to distinguish between constitutionally valid reasons and politically partisan reasons.

⁶⁹ S. R. *Bommai*, (1994) 3 SCC 1, 266, Para. 372.

⁷⁰ *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1.

⁷¹ Sudhir Krishnaswamy and Madhav Khosla (2009), "Regional Emergencies under Article 356," 3 *Indian Journal of Constitutional Law* 168.

In *Rameshwar Prasad*, much turned on the governor's report to the president, which concluded that there was a breakdown of constitutional machinery. The different conclusions reached by the majority and minority opinion in this case illustrate the perils of adjudication in such cases. Justice Y. K. Sabharwal, speaking for the majority, was skeptical of the governor's ability to make a substantive constitutional judgment about the proclamation of emergency. He observed that:

... [w]ithout highly cogent material, it would be wholly irrational for constitutional authority to deny the claim made by a majority to form the Government only on the ground that the majority has been obtained by offering allurements and bribe which deals have taken place in the cover of darkness but his undisclosed sources have confirmed such deals. The extra-ordinary emergency power of recommending dissolution of a Legislative Assembly is not a matter of course to be resorted to for good governance or cleansing of the politics for the stated reasons without any authentic material. These are the matters better left to the wisdom of others including opposition and electorate.⁷²

While not expressly doubting the political motivations of the governor in this case, the majority opinion clearly understood the report in this light. By circumscribing the range of valid constitutional reasons that the governor may consider when sending a report under Article 356, the majority sought to eliminate partisan considerations from such a decision. Moreover, the majority, when in doubt, sought to enhance the demos-enabling aspects of federalism by allowing the electorate to determine the political fortunes of parties.

In his vigorous dissent, Justice Pasayat stated the matter more precisely:

... If the Governor would have formed his opinion for dissolution with the sole objective of preventing somebody from staking a claim it would clearly be extraneous and irrational. The question whether such person would be in a position to form a stable government is essentially the subjective opinion of the Governor; of course to be based on objective materials. The basic issue therefore is did the Governor act on extraneous and irrelevant materials for coming to the conclusion that there was no possibility of stable government.⁷³

Justice Pasayat concluded that the governor was right to prevent corrupt legislative maneuvers to secure a majority because he was expected to act to protect the constitutional values of democracy. The dissent in this case makes clear that the juridification of this arena of political action well may eliminate

⁷² *Rameshwar Prasad*, (2006) 2 SCC 1, 121, Para. 145.

⁷³ *Rameshwar Prasad*, (2006) 2 SCC 1, 169, Para. 249.

some partisan political considerations but yet not yield neutral constitutional principles. Hence, the dissent upholds the governor's decision as a legitimate constitutional restraint on the conduct of politics at the State level.

Despite the doubts expressed by the minority, the Supreme Court's judicial review of presidential proclamations under Article 356 effectively has constrained, if not eliminated, partisan federalism in this area of Indian constitutional practice. The invocation of regional emergencies has been reduced rather dramatically since *Bommai*. However, the capacity of the Court to clearly identify when Governors are motivated by partisan considerations in complex factual circumstances is in some doubt. Whereas in *Rameshwar Prasad*, the Court was divided on this question, in more recent cases it has turned its focus on the appointment of governors rather than the exercise of its functions.

Appointment and Role of Governors

In 2004, the president removed the governors of the States of Uttar Pradesh, Gujarat, Haryana, and Goa, all of whom were not appointed by the Congress party then in power at the Union government. Article 156 provides that the governor shall ordinarily hold office for a term of five years, subject to the general principle that the governor shall hold office at the pleasure of the President of India.⁷⁴ In *BP Singhal v. Union of India*,⁷⁵ the petitioner, who was a member of a political organization, argued that the doctrine of pleasure does not give rise to unfettered discretion to dismiss a governor because he is a high constitutional authority and not an employee, servant, or agent of the Union government. The attorney general, representing the Union government, argued that 'in a democracy, political parties are formed on shared beliefs and they contest election with a declared agenda. If a party which comes to power with a particular social and economic agenda, finds that a Governor is out of sync with its policies, then it should be able to remove such a Governor'.⁷⁶ This argument invited the Court to reconsider the extent to which partisan considerations may determine the appointment and conduct of a key constitutional authority who mediates between the power of the Union and the States.

Justice Raveendran, speaking for the bench, situated the question of the federal role of the governor in the complex political landscape in India. The

⁷⁴ Constitution of India 1950, Article 156.

⁷⁵ *B. P. Singhal v. Union of India*, (2010) 6 SCC 331.

⁷⁶ *B. P. Singhal*, (2010) 6 SCC 331, 344, Para. 10.

nature of Indian democracy had evolved, Justice Raveendran observed, from one in which the same political party held power at the federal and State level to an era of coalition politics, multiple parties, and power sharing. In such circumstances, with political parties often having varied and shifting ideologies, the task of a governor is not to implement policies or popular mandates. As the constitutional head of the State, his role and responsibility are nonpartisan:⁷⁷

While some [Governors] may come from a political background, once they are appointed as Governors, they owe their allegiance and loyalty to the Constitution and not to any political party and are required to preserve, protect and defend the Constitution (see the terms of oath or affirmation by the Governor, under Article 159 of the Constitution). Like the President, Governors are expected to be apolitical, discharging purely constitutional functions, irrespective of their earlier political background. Governors cannot be politically active. We therefore reject the contention of the respondents that Governors should be in “sync” with the policies of the Union Government or should subscribe to the ideology of the party in power at the Centre. As the Governor is neither the employee nor the agent of the Union Government, we also reject the contention that a Governor can be removed if the Union Government or party in power loses ‘confidence’ in him.

By recognizing the perils of partisan federalism, the Supreme Court reinterpreted the doctrine of pleasure, insofar as it applies to governors, to clearly identify them as nonpartisan constitutional functionaries. The protection of tenure created by the Court gives the office of governor the normative role that can fundamentally reshape the federal character of Indian politics and constitutional law. By focusing on the appointment and role of the governor rather than the manner of exercise of executive power, the Court signals its intention to root out partisan considerations from becoming embedded in Indian constitutional practice. Despite the clarity of the Court in *Singhal* on the unconstitutionality of partisan considerations in the appointment and dismissal of governors, the recently elected Bharatiya Janata Party Union government has proceeded to nudge or sack governors who were appointed by the previous government. The capacity of the Court to uphold its precedent and root out partisan considerations from Indian federalism will be tested in these cases.⁷⁸

⁷⁷ B. P. *Singhal*, (2010) 6 SCC 331, 356, Para. 45.

⁷⁸ *Aziz Qureshi v. Union of India*, Supreme Court of India, WC 763/2014.

Creation of New States

The previous section discussed the significant power of the Union of India to reorganize State boundaries to illustrate the distinctions between state-nation and nation-state federal arrangements. This chapter concludes with an account of the controversies surrounding the creation of India's twenty-ninth State in 2014 – namely, Telangana. This section revisits the Telangana controversy to highlight and illustrate the particular difficulties in distinguishing between partisan political considerations masquerading as State interests and the political salience that must be accorded to the preferences of particular political identities that claim territorial autonomy. In the case of Telangana, many commentators argued that the Congress Party and the Telangana Rashtriya Samiti may well be endorsing the Telangana State to secure partisan electoral gains. Therefore, should the President of India or the courts intervene to craft neutral constitutional rules that prevent the federal constitutional arrangements from being exploited for partisan political considerations?

The diverse range of political mobilization that gives rise to State reorganization claims in India alerts us to the analytical problems of distinguishing between legitimate political mobilization and partisan mobilization. Although linguistic State reorganization in the early decades of the Republic is now construed as legitimate constitutional redrawing of boundaries, there is no doubt that several regional party formations benefited from this process: the Dravidian parties in Tamil Nadu and the Shiv Sena in Maharashtra are prominent examples. The Akali parties benefited from the creation of a Sikh-majority Punjab state and, as Tillin persuasively showed, the Bharatiya Janata Party's political interests were critical to the formation of the States of Uttaranchal, Jharkhand, and Chattisgarh.⁷⁹ Therefore, States invariably have emerged from legitimate demands for political autonomy anchored by political parties that either motivated or benefited from the creation of new States.

Is the movement for the creation of a Telangana state an exception to this historical pattern? There is one issue on which the Justice B. N. Srikrishna Committee Report is emphatic and clear: that the political demand for a Telangana state is perceived as legitimate due to the persistent underdevelopment of these regions.⁸⁰ The Gentlemen's Agreement settled in 1956 devised statutory means to eliminate under-representation and underdevelopment in

⁷⁹ Louise Tillin, (n. 39), chaps. 3 and 4.

⁸⁰ Report of the Committee for Consultations on the Situation in Andhra Pradesh (December 2010). Available at <http://pib.nic.in/archieve/others/2011/jan/d2011010502.pdf> (accessed October 19, 2014).

the Telangana region.⁸¹ Article 371-D was introduced in 1973 to formalize the Six Point Formula through a nonterritorial asymmetric arrangement to reserve jobs and educational opportunities for people from the region. The failure of these statutory and constitutional arrangements led to the present demand for a new State. Although the Telangana Rashtriya Samiti has benefited handsomely from its leadership of the political movement that led to the formation of a new State, there is debate over whether the President of India or the Supreme Court should change the balance of power between the Union and the States in the process of State reorganization by insisting on an affirmative State resolution under Article 3.

There are three compelling reasons not to do so. First, as discussed previously, India's successful holding-together-federalism model helped to craft an enduring state-nation by allowing the Union to redraw State boundaries. Second, although we have crafted neutral constitutional rules to check partisan federalism in several cases, such as the proclamation of regional emergencies, it is difficult if not impossible to do so in the complicated and contested political environment that accompanies State reorganization. Third, there is no limited set of constitutional principles that *ex-ante* justify the formation of States because the primary justification for State formation is of an *ex-post* political character. In these circumstances, it is best left to the political process to craft a resolution to competing group claims for political autonomy and statehood rather than the president or the Supreme Court to second-guess this process through constitutional rules.

CONCLUSION

This chapter reviews the development of the constitutional doctrine of federalism in the Indian Supreme Court in the past three decades. In particular, it focuses on bringing together the fields of political theory and constitutional law in India to enhance our understanding of Indian federalism. The second section argues that the Indian Supreme Court's decisions on the composition of the upper house of the Union legislature, redrawing State boundaries and asymmetric federalism would do well to rely on the conceptual understanding of state-nation federalism in the political science literature. The third section suggests that the claim that Indian federalism was revitalized by the breakdown of Congress Party dominance in the political science literature fails to consider

⁸¹ Gentlemen's Agreement, 1956. Available at <http://aponline.gov.in/quick%2olinks/departments/general%2oadministration/rti%2oact/ga-sr-41b/gentlemen%2oagreement.doc> (accessed October 18, 2014).

the extent to which partisan considerations masquerade as federal conflicts. By contrast, the Indian Supreme Court has struggled to develop neutral constitutional rules that prevent the conflation of partisan political motivations with constitutionally valid federal interests. The key to settling the normative instabilities of Indian constitutional federalism is to relocate legal doctrinal debates within a wider political theory of Indian federalism.

