INTERNATIONAL JOURNAL OF SOCIAL SCIENCES BULLETIN
ISSN: (E) 3007-1917 (P) 3007-1909
Volume 4, Issue 5, 2026

BETWEEN DEFERENCE AND DEFIANCE: JUDICIAL AUTHORITY, EXECUTIVE SUPREMACY, AND CONSTITUTIONAL FRAGILITY IN EARLY PAKISTAN (1947–1971)

Dr. Muhammad Altaf Tahir[*1], Muhammad Rafaqat Baig[2]

[*1,2]*Dept. of Criminology, University of Karachi, Pakistan*

[*1]draltaftahir@gmail.com, [2]muhammad.rafaqat.baig@gmail.com

Corresponding Author: *
Dr. Muhammad Altaf Tahir
DOI: https://doi.org/10.5281/zenodo.20225724

Received	Accepted	Published
16 March 2026	25 April 2026	16 May 2026

ABSTRACT

The consolidation of democratic governance in post-colonial states hinges, in large measure, on the functional equilibrium between state branches. Pakistan's constitutional experience in its foundational quarter-century presents a particularly instructive case of that equilibrium's collapse. Drawing on constitutional cases, legislative records, and historical scholarship, this article examines the relationship between the executive and judicial branches in Pakistan from independence in 1947 through the breakup of 1971. It argues that what appeared to be institutional harmony masked a structurally subordinate judiciary that repeatedly deferred to executive overreach, most consequentially through its recourse to the doctrine of necessity. The article traces how inherited vice-regal frameworks, bureaucratic authoritarianism, and an absent constitutive constitution converged to inhibit judicial independence. Analysis of landmark rulings, including the Maulvi Tamizuddin, Usif Patel, Dosso, and Ghulam Jilani cases, reveals a pattern of judicial capitulation punctuated by fitful assertion. The article contends that rather than functioning as a guardian of constitutionalism, the superior judiciary became, paradoxically, an instrument of its erosion. These findings carry implications for understanding institutional failure in post-colonial democracies and for current debates on judicial independence in fragile constitutional orders.

Keywords: *Judicial Independence · Executive Dominance · Doctrine of Necessity · Constitutional History of Pakistan · Separation of Powers · Judicial Review · Post-Colonial Governance*

1. INTRODUCTION

The relationship between judicial and executive authority lies at the heart of constitutional democracy. When that relationship is strained, or when one branch systematically subordinates the other, the consequences extend far beyond inter-institutional disputes: they reshape the political architecture of the state and determine the fate of democratic governance itself. Few cases in the post-colonial world illustrate this dynamic as starkly as Pakistan during its first twenty-four years, a period bracketed by independence in August 1947 and the traumatic disintegration of the country in December 1971.

Pakistan emerged from the partition of British India without an autochthonous constitution, without a settled framework of governance, and burdened by deep social and administrative divisions. For nearly a decade, the country operated under a heavily adapted version of the Government of India Act 1935, an instrument of

imperial control, before finally enacting its first constitution in 1956. That constitution survived barely two years before a military coup relegated it to history. A second constitutional order (1962) followed, itself abrogated in 1969 under conditions of intensifying civil conflict. The entire period was thus one of constitutional improvisation, executive aggrandizement, and, as this article demonstrates, judicial ambivalence.

Existing scholarship has explored Pakistan's political instability and military interventions at length, but the judiciary's constitutive role in enabling or impeding these trajectories has received comparatively less sustained analytical attention. Where judicial behaviour has been examined, attention has tended to cluster around single landmark cases rather than the arc of institutional development across the founding decades. This article addresses that gap by situating judicial conduct within the broader structural context of executive dominance, colonial inheritance, and constitutional absence.

The central argument advanced here is threefold. First, that Pakistani superior courts in this period maintained the outward trappings of institutional independence whilst conceding, case by case, the substantive power to check executive overreach. Second, that the repeated invocation of the doctrine of necessity, far from being an exceptional emergency measure, became a jurisprudential habit that legitimised authoritarianism and foreclosed democratic possibility. Third, that this judicial posture was not merely the product of individual judicial temperament but was structurally conditioned by the colonial legacy, the absence of an entrenched constitution, and the dominance of the bureaucratic-military nexus.