Index

- Abstract judicial review, 269
Abu Hanifa, 162
Affirmative action. *See also* Reservations
 in India (*See* India)
 in Nepal, 98
Africa, judicialization of politics in, 265–266
Afzal, A.T.M., 273
Aggarwal, Rajesh Kumar, 374
Ahmed, Khondaker Mostaq, 198, 204–205
Ahmed, Moudud, 210–211
Ahmed, Shahabuddin, 205–206, 208, 215,
 222–223
Alam, M. Shah, 219
Ali, Muhammad Imman, 284–285
All Ceylon Tamil Congress (Sri Lanka),
 292–293, 301
All India Muslim League (Pakistan), 141–142
Amaratunga, Chanaka, 331–332
Ambedkar, B. R., 356
Anglo–Nepali War (1814–1816), 49–50, 61,
 93–94
Arthashastra (Hindu political treatise), 64
Articulation, 45
Asia, judicialization of politics in, 265–266
Asymmetrical federalism, 366–369
Austin, Granville, 24–25, 26
Autonomy
 disaggregation of nation and state, 347–348
 federal-state model and, 331–333
 in India
 creation of new states and, 378–379
 Rajya Sabha (Council of States),
 representation in, 359
 state boundaries, redrawing of, 363,
 365
 substates and, 367
 liberalism and, 352
 “minorities within minorities” critique of
 federalism and, 298–299
 in Nepal, 86–92, 110–113, 117–119, 315
 in Pakistan
 18th Amendment and, 145–146
 federalism and, 139–140
 provincial autonomy, 125, 139–144
 in plurinational state model, 352
 in Sri Lanka, 12, 293, 322–323
Awami League (Bangladesh). *See* Bangladesh
Awami League (Pakistan), 142, 150–151
Ayub Khan, Muhammad, 75, 132–133, 140–141,
 151–152
Ayyar, Alladi Krishna Swami, 356
Aziz, M. A., 202–203, 215, 220, 221–222, 223

Babri Masjid (mosque), 372–373
Bagehot, Walter, 57, 58
Bahun caste in Nepal, 87–88, 101, 112, 296,
 298, 307–308
Balakrishnan, K. G., 38, 368
Balochistan National Party (Pakistan), 145
Bandaranaike, S. W. R. D., 293
Bandhari, Dalveer, 40
Bangladesh
 overview, 4–5
 Abdul Mannan Khan v. Bangladesh (2011),
 223–224, 280–285, 286–287
 Advocate Ruhul Quddus v. Justice M. A.
 Aziz (2008), 222, 223
 Advocate Sultana Kamal v. Bangladesh
 (2008), 274
 A. K. Mujibur Rahman v. Returning Officer
 (1979), 205
 Anticorruption Commission, 220, 221–222

- Bangladesh (*cont.*)
- Anwar Hossain Chowdhury v. Bangladesh* (1989), 221–222, 271–274, 278–279
- Appellate Division
- Abdul Mannan Khan v. Bangladesh* (2011), 281–283, 285
- Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2005), 279–280
- judicialization of politics in, 269, 272–274, 287
- political-question doctrine in, 271
- Army Regulations, 205–206
- Awami League (AL)
- generally, 275
- caretaker government model and, 208, 210–211, 213–214, 263, 281–282
- elections and, 204–205, 207–208, 225
- judges, appointment of, 223
- Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2005), 279–280
- Bangladesh Nationalist Party (BNP)
- caretaker government model and, 208–209, 213–215, 263, 281–282
- elections and, 202–203, 206, 207–208, 225
- judges, appointment of, 223
- basic structure doctrine in, 197–198
- annulment of Constitutional Amendments and, 277–280
- debate regarding, 277
- India compared, 278
- invalidation of Thirteenth Amendment and, 281, 283–284
- judicial review and, 283
- United Kingdom compared, 277–278
- caretaker government model
- overview, 194, 263
- adoption of, 263
- Awami League (AL) and, 208, 210–211, 213–214, 263, 281–282
- Bangladesh Nationalist Party (BNP) and, 208–209, 213–215, 263, 281–282
- boycott of, 208–209, 271–274
- Chief Advisor, 209–210, 212–213, 215
- drawbacks of, 210–219
- emergence of, 208–210
- failure of, 225
- head of, 263
- invalidation of, 212, 280–285, 286–287
- judicial independence and, 211–212
- military and, 211–212
- Parliament and, 218–219
- President and, 212–215, 218–219
- Prime Minister and, 218–219
- routine functions, limited to, 215–218
- sovereignty and, 216
- Supreme Court and, 263
- undemocratic nature of, 211
- Chief Advisor, 209–210, 212–215
- Chittagong Hill Tracts Peace Accord (1997), 275–277
- civil war in, 192–193
- Combined Opposition Party (COP), 207–208
- Consequential Courts*, 267
- Constituent Assembly, 195, 196
- Constitution (1972)
- adoption of, 196–197
- annulment of Amendments, 277–280
- Election Commission under, 200–201
- judicialization of politics under, 220–221
- judicial review and, 197, 198, 264
- normative theory versus empirical reality, 264
- Delhi–Dhaka Treaty (1974), 269
- Dhaka Brigade, 213–214
- Eighth Amendment Act (1988), 278–279, 284
- Election Commission, 199–204
- generally, 275
- overview, 10, 194
- Chief Election Commissioner, 202–203, 220, 221–223, 273
- under Constitution (1972), 200–201
- lack of independence, 201–202, 204
- President and, 201–204
- Prime Minister and, 201–204
- reform of, 224–225
- role in elections, 204–208
- Election Commission Secretariat Act (2009), 201, 202
- elections in
- overview, 10, 192–195, 224–226
- Awami League (AL) and, 204–205, 207–208, 225
- Bangladesh Nationalist Party (BNP) and, 202–203, 206, 207–208, 225
- constitutional framework, 195–199
- fraud in, 278
- historical background, 193–194, 204–208, 263–264
- military and, 204–208, 262
- within Pakistan, 194
- Eleventh Amendment Act (1991), 208

- Emergency (2007–2008), 274
- Fifteenth Amendment Act (2011), 10, 194, 212, 279, 281
- Fifth Amendment Act (1979), 206, 279–280, 281, 284
- Fourth Amendment Act (1975), 198, 199, 262
- Grand Alliance, 203–204
- hartal* (political strikes), 270–271
- High Court Division
- Abdul Mannan Khan v. Bangladesh* (2011), 281
 - Anwar Hossain Chowdhury v. Bangladesh* (1989), 278–279
 - Bangladesh Italian Marble Works Ltd. v. Bangladesh* (2005), 279–280
 - during Emergency (2007–2008), 274
 - judicialization of politics in, 272–274, 287
 - Mohammad Badiuzzaman v. Bangladesh* (2010), 275–277
- Idrisur Rahman v. Shahiduddin Ahmend* (1999), 201–202
- India compared, 225–226
- Jamaat-e-Islami Bangladesh (JIB), 208, 210–211, 223, 275–277
- Jatya Party (JP), 206–208, 210–211, 275, 281
- judges, appointment of, 223
- judicial balancing in, 285–287
- judicialization of politics in
- overview, 11–12, 220–224, 261–265, 287
 - aboriginals and, 275–277
 - annulment of Constitutional Amendments, 277–280
 - Appellate Division, 269, 272–274, 287
 - concept of, 265–268
 - under Constitution (1972), 220–221
 - context of, 265–268
 - during Emergency (2007–2008), 274
 - engagement approach, 270–271
 - High Court Division, 272–274, 287
 - India compared, 265–266
 - invalidation of Thirteenth Amendment and, 280–285
 - judicial balancing, 285–287
 - lack of judicial independence, 220–224
 - normative theory versus empirical reality, 264
 - within Pakistan, 268–269
 - Pakistan compared, 265–266
 - political process and, 271–274
 - political question doctrine, 267–268
 - post-independence, 269–270
 - public interest litigation (PIL) and, 270
 - strategic intervention, 285–287
 - treaties and, 269
- judicial review in
- overview, 287
 - basic-structure doctrine and, 283
 - Constitution (1972) and, 197, 198, 264
 - Parliament and, 271
 - Supreme Court and, 264
- Kazi Mamunur Rashid v. Bangladesh* (2008), 201–202
- Law Commission, 221–222
- M. Saleem Ullah v. Bangladesh* (2005), 211, 274, 280–281, 282–283
- Martial Law Proclamation (1977), 198, 205–206
- Masder Hossain v. Secretary, Ministry of Finance* (1999), 201, 202
- Maulvi Tamizuddin Khan v. Pakistan* (1955), 268–269
- Members of Parliament (MPs), 271–274
- military in
- caretaker government model and, 211–212
 - elections and, 204–208, 262
- Mohammad Badiuzzaman v. Bangladesh* (2010), 275–277
- Moudud Ahmed v. Anwar Hossain Khan* (2008), 210–211
- Parbayata Chattagram Jana Samhati Samiti (PCJSS), 275
- Parliament
- authority of, 198–199, 218–219
 - boycott of, 208–209, 271–274
 - caretaker government model and, 218–219
 - judicial review and, 271
 - mandamus to compel attendance, 210–211
 - partition from Pakistan, 192–193
 - political question doctrine in, 267–268, 271
- President
- authority of, 195–197, 198–199, 218–219
 - caretaker government model and, 212–215, 218–219
 - Chief Advisor versus, 212–213, 215
 - Election Commission and, 201–204
- Press Council, 220
- Prime Minister
- authority of, 195–197, 218–219
 - caretaker government model and, 218–219
 - Election Commission and, 201–204
- Proclamation of Independence, 195, 196
- Provisional Constitution (1972), 196

- Bangladesh (*cont.*)
- public interest litigation (PIL) in, 270, 274
 - Representation of the People Order (1972), 199–200, 215–216
 - rule of law in, 261–265
 - Rules of Business, 201
 - Seventh Amendment Act (1986), 207, 278, 280, 281, 284
 - Siddique Ahmed v. Bangladesh* (2011), 280
 - similarities with other South Asian countries, 5
 - sovereignty, caretaker government model and, 216
 - strategic intervention in, 285–287
 - Supreme Court
 - Anwar Hossain Chowdhury v. Bangladesh* (1989), 272–274
 - caretaker government model and, 263
 - judicialization of politics in, 287
 - judicial review and, 264
 - Thirteenth Amendment Act (1996)
 - adoption of, 263
 - caretaker government model under, 10, 199, 209
 - invalidation of, 280–285, 286–287
 - Twelfth Amendment Act (1990), 199
 - Village Government Act (2003), 273
- Bangladesh Nationalist Party. *See* Bangladesh
- Barak, Aharon, 183
- Basantapur Palace (Nepal), 46, 61–62, 66
- Basaveshwara (Hindu philosopher), 247
- Basic-structure doctrine
- in Bangladesh, 197–198
 - annulment of Constitutional Amendments, 277–280
 - debate regarding, 277
 - India compared, 278
 - invalidation of Thirteenth Amendment and, 281, 283–284
 - judicial review and, 283
 - United Kingdom compared, 277–278
 - in Czech Republic, 283
 - in India (*See* India)
 - in United Kingdom, 277–278
- Bastiampillai, Bertram, 348
- Baxi, Upendra, 23, 27
- Beg, M. H., 26–28
- Bengalis in Pakistan, 140
- Bhagwati, P. N., 372
- Bharatiya Janata Party (India), 33, 372–373, 377, 378
- Bhimsen Thapa (Nepal), 93–94
- Bhutto, Benazir, 137, 143–144, 172, 187
- Bhutto, Zulfikar Ali, 133, 136–137, 143–144, 150–151
- Bicameralism
- in India, 360–363
 - in Pakistan, 142–143, 146
- Birendra Shah
- generally, 62, 74
 - accession to power, 76
 - Constitution (1990) and, 76–77
 - sovereignty and, 54
- Bir Shamsheer Rana, 66
- Bismarck doctrine, 219
- Biswas, Abdur Rahman, 213–214
- Bodin, Jean, 57
- Bokhari, Naeem, 170
- Bracton, Henry de, 162
- Brahmin caste
- in India, 29–30
 - in Nepal, 62–63, 87–88, 101
- Breyer, Stephen, 265
- British East India Company, 49, 61, 64, 93–94
- Buchanan, Allen, 348
- Buddhists
- in Nepal, 93, 99, 105, 313–314
 - in Sri Lanka (*See* Sri Lanka)
 - Theravada Buddhism, 326
- Bulman-Pozen, Jessica, 369–371
- Bureaucracy
- in India
 - reservations and, 31
 - Telecom case (Subramanian Swamy v. Manmohan Singh and Centre for Public Interest Litigation v. India)* (2012), 256–257
 - in Pakistan (*See* Pakistan)
- Caminal, Miquel, 340
- Canada
- non-territorial federalism in, 362
 - plurinational state model in, 341–342
 - Quebec as substate, 341–342
- Caretaker government model. *See* Bangladesh
- Caste hill Hindu elite. *See* Nepal
- Caste system
- India (*See* India)
 - Nepal, nation-state model and, 94
- Catalonia as substate, 341–342
- Ceylon Workers Congress (Sri Lanka), 301

- Chandrachud, Y. V., 27
- Chandra Shamsheer Rana, 66–67, 70, 95
- Chang, Wen-Chen, 285
- Chaudhry, Iftikhar Muhammad
generally, 130, 161
overview, 165, 166, 180–191
Asghar Khan v. Mirza Aslam Beg (2012),
187–188
attention-seeking by, 182–187, 188–189
criticism of, 131
dismissal of, 9–10, 168
government accountability and, 174–176
judicial activism of, 166–167, 185, 189–190
judicial appointments and, 185–187
judicial independence and, 173–174
judicialization of politics under, 138
Lawyers' Movement and, 169–173, 174, 182,
190
legal profession and, 183–184
media and, 182–183
“Memogate” and, 179–181
military and, 187–188
Musharraf and, 9–10, 168, 170, 171, 175
National Reconciliation Ordinance (NRO)
and, 174–176
personality-driven approach, 182–187,
188–189
public interest litigation (PIL) and, 176–179,
189–190
restoration of, 169–172, 173
suo motu powers and, 176–179, 189–190
Zafar Ali Shah v. Musharraf (2000), 165
- Chelvanayakam, S. J. V., 293, 299–300
- CHHE. *See* Nepal
- Chhetri caste in Nepal, 87–88, 296, 298,
307–308
- Chidambaram, Palaniappan, 256
- Chittagong Hill Tracts Peace Accord (1997),
275–277
- Choudhry, Sujit, 6–7
- Chowdhury, G. W., 131–132
- Chowdhury, Abdul Matin Khan, 205–206
- Chowdhury, Abu Sayeed, 196
- Chowdhury, M. Jashim Ali, 10, 11–12
- Christians in Nepal, 93, 99, 105
- Cicero, 162
- Combined Opposition Party (Bangladesh),
207–208
- Comparative constitutional law
overview, 3–4
neglect of South Asia, 3–4, 18–19
- Sri Lanka, constitutional reform in,
321–323
study of in South Asia, 18–20
- Congress Party. *See* India
- Constitutional design, 15–17
- Constitutional law
centrality of in unstable constitutionalism,
6
in Israel, 19
in South Africa, 19
study of in South Asia, 18–20
in United States, 19
- Constitutional reform in Sri Lanka
overview, 13–14, 320–321, 353–354
comparative constitutional law and,
321–323
theoretical approach, lack of, 321–323,
324
- Courage, Craft, and Contentions* (Baxi), 27
- Crafting State-Nations* (Stepan, Linz, and
Yadav), 359
- Croce, Benedetto, 348
- Cultural Studies, articulation and, 45
- Czech Republic
Basic-structure doctrine in, 283
Constitutional Court, 283
- Dalits in Nepal. *See* Nepal
- Delhi–Dhaka Treaty (1974), 269
- Democracy and Constitutionalism in India*
(Krishnaswamy), 23
- Democratic positioning in India. *See* India
- Deng Xiaoping, 245
- Descartes, René, 57
- de Silva, Colvin R., 294
- Dharmashāstra* (Hindu religious texts), 64,
93–94
- Dhavan, Rajeev, 22, 23, 37
- Dhimals in Nepal, 106
- Discrimination in caste system, 30
- Dixon, Rosalind, 286
- Dravidians, 378
- Dworkin, Ronald, 236, 265
- Edrisinha, Rohan, 12–13, 346–347, 350–351
- Egypt, influence on Nepal, 72
- Elections in Bangladesh. *See* Bangladesh
- Ershad, H. M., 199, 201, 206–208, 262
- Ethnic federalism
in Nepal, 310–311
in Pakistan, 139–140

- Ethnocracy
 Sri Lanka as, 327–328, 330–331, 337–338
 Westphalian state model versus, 337–338
- European Union
 judicialization of politics in, 265–266
 sovereignty in, 342
- Fazlurrahman, 149–150
- Federalism
 asymmetrical federalism, 366–369
 ethnic federalism
 in Nepal, 310–311
 in Pakistan, 139–140
 in India (See *India*)
 in Nepal (See *Nepal*)
 non-territorial federalism, 362
 in Pakistan
 autonomy and, 139–140
 Eighteenth Amendment and, 146–147
 historical background, 140–144
 partisan federalism
 in India (See *India*)
 in United States, India compared, 369–371
 rule of law and, 13
 in Sri Lanka (See *Sri Lanka*)
 United States, India compared, 356, 361
- Federal Party (Sri Lanka), 293, 299–301, 336
- Forms of unstable constitutionalism, 6, 7–10
- Fredman, Sandra, 19
- Gajendragadkar, Pralhad Balacharya, 235
- Galanter, Marc, 30, 31, 34
- Gallery Baithak, 46, 69–70, 73, 80
- Gandhi, Indira, 24, 25–29, 246–247
- Gandhi, Mohandas, 131
- Geertz, Clifford, 57
- General cultural element of constitutionalism, 99
- Germany
 Constitutional Court, 267, 286
Inter-German Basic Treaty case (1973), 286
- Gilani, Yousef Raza, 131, 138
- Goit, Jaya Krishna, 109–110
- Gorkha Bhasa Prakashan Samiti (Nepal), 95
- Gorkhali kingdom, 61–63
- Gyanendra Shah
 generally, 62
 accession to power, 79
 emergency declaration by, 297
 isolation of, 79
 sovereignty and, 54
- Habermas, Jürgen, 241, 343
- Haqqani, Husain, 181
- Haque, A. B. M. Khairul, 212, 226, 282, 283
- Hasan, K. M., 214, 215
- Hasan, Zoya, 38
- Hasina, Skeikh, 216–217
- Hausing, K. K. S., 368
- Hindus in Nepal. See *Nepal*
- Hirschl, Ran, 160–161, 238, 268
- Hobbes, Thomas, 48–49, 54–55, 57
- Hoque, Ridwanul, 11–12, 223–224, 270
- Horowitz, Donald, 339
- Host-state societal dominance, 342–347
Human Rights Transformed (Fredman), 19
- Identity politics
 in Nepal (See *Nepal*)
 in Pakistan (See *Pakistan*)
- Ijaz, Mansoor, 179–181
- Ilankai Thamil Aaras Katchi (Sri Lanka), 299–300
- India
 overview, 4–5
 admission of new states, 366–367
 affirmative action in See (*within this heading*, reservations in)
 Andhra Pradesh, proposed redrawing of boundaries, 364–365
 Armed Forces (Special Powers) Act (1958), 247
Ashoka Thakur v. India (2008), 34, 37–41
 Assam as substate, 367–368
 asymmetrical federalism, 366–369
 autonomy in
 creation of new states and, 378–379
 Rajya Sabha (Council of States), representation in, 359
 state boundaries, redrawing of, 363, 365
 substates and, 367
 Babri Masjid (mosque), 372–373
Babulal Parate v. Bombay (1960), 364, 365
 Bangladesh compared, 225–226
 Basic-structure doctrine in
 Bangladesh compared, 278
 Congress Party and, 24, 28, 29
 context of, 28
 criticism of, 22–23
 defense of, 24–25
 elements of, 21–22

- Golak Nath v. Punjab* (1967), 21, 22, 246
 historical background, 21
Indira Nehru Gandhi v. Raj Narain
 (1975), 25–29
Kesavananda Bharati v. Kerala (1973), 21,
 22
 property rights and, 21
 scholarly acceptance of, 23–24
 Bharatiya Janata Party, 33, 372–373, 377, 378
 bicameralism in, 360–363
 Bihar, regional emergencies in, 374
B. P. Singhal v. India (2010), 376–377
 bureaucracy in
 reservations and, 31
Telecom case (Subramanian Swamy v. Manmohan Singh and Centre for Public Interest Litigation v. India)
 (2012), 256–257
 caste system
 Brahmins, 29–30
 discrimination in, 30
jatis (subcastes), 29–30
 Kshatriyas, 29–30
 Other Backward Castes, 30–31
 Scheduled Castes and Tribes, 29–30, 31
 Sudras, 29–30
 “Untouchables,” 29–30
 Vaishyas, 29–30
varnas (castes), 29–30
 Central Bureau of Investigation (CBI), 253,
 257–258
 Central Vigilance Commissioner (CVC),
 253
Centre for Public Interest Litigation v. India
 (*Telecom case*) (2012), 251–252, 258
 Chattisgarh, creation of, 378
 Civil Service, 140
Coal case (Manohar Lal Sharma v. Principal Secretary) (2014), 251
 Congress Party
 Basic-structure doctrine and, 24, 28, 29
 creation of new states and, 378
 regional emergencies and, 371–372
 reservations and, 32–34, 37, 38
 Constituent Assembly, 48
 Constitution
 Article 2, 366–367
 Article 3, 365, 378–379
 Article 15, 30
 Article 16, 30, 36
 Article 21, 246–247
 Article 80, 359–360
 Article 84, 360, 361
 Article 145, 361
 Article 156, 376
 Article 249, 361
 Article 332, 15, 366
 Article 356, 23, 369, 371–376
 Article 368, 20–21, 366
 Article 371-D, 378–379
 Article 371-F, 366
 Basic-structure doctrine (*See*
Basic-structure doctrine)
 Fifth Schedule, 367
 Ninth Schedule, 21
 Part III, 21
 Sixth Schedule, 367–369
 39th Amendment, 25–28
 Constitution (36th Amendment) Act (1975),
 366
 corruption cases in, 259
Coal case (Manohar Lal Sharma v. Principal Secretary) (2014), 257–258
 Members of Parliament (MPs), 249–251
Telecom case (Subramanian Swamy v. Manmohan Singh and Centre for Public Interest Litigation v. India)
 (2012), 251–258
 Council of States (Rajya Sabha),
 representation in, 14, 359–363
 “creamy-layer” exclusion, 37–38, 41
 creation of new states, 378–379
 Delhi–Dhaka Treaty (1974), 269
 democratic positioning in, 10–11, 233–234,
 258
 Directive Principles, 246–247
 District Councils, 367–368
 Election Commission, 10, 360
 Emergency (1975), 24, 25, 246–247
 Empowered Group of Ministers (EGoM),
 255–257
 federalism in
 overview, 14–15, 355–358, 379–380
 admission of new states and, 366–367
 asymmetrical federalism, 366–369
 creation of new states and, 378–379
 debate regarding, 356
 Finance Commission and, 358
 governors, removal of, 376–377
 lack of scholarly review of, 357
 non-territorial federalism, 362
 political monopoly and, 355