The article proceeds in five parts. Section 2 surveys the theoretical and historical backdrop, including the colonial formation of the executive-judiciary relationship. Section 3 examines the formative constitutional crises of the first decade and the judicial responses they elicited. Section 4 analyses the Ayubian constitutional order and the courts' evolving, if still constrained, exercise of judicial review. Section 5 addresses the terminal crisis of Pakistani constitutionalism leading to the 1971 breakup. Section 6 offers concluding reflections on the legacy of this period and its broader implications for post-colonial constitutional studies.

2. Theoretical and Historical Framework

2.1 Separation of Powers and Judicial Independence in Theory

The doctrine of separation of powers, as classically articulated by Montesquieu in De l'esprit des lois (1748), proceeds from the premise that liberty is endangered whenever executive, legislative, and judicial functions are concentrated in a single authority. Montesquieu's prescriptive architecture, drawing on his reading of the English constitution, envisioned three coordinate branches, each performing its designated role within a system of mutual restraint. His insistence that "there is no liberty if the judiciary power be not separated from the legislative and executive" has resonated across constitutional traditions, including those of post-colonial states that fashioned their frameworks in conscious dialogue with Western constitutionalism (Montesquieu, 1748).

Madison's elaboration of Montesquieu in the Federalist Papers, particularly his argument that ambition must be made to counteract ambition, gave institutional concreteness to the separation principle and introduced the idea of checks and balances as its operational mechanism. The American constitutional model, which Pakistan's judiciary drew upon alongside English common law, treats judicial review as integral to this architecture, with the landmark ruling in Marbury v. Madison (1803) establishing that it is "emphatically the province and duty of the judicial department to say what the law is" (Marshall, C.J., 1803).

In practice, however, the realisation of judicial independence is conditioned by structural factors that pure constitutional text cannot resolve. Scholars including Tom Ginsburg (2003) and Ran Hirschl (2004) have examined how courts in new democracies navigate the tension between institutional self-preservation and assertive constitutional guardianship. Ginsburg's insurance model suggests that judicial review tends to be

entrenched when political actors anticipate losing power and seek a judicial hedge against their successors' authority. In Pakistan's case, this dynamic was inverted: the dominant executive had every incentive to constrain judicial review, and the judiciary, lacking entrenched constitutional protection and facing institutional annihilation, accommodated that preference.

The doctrine of ultra vires, inherited from English administrative law, provided the formal conceptual vocabulary through which Pakistani courts attempted to scrutinise executive action. Its central idea, that any public authority acting beyond the powers conferred by statute is acting beyond its legal competence offered a potential lever for constraining executive excess. Yet, as critics observed, ultra vires is ultimately the will of Parliament, not the will of the judiciary, and in Pakistan's constitutional vacuum, where parliamentary sovereignty was itself contested, the doctrine's purchase was correspondingly limited (Forsyth, 1996; Hussain, 2011).

2.2 Colonial Inheritance and the Formation of Executive Dominance

Pakistan's institutional landscape at independence was shaped, in decisive ways, by nearly two centuries of British colonial administration. The judicial history of the subcontinent traversed several phases—from the presidency courts under royal charters, through the consolidation of High Courts under the Indian High Courts Act 1861, to the Federal Court established under the Government of India Act 1935—and each phase reinforced, in different registers, the subordination of judicial authority to executive will.

The Government of India Act 1935, which served as Pakistan's provisional constitutional framework after independence, was an instrument designed to sustain imperial governance rather than enable representative self-government. Its provisions vest sweeping discretionary powers in the Governor-General, including the authority to issue ordinances, dissolve legislatures, and act independently of ministerial advice in specified circumstances. While formal guarantees of judicial independence existed on paper, the overall constitutional architecture was one in which the executive held structural predominance (Chaudhury, 1998).

The Chief Justice of the Lahore High Court noted, in the closing years of colonial rule, that there appeared to be a "persistent endeavour on the part of the Executive...to interfere with and curtail the powers of the judiciary" (cited in Tasneem Sultana, 2001). That observation anticipated, with uncomfortable precision, the trajectory of the post-independence relationship between the two branches in Pakistan.

When Pakistan inherited this framework, it also inherited the behavioural dispositions embedded within it. Colonial courts had functioned in a condition of practical subordination to the colonial executive; post-colonial courts were thus not beginning from a baseline of institutional assertion but from one of institutional deference. This inheritance had concrete effects on the professional culture of the judiciary and on the doctrinal resources available to it when confronted with executive overreach. The bureaucracy, likewise, emerged from partition with its institutional confidence intact, rapidly consolidating a dominance over the political and administrative life of the new state that democratic governance was insufficiently robust to contest.

3. Constitutional Crisis and Judicial Response in the First Decade (1947–1958)

3.1 The Constitutional Vacuum and the Rise of Bureaucratic Authoritarianism

Pakistan's founding constitutional moment was, paradoxically, one of constitutional absence. The Constituent Assembly convened in August 1947 with the twin mandate of framing a constitution and acting as the federal legislature in the interim. For nine years, that dual mandate produced legislative activity but no constitution, a failure attributable in roughly equal measure to elite political fragmentation, unresolved disputes over provincial representation and the role of Islam, and the structural imperatives of a bureaucratic apparatus that benefited from constitutional ambiguity.

Mohammad Ali Jinnah's decision to assume the office of Governor-General rather than Prime

Minister crystallised the executive dominance that would define Pakistani politics across the founding decades. Exercising powers that, as Cheema (2005) observes, Jinnah wielded "far beyond those normally associated with that office," the Governor-General inserted Section 92-A into the constitutional framework, enabling the dismissal of provincial governments and the dissolution of provincial assemblies in the name of executive necessity. Jinnah used this power twice before his death in 1948; his successors would deploy it far more liberally (Maluka, 1995).

The bureaucracy, consolidated under civil servants who had inherited both the ethos and the procedural culture of the Indian Civil Service, filled the political vacuum left by the weakness of parliamentary institutions. As Egger's (1953) contemporary assessment observed, the Pakistani bureaucracy had "hardly changed the days of the British Raj" and had, if anything, grown in relative importance following independence, deploying the instruments of the colonial administrative state to direct political behaviour. Under Ghulam Mohammad's Governorship-General, this bureaucratic authoritarianism reached its apogee, precipitating the constitutional crisis of 1954 and directly confronting the judiciary with the most consequential test it had yet faced.

3.2 The Maulvi Tamizuddin Case: Judicial Review at the Constitutional Threshold

The dissolution of the Constituent Assembly by Governor-General Ghulam Mohammad in October 1954 generated Pakistan's first existential constitutional crisis. The president of the dissolved Assembly, Maulvi Tamizuddin Khan, challenged the dissolution before the Sindh High Court, invoking Section 223-A, a provision granting High Courts writ jurisdiction, that the Assembly itself had inserted into the Government of India Act. The Sindh Court, in a ruling that briefly illuminated the possibilities of judicial constitutionalism, upheld the Assembly's sovereignty and invalidated the dissolution, finding that as a constituent body the Assembly derived its authority from Section 6 of the Indian Independence Act 1947, which made no provision for dissolution by gubernatorial fiat (PLD 1955 Sind 96).

The Federal Court's reversal of this ruling, in a judgment authored by Chief Justice Muhammad Munir, proved to be a watershed moment in Pakistan's constitutional history, though for reasons that its author might not have intended. Munir C.J. held that the Constituent Assembly, in enacting Section 223-A, had acted as the federal legislature and thus required the Governor-General's assent under Section 6(3) of the Indian Independence Act. Since that assent had never been given, Section 223-A had never become law, and the Sindh Court therefore lacked the writ jurisdiction it had purported to exercise (PLD 1955 FC 240).