India (*cont.*)

- Rajya Sabha (Council of States), representation in, 14, 359–363
- regional emergencies and, 371–376
- state boundaries, redrawing of, 363–365
- substates and, 367–369
- Supreme Court and, 356–358
- terrorism and, 355
- United States compared, 356, 361
- Finance Commission, 358
- Finance Minister, 256
- First Backward Classes Commission, 31–32
- Goa, removal of governor, 376
- Golak Nath v. Punjab* (1967), 21, 22, 246
- Gorkhaland Autonomous Hill Councils, 367
- governors, removal of, 376–377
- Gujarat
 - proposed redrawing of boundaries, 364
 - removal of governor, 376
- Himachal Pradesh, regional emergencies in, 372–373
- House of the People (Lok Sabha)
 - generally, 359, 372
 - Speaker of, 25–26
- Indian National Congress, 118, 355
- Indira Nehru Gandhi v. Raj Narain* (1975), 25–29
- Indira Sawhney v. India* (1992), 33, 34–41
- Janata Dal Party, 32–33, 34, 371–372
- jatis* (subcastes), 29–30
- Jharkhand, creation of, 378
- Judicial Appointments Bill (2014), 240, 244–245
- judicial discretion in, 253–254
- judicialization of politics in, Bangladesh compared, 265–266
- judicial review in, 25, 237–238, 240–241, 371–372
- K. Prabhakaran v. P. Jayarajan* (2005), 251
- Karnataka
 - regional emergencies in, 372–373
 - reservations in, 32
- Kesavananda Bharati v. Kerala* (1973), 21, 22, 138, 197–198, 246, 252, 278
- Kuldip Nayar v. India* (2006), 360–363
- Lily Thomas v. India* (2013), 250
- Lok Sabha (House of the People)
 - generally, 359, 372
 - Speaker of, 25–26
- Madhya Pradesh, regional emergencies in, 372–373

- Maharashtra
 - proposed redrawing of boundaries, 364
 - Shiv Sena in, 378
- Mandal Commission, 32–33, 34, 36–37
- Manohar Lal Sharma v. Principal Secretary* (Coal case) (2014), 251, 257–258
- Mara Autonomous District Council (MADC), 367–368
- Meghalaya
 - regional emergencies in, 372–373
 - as substate, 367–368
- Members of Parliament (MPs), 250–251
- Mizoram as substate, 367–368
- M. R. Balaji v. Mysore* (1962), 39
- Nagaland, regional emergencies in, 372–373
- National Green Tribunal, 259–260
- National Tax Tribunal Act (2005), 259
- Nepal, involvement in, 68
- non-territorial federalism in, 362
- Object and Reasons of Constitution Amendment Act (1988), 368
- Olga Tellis v. Bombay Municipal Corporation* (1985), 248–249
- Other Backward Castes
 - overview, 30–31
 - reservations, 31–41
- P. A. Inamdar v. Maharashtra* (2005), 243–251
- Pakistan compared, 11
- partisan federalism in
 - overview, 14–15, 358, 369–371
 - creation of new states and, 378–379
 - governors, removal of, 376–377
 - regional emergencies and, 371–376
 - United States compared, 369–371
- partition of Pakistan from, 126
- Pradeep Chaudhary v. India* (2009), 363–364
- Prime Minister
 - election of, 25–26
 - Telecom case* (*Subramanian Swamy v. Manmohan Singh and Centre for Public Interest Litigation v. India*) (2012), 255–257
- property rights in, 246
- public interest litigation (PIL) in, 246–247
- Pu Myllai Hlychho v. Mizoram* (2005), 367–369
- quotas in *See* (*within this heading*, reservations in)
- Rajasthan, regional emergencies in, 372–373
- Rajasthan v. India* (1977), 371–372

- Rajya Sabha (Council of States),
 representation in, 14, 359–363
- Rameshwar Prasad v. India* (2006), 374–376
- R. C. Poudyal v. India* (1994), 15, 366–367
- Regional Councils, 367–368
- regional emergencies in, 371–376
- Representation of People Act (1951), 360
- Representation of People (Amendment) Act (2003), 360, 362
- reservations in
 overview, 15, 29–30, 41
Ashoka Thakur v. India (2008), 34, 37–41
 Bharatiya Janata Party and, 33
 bureaucracy and, 31
 case law on, 34
 Congress Party and, 32–34, 37, 38
 “creamy-layer” exclusion, 37–38, 41
 First Backward Classes Commission, 31–32
Indira Sawhney v. India (1992), 33, 34–41
 Janata Dal Party and, 32–33, 34
 in Karnataka, 32
 literature on, 34
 Malaysia compared, 41
 Mandal Commission, 32–33, 34, 36–37
M. R. Balaji v. Mysore (1962), 39
 Other Backward Castes, 31–41
 Scheduled Castes and Tribes, 31
 Second Backward Classes Commission, 32–33, 34, 36–37
 Sri Lanka compared, 41
 states, shift to, 32
 in Tamil Nadu, 32, 244
 total proportions in, 40
- rule of law in, 10–11, 14–15, 233–234, 236–251, 254
- Scheduled Castes and Tribes, 29–30, 31
- Second Backward Classes Commission, 32–33, 34, 36–37
- Sikkim, admission of, 366–367
- similarities with other South Asian countries, 5
- S. R. Bommai v. India* (1994), 372–374
- state boundaries, redrawing of, 363–365
- state-nation model versus nation-state model
 overview, 355, 358, 359
 admission of new states and, 366–367
 asymmetrical federalism, 366–369
 Rajya Sabha (Council of States),
 representation in, 359–363
 state boundaries, redrawing of, 363–365
 substates and, 367–369
 “state-nation” structure, 14
 state versus constitution in, 129–131
- Subramanian Swamy v. Manmohan Singh* (*Telecom case*) (2012), 251–252, 258
- substates, 367–369
- Supreme Court
 overview, 10–11, 233–234, 258–260
 accountability, as instrument of, 249–258, 259
 class and, 238–240
 as conflict manager, 233–234
 constitution bench, 361
 corruption cases, 249–258, 259
 democratic positioning by, 10–11, 233–234, 258
 economic inequality and, 238–240
 during Emergency (1975), 246–247
 evolution of, 245–249
 federalism and, 356–358
 institutional theories, rise of, 237–241
 interference with, 246
 judicial discretion of, 253–254
 judicial review in, 237–238, 240–241
 majoritarian threats to democracy and, 246
 nonmonolithic nature of, 247–248
 normative approach versus empirical reality, 233, 258–259
 normative theory, demise of, 234–237
 “promiscuous” role of, 233
 public legitimacy of, 242–245
 public reason in, 241–242
 rule of law in, 251
 sociological theories regarding, 238
 “strong courts, weak rights,” 248–249
- Tamil Nadu
 Dravidians in, 378
 reservations in, 32, 244
- Telangana
 creation of, 364–365, 378–379
 Gentlemen’s Agreement (1956), 378–379
 Justice B. N. Srikrishna Committee Report, 378–379
 Six Point Formula, 378–379
 as substate, 367
- Telangana Rashtriya Samiti, 378–379
- Telecom case* (*Subramanian Swamy v. Manmohan Singh and Centre for Public Interest Litigation v. India*) (2012), 251–252, 258

- India (*cont.*)
 Telecom Minister, 255–257
 Telecom Regulatory Authority of India (TRAI), 256–257
 Tripura as substate, 367–368
 Union Territory of Bombay, proposed, 364
 “Untouchables,” 29–30
 Uttaranchal, creation of, 363–364, 378
 Uttar Pradesh
 proposed redrawing of boundaries, 363–364
 removal of governor, 376
 Uttar Pradesh Reorganization Act (2000), 363–364
varnas (castes), 29–30
 Vidarbha as substate, 367
Vineet Narain v. India (1998), 249, 252, 253
zamindari system, 21
- Indigenous Nationalities in Nepal. *See* Nepal
- Indonesia, influence on Nepal, 72
- Indra Jatra* (Nepali festival), 61–62
- International Commission of Jurists, 178–179
- International Convention Centre (Nepal), 46, 80–81
- International Labor Organization (ILO), Convention 169, 308
- Iran
 Guardian Council, 149
 Pakistan compared, 149
- Ishaq Khan, Ghulam, 134
- Islam. *See* Muslims
- Islam, Syed Nazrul, 195–196
- Israel, constitutional law in, 19
- Iyer, V. R. Krishna, 239
- Jacobsohn, Gary, 19
- Jaffrelot, Christopher, 31, 32
- Jamaat-e-Islami Bangladesh, 208, 210–211, 223, 275–277
- Janata Dal Party (India), 32–33, 34, 371–372
- Janatha Vimukthi Peramuna (Sri Lanka), 305
- Jang Bahadur Rana
 overview, 63–64
 consolidation of power under, 67
 Hinduism and, 103
 Muluki Ain (Country Code) and, 50, 91, 93–94, 101
- Jathika Hela Urumaya (Sri Lanka), 305
- Jatis* (subcastes) in India, 29–30
- Jatyta Party (Bangladesh), 206–208, 210–211, 275, 281
- Jayal, Niraja, 30, 33–34
- Jayewardene, J. R., 294–295, 301–302
- Jay Prakash Malla, 61–62
- Jennings, Ivor, 68–69
- Jibrān, Khalil, 184–185
- Jinnah, Muhammad Ali, 131, 149–150
- Joshi, Bhuvan, 62–63
- Judicialization of politics
 in Africa, 265–266
 in Asia, 265–266
 in Bangladesh (*See* Bangladesh)
 defined, 266
 in European Union, 265–266
 in India, Bangladesh compared, 265–266
 in Latin America, 265–266
 in Pakistan (*See* Pakistan)
 in United States, 265–266
- Judicial review
 abstract judicial review, 269
 in Bangladesh
 overview, 287
 basic-structure doctrine and, 283
 Constitution (1972) and, 197, 198, 264
 of Parliament, 271
 Supreme Court and, 264
 criticism of, 237–238, 240–241
 in India, 25, 237–238, 240–241, 371–372
 liberalism and, 242
 in Nepal, 77
 in Pakistan, 137, 149, 158, 185–187
 public reason and, 241–242
 in Sri Lanka, 295
 in United States, 78
- Junejo, Muhammad Khan, 137
- Kaikaus, Badi-uz-Zaman, 153
- Kalhan, Anil, 173, 266
- Kearney, Hugh, 351
- Keating, Michael, 341
- Kelsen, Hans, 136–137, 162
- Khambus in Nepal, 108–109
- Khamenei, Ali, 149
- Khan, Sultan Hossain, 215, 220
- Khanna, H. R., 26
- Khas-Nepali language, 95, 96, 98
- Khosla, Madhav, 237–240, 248
- Kiratis in Nepal, 105, 106
- Kirat Workers Party (Nepal), 109
- Kishore Narsingh Rana, 66
- Koirala, Bishweshwar Prasad, 69
- Krishnaswamy, Sudhir, 14–15, 23, 26

- Kshatriya caste
 in India, 29–30
 in Nepal, 62–63, 87–88, 93–94
- Kumaratunga, Chandrika, 291, 302–304, 305–306
- Kumari Devi* (Nepali deity), 61–62
- Kumar Narsingh Rana, 66
- Kynlicka, Will, 345
- Lapidoth, Ruth, 348
- Late sovereignty, 341–342
- Latin America, judicialization of politics in, 265–266
- La Traviata* (Verdi), 57–58
- Lawoti, Mahendra, 8, 12–13
- Lawyers' Movement. *See* Pakistan
- Lee, Daniel, 54–55
- Leghari, Farooq, 134
- Liberalism
 autonomy and, 352
 constitutionalist theory, 321–323
 federal-state model, 331–333
 host-state societal dominance and, 342–347
 judicial review and, 242
 monistic demos thesis versus, 342–347
 plurinational state model and, 324, 333, 335
 rule of law and, 332
- Liberation Tigers of Tamil Eelam (LTTE).
See Sri Lanka
- Liechty, Mark, 64–65
- Lijphart, Arend, 339
- Limbu in Nepal, 93, 107–110
- Linz, Juan J., 359, 363, 365
- Loughlin, Martin, 47–52, 54–55
- LTTE. *See* Sri Lanka
- Lutz, Donald S., 99
- Madhesi Liberation Front (Nepal), 108
- Madhesis in Nepal. *See* Nepal
- Magars in Nepal, 313–314
- Mahajana Eksath Peramuna (Sri Lanka), 336–337
- Mahendra Shah
 architecture commissioned by, 73–76
 autocratic rule of, 103, 107–108
 CHHE and, 94
 Constitution (1959) and, 102
 Constitution (1962) and, 73–74
 “coup” by, 72
 death of, 76
 democratization under, 68–69
- Maitra, Pandit Laxmi Kanta, 356
- Malagodi, Mara, 7–8, 12–13
- Malaysia, reservations in, India compared, 41
- Mandela, Nelson, 315
- Manowaruddin, Kazi A. T., 210–211
- Maoists in Nepal. *See* Nepal
- Marxism
 plurinational state model and, 335
 in Sri Lanka, 294
- Mathew, K. K., 26
- McGarry, John, 339
- Mehsud, Hakeemullah, 154–155
- Mehta, Pratap Bhanu, 10–11, 14–15, 24
- Methodology of study, 6–7
- Miah, Wahab, 219
- Military
 in Bangladesh
 caretaker government model and, 211–212
 elections and, 204–208, 262
 in Pakistan
 overview, 8, 124, 126–127
 judicialization of politics and, 162–164, 176, 187–188
 transformative preservation, 173–174
 unstable constitutionalism and, 7–10
- Mirza, Iskandar, 140–141
- Modern sovereignty, 47–48
- Mohammad, Fazlullah, 154–155
- Mohammad, Ghulam, 132
- Mohammad, Sufi, 154–155
- Monistic demos thesis, 339, 342–347
- Morris, John, 65
- Mountbatten, Louis, 131
- Movement for Restoration of Democracy (Pakistan), 143–144
- Mujiburrehman, Sheikh, 142
- Munir, Muhammad, 269
- Musharraf, Pervez
 generally, 128
 arrest of, 187–188
 Chaudhry and, 9–10, 168, 170, 171, 175
 Constitution (1973) and, 133, 134–135, 139
 coup by, 137
 federalism and, 143–144
 judicialization of politics and, 161, 164, 165–168
 ouster of, 174
- Muslim League (Pakistan), 143–144, 147, 150–151

- Muslims
 in Nepal, 87–88, 93, 99, 101, 105
 in Pakistan (See Pakistan)
 in Sri Lanka, 298–299, 304, 305, 313, 316
- Muttahida Majlis Amal (Pakistan), 143–144
- Muttahida Qaumi Movement (Pakistan), 146, 156
- Narayanhiiti Palace (Nepal), 46, 60, 66, 71–72, 73–76, 80–81, 83
- Nasim, Abu Saleh Muhammad, 213–214
- National Awami Party (Pakistan), 140–141, 156
- National Party (Pakistan), 145
- Negara: The Theatre State in Nineteenth-Century Bali* (Geertz), 57
- Nehru, Jawaharlal, 30, 118, 131
- Nepal
 overview, 4–5
 Anglo–Nepali War (1814–1816), 49–50, 61, 93–94
 architecture in
 overview, 45–46, 47, 56–61, 81–83
 Basantapur Palace, 46, 61–62, 66
 first democratic period, 68–72
 Gallery Baithak, 46, 69–70, 73, 80
 International Convention Centre, 46, 80–81
 Narayanhiiti Palace, 46, 60, 66, 71–72, 73–76, 80–81, 83
 Panchayat regime, 72–76
 Parliament Building, 46, 69, 78–79
 postconflict period, 79–81
 Rana period, 63–67
 Rashtra Sabha Bhawan, 46
 second democratic period, 76–79
 Shah period, 61–63
 Singha Darbar compound, 46, 66–67, 69–70, 71–72, 79
 Supreme Court Building, 46, 71–72, 75–76
 armed groups in, 109
 autonomy in, 86–92, 110–113, 117–119, 315
 Bahun caste in, 87–88, 101, 112, 296, 298, 307–308
bandhs (protests), 108–109
 Basantapur Palace, 46, 61–62, 66
 Buddhists in, 93, 99, 105, 313–314
 caste hill Hindu elite (CHHE)
 overview, 87–88
 multination model and, 99, 110–113
 nation-state model and, 90, 92–93, 96–97, 100, 103–104
 Chhetri caste in, 87–88, 101, 296, 298, 307–308
 Chhintang massacre, 108
 Christians in, 93, 99, 105
 Committee on Restructuring of the State and the Distribution of State Powers (CRSDSP), 308–310
 Comprehensive Peace Agreement (2006)
 overview, 291–292
 federalism and, 297–298, 307–308, 312
 Maoists and, 291–292, 297
 Constituent Assembly
 demands for autonomy and, 88
 dissolution of, 54, 311–312
 elections to, 80–81, 86
 failure to adopt final constitution, 307, 308
 Interim Constitution (2007) and, 298
 Mahendra and, 68–69
 Maoists and, 56
 multination model and, 98, 110–113
 nation-state model and, 103–104
 Constitution (1948), 48, 67, 100, 101
 Constitution (1959)
 adoption of, 68–69
 Khas–Nepali language and, 95–96
 marginalization of legislature under, 69–71
 nation-state model and, 100, 102
 submission of bills under, 71
 suspension of, 72
 Constitution (1962)
 adoption of, 72–74
 Hindus and, 73, 95
 Khas–Nepali language and, 96
 nation-state model and, 100, 102
 Constitution (1990)
 overview, 50–51
 authority of monarch under, 53
 demands for autonomy and, 88
 federalism and, 296–297
 Khas–Nepali language and, 96
 Maoists and, 56
 multination model and, 97–98
 nation-state model and, 102–103
 sovereignty under, 77
 Constitutional Council, 296
 Country Code (Muluki Ain), 64, 91, 93–94, 101–102

- Dalits in
 generally, 296
 CHHE and, 104
 Comprehensive Peace Agreement (2006)
 and, 298
 demographics of, 87–88
 federalism and, 297, 309–310
 identity politics and, 118
 Maoists and, 113
 marginalization of, 101, 105
 mobilization and resistance by, 107–110
 multination model and, 107–110
 during Panchayat regime, 103
 protests by, 111
 representation of, 98, 99–100
- Dhimals in, 106
- Dibyā Upadesh* (Divine Counsel), 91, 93
- Election Commission, 69
- elections in, 311–312
- ethnic diversity in, 87–88
- ethnic federalism in, 310–311
- federalism in
 overview, 12–13, 291–292, 317–319
 autonomy and, 117–119
 Comprehensive Peace Agreement (2006)
 and, 297–298, 307–308, 312
 constitutionalism, relationship with,
 315–316
 Constitution (1990) and, 296–297
 Dalits and, 297, 309–310
 democracy, relationship with, 315–316
 discrimination as factor in demand for,
 298
 ethnic federalism, 310–311
 Hindus and, 296–297
 historical background, 296–298
 identity politics and, 117–119, 312–314
 ILO Convention 169 and, 308
 Interim Constitution (2007) and, 291–292,
 298, 307, 311–312
 Madhesis and, 291–292, 297, 317
 majoritarianism as factor in demand for,
 298
 Maoists and, 315–316
 “minorities within minorities” critique of,
 298–299, 316
 naming of provinces and, 310
 polarization and, 314
 self-rule versus shared rule, 315
 Sri Lanka compared, 298–299, 310–311
 third tier of government and, 316–317
 unitary definition of ethnicity and,
 313–314
 violence and, 292
- “First Past the Post” elections, 104
- Gallery Baithak, 46, 69–70, 73, 80
- Goodwill Council, 108
- Gorkha Bhasa Prakashan Samiti, 95
- Gorkhali kingdom, 61–63
- Government of Nepal Act (1948), 101–102
- High Level State Restructuring
 Commission (HLSRC), 309–310
- Hindus in
 Constitution (1962) and, 73, 95
 Constitution (1990) and, 77
 federalism and, 296–297
 freedom of religion limited to, 69
 historical background, 92–93
 Interim Constitution (1951) and, 68
 nation-state model and, 93–95
 unitary definition of ethnicity and,
 313–314
- identity politics in
 overview, 8, 116–119
 autonomy and, 117–119
 CHHE and, 116–117
 Constituent Assembly and, 117–119
 Constitution (1990) and, 117–119
 Dalits and, 118
 demands for autonomy and, 88
 ethnic diversity and, 87–88
 expectations of constitutionalism, 88
 federalism and, 117–119, 312–314
 future prospects, 116–119
 historical background, 91, 117
 Indigenous Nationalities and, 118–119
 instability of constitutionalism, 88–89,
 90–91
 Interim Constitution (2007) and,
 117–119
 Madhesis and, 118–119
 ILO Convention 169 and, 308
- Indian involvement in, 68
- Indigenous Nationalities in
 autonomy, demand for, 111–112
 demographics of, 87–88
 identity politics and, 118–119
 Maoists and, 113
 marginalization of, 101, 105
 organization and mobilization of,
 107–108
 representation of, 99–100

Nepal (*cont.*)

Interim Constitution (1951), 68, 71–72,
101–102

Interim Constitution (2007), 8, 50–51, 80–81
demands for autonomy and, 88
federalism and, 291–292, 298, 307, 311–312
identity politics and, 117–119
multination model and, 90, 98, 110–113,
114