The technical elegance of this reasoning concealed its substantive radicalism. By invalidating Section 223-A, the Federal Court simultaneously invalidated approximately forty-six enactments passed by the Constituent Assembly without Governor-General assent, including fundamental rights protections that had been operating for years. Justice Cornelius dissented with compelling force, arguing that the Independence Act represented a constitutive break from the Government of India Act framework and that the Constituent Assembly's sovereign character was incompatible with the requirement of executive assent. Cornelius demonstrated that the requirement of assent had never in practice been applied to constituent legislation, a point Munir C.J. effectively brushed aside.

What remains analytically significant about the Tamizuddin ruling is less its doctrinal architecture than its political consequences. By invalidating the Constituent Assembly's legislative output, the Federal Court created the legal vacuum it then proceeded to fill, through the Governor-General Reference Case, by legitimising executive power to govern by ordinance in the absence of a legislature. The courts thus became, however inadvertently, the instruments of their own marginalisation. Hussain (2011) is right to observe that the judgment "restricted the evolution of judicial review to its historical predecessor, ultra vires", but the restriction was not merely doctrinal; it was structural, enabling the entrenchment of executive

authority at the precise moment when judicial assertion might have arrested it.

3.3 The Doctrine of Necessity and Its Jurisprudential Consolidation

The constitutional void created by the Federal Court's Tamizuddin ruling was immediately confronted in the Usif Patel case, where the court was asked to adjudicate the validity of the Governor-General's Emergency Powers Ordinance, a measure designed to validate, retroactively, legislation invalidated by the preceding judgment. The Federal Court, in what read initially as a more assertive posture, struck down the Governor-General's claim to validate legislation by ordinance, finding that only a legislative body could perform that function and that the Governor-General's emergency powers did not extend to constitutional amendment (PLD 1955 FC 387).

The boldness of this ruling proved short-lived. Within days, the Governor-General filed a Reference under Section 213 of the Government of India Act, asking the Federal Court to advise on how the constitutional impasse might be resolved.

The court's response, that the Governor-General possessed interim powers under "the common law of civil or State necessity" to validate the laws in question until a new Constituent Assembly could be elected, has been described by Waris Hussain (2011) as among the most consequential and most criticised rulings in Pakistani legal history. Chief Justice Munir, drawing on the medieval Latin maxim attributed to Henry de Bracton, quod alias non est licitum, necessitas licitum facit (what is otherwise not lawful is made lawful by necessity), grafted a doctrine of emergency executive prerogative onto Pakistani constitutional law with consequences that reverberated across decades.

The doctrine's application in the Dosso case (PLD 1958 SC 533), decided within days of General Ayub Khan's October 1958 coup, represented the doctrine's fullest and most damaging expression. Chief Justice Munir, invoking Hans Kelsen's theory of grundnorm and the criterion of "effective control," held that the military coup constituted a successful revolution, a new legal order displacing the previous one, and that the Laws (Continuance in Force) Order 1958 was therefore valid as the constitutive document of that order. In a single judgment, the Supreme Court legitimised martial law, suspended the fundamental rights guaranteed by the 1956 Constitution, and deprived the courts themselves of the writ jurisdiction through which they might have challenged executive action.

The Dosso ruling has been subject to sustained criticism from multiple directions. Newberg (1995) argues that Munir C.J. adjudicated only the legality of the coup by analytically recasting it as revolution, while evading the question of legitimacy, a conceptually more demanding inquiry that would have resisted easy resolution in Kelsen's favour. Imtiyaz Omar contends that the judges did not merely approve the coup but "assisted to lay the foundation of the revolutionary order" by providing it with legal architecture. From a separation of powers perspective, the ruling's most grievous consequence was the signal it transmitted to future actors: that extra-constitutional seizure of power, if sufficiently comprehensive and rapidly executed, would receive judicial validation.

4. Judicial Review Under the Ayubian Constitutional Order (1958–1969)

4.1 The 1962 Constitution and the Structure of Judicial Authority

The constitution that General Ayub Khan promulgated in June 1962 was, as even its nominal author acknowledged, a document that "conformed neither to the parliamentary nor to the Presidential pattern" (Munir, as cited in Khan, 2020). Drafted without deliberative involvement of elected representatives and designed to entrench presidential authority, the 1962 Constitution nonetheless contained provisions that, over time, provided courts with a renewed, if circumscribed, basis for constitutional adjudication.

Article 98, dealing with judicial review of executive action, and the writ jurisdiction provisions offered courts formal grounds to scrutinise administrative conduct. Article 133, however, introduced a structural ambiguity by providing that the validity of legislation could not be called into question on

the ground that the enacting legislature lacked the requisite authority, while simultaneously preserving High Court review powers under Article 98(2). This tension was resolved by Chief Justice Cornelius, who delivered what is now regarded as the most intellectually distinguished judicial contribution of the Ayubian era, insisting upon the court's inherent right to review the constitutionality of legislation as "necessarily connoted" by the existence of a written constitution. Cornelius's reasoning, which drew on comparative constitutional jurisprudence, re-established the theoretical foundations of judicial review at a moment when they were under structural pressure.

The appointment procedures under the 1962 Constitution, preserving a degree of judicial input into appointments, provided modest institutional protection. Yet the overall constitutional architecture remained one in which presidential authority was pervasive, the legislative branch was denied elected character until constitutional amendment, and the courts operated within a system in which fundamental rights had been suspended and then conditionally restored. This was not, in any meaningful sense, the environment of constitutional equilibrium that judicial independence requires.

4.2 Judicial Review in Practice: Detention, Emergency, and the Expansion of Review Powers

Despite these structural constraints, the judicial record under the 1962 Constitution includes episodes of genuine constitutional assertion. The cases arising from the emergency of 1965, particularly Ghulam Jilani v. Government of West Pakistan and Abdul Baqi Baluch v. Government of Pakistan, illustrate a judiciary that was, by the mid-1960s, beginning to develop a more robust conception of its review function.

In Ghulam Jilani, Chief Justice Cornelius challenged the uncritical application of the English Liversidge doctrine, under which executive satisfaction as to the necessity of detention was treated as unchallengeable, by insisting that "the ascertainment of reasonable grounds is essentially a judicial or at least a quasi-judicial function" (PLD 1967 SC 373). This represented a significant departure from the deferential posture that had characterised earlier jurisprudence. Cornelius's successor, Chief Justice Hamoodur Rahman, extended this reasoning in the Abdul Baqi Baluch case, holding that the detaining authority must "place before a Court the material upon which it so claims to have been satisfied" and that not only the jurisdiction but the manner of its exercise was subject to judicial review (PLD 1968 SC 334).

These rulings pointed towards an emerging judicial self-confidence in relation to executive detention powers, an area in which the courts' constitutional mandate to protect individual liberty was most directly implicated. Yet scholars have noted the paradox embedded in this jurisprudence: in both cases, while expanding the scope of judicial review as doctrine, the courts ultimately affirmed the contested detentions, thereby simultaneously asserting institutional authority and validating the executive's substantive exercise of that authority. This pattern, doctrinal expansion combined with substantive deference, captures, in microcosm, the ambivalent character of judicial behaviour across the founding decades.

The East Pakistan High Court's decisions during this period introduced a further dimension of complexity. Chief Justice Murshed's ruling in Mohammad Abdul Haque v. Fazlul Quader Chowdhury (PLD 1963 Dacca), which challenged the admixture of executive and legislative functions under Basic Democracies, represented a principled assertion of separation of power doctrine. The Supreme Court's overruling of that judgment, on the ground that it was not the courts' function to question the underlying political theory of legislation, illustrated the persistent tension between judicial principle and judicial prudence that the era generated in abundance.