International Convention Centre, 46, 80–81

Jana Andolan II (People's Movement), 297
janajathis (ethnic groups), 296, 297, 298

Jan Yuddah (People's War), 56

judicial review in, 77

Khambus in, 108–109

Kipat system, 97, 106, 107

Kiratis in, 105, 106

Kirat Workers Party, 109

Limbus in, 93, 107–110

Madhesi Liberation Front, 108

Madhesis in

generally, 93, 106

CHHE and, 104

Comprehensive Peace Agreement (2006)
and, 298

demographics of, 87–88

federalism and, 291–292, 297, 317

identity politics and, 118–119

Maoists and, 113

marginalization of, 101, 105

mobilization and resistance by, 107–110

multination model and, 107–112

during Panchayat regime, 103

representation of, 98–100

Magars in, 313–314

Maha Sabha (Senate), 69

Maoists in

Comprehensive Peace Agreement (2006)
and, 291–292, 297

Constituent Assembly and, 86

Dalits and, 113

elections and, 311–312

federalism and, 315–316

Indigenous Nationalities and, 113

Madhesis and, 113

multination model and, 98, 99–100,
110–111, 113–114

People's War and, 56, 78, 297

postconflict period, 79–81

rebellion by, 113–114

minority groups in

gains in recognition, 99

marginalization of, 105–106

multination model and, 105–106

multination model, 89–90

overview, 90

CHHE and, 99, 110–113

Constituent Assembly and, 98, 110–113

Constitution (1990) and, 97–98

Dalits and, 107–110

democratization as factor in, 114–116

increased representation as factor in,
110–113

Interim Constitution (2007) and, 90, 98,
110–113, 114

Khas-Nepali language and, 98

Madhesis and, 107–112

Maoists in and, 98, 99–100, 110–111, 113–114

minority groups, marginalization of as
factor in, 105–106

mobilization and resistance as factor in,
106–113

Panchayat regime and, 108

Muluki Ain (Country Code), 64, 91, 93–94,
101–102

Muslims in, 87–88, 93, 99, 101, 105

Narayanhihi Palace, 46, 60, 66, 71–72,
73–76, 80–81, 83

National Education Planning Commission,
96

nation-state model, 89

autocratic regime as factor in, 103–104

caste system and, 94

CHHE and, 90, 92–93, 96–97, 100,
103–104

Constituent Assembly and, 103–104

Constitution (1948) and, 100, 101

Constitution (1959) and, 100, 102

Constitution (1962) and, 100, 102

Constitution (1990) and, 102–103

establishment of, 92–93

Hindus and, 93–95

historical background, 100–103

Interim Constitution (1951) and, 101–102

Khas-Nepali language and, 95–96

Panchayat regime and, 92–93, 94, 96–97,
103

under-representation as factor in, 100–103

Nepali Congress Party, 76–77, 311–312

Nepal Tarai Congress, 109

Newars in, 108–109, 313–314

Pakistan, influence of, 72, 75

- Pallo Kirat Limbuwan National Forum, 109–110
- Panchayat Constitution (1962)
 adoption of, 72–74
 Hindus and, 73, 95
 Khas-Nepali language and, 96
 nation-state model and, 100, 102
- Parliament Building, 46, 69, 78–79
- Pashupatinath Temple, 107–108
- People's Movement (Jana Andolan II), 297
- People's War (Jan Yuddha), 56, 78, 297
- Piskar massacre, 108
- political parties in, 109
- popular sovereignty in, 52–53
- Pratinidhi Sabha (House of Representatives), 69, 78–80
 quotas in, 98
 Rais in, 107, 108–109
- Rana Constitution (1948), 48, 67, 100, 101
- Rashtra Sabha Bhawan, 46
- Rashtriya Panchayat, 72–73
- reservations in, 98
- Royal Massacre, 79
- Sanyasi caste in, 87–88
- secessionist movements in, 109–110
- Senate (Maha Sabha), 69
- similarities with other South Asian countries, 5
- Singha Darbar compound, 46, 66–67, 69–70, 71–72, 79
- sovereignty in
 overview, 7–8, 45–47
 articulation and, 45
 colonization, lack of, 49–50
 constituent power and, 51–52, 54–56
 constituted power and, 51–52
 under Constitution (1990), 77
 constitutional identity and, 51–52
 corporatization and, 50
 exclusion of minorities and, 82–83
 failure of, 46
 form and operation of government and, 53–54
 historical institutionalism and, 45–46, 51–52
 indirect sovereignty, 53
 institutionalization and, 50
 internal differentiation and, 50
 monarchy versus prime minister, 71–72, 82
 monolithic version of, 47
 national identity and, 73
 Parbatiya caste, 47
 Parliament, relegation to inferior position, 46–47
 popular sovereignty, 52–53
 secularization, lack of, 50–51
 selective exclusion and, 64–65
- State Restructuring Commission, 112
- Supreme Court, 78
- Supreme Court Building, 46, 71–72, 75–76
- Tamangs in, 93, 107–109
- Tarai Brahmins in, 101
- Tarai Congress of the Madhesi, 107–108
- Tarai Dalits in, 87–88
- Tarai People's Liberation Front, 109–110
- Thakuri caste in, 87–88, 93–94, 100–101
- Tharus in, 106, 108–109
- Treaty of Sagauli (1816), 61, 93–94
- United Left Front, 76–77
- United Marxist Leninist Party (UML), 311–312
 violence in, 108
- Nepali Congress Party, 76–77, 311–312
- Newar-Malla Kings, 61–62
- Newars in Nepal, 108–109, 313–314
- Newberg, Paula, 135
- Non-territorial federalism, 362
- Norman, Wayne, 344–345
- Norway, mediation of Sri Lankan civil war, 291, 303–304
- O'Leary, Brendan, 339
- Oslo Statement (2002), 304–305
- Other Backward Castes in India
 overview, 30–31
 reservations, 31–41
- Padma Shamsher Rana, 67, 101
- Pakhtun-khwa Milli Awami Party (Pakistan), 145
- Pakistan
 overview, 4–5, 156–158
 Advisory Council (Majlis-e-Shoora), 134
 Advisory Council of Islamic Ideology, 151–152
Al-jihad Trust Case (1996), 130
 All India Muslim League, 141–142
Asghar Khan v. Mirza Aslam Beg (2012), 131, 187–188
Asma Jilani v. Punjab (1972), 136–137

- Pakistan (*cont.*)
- autonomy in
 - Eighteenth Amendment and, 145–146
 - federalism and, 139–140
 - provincial autonomy, 125, 139–144
 - Awami League, 142, 150–151
 - Balochistan
 - devolution and, 127
 - Eighteenth Amendment and, 134–135, 145–146
 - elections in, 145
 - federalism and, 142–144
 - One-Unit and, 140
 - revenues to, 143
 - Balochistan National Party (BNP), 145
 - Bar Council, 170
 - Basic Democrats, 132–133
 - Basic Principles Committee Report (1952), 131–132
 - Begum Nusrat Bhutto v. Chief of Army Staff* (1977), 137
 - Bengalis in, 140
 - bicameralism in, 142–143, 146
 - Blasphemy Laws, 125, 151–152
 - bureaucracy in
 - overview, 8, 124
 - constitutionalism and, 135
 - under Eighteenth Amendment, 144
 - historical background, 126–127
 - parliamentarianism and, 128–131
 - Central Superior Services, 140
 - Charter of Democracy (2006), 172
 - civil war in, 142
 - Constituent Assembly, 129, 131–132, 138–139
 - Constitution (1956), 132, 139, 150–151
 - Constitution (1962), 126–127, 128, 132–133, 139, 150–151
 - Constitution (1973)
 - overview, 133
 - adoption of, 126–127
 - centralization of power under, 127
 - federalism and, 142–143, 146–147
 - Muslims and, 150–153
 - constitutional law, relationship with
 - unstable constitutionality, 125–126
 - Council of Common Interests (CCI), 143
 - Council of Ministers, 132
 - dependent variable, constitutionalism as, 126
 - Devolution Plan (2001), 145
 - Eighteenth Amendment, 144–147
 - overview, 8–9, 125, 126–127, 130–131
 - autonomy and, 145–146
 - Balochistan and, 134–135, 145–146
 - bureaucracy under, 144
 - federalism and, 146–147
 - judicialization of politics and, 185–186
 - National Assembly and, 144
 - parliamentary sovereignty in and, 144
 - President and, 144
 - Prime Minister and, 144
 - Eighth Amendment, 126–127, 133–135, 154, 156
 - Election Commission, 145
 - elections in
 - Balochistan, 145
 - Khyber Pakhtunkhwa, 156
 - National Assembly, 139
 - Punjab, 145, 156
 - Sindh, 145
 - Emergency Powers Ordinance No. 9, 132, 135–136
 - Enforcement of Sharia Act (1988), 154
 - Enforcement of Sharia Act (1991), 153
 - ethnic federalism in, 139–140
 - Evidence Act (1984), 151–152
 - Family Ordinance (1961), 151–152, 154
 - federalism in
 - autonomy and, 139–140
 - Balochistan and, 142–144
 - Constitution (1973) and, 142–143, 146–147
 - Eighteenth Amendment and, 146–147
 - historical background, 140–144
 - Khyber Pakhtunkhwa and, 143–144
 - Punjab and, 142–144
 - Sindh and, 142–144
 - Federally Administered Tribal Areas (FATA), 154–155
 - Federal Sharia Court (FCS), 153, 156, 157
 - Fifteenth Amendment, 152–153
 - First Amendment, 152–153
 - Governor General, authority of, 131–132, 135–136
 - Hudood Ordinances (1979), 151–152
 - identity politics in, 8–9, 125
 - Independence of India Act (1947), 126, 131–132, 135–136
 - independent variable, constitutionalism as, 126
 - India Act (1935), 126, 132, 135–136
 - India compared, 11
 - Iran compared, 149
 - Islamic Research Institute, 151–152