4.3 Basic Democracies, Provincial Autonomy, and the Limits of Judicial Review

The Ayub Khan regime's basic democracies scheme, which created a tiered system of local bodies whose elected members constituted the Electoral College for national elections, generated a succession of constitutional challenges through which courts were drawn into the political

contestation between the centralising impulse of the regime and the demands of provincial and popular democracy. These cases illuminate both the regime's instrumentalisation of the constitutional framework and the courts' ambivalent response to it.

The Dacca High Court's ruling in the 1965 electoral college case was, on its face, a significant judicial assertion: the court found that the Electoral College Act confused administrative and electoral functions, thereby violating the separation of powers principle, and declared it unconstitutional. The Supreme Court's reversal, insisting that it was not the judiciary's role to question the political theory underlying legislation, reflected the institutional caution that pervades the era's constitutional jurisprudence. As Newberg (1995) notes, however, this reversal was itself strategically motivated, the Supreme Court was seeking to protect its own review powers rather than genuinely endorse the legislation's constitutional validity, and the sacrifice of East Pakistan's claims to provincial autonomy was the price of that institutional self-preservation.

The tragic irony of this calculus is that the very issues the courts declined to engage, provincial representation, the democratic legitimacy of electoral structures, the constitutional dimensions of East Pakistan's marginalization, were precisely those that, unresolved, generated the centrifugal pressures culminating in the 1971 war. The judiciary's institutional prudence, in other words, was institutionally self-defeating: by preserving its formal authority through deference, it contributed to the conditions under which that authority became irrelevant to the state's survival.

5. Constitutional Collapse and the Terminal Crisis (1969–1971)

5.1 The Yahya Khan Period and Judicial Assertion in a Post-Constitutional Order

Ayub Khan's transfer of power to General Yahya Khan in March 1969, itself an extra-constitutional act that the courts again declined to challenge, inaugurated the terminal phase of Pakistan's first constitutional experiment. Yahya Khan ruled through the Provisional Constitution Order (PCO) and a series of Martial Law regulations that established the basic structural parameters within which courts could operate.

The Malik Mir Hasan v. The State case (PLD 1969 Lahore) represents the most dramatically assertive judicial moment of the entire founding period. Confronted with the Martial Law Administration's attempt to transfer pending criminal cases from the High Court to a Special Military Court, a manoeuvre that would have subordinated the regular judiciary to military jurisdiction, the West Pakistan High Court delivered a judgment that its commentators have described as the most principled and courageous of the era. The bench held that the Provisional Constitution Order, which preserved courts' pre-proclamation jurisdiction, could not be overridden by Martial Law Regulation No. 42; that the jurisdiction of ordinary courts "continues to vest in them" under martial law; and, most significantly, that "the action of any authority, including a Martial Law Authority, howsoever high he may be, if it had not the backing of a constitutional provision, was not immune from being struck down by the courts."

The judgment's practical effect was immediately nullified by the Jurisdiction of Courts (Removal of Doubts) Order 1969, promulgated on the same day as the ruling, which stripped courts of the authority to review any exercise of martial law power. This response confirmed what the courts had always, at some level, understood: that assertive judicial review, in a constitutional order without entrenched protection for judicial independence, would be met by executive retaliation. The response also rendered tragically explicit the limits of judicial constitutionalism in the absence of the political and social conditions that give judicial independence its effective content.

5.2 The Road to Disintegration: Constitutional Failure and the Breakup of 1971

The constitutional negotiations that followed the December 1970 elections, which produced a landslide victory for Sheikh Mujibur Rahman's Awami League in East Pakistan and a strong showing for Bhutto's Pakistan Peoples Party in the West, failed because the fundamental questions of

provincial autonomy, power-sharing, and constitutional design that had been deferred since independence could no longer be managed through elite bargaining. Yahya Khan's decision to postpone the National Assembly session in March 1971, widely interpreted as capitulation to Bhutto's demands and West Pakistani military establishment's resistance to an Awami League government, triggered the civil war that ended in the creation of Bangladesh.