- Judicial Commission, 185–187
- judicialization of politics in
 overview, 9–10, 159–161
 Bangladesh compared, 265–266
 characteristics of, 173–189
 Eighteenth Amendment and, 185–186
 future prospects, 189–191
 government accountability and, 174–176
 historical background, 162–164
 judicial activism and, 166–167, 185,
 189–190
 judicial appointments and, 185–187
 judicial independence and, 173–174
 Lawyers' Movement and, 182
 “Memogate” and, 179–181
 military and, 162–164, 176, 187–188
 National Reconciliation Ordinance
 (NRO) and, 174–176
 public interest litigation (PIL) and,
 176–178, 179, 189–190
suo motu powers and, 176–179, 189–190
 judicial review in, 137, 149, 158, 185–187
- Khyber Pakhtunkhwa
 Eighteenth Amendment and, 134–135,
 145–146
 elections in, 156
 federalism and, 143–144
 One-Unit and, 140
- Lahore High Court Bar Association, 190
- Lahore Resolution (1940), 127, 141–142,
 143–144, 146–147
- Law Continuation in Force Order, 136
- Lawyers' Movement, 169–173
 generally, 9–10
 overview, 161
 effect on legal profession, 174
 judicialization of politics and, 182
 in Punjab, 171
- Majlis-e-Shoora (Advisory Council), 134
- Malakand, Muslims in, 154–155
- Members of National Assembly (MNAs), 153
- Members of Provincial Assemblies (MPAs),
 142–143, 153
- “Memogate,” 179–181
- military in
 overview, 8, 124, 126–127
 judicialization of politics and, 162–164,
 176, 187–188
 transformative preservation, 173–174
- Movement for Restoration of Democracy
 (MRD), 143–144
- multiple political power centers in, 127–128
- Muslim League, 143–144, 147, 150–151
- Muslims in
 overview, 9, 125
 colonial legacy and, 147–148
 constitutionalism and, 147–148
 Constitution (1956) and, 150–151
 Constitution (1962) and, 150–151
 Constitution (1973) and, 150–153
 democracy versus constitutionalism, 149
 dual sovereignty, 149
 Islamic law, constitutionalization of,
 148–153
 Malakand, 154–155
 “repugnancy clause,” 150–151, 154
 Sharia judicial system, 153–156
- Muttahida Majlis Amal (MMA), 143–144
- Muttahida Qaumi Movement (MQM), 146,
 156
- National Assembly
 generally, 138–139
 Constitution (1973) and, 142–143
 dissolution of, 137
 Eighteenth Amendment and, 144,
 146–147
 Eighth Amendment and, 134–135
 elections to, 139
- National Awami Party (ANP), 140–141, 156
- National Finance Commission (NFC), 143
- National Party (NP), 145
- National Reconciliation Ordinance (NRO),
 174–176
- Nepal, influence on, 72, 75
- Nizam-i-Shariat Regulation (1994), 154–155
- nonparliamentary forces versus
 parliamentary forces, 127–128, 156–158
- Objectives Resolution (1949), 125, 147, 148,
 149–150, 152–153
- One-Unit, 140–141, 142–143
- Pakhtun-khwa Milli Awami Party (PKMAP),
 145
- Pakistan Muslim League (PML-N), 134–135,
 145, 146, 156
- Pakistan People's Party (PPP), 134–135, 145,
 146, 150–151, 156, 174
- Pakistan Tehreek-e-Insaf (PTI), 156
- parliamentarianism in
 bureaucracy and, 128–131
 constitutionalism and, 128–129
 political landscape for, 129–131
- Parliamentary Committee, 185–187

- Pakistan (*cont.*)
- Parliamentary Committee for Constitutional Reform (PCCR), 143–144, 145
 - parliamentary sovereignty in
 - by case law, 135–139
 - Eighteenth Amendment and, 144
 - by legislation, 131–135
 - partition from India, 126
 - partition of Bangladesh from, 192–193
 - politics, relationship with unstable constitutionality, 125–126
 - President, authority of, 132–133, 144
 - Prime Minister, authority of, 133, 144
 - Proclamation of Emergency, 165
 - proportional representation in, 142–143
 - provincial autonomy in, 125, 139–144
 - Provincially Administered Tribal Areas (PATA), 154–155
 - Provisional Constitutional Orders (PCOs), 165, 168
 - public interest litigation (PIL) in, 176–178, 179, 189–190
 - Punjab
 - Eighteenth Amendment and, 145–147
 - elections in, 145, 156
 - federalism and, 142–144
 - Lawyers' Movement in, 171
 - revenues to, 143
 - Sikhs in, 378
 - Punjab Preemption Act (1913), 154
 - Qisas and Diyat Ordinance (1990), 151–152
 - “repugnancy clause,” 150–151, 154
 - Restoration of Constitution Order (RCO), 134
 - rule of law in, 136, 169–173
 - Senate, 142–143, 144, 146, 152–153
 - Seventeenth Amendment, 126–127, 133, 134–135
 - Sharia Academy of International Islamic University, 154–155
 - Sharia Act (1990), 152–153, 154
 - Sharia judicial system in, 153–156
 - Sharia Nizam-i-Adl Regulations (1999), 154–155
 - shariatization* in, 9, 125, 153–156
 - similarities with other South Asian countries, 5
 - Sindh
 - devolution and, 127
 - Eighteenth Amendment and, 134–135, 145–146
 - elections in, 145
 - federalism and, 142–144
 - One-Unit and, 140
 - Sindhi Baloch Pashtun Front (SBPF), 143–144
 - Six Points, 142
 - Special Reference Case* (1955), 137
 - State v. Dosso* (1958), 136, 137
 - state versus constitution in, 129–131
 - Swat, Taliban in, 154–155
 - Taliban in, 154–156
 - taxation, 140
 - Tehrik-e-Nifaz-e-Shariat-e-Mohammadi (TNSM), 154–155
 - Tehrik Taliban Pakistan (TTP), 154–155
 - Thirteenth Amendment, 126–127, 134
 - Turkey compared, 149
 - United Front in East Bengal, 142
 - Zafar Ali Shah v. Musharraf* (2000), 134–135, 137, 165
- Pakistan Muslim League, 134–135, 145, 146, 156
- Pakistan People's Party, 134–135, 145, 146, 150–151, 156, 174
- Pakistan Tehreek-e-Insaf, 156
- Parbatiya caste (Nepal), 47, 56, 64
- Parbayata Chattagram Jana Samhati Samiti (Bangladesh), 275
- Parliament Building (Nepal), 46, 69, 78–79
- Partisan federalism
 - in India (*See* India)
 - United States, India compared, 369–371
- Pasayat, Arijit, 39–40, 375
- Pashupatinath Temple, 107–108
- People's United Front (Sri Lanka), 336–337
- PIL. *See* Public interest litigation (PIL)
- Pildes, Richard, 195
- Plurinational constitutionalism in Sri Lanka, 13–14
- Plurinational state model
 - autonomy in, 352
 - in Canada, 341–342
 - democracy in, 353
 - guiding principles, 351–353
 - liberalism and, 324, 333, 335
 - Marxism and, 335
 - reciprocity in, 352, 353
 - recognition in, 352
 - representation in, 352
 - self-determination in, 352
 - in Spain, 341–342

- in Sri Lanka (*See Sri Lanka*)
- in United Kingdom, 341–342, 351
- Political parties. *See specific country or party*
- Political question doctrine in Bangladesh, 267–268, 271
- Politics
 - centrality of in unstable constitutionalism, 6
 - study of in South Asia, 18–20
- Polk, Benjamin, 73–75
- Ponnambalam, G. G., 292–293
- Popular sovereignty, 52–53, 241
- Posner, Richard A., 265
- Prasad, Anirudh, 357
- Prithvi Bir Bikram Shah, 62, 66
- Prithvi Narayan Shah
 - generally, 63, 69, 77, 106
 - architecture under, 61–63
 - Dibya Upadesh* and, 91, 93, 100–101
 - Hinduism and, 103
- Public interest litigation (PIL)
 - in Bangladesh, 270, 274
 - in India, 246–247
 - in Pakistan, 176–178, 179, 189–190
- Public reason, judicial review and, 241–242
- Quebec as substate, 341–342
- Quotas
 - in India (*See India*)
 - in Nepal, 98
- Rahman, Habibur, 214–215
- Rahman, Latifur, 214, 215, 216
- Rahman, Mahbubur, 213–214
- Rahman, Mujibur, 195–196, 198, 204–205
- Rahman, Ziaur, 198, 204–206
- “Rainbow-nation” concept, 315, 318
- Rais in Nepal, 107, 108–109
- Raja, Andimuthu, 255–257
- Rajapaske, Mahinda, 303, 305–306
- Ran Bahadur Shah, 93
- Rashid, Abdur, 217–218
- Rashtra Sabha Bhawan (Nepal), 46
- Raveendran, R. V., 376–377
- Rawls, John, 343
- Ray, A. N., 26
- Reactions to unstable constitutionalism, 6, 10–17
- Reciprocity in plurinational state model, 352, 353
- Recognition in plurinational state model, 352
- Reddy, B. P. Jeevan, 374
- Regmi, M. C., 50
- Representation in plurinational state model, 352
- Requejo, Ferran, 340, 343
- Reservations. *See also Affirmative action*
 - in India (*See India*)
 - in Nepal, 98
- Responses to unstable constitutionalism, 6, 10–17, 374
- Rimal, Gouri Nath, 71–72
- Rose, Leo, 62–63
- Rouf, Abdur, 215, 220, 221–222
- Rousseau, Jean-Jacques, 54–55
- Rudolph, Lloyd I., 116, 355
- Rudolph, Susanne Hoerber, 355
- Rule of law
 - in Bangladesh, 261–265
 - constitutions and, 88
 - federalism and, 13
 - in India, 10–11, 14–15, 233–234, 236–251, 254
 - liberalism and, 332
 - in Pakistan, 136, 169–173
- Sabharwal, Y. K., 360–362, 375
- Sadek, A. K. M., 220
- Sahai, R. M., 37
- Saini, O. P., 256, 257
- Sampanthan, R., 350
- Sanyasi caste in Nepal, 87–88
- Sattar, Abdus, 206
- Sawant, P. B., 373
- Saxena, Rekha, 367
- Sayeed, M. A., 202–203
- Sayem, A. S. M., 198, 204–205, 221
- Scheduled Castes and Tribes in India, 29–30, 31
- Schmitt, Carl, 49
- Scotland as substate, 341–342, 350
- Secession
 - Nepal, secessionist movements in, 109–110
 - Sri Lanka
 - federalism and, 300–301
 - LTTE and, 295
- Self-determination in plurinational state model, 352
- Senanayake, Dudley S., 293, 336
- Shafuddin, Qazi, 210–211
- Shah, Sajjad Ali, 130
- Shaha, Rishikesh, 72
- Shariatization* in Pakistan, 9

- Sharif, Nawaz, 131, 134, 137, 152–153, 154–155, 172
- Shiv Sena, 378
- Siddique, Osama, 9–10, 11, 130, 138
- Sikhs in Pakistan, 378
- Sikkim, admission to India, 366–367
- Simeon, Richard, 339
- Sindhi Baloch Pashtun Front (Pakistan), 143–144
- Singh, Gajendra Narayan, 108
- Singh, Jwala, 109–110
- Singh, Kuldip, 373
- Singh, Manmohan, 34, 35
- Singh, Ramraja Prasad, 108
- Singha Darbar compound (Nepal), 46, 66–67, 69–70, 71–72, 79
- Sinhalese in Sri Lanka. *See* Sri Lanka
- Sources of unstable constitutionalism, 6, 7–10
- South Africa
 constitutional law in, 19
 “rainbow-nation” concept in, 315
 third tier of government in, 317
- Sovereignty
 Bangladesh, caretaker government model and, 216
 constituent power and, 49
 disaggregation of nation and state, 347–348
 in European Union, 342
 federal-state model and, 331–333
 government and, 48–49
 late sovereignty, 341–342
 legal authority and, 49
 modern sovereignty, 47–48
 in Nepal (*See* Nepal)
 Pakistan, parliamentary sovereignty in
 by case law, 135–139
 Eighteenth Amendment and, 144
 by legislation, 131–135
 people and, 49
 popular sovereignty, 52–53, 241
 state and, 48
 unitary state model and, 328–329
- Spain
 Catalonia as substate, 341–342
 plurinational state model in, 341–342
- Sri Lanka
 overview, 4–5
 affirmative action, Indian reservations compared, 41
- All Ceylon Tamil Congress (ACTC), 292–293, 301
- autonomy in, 12, 293, 322–323
- Bandaranaike–Chelvanayakam Pact (1957), 293
- Basic Resolution No. 2, 294
- Buddhists in
 failure of nation-state and, 336, 337
 federalism, opposition to, 298, 300, 301, 302–303
 First Republican Constitution (1972) and, 294
 nationalism and, 322–323, 330
 unitary state model and, 326–328
- Ceylon Workers Congress, 301
- civil war in, 12, 306–307, 320–321, 327, 351
- Constituent Assembly, 294
- constitutional reform in
 overview, 13–14, 320–321, 353–354
 comparative constitutional law and, 321–323
 theoretical approach, lack of, 321–323, 324
- Constitution Bill (2000), 315
- dhammadeepra* (island of the dharma), 326
- Donoughmore Constitution (1931), 335–336
- Dudley–Chelva Pact (1965), 293
- as ethnocracy, 327–328, 330–331, 337–338
- federalism in
 overview, 12–13, 291–292, 317–319
 Buddhist opposition to, 298, 300, 301, 302–303
 constitutionalism, relationship with, 315–316
 democracy, relationship with, 315–316
 devolution and, 294–295, 302–303, 320
 discrimination as factor in demand for, 298
 historical background, 292–295
 identity politics and, 312–314
 LTTE and, 302–304
 majoritarianism as factor in demand for, 298
 “minorities within minorities” critique of, 298–299, 316
 Nepal compared, 298–299, 310–311
 polarization and, 314
 secession and, 300–301
 self-rule versus shared rule, 315
 Sinhalese opposition to, 298, 300, 301, 302–303

- Tamils and, 299–307, 316–317
 third tier of government and, 316–317
 unitary definition of ethnicity and, 313–314
 violence and, 292
- Federal Party, 293, 299–301, 336
- federal-state model
 overview, 324–325
 liberal variant, 331–333
 Tamils and, 329–331
- First Republican Constitution (1972), 294
 House of Representatives, 294
- identity politics in, federalism and, 312–314
- Ilankai Tamil Araus Katchi (Tamil State Party of Lanka), 299–300
- Interim Self-Governing Authority, 305, 316–317
- “Jacobin” variant of unitary state model, 328–329
- Janatha Vimukthi Peramuna (JVP), 305
- Jathika Hela Urumaya (JHU), 305
- judicial review in, 295
- Legislative Councils, 313
- liberal variant of federal-state model, 331–333
- Liberation Tigers of Tamil Eelam (LTTE)
 generally, 330
 defeat of, 12, 306–307, 320–321
 extremism of, 318
 federalism and, 302–304
 negotiations by, 291, 298, 315–316
 Oslo Statement (2002) and, 304–307
 secession and, 295
- Mahajana Eksath Peramuna (MEP), 336–337
- Marxists in, 294
- Muslims in, 298–299, 304, 305, 313, 316
- nation-state, failure of, 334–338
 overview, 325
 assumptions regarding, 335
 Buddhists and, 336, 337
 civil war and, 351
 ethnocracy versus Westphalian model, 337–338
 historical background, 335–337
 Sinhalese and, 336, 337
 Soulbury Constitution (1946) and, 335–336
- non-territorial federalism in, 362
- Oslo Statement (2002), 304–305
- People’s United Front, 336–337
- plurinational constitutionalism, 13–14
- plurinational state model in
 overview, 323, 325, 338–342
 accommodation and, 324, 333
 autonomy and, 352
 Canada compared, 341–342
 civic versus ethnic nationalism, 324
 democracy and, 353
 disaggregation of nation and state in, 347–351
 guiding principles, 351–353
 host-state societal dominance and, 342–347
 monistic demos thesis and, 339, 342–347
 novelty of, 339–340
 origin of, 340
 reciprocity and, 352, 353
 recognition and, 352
 representation and, 352
 self-determination and, 352
 Sinhalese and, 351
 Spain compared, 341–342
 substates in, 340–341
 Tamils and, 351
 United Kingdom compared, 341–342
- President, authority of, 295
- Provisional Councils, 295
- secession
 federalism and, 300–301
 LTTE and, 295
- Second Republican Constitution (1978)
 adoption of, 294–295
 Eighteenth Amendment, 320
 Seventeenth Amendment, 321
 Thirteenth Amendment, 291, 294–295, 302–303, 304, 306–307, 320, 321, 331
- Sihaladeepa* (island of the Sinhalese), 326
- similarities with other South Asian countries, 5
- Sinhalese in
 generally, 305–306
 civil war and, 320–321
 failure of nation-state and, 336, 337
 federalism, opposition to, 298, 300, 301, 302–303
- First Republican Constitution (1972) and, 294
- Interim Self-Governing Authority (ISGA) and, 305
- as “majority within minority,” 306
- nationalism and, 322–323, 330
- Oslo Statement (2002) and, 304

- Sri Lanka (*cont.*)
 plurinational state model and, 351
 tension with Tamils, 12
 unitary definition of ethnicity and, 313–314
 unitary state model and, 326–328
- Soulbury Constitution (1946)
 consensus regarding, 301
 failure of nation-state and, 335–336
 replacement of, 294
 Section 29, 293, 294
- Sri Lanka Freedom Party, 294
- Tamils in
 generally, 291, 313
 civil war and, 320–321, 327
 federalism and, 299–307, 316–317
 federal-state model and, 329–331
 Muslims and, 298–299
 nationalism and, 322–323, 330, 333, 334, 338
 as “others,” 326
 plurinational state model and, 351
 pogrom against, 301–302
 polarization and, 314
 tension with Sinhalese, 12
 unitary definition of ethnicity and, 313–314
- Tamil State Party of Lanka (Ilankai Thamil Aarua Katchi), 299–300
- Tamil Tigers *See (within this heading, Liberation Tigers of Tamil Eelan (LTTE))*
- Tamil United Liberation Front, 301–302
- Thimpu Principles, 301–302, 303–304
 unitary state model
 overview, 324–325
 Buddhists and, 326–328
 “Jacobin” variant, 328–329
 Sinhalese and, 326–328
- United Front, 294, 301
- United National Party (UNP), 295, 302–303, 336
- Vaddukodiamulla Resolution (1976), 301
- Sri Lanka Freedom Party, 294
- “State-nation” structure of India, 14
- Statutes. *See specific country*
- Stepan, Alfred, 359, 363, 365
- Sthapit, Joglal, 66
- Sudra caste in India, 29–30
- Sultana, Nazmun Ara, 218
- Supreme Court Building (Nepal), 46, 71–72, 75–76
- The Supreme Court of India and Parliamentary Sovereignty* (Dhavan), 22
- Taleju* (Nepali deity), 61–62
- Taliban in Pakistan, 154–156
- Tamangs in Nepal, 93, 107–109
- Tamils in Sri Lanka. *See Sri Lanka*
- Tamil State Party of Lanka (Sri Lanka), 299–300
- Tamil Tigers. *See Sri Lanka*
- Tamil United Liberation Front (Sri Lanka), 301–302
- Tandukar, Sabina, 65
- Tarai Brahmins in Nepal, 101
- Tarai Congress of the Madhesi (Nepal), 107–108
- Tarai Dalits in Nepal, 87–88
- Tarai People’s Liberation Front (Nepal), 109–110
- Tate, C. N., 266
- Taylor, Charles, 343, 345
- Tehrik-e-Nifaz-e-Shariat-e-Mohammadi (Pakistan), 154–155
- Tehrik Taliban Pakistan (Pakistan), 154–155
- Telangana Rashtriya Samiti (India), 378–379
- Thailand, Constitutional Court, 285
- Thakuri caste in Nepal, 87–88, 93–94, 100–101
- Thapa, Surya Jung, 66
- Tharus in Nepal, 106, 108–109
- Theravada Buddhism, 326
- Thimpu Principles, 301–302, 303–304
- Tierney, Stephen, 343–344, 346, 351
- Tillin, Louise, 367, 378
- Tilly, Charles, 327, 330
- Tiruchelvam, Neelan, 322, 334
- Treaty of Sagauli (1816), 61, 93–94
- Tribhuvan Shah, 66, 68, 101–102
- Tripathi, P. K., 22, 23, 235
- Tully, James, 14
- Turkey, Pakistan compared, 149
- United Front in East Bengal (Pakistan), 142
- United Front (Sri Lanka), 294, 301
- United Kingdom
 Basic-structure doctrine in, 277–278
 Lord Nolan Committee, 249, 251
 plurinational state model in, 341–342, 351
 Scotland as substate, 341–342, 350

- United Left Front (Nepal), 76–77
- United Marxist Leninist Party (Nepal), 311–312
- United National Party (Sri Lanka), 295, 302–303, 336
- United States
- Brown v. Board of Education*, 22
 - constitutional law in, 19
 - federalism in, India compared, 356, 361
 - judicial activism in, 265
 - judicialization of politics in, 265–266
 - judicial review in, 78
 - Lochner*-era jurisprudence, 23
 - Marbury v. Madison*, 78
 - normative theory in, 236
 - partisan federalism in, India compared, 369–371
 - Senate, 361
 - Seventeenth Amendment, 361
 - Supreme Court, 78
 - “War on Terror,” 169, 216
- Unstable constitutionalism
- overview, 3–7
 - constitutional law, centrality of, 6
 - defined, 5–6, 261–262
 - forms and sources of, 6, 7–10
 - methodology of study, 6–7
 - military and, 7–10
 - politics, centrality of, 6
 - reactions and responses to, 6, 10–17
- “Untouchables” in India, 29–30
- Uyangoda, Jayaveda, 326
- Vaishya caste in India, 29–30
- Vale, Lawrence, 57, 58, 75
- Vallinder, Torbjörn, 266
- Varnas* (castes) in India, 29–30
- Verdi, Giuseppe, 57–58
- Vermam Jagdish Sharan, 249, 251
- Waldron, Jeremy, 237–238
- “War on Terror,” 169, 216
- Warren, Earl, 22
- Waseem, Mohammad, 8–9
- Weiler, Katharina, 67
- Welikala, Asanga, 13–14
- Westphalian state model
- disaggregation of nation and state and, 347–351
 - ethnocracy versus, 337–338
 - monistic demos thesis versus, 342–347
- Wheel of Law* (Jacobsohn), 19
- Wickremasinghe, Ranil, 303–304, 305–306
- Wilson, A. J., 330
- Wolf-Phillips, Leslie, 137
- Working a Democratic Constitution* (Austin), 24
- Yack, Bernard, 49, 55
- Yadav, Sambhu Prasad, 109
- Yadav, Yogendra, 359, 363, 365
- Yahya Khan, Agha Muhammad, 136–137, 142
- Yiftachel, Oren, 327–328
- Yingluck Shinawatra, 267, 285
- Yugoslavia, influence on Nepal, 72
- Zamindari* system, 21
- Zardari, Asif Ali, 130–131, 138, 143–144, 154–155
- Zia, Khaleda, 216–217
- Zia-ul-haq, Muhammad
- generally, 133–135, 164
 - Constitution (1973) and, 139, 163
 - federalism and, 143–144
 - Islam and, 125, 128, 151–152, 154