Throughout this terminal crisis, the courts were marginal actors. The judiciary had neither the institutional authority nor the political credibility, after two decades of subordination to executive will, to function as a constitutional arbiter of last resort. The Asma Jilani case (PLD 1972 SC 139), decided after the breakup, provided a belated and partial repudiation of the necessity doctrine, the Supreme Court held that Yahya Khan had been a usurper and that the doctrine of revolutionary legitimacy was constitutionally invalid, but its practical significance was, as the court's own reasoning acknowledged, constrained by the need to preserve the legal validity of measures taken under the regime whose legitimacy was now denied.

The breakup of Pakistan in 1971 was not caused by judicial failure alone; it was the product of accumulated political, institutional, and social failures across multiple domains. But the judiciary's consistent validation of executive overreach, from Munir C.J.'s endorsement of the dissolution of the Constituent Assembly to the Supreme Court's approval of the 1958 coup, meant that the constitutional resources available to manage the centrifugal crisis had been depleted precisely when they were most needed. A judiciary that had consistently deferred to executive authority was ill-positioned to assert itself as the crisis peaked, and its belated assertion, when it eventually came—arrived too late to matter.

6. Discussion: Structural Determinants of Judicial Deference

The foregoing analysis raises the question of why, given moments of principled assertion by individual judges such as Cornelius and Hamoodur Rahman, the overall trajectory of judicial behaviour in this period was one of deference rather than assertion. Three structural determinants merit analytical attention.

The first is the weight of colonial inheritance. Courts in late colonial India had operated within a framework in which the executive held structural predominance, in which the judicial function was conceived as adjudicatory rather than constitutive, and in which challenges to executive authority were exceptional rather than routine. The habits of institutional deference formed under colonial governance did not dissolve at partition; they were reproduced, in conditions of political uncertainty and institutional fragility, in the post-independence courts. The contrast with the Indian Supreme Court, which developed a more assertive constitutional jurisprudence from an earlier stage, reflects, among other differences, India's early success in entrenching a comprehensive constitutional framework that provided the judiciary with both doctrinal resources and institutional protection.

The second determinant is the absence of a consolidated constitutional framework. The Government of India Act 1935, however adapted, was an instrument of imperial governance rather than democratic constitutionalism, and its silences and ambiguities, particularly regarding executive power, were invariably resolved in the executive's favour. The 1956 Constitution arrived too late and survived too briefly to generate the interpretive tradition and constitutional culture that give written constitutions their practical significance. The 1962 Constitution, as examined above, was an authoritarian document with democratic elements rather than a democratic document with authoritarian exceptions. Courts attempting to exercise judicial review in these conditions found their doctrinal tools blunted by the very constitutional frameworks within which they operated.

The third determinant is the political economy of judicial self-preservation. The courts faced a genuine dilemma: assertive constitutional review risked confrontation with an executive fully capable of retaliating through appointment manipulation, jurisdictional curtailment, or simple non-compliance, any of which would have

exposed the limitations of judicial power more nakedly than managed deference. The calculated ambivalence, maintaining formal institutional standing while conceding substantive review authority, can be understood as a rational response to the incentive structures facing an institutionally vulnerable judiciary. The difficulty with this explanation, as the record of this period demonstrates, is that the costs of managed deference ultimately exceeded those of assertive review: the judiciary's institutional standing was not preserved by its deference but eroded by it, as each capitulation made the next easier and reduced the courts' credibility as constitutional actors.

7. Conclusion

This article has examined the relationship between judicial authority and executive power in Pakistan across the founding quarter-century, arguing that what appeared to be institutional harmony concealed a structurally subordinate judiciary that, through its recourse to the doctrine of necessity and its consistent validation of executive overreach, became paradoxically complicit in the erosion of constitutionalism it was constitutionally mandated to protect.

The findings carry several implications. For the historiography of Pakistani constitutionalism, they suggest the need to locate judicial conduct within a structural analysis of colonial inheritance and executive dominance rather than attributing it solely to individual judicial temperament or intellectual error. Chief Justice Munir has become the emblematic villain of Pakistan's constitutional founding, and his judgments deserve the criticism they have received; but a structurally adequate account must explain why the institutional conditions in which he operated made assertive judicial review extremely difficult, and why individual episodes of judicial assertion, from Constantine's dissent in Tamizuddin to Cornelius's jurisprudence in the 1960s, did not alter the broader institutional trajectory.

For comparative constitutional studies, the Pakistani case illustrates the fragility of judicial independence in the absence of entrenched constitutional protection, consolidated democratic politics, and a civil society capable of providing political cover for judicial assertion. Judicial review, as the literature from Ginsburg (2003) to Hirschl (2004) emphasises, is not self-sustaining: it requires political, institutional, and social conditions for its effective exercise, and their absence in Pakistan's founding decades goes a long way toward explaining the distinctive pattern of deference and occasional defiance that this article has traced.

The eventual belated reassertion of judicial authority, from the partial restoration in Asma Jilani through the Lawyers' Movement of 2007, did not begin from neutral ground but from an institutional position deeply shaped by the precedents examined here. Understanding the full weight of those precedents, not merely as doctrinal errors but as structurally conditioned responses to the imperatives of institutional survival in conditions of constitutional fragility, is essential for understanding both the possibilities and the limits of judicial constitutionalism in Pakistan and in comparable post-colonial contexts.

REFERENCES

Barak, A. (2006). The judge in a democracy. Princeton University Press.

Beth, L. P. (1975). The judicial committee of the Privy Council and the development of judicial review. American Journal of Comparative Law, 24(1), 22–42.

Cheema, P. I. (2005). The dynamics of civil-military relations in Pakistan. Institute of Strategic Studies.

Chaudhury, G. W. (1998). Constitutional development in Pakistan (2nd ed.). Oxford University Press.

Dicey, A. V. (1885). Introduction to the study of the law of the constitution. Macmillan.

Egger, R. (1953). The improvement of public administration in Pakistan: Report to the Government of Pakistan. International Cooperation Administration.

Forsyth, C. (1996). Of fig leaves and fairy tales: The ultra vires doctrine, the sovereignty of Parliament and judicial review. Cambridge Law Journal, 55(1), 122–140.

Ginsburg, T. (2003). Judicial review in new democracies: Constitutional courts in Asian cases. Cambridge University Press.

Hirschl, R. (2004). Towards juristocracy: The origins and consequences of the new constitutionalism. Harvard University Press.

Hussain, W. (2011). Under siege: The judiciary in Pakistan. Fordham International Law Journal, 35(1), 1–67.

Khan, H. (2020). Constitutional and political history of Pakistan (3rd ed.). Oxford University Press.

Kelson, H. (1949). General theory of law and state (A. Wedberg, Trans.). Harvard University Press.

Maluka, Z. K. (1995). The myth of constitutionalism in Pakistan. Oxford University Press.

Montesquieu, C. L. de S. (1748). De l'esprit des lois [The spirit of the laws]. (A. M. Cohler, B. C. Miller, & H. S. Stone, Trans., 1989). Cambridge University Press.

Munir, M. (1980). From Jinnah to Zia. Vanguard Books.

Newberg, P. R. (1995). Judging the state: Courts and constitutional politics in Pakistan. Cambridge University Press.

Omar, I. (2002). Emergency powers and the courts in India and Pakistan. Intersentia.

Sultana, T. (2001). Constitutional development of Pakistan. Book Foundation.

Wolpert, S. (1984). Jinnah of Pakistan. Oxford University Press.

Case Law:

Maulvi Tamizuddin Khan v. Federation of Pakistan, PLD 1955 FC 240.

The State v. Dosso, PLD 1958 SC 533.

Usif Patel v. The Crown, PLD 1955 FC 387.

Ghulam Jilani v. Government of West Pakistan, PLD 1967 SC 373.

Abdul Baqi Baluch v. Government of Pakistan, PLD 1968 SC 334.

Asma Jilani v. Government of the Punjab, PLD 1972 SC 139.

Malik Mir Hasan v. The State, PLD 1969 Lahore (West Pakistan High Court).

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).